ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.07.2009

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

Civil Misc. Writ Petition No. 32287 of 2009

Nasir Hasan ...Petitioner
Versus
D.D.C./Collector & others ...Respondents

Counsel for the Petitioner:
Sri Uttar Kumar Goswami

Counsel for the Respondents:
Sri Anuj Kumar
S.C.

U.P. Zamindari Abolition of Land Reforms Rules-Section 176-A- Assami Patta can not be granted exceeding 5 years-contention regarding opportunity of hearing before cancellation-if opportunity given-what would be plausible explanation-even before the Court nothing disclosed-held-no opportunity can be claimed as a matter of right.

Case law discussed:
2007 (4) SCC 54, AIR 2000 SC 2783.

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

1. Learned counsel for the petitioner states that Assami Patta was granted to the petitioner on 12.06.1998 and Consolidation Officer, district Bijnor through order dated 22.12.2008 passed in the case State Vs. Nasir Hasan directed that name of the petitioner shall be expunged from the Revenue Records. The said order has been challenged through this writ petition only on the ground that opportunity of hearing was not provided to the petitioner. By virtue of proviso to Rule 176-A of U.P. Zamindari Abolition and Land Reforms Rules no Assami Patta can be granted for more than five years. On repeated inquiry of the Court as to what right the petitioner had to remain in possession after 5 years from 12.06.1998 learned counsel for the petitioner could not give any reply. The only argument raised by the learned counsel for the petitioner is that opportunity of hearing ought to have been granted. Supreme Court in **Ashok Kumar Sonkar Vs. Union of India, 2007 (4) SCC 54 and AIR 2000 SC 2783 "Aligarh Muslim University v. Mansoor Ali Khan** has held that if someone complains denial of opportunity of hearing then he must show that in case opportunity had been provided, what plausible cause he would have shown. In this case learned counsel for the petitioner is unable to justify petitioner's continuance in possession after expiry of the period of Assami Patta. In such circumstances impugned order can be set aside and matter can not be remanded for completion of formality of use less opportunity of hearing.

2. Learned counsel for the petitioner has argued that in several such cases where question of cancellation of Assami Patta even after 5 years was involved, interim order have been passed. One of such interim order is dated 17.03.2009 passed in writ petition no. 13715 of 2009 Liyakat Vs. D.D.C. Firstly it is as interim order and secondly it appears the attention of the Hon. Judges was not drawn to the above authorities of the Supreme Court.

3. Accordingly, there is absolutely no merit in the writ petition as admittedly about six years period of patta has expired. Writ petition, therefore dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.07.2009

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

Civil Misc. Writ Petition No. 62394 of 2008

Om Saran Tripathi ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Arvind Srivastava
Sri Ashok Kr. Dubey

Counsel for the Respondent:
Sri R.B. Pradhan
S.C.

U.P. State Universities Act-1973-Section 2 (19)-words and pharases -'Teacher' - includes the principal also petitioner claiming Salary-the period on which worked as officiating principal -vacancy of principal not filled for the last 6 years-senior most lecturer entitled to work as officiating principal-held entitled for salary.

Held: Para 6

Thus, coming back to the original position, we are of the view that we cannot deviate ourselves from our earlier stand as we have taken in C.M.W.P. No. 49172 of 2008. Having so distinguishing feature between our decision relied upon in earlier judgments and the judgment of Daljeet Singh (supra) therefore, the writ petition is disposed of accordingly, however, without imposing any cost. The respondents are directed to pay salary and emoluments of the petitioner for the post of Principal when he was officiating as principal with in the period of three months from the date of communication of this order.

Case law discussed:
C.M.W.P. No. 49172 of 2008, 2007 (4) ESC 2261 (All) (DB), 1997(1) E.S.C. 164 (All),

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

1. The petitioner has made this writ petition to direct the respondents to pay the salary and emoluments of the post of Principal to the petitioner when he has acted as Principal in the institution from the month of July, 2008 till date. He relied upon the judgments of this Bench dated **18th September, 2008** passed in **C.M.W.P. No. 49172 of 2008 (Dr. V.K. Tiwari Vs. Director of Education & others)**

2. Learned Standing Counsel has taken a different view in view of the judgment report in **2007 (4) ESC 2261 (All) (DB) [Daljeet Singh Vs. State of U.P. & others]** to substantiate that there is distinction between a government servant who is promoted to higher post and who is discharging duties of the higher post on the exigencies. Mere discharge of such duties in the higher post cannot be treated as promotion, therefore, the person acted as ad hoc Principal in the institution cannot get salary and emoluments of the regular Principal.

3. Mr. Arvind Srivastava, learned counsel appearing for the petitioner, has relied upon another Division Bench judgment reported in **1997(1) E.S.C. 164 (All)[Km. Renu Tiwari and others Vs. The Director, Higher Education, Allahabad (U.P.) and others].** In that case in considering the respective Regularization Rules, 1979 the Court held that practice of adhocism has been deprecated by the Supreme Court in numerous cases. In a number of cases, the

Supreme Court indicated equal pay for equal work and has directed the concerned authorities for making payment of same emoluments to the incumbents working in the organization.

4. In any event, upon going through the judgment, we have also gone through the counter affidavit. In sub-para (e) of para 3 of the same we find that stand factually taken by the State is that unless the vacancy is notified by the Committee of Management to the Commission for filling up the post of Principal on regular basis, the officiating Principal cannot claim salary of the regular Principal for the period he officiated as Principal of the college.

5. We have come to know that the vacancy of the Principal has not been filled for a long period i.e. for a period of 6 years, therefore, the senior most teacher was directed to discharge the duty of the Principal which is not a post of promotion. Section 2(19) of the U.P. State Universities Act, 1973 gives definition of the 'teacher' which includes a Principal. Principal will be selected by the Commission from amongst the senior most teacher. There is no scope of promotion as such, in totality, the senior most teacher, who is officiating for the post of Principal, is not being promoted to apply the ratio of the judgment laid down in **Daljeet Singh (supra).**

6. Thus, coming back to the original position, we are of the view that we cannot deviate ourselves from our earlier stand as we have taken in C.M.W.P. No. 49172 of 2008. Having so distinguishing feature between our decision relied upon in earlier judgments and the judgment of **Daljeet Singh (supra)** therefore, the writ petition is disposed of accordingly, however, without imposing any cost. The respondents are directed to pay salary and emoluments of the petitioner for the post of Principal when he was officiating as principal with in the period of three months from the date of communication of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.07.2009

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 30252 of 2002

Om Prakash Kapoor ...Petitioner
Versus
Managing Director, UPSRTC and others ...Respondents

Counsel for the Petitioner:
Sri R.C. Pal
Sri Dinesh Tiwari

Counsel for the Respondents:
Sri V.K. Singh
Sri N.N. Sharma
Sri P.N.Rai
S.C.

Constitution of India-Article-226-Post Retiral benefits-petitioner working as driver-became unfit due to accident-service terminated on ground of unfitness on opinion of medical board-alternate jobs provided in pursuance-of interim order worked upto the age of superannuation- by supply affidavit relief for post retiral benefits-claimed-technical objection-in absence of specific prayer by amendment-no such relief can be granted-held court empowered to grant such relief even if not claimed-petition disposed of with direction to consider payment of post retirement benefits within three months.

Held: Para 10

Counsel for the respondents may be technically correct in his argument that prayer for retiral benefits ought to have been made in an application for amending prayer of the writ petition. However since this prayer already exists in the shape of application alongwith supplementary affidavit, considering facts & circumstances of the case, the Court in its discretionary jurisdiction, to secure ends of justice and equity, can always grant any relief on a separate application with affidavit or under aforesaid clause (4) of the prayer. Therefore, without entering going into petty technicalities as raised by the counsel for respondent, this writ petition is being finally disposed of with a direction to the respondent to consider payment of retiral benefits to the petitioner expeditiously within a period of three months from the date of receipt of a certified copy of this order, in accordance with law.

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

1. Heard counsel for the petitioner and Sri V.K. Singh appearing for the respondents.

2. Facts of the case in nutshell are that petitioner was appointed as driver in the year 1972. Due to an accident in 1998, he became unfit to render his service as driver. In view of guidelines dated 13.10.1989, the petitioner was thereafter directed to work in the workshop and he worked there upto 6.6.2002 when his services were terminated on the ground that he was unfit to drive a vehicle. Aggrieved the petitioner has come up in this writ petition challenging validity and correctness of impugned orders dated 24.5.2002 and 6.6.2008 appended as annexure no. 7 & 9 to the writ petition.

3. By the order dated 24.5.2002, the petitioner was informed that after medical investigation, a medical report has been received in which he was been found unfit to work as driver and by order dated 6.6.2002 his services have been terminated on that ground.

4. By its order dated 29.7.2002, the Court stayed operation of the termination order dated 6.6.2002, pursuant to which the petitioner was provided with alternate job on 3.10.2002 and he worked upto 30.9.2008 when he attained the age of superannuation.

5. Counsel for the petitioner has urged that since the petitioner has remained in service of respondent corporation upto his date of superannuation, he is entitled for retiral benefits also as he was a permanent employee of the corporation. The petitioner has also submitted a supplementary affidavit with the prayer to direct the respondent to pay his post retiral benefits in respect of continuous work from 7.11.1972 to 30.9.2008 within a specified period that may be filed by the Court.

6. Copy of the application along with supplementary affidavit was served upon the counsel for respondents as bar back as on 16.10.2008. The Court by its order dated 18.10.08 has directed the application to be listed before appropriate Court after two weeks. It was expected that within two weeks, counter affidavit to the aforesaid supplementary affidavit will be filed by the respondent which has not been filed till date.

7. Counsel for the respondent submits that in the facts and

circumstances of this case, the writ petition appears to have become infructuous as the petitioner continued in service and there is no prayer in the writ petition for payment of retiral benefits. He urges that it was duty of the petitioner to move an application for amending the prayer in the writ petition seeking the relief which he has sought in the application alongwith the supplementary affidavit.

8. Counsel for the petitioner does not dispute this fact that amendment has not been sought by him in the prayer made the writ petition for a direction with regard to payment of retiral benefits. He submits that prayer is already there in the shape of application alongwith supplementary affidavit which may be considered by this Court under clause (4) of the prayer in the writ petition which is as under:

"**(4) Issue any other writ, order or direction which this Hon. Court may deem fit and proper under the circumstances of the case."**

9. After hearing counsel for the parties and on perusal of the record, I am of the opinion that petitioner has worked since 1972 in the respondent corporation as driver till he met with accident. It is not in dispute that he was provided alternate job by the corporation before they terminated his services on the ground that he was not medically fir. Considering this aspect of the matter, the Court by order dated 29.7.2002 stayed operation of the termination order and alternate job was provided to the petitioner thereafter. It is also not disputed that petitioner continued in service till he attained the age of superannuation on 30.9.2008. Amount of group insurance is also said to have been paid to him after his retirement.

10. Counsel for the respondents may be technically correct in his argument that prayer for retiral benefits ought to have been made in an application for amending prayer of the writ petition. However since this prayer already exists in the shape of application alongwith supplementary affidavit, considering facts & circumstances of the case, the Court in its discretionary jurisdiction, to secure ends of justice and equity, can always grant any relief on a separate application with affidavit or under aforesaid clause (4) of the prayer. Therefore, without entering going into petty technicalities as raised by the counsel for respondent, this writ petition is being finally disposed of with a direction to the respondent to consider payment of retiral benefits to the petitioner expeditiously within a period of three months from the date of receipt of a certified copy of this order, in accordance with law. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.07.2009

BEFORE
THE HON'BLE RAKESH TIWARI, J

Civil Misc. Writ Petition No. 2222 of 2008

Shaukat Ali ...Petitioner

Versus

Dugdh Utpadak Sahkari Sangh, Mirzapur and others ...Respondents

Counsel for the Petitioner:
Sri K.P. Agrawal
Sri Sumati Rani Gupta

Counsel for the Respondent:
Sri G.D. Mishra, S.C.

Constitution of India-Article-12: State-Dugdh Parishad Dughashala Vikas not discharging public -duty-not within meaning of State-petitioner a regular employee as Dairy man-arrears of salary not given-counter affidavit liability of payment not disputed-reference under Section 70 of cooperative Societies Act-unwarranted-direction for payment of entire amount with 5% Simple interest issued within 3 month.

Held: Para 12

It is apparent that the service of the petitioner had not been terminated at any point of time and the relationship of master and servant continued to exist therefore, respondent are liable to pay wages to him and non-payment of wages on the ground that the unit is facing loss, is in the nature of 'begar' and hit by Article 23 of the Constitution of India therefore, is not acceptable. Furthermore since the amount of salary due to the petitioner has been admitted by the respondent, it would not be in the interest of justice to refer the dispute to arbitration under Section 70 of U.P. Cooperative Societies Act, 1965 as there is no dispute regarding payment of dues.

Case law discussed:
[2007(113)FLR 505]

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

1. Heard Sri K.P. Agrawal, learned Senior Counsel appearing for the petitioner, and Sri G.D. Mishra who has accepted notice on behalf of respondents no. 1 and perused the record.

2. The petitioner claims that he was appointed as a permanent employee on the post of Dairyman in the State Dugdh Parishad dugdhshala Vikas, Mirrzapur and since then he has been regularly working. His wages at the time of appointment was about 1200/- per month and currently the wages are Rs.7735/- per month and the under orders of the D.D.O. Mirzapur and Vikas Adhikari the daily activity of collecting and selling the milk as stopped but the petitioner was continued in employment having been retained for looking after some essential works.

3. It is stated that the activities collection and distribution of milk in the Dugdhshala Mirzapur started again and duties of the Dairyman were again assigned to the petitioner by order dated 20.6.2005. However, during the aforesaid period he was paid some amount towards part of wages for which he made representations for payment of the back wages as well as full wages on 10.9.2007, 30.10.2007, and 5.11.2007.

4. It is also stated that he has never paid his full wages as sometimes he was paid a thousand rupees or two thousand rupees as advance.

5. It is further stated that due to non-payment of his wages the petitioner approached the Secretary of the Dugdh Vikas Parishad and reply has been given to him by State Backward commission admitting that the payment of wages has not been made to him. Though he has his duty almost 12 hours everyday.

6. Sri K.P. Agrawal, learned Senior Counsel appearing for the petitioner submits that the petitioner is entitled to full wages as there was no severance of relationship of master and servant when the activities of the respondent-Dugdh Utpadak Sahkari Sangh were temporarily stopped. According to him non-payment of full salary is not only hit by Article 21 but is also hit by Article 23 of the Constitution of India.

7. It is urged by him that services of the petitioner had not been terminated during the period when some of the activities the respondents unit at Mirzapur remained suspended. The petitioner continued to be engaged in other works of the Unit and that the manner in which the respondents have not paid the wages to the petitioner amounts to taking of (Begar) which is hit by Article 23 of the Constitution of India.

8. It is also urged that both the units of Dugdha Parishad and Milk federation or Cooperative Societies are State within the meaning of Article 12 of the Constitution of India as has been held by Supreme Court in the case of **Ram Sahan Rai Versus Sachiv Samanaya Prabandhak and another**, hence the case of the petitioner is amenable to wrti jurisdiction hence the petitioner can get the constitutional obligations enforced by approaching the High Court in its writ jurisdiction under Article 226 of the Constitution of India.

9. Sri G.D. Mishra, counsel for respondents relying upon para 4 and 6 of the counter affidavit has submitted that the writ petition filed by the petitioner is not maintainable as the State Government does not have 100% share in Dugdh Sangh, Mirzapur and further submitted that out of due salary Rs. 4,41,221/- the petitioner Rs. 2, 13, 590/- has already been paid a sum of Rs. 2,13,590/-; Thus only a sum of Rs. 2,27,631/- could not be paid to him.

10. Learned counsel for respondents further urged that the petitioner has a remedy of arbitration proceeding in respect of salary under Section 70 of U.P. Cooperative Societies Act, 1965 which is a complete code in itself. He has placed reliance upon the judgment rendered in the case of **Madan Lal Gupta versus State of U.P. and others** and other reported in [2007(113)FLR 505] wherein the Court has held that 'Parag Dairy' Aligarh Dugdh Utpadak Sahkari Sangh Ltd. is not State with the meaning under Article 12 of the Constitution, therefore, writ petition under Article 226 of the Constitution of India is not maintainable for relief of post retiral benefits as the dispute pertaining to service matters between an employee and private employer does not involve public function or discharge of public duty.

11. After hearing counsel for the parties and on perusal of records as well as averments made in the counter affidavit and rejoinder affidavits it is apparent that the respondents have admitted that petitioner has not been paid salary due to 'lack of funds.'

In Para 12 of the counter affidavit it is further averred that

"For making of payment for rest of the amount, a letter has been written to the Milk Commissioner as well as Additional Milk commissioner demanding the financial assistance so that rest of the money of the petitioner may be paid."

12. It is apparent that the service of the petitioner had not been terminated at any point of time and the relationship of master and servant continued to exist therefore, respondent are liable to pay wages to him and non-payment of wages on the ground that the unit is facing loss, is in the nature of 'begar' and hit by Article 23 of the Constitution of India

therefore, is not acceptable. Furthermore since the amount of salary due to the petitioner has been admitted by the respondent, it would not be in the interest of justice to refer the dispute to arbitration under Section 70 of U.P. Cooperative Societies Act, 1965 as there is no dispute regarding payment of dues.

13. For the reasons stated above and in the aforesaid circumstances, writ petition is allowed. The respondents are directed to pay total admitted amount of salary along with 5% simple interest to the petitioner within three months from the date of production of certified copy of this order. Since the Unit is said to be suffering loss, the respondent in the alternative may pay one third of the amount due with interest aforesaid each month for three months in equal installments in addition to his regular wages from the date of production of certified copy of this order along with 5% simple interest.

No order as to costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.07.2009

BEFORE
THE HON'BLE SHRI KANT TRIPATHI, J.

Criminal Misc. Application No. 1737 of 2005

Ram Chandra Balani & another...Applicants
Versus
State of U.P. and another ...Respondents

Counsel for the Applicants:
Sri P.N. Tripathi
Sri Rakesh Bhatt

Counsel for the Respondent:
Sri Rajesh Kumar Dubey

<u>Code of Criminal Procedure-Section-482</u>-Quashing of Chargesheet including entire preceding-offence under Section 380 I.P.C.-on ground that sole informant died- no useful purpose will be served in Continuing proceeding- other witness are there death of informant cannot be ground for quashing the preceding-other argument of absurd and inherently improbable is concern-the Magistrate after considering entire material collected during investigations found sufficient ground to proceed can not be said to be absurd-case law relied by applicant also support the presentation-no legal bar on taking opinion by investigation agency-application rejected.

Held: Para 10

The learned counsel for the applicants submitted that there was no reason for the applicants to commit theft as stated in the FIR specially when they are respectable persons and have no criminal history. The allegations are highly improbable and absurd. In view of illustration no. 5 of Bhajan Lal's case (supra), the proceedings of the criminal case pending against the applicants are liable to be quashed. In my opinion, it is true that if the allegations made in the FIR or the complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused , the proceedings can be quashed under section 482 Cr.P.C. But these principles are of no help to the applicants in view of the fact that the satisfaction of the Magistrate, which is based on perusal of the entire materials collected during in investigation, can not be said to be absurd or inherently improbable.

Case law discussed:
1992 SCC (Crl.) 426, (2006) 6 SCC-736, (2006)7 SCC 188, (2005) 13 SCC 540, 2000 (40) ACC 1021

(Delivered by Hon'ble Shri Kant Tripathi, J.)

1. The applicants Ram Chndra Balani and his son Shyam Balani have filed his application under Section 482 Cr. P.C. for quashing the proceedings of the Criminal Case No. 399 of 2000 State Vs. Ram Chanda Balani and another under section 380 IPC pending in the court of Ist Additional Chief Judicial Magistrate, Mathura along with the impugned order dated 6.11.2004 and charge sheets dated 25.4.2000 and 5.7.2000.

2. Neither the opposite party No. 1 nor the opposite party no. 2 (the complainant) filed any counter affidavit.

3. I have heard the learned counsel for the applicants, the learned AGA for the State and also the learned counsel for the opposite party no. 2 and perused the record.

4. It is alleged that the marriage of the applicant no. 2 Shyam Balani, son of the applicant no. 1, was to take place on 5.5.1997. The applicants had gone to the house of the opposite party no. 2 Gurudeo Sharma on 1.4.1997 at about 10.00 AM to invite him for the marriage. At that time the opposite party no. 2 was not present in his house but his servant Mohan Singh Yadav(informant) was present, who entertained the applicant s in the house of the opposite party no. 2 and went to the market to bring refreshment etc. for them. When the servant Mohan Singh Yadav returned, he found that the applicants were not in the house and had already gone and the attachi kept in an almirah was found in open condition and the cash amount of Rs.12,000/- kept by the opposite party no. 2 was missing from the attachi. is alleged that the applicants have committed theft on the cash amount of Rs.12,000/- by entering into the house of the opposite party no. 2. Accordingly the servant of the opposite party no. 2 lodged FIR at the concerned police station. The police registered the case for investigation and on completion of investigation submitted a final report by holding that no case was made against the applicants. The final report was, then , refereed to the Senior Prosecution Officer, Mathura for opinion, who had kept the matter pending with him for about three years and then returned the case to the investigation officer for filing charge sheet against the applicants. Accordingly the investigation officer submitted charge sheet against the applicants in the court concerned and the final report already submitted was recalled.

5. The learned Additional Chief Judicial Magistrate took cognizance of the offence and issued processes to the applicants. The applicants, after putting appearance before the Additional Chief Judicial Magistrate, contended that no offence was made out against them and prayed for their discharge. The learned Magistrate considered the entire material annexed with the charge sheet and arrived at the conclusion that there was sufficient evidence on record to frame a charge under section 380 IPC against the applicants. Accordingly the learned Magistrate passed the impugned order dated 6.11.2004 and rejected the applicants' prayer for discharge and decided to frame a charge under section 380 IPC against them. The applicants have challenged the order dated 6.11.2004

of Additional Chief Judicial Magistrate, Mathura as well as charge sheets dated 25.4.2004 and 5.7.2000 in the instant case.

6. The learned counsel for the applicants submitted that the applicants are respectable persons. The applicant no. 1 was the Vice President of the society Uhulelal Sindhu Nagar Welfare Association where as the opposite party no. 2 Gurudeo Sharma was the Chairman. They were on friendly term but due to a dispute concerning the society, the opposite party no. 2 developed an enmity with the applicants and got lodged the FIR against them with the help of his own servant. The learned counsel for the applicants further submitted that the informant Mohan Singh Yadav, who is the sole witness, has died and no useful purpose will be served to continue with the trial after the death of the sole witness Mohan Singh Yadav. It was further submitted that the story of theft as disclosed in the charge sheet is not only absurd but is also inherently improbable. The proceedings of the case, in view of the principles of law laid down in the case of **State of Hariyana and others vs. Bhajan Lal and others 1992 SCC (Crl.) 426** are liable to be quashed. In Bhjan Lal's case (supra) the Supreme Court had dealt with the scope of exercise of powers under Section 482 Cr.P.C. And category of cases where High Court may exercise its power relating to the cognizable offence to prevent abuse of the process of the court or otherwise to secure the ends of justice. The seven categories of illustrations propounded by the Supreme Court are as follows:

"(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirely do not prime facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the F.I.R. Do not disclose a cognizable offence, justifying an investigation by police officer under section 156(1) of the Code except under an order of a Magistrate within the purview of section 155 (2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under section 155 (2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceeding and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide an/or where the proceeding is maliciously

instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

7. The case of Bhajan Lal (supra) has been followed with approval in the cases of Indian Oil Corporation vs. NTPC India Ltd. And others (2006) 6 SCC-736, Central Bureau of Investigation vs. Ravi Shankar Srivastava, IAS and another (2006)7 SCC 188 and State of Orissa and another vs. Saroj Kumar Sahoo (2005) 13 SCC 540 and in few other cases. It may not be out of context to refer the following observations made by the Supreme Court in Ravi Shankar Srivastava's case (supra):

"It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises arrive at a conclusion that the proceeding are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint can not be proceeded with. In a proceeding instituted on complaint, exercise of the inherent powers to quash the proceeding is called for only in a case where the the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of the inherent powers under section 482 of the Code. It is not, however, necessary that there should be meticulous analysis of the case before the trial to find out whether the case would end in conviction or acquittal. The complaint has to be read as a whole. If it appears that on consideration of the allegations in the light of the statement made on oath of the complainant that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint is mala fide, frivolous or vexatious , in that event there would be no justification for interference by the High Court. *When an information is lodged at the police station and an offence is registered, then the mala fides of the informant would be of secondary importance. It is the material collected during the investigation and evidence led in the court which decides the fate of the accused person. The allegations of mala fides against the informant are of no consequence and cannot by themselves be the basis for quashing the proceedings*."

8. Section 482 Cr.P.C. has conferred inherent powers on the High Court which should be exercised sparingly, carefully and with caution only when the exercise is necessary, firstly, to give effect to an order under the Code, secondly, to prevent abuse of the process of the court and thirdly, to otherwise secure the ends of justice. It is to be exercised ex debito justitiae to do real and substantial justice for the administration of which alone the courts exist. While exercising the powers under section 482 Cr.P.C. The High Court does not function as a court of appeal or revision and as such it is not permissible to make evaluation or appreciation of the evidence collected during the investigation. The evidence and materials collected during the investigation have to be taken on their face value and if they make out a case of commission of an offence, the proceeding of the case can not be quashed on the ground that the evidence is not creditworthy. The reliability evidence in a criminal case is a

matter to be considered at the stage of trial and not under section 482 Cr.P.C. Or at the stage of taking cognizance of the offence or framing a charge. The police report and the materials collected during the investigation in support of the report are the only materials for the purposes of taking cognizance of an offence as well as for framing a charge. Even the defence version has no relevancy at this stage. The inherent power should not be exercised to stifle a legitimate prosecution but that power is very wide and the very plenitude of the power requires great caution in its exercise. In a case instituted on complaint the inherent power to quash the proceeding has to be exercised only in a case where the complaint does not disclose any offence or is mala fide, frivolous, vexatious or oppressive, but in case instituted on a police report, the allegations of mala fides against the informant are of no consequence and can not by themselves be the basis for quashing the proceeding. In such case only the materials collected during the investigations and the evidence led in the court are relevant.

9. In the instant case, the leaned Additional Chief Judicial Magistrate has, on perusal of the entire case diary, very categorically come to the conclusion that there was sufficient evidence to frame a charge under section 380 IPC against the applicants. The conclusion so drawn by the learned Magistrate is based on the materials collected during the investigation. The informant Mohan Singh Yadav has no doubt died and he can not be examined during the trial but this is itself no ground to quash the proceedings when it is contended on behalf of the opposite party no. 2 that there are other witnesses too to support the prosecution story during the trial.

10. The learned counsel for the applicants submitted that there was no reason for the applicants to commit theft as stated in the FIR specially when they are respectable persons and have no criminal history. The allegations are highly improbable and absurd. In view of illustration no. 5 of Bhajan Lal's case (supra), the proceedings of the criminal case pending against the applicants are liable to be quashed. In my opinion, it is true that if the allegations made in the FIR or the complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused , the proceedings can be quashed under section 482 Cr.P.C. But these principles are of no help to the applicants in view of the fact that the satisfaction of the Magistrate, which is based on perusal of the entire materials collected during in investigation, can not be said to be absurd or inherently improbable.

11. The applicants are alleged to have entered into the house of the opposite party no.2 and taking advantage of his absence and also the absence of the informant Mohan Singh Yadav, they took away cash amount of Rs. 12,000/- from the attachi kept by the opposite party no. 2 in an almirah. These allegations duly supported with the evidence collected during the investigation are not in any way inherently improbable or absurd and make out a prima facie case against the applicants under section 380 I.P.C.

12. The learned counsel for the applicants further submitted that the

investigation officer, on conclusion of the investigation, prepared and submitted a final report but the Senior Prosecuting Officer acted illegally not only in retaining the file for about three years but also in directing the investigating officer to file charge sheet against the applicants. It was further submitted that the charge sheet against the applicants was an outcome of the opinion given by the Senior Prosecuting Officer and as such the proceedings of the criminal case are liable to be quashed. In support of this submission, the learned counsel for the applicants placed reliance on **R. Sarala vs. T.S. Velu & others 2000 (40) ACC 1021.** In that case the Apex Court has held that the High Court's order directing the investigating officer to take opinion of Public Prosecutor for filling charge sheet was not proper. The Apex Court has further held that opinion of the Public Prosecutor has no relevance and the investigating officer was not required to seek opinion in the matter. In my opinion, the facts of the case of R. Sarala (supra) were some how different. In that case a young bride had committed suicide. An inquiry under section 174(3) Cr.P.C. Was held. The Sub Divisional Officer, who conducted the inquiry, found that due to mental restlessness the bride had committed suicide and no one was responsible and he accordingly inferred that her death was not due to dowry harassment. However, the police continued with the investigation and submitted a challan against the husband of bride and his mother under sections 304-B and 498-A IPC. The bride's father was not satisfied with the challan as the sister of the husband to his daughter had been exonerated and was not made as accused. The deceased's father filed a petition under section 482 Cr.P.C. The High Court directed that the papers shall be placed before the Public Prosecutor as it is, without any further investigation, and he shall render an impartial opinion in the matter and thereafter an amended charge sheet shall be filed in the concerned court. In view of peculiar facts of that case the Apex Court was of the view that High Court was not justified in giving direction to seek opinion of the Public Prosecutor. It was further held that the investigating officer, though, is subject to supervision by his superiors in rank, is not to take instructions regarding investigation of any particular case even from the executive Government of which he is a subordinate officer. The opinion of the Public Prosecutor in such circumstances was held not relevant and the order of the High Court directing the investigating officer to seek opinion of the Public Prosecutor, was set aside.

13. In **R. Sarala's case** (supra) the Apex Court has further held in para 7 as follows:

"*The question here is not simply whether an investigating officer, on his own volition or on his own initiative, can discuss with the Public Prosecutor or any legal talent, for the purpose of forming his opinion as to the report to be laid in the court. Had that been the question involved in this case it would be unnecessary to vex our mind because it is always open to any office, including any investigating officer, to get the best legal opinion on any legal aspect concerning the preparation of any report. But the real question is, should the High Court direct the investigating officer to take opinion of the Public Prosecutor for filling the charge-sheet.*"

14. The investigating officer has ample power under the Code of Criminal Procedure to collect relevant material during the investigation and to arrive on a conclusion independent of any extraneous reasons but he is not in any way precluded in law to seek legal opinion which may assist him in forming a definite conclusion. This power of the investigating officer has been upheld in R. Sarala's case (supra). It is equally well settled that the investigating officer can not be given any direction by the court to seek legal opinion either of the Public Prosecutor or any other legal expert for filling the final report or the charge sheet. In R. Sarala's case (supra) the legality of the order of the High Court giving direction to the investigating officer to take opinion of the Public Prosecutor for filling the charge sheet was in issue before the Apex Court and that question was considered and answered against the verdict of the High Court and it was held that there was no compulsion on the part of the investigating officer to seek legal opinion and the High Court had not power to issue such direction. In my opinion, R. Sarala's case (supra) instead of supporting the case of the applicants, supports the facts of the investigating officer in seeking legal opinion on the final report.

15. The application under section 482 Cr.P.C. has no merit. It is accordingly dismissed with costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.08.2009

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 53798 of 2006

Gopal Krishna Srivastava ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Nar Singh Dixit
Sri Siddhartha Srivastava
Sri Himanshu Srivastava

Counsel for the Respondents:
Sri K.R. Sirohi
Sri Saurabh Singh
Sri Neeraj Upadhyay
S.C.

Subordinate Civil Courts Ministerial Establishment Rules 1947-Rule-20 (3)- Appointment of Sadar Munsrim-should be done only by way of promotion seniority cum suitability-strictly from clerical staff-if suitable candidate if clerical staff not available-promotion of stenographer can be considered-promotion of stenographer without prior approval of High Court ignoring senior most ministerial staff-illegal.

Held: Para 14

The claim of respondent no. 3 could have been considered by District Judge for promotion to the post of Sadar Munsarim only where it is found that no incumbent in clerical staff is suitable for promotion. Even at the time when the respondent no. 3 was made Incharge Sadar Munsarim it does not appear from the record that the claim of all the clerical staff was considered at that time and any recommendation was made finding no clerical staff working in the next

lower grade suitable for promotion to the post of Sadar Munsarim.

Case law discussed:

1975(1) SLR 699, 1989(2) UPLBEC 569, 2000(1) AWC 249, Writ Petition No. 1267 of 1988.

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

1. Heard Sri Siddharth Srivastava learned counsel for the petitioner. Despite the case having been called in revised list, none has appeared on behalf of respondents no. 2 and 3 though the names of Sri Saurabh Singh and Sri K.R. Sirohi are shown in the cause list as counsels for the respondents. Learned Standing Counsel representing respondent no. 1 is present.

2. The grievance of petitioner is that the respondent no. 3 was working in the cadre of Stenographer in District Judgeship, Deoria and, therefore, could not have been promoted either as Sadar Munsarim or as Senior Administrative Officer since the said posts were available for clerical staff only and in absence of suitable clerical staff, the persons working on the post of Stenographer could have been considered for such promotion but any such promotion could not be made without prior approval of the High Court. It is submitted that a selection committee was constituted by District Judge for regular promotion on the post of Sadar Munsarim and the said committee selected one Sri Sukhu Prasad for promotion to the post of Sadar Munsarim who was admittedly senior to the petitioner and it is in that view of the recommendation that the petitioner could not be promoted to the post of Sadar Munsarim. However instead of promoting Sri Sukhu Prasad, the District Judge passed order dated 15.09.2005 observing that the respondent no. 3, Sri Deen Bandhu Prasad working as Incharge Sadar Munsarim and Incharge Senior Administrative Officer he shall draw salary against the post of Sadar Munsarim. The order further says that it shall not create any right to Sri Deen Bandhu Prasad to confirm his claim on the post of Sadar Munsarim or Senior Administrative Officer as the matter is pending before the selection committee. Thereafter, he passed another order on 27.05.2006 appointing Sri Deen Bandhu Prasad as Sadar Munsarim on regular basis with all consequential benefits.

3. It is contended that Sri Deen Bandhu Prasad being not a member of clerical staff, and, a suitable candidate for promotion to the post of Sadar Munsarim from clerical staff was available, Sri Deen Bandhu Prasad could not have been appointed as Sadar Munsarim and the impugned order passed by the District Judge is wholly illegal and contrary to law.

4. On behalf of respondent no. 2 a counter affidavit has been filed wherein it has been said in para 5 that the petitioner is wrong in saying that he is senior to respondent no. 3. However, instead of showing seniority list of the petitioner qua respondent no. 3, the District Judge in para 5 further says that the petitioner is junior to Sri Sukhu Prasad as per report of the selection committee dated 01.04.2006. He further says that under Rule 20(3) of the Subordinate Civil Courts Ministerial Establishment Rules, 1947 *(hereinafter referred to as the "1947 Rules")* the post of Sadar Munsarim is a selection post, promotion to which shall be based on "merit with the due regard to seniority". It is said that the case of petitioner for the

post of Sadar Munsarim was considered by the committee on 29.07.2004 which did not find him suitable for promotion to the post of Sadar Munsarim and, therefore, the petitioner cannot claim any promotion on the post of Sadar Munsarim. It further says that against the order of District Judge dated 31.07.2003, by which the respondent no. 3 was made Incharge Sadar Munsarim, no objection was filed by Sri Sukhu Prasad who was senior to petitioner. It further says that the order of District Judge directing the respondent no. 3 to continue to the work as Incharge Sadar Munsarim does not confer any right upon him since according to Rule inchargeship does not confer any right to the person concerned. But then it is said the order dated 27.05.2006 has been passed in consonance with the report dated 01.04.2006 submitted by the selection committee and thereafter the respondent no. 3 has been further promoted to the post of Senior Administrative Officer on 28.07.2006.

5. A separate counter affidavit has been filed by respondent no. 3 stating that he was initially appointed on the post of clerk and thereafter he was promoted on the post of Stenographer on the recommendation of the then Civil Judge, Deoria in absence of a suitable candidate. In respect to the other aspects he has reiterated what has been stated in the counter affidavit of respondent no. 2.

6. Having considered the submission of learned counsel for the petitioner and perusing the record it appears that the respondent no. 3 was appointed as Stenographer long back and that letter of appointment was never challenged by him.

7. Rule 3 of 1947 Rules provides strength of ministerial staff and reads as under:

"3. Strength of Ministerial Establishment.--(1) *The ministerial establishment of a Judgeship shall form a unit; but the stenographers shall form a separate cadre.*

Provided that a stenographer recruited from regular line may, with the previous approval of the High Court, be reverted to the regular line subject to the condition that he is given a place in the gradation list which he would have occupied in ordinary course had he not been appointed a stenographer—

Scale of Pay, if No suitable Clerk is Available for—Note

1. The claim of a stenographer working in the Judgeship may also be considered for appointment to a selection post in Grade I in the revised, (1947)/scale of pay, if no suitable clerk is available for promotion to such post, provided that no such appointment shall be made without the previous approval of the High Court.

2. The sanctioned strength of the ministerial establishment of a judgeship shall consist of such posts as may be sanctioned by Government from time to time in the proposition statement of the judgeship—

Provided that the District Judge may from time to time with the concurrence of the High Court or the Chief Court as the case may be, leave unfilled or the Governor may hold in abeyance or abolish any vacant post without entitling any person to any compensation."

(emphasis added)

8. A perusal of Rule 3 makes it clear that though the cadre of Stenographer constitute part of ministerial establishment of the judgeship but it is a separate cadre than the remaining ministerial staff which are normally known as "clerical staff".

9. Rule 15 of 1947 Rules talks of appointments and provides that all appointments of ministerial staff shall be made to the lowest post subject to provision of Rule 12 and other posts in higher grade are promotional posts but there is an exception in respect to Stenographer.

10. Rule 20 of 1947 Rules provides for promotion and reads as under:

"20. Promotion.--(*1) The posts in a judgeship reserved for clerks in that judgeship and promotion to higher posts shall be made from amongst them. If, however, no suitable clerk is available in the judgeship for promotion to a particular post, promotion as a special case may be made from another judgeship with the sanction of the High Court or the Chief Court, as the case may be.*

(2) Except in cases of Amins, promotion shall be made according to seniority subject to efficiency up to Rs. 80 grade in the case of persons getting pre-1931 scale of pay and the scale of Rs. 70-4-90 (Callas III) in the case of persons getting pay in the post-1931 scale of Rs. 85-6-145 in the case of persons drawing the revised 1947 scale.

(3) Posts other than those mentioned in clause (2) above, for persons in the pre 1931 scale on post 1931 scale respectively shall be treated as selection posts, promotion to which shall be based on merit with the due regard to seniority.

Note-In passing over a person for inefficiency as well as promotion for a selection post due weight shall be given to his previous record of service and seniority should be disregarded only when the junior official promoted is of outstanding merit as compared with his seniors.

(4) Promotions to the posts of Central Nazir or Central Nazirs from one grade to another in the provinces of Agra shall be made according to the rules made from time to time by the High Court.

(5) In courts subordinate to the High Court, promotion of Amins from the second to the first grade shall, as a rule, be made within the local jurisdiction of a judge upon the ground of superiority of general qualifications, irrespective of more length of service.

(6) Promotions or appointments to the posts of Amins in court shall ordinary be confined to persons who satisfy the District Judge that they have a competent knowledge of—

(i) Urdu and Hindi.
(ii) Arithmatic.
(iii) Mensuration.
(iv) Elementary land surveying and mapping.
(v) Order XXVI of Act No. V of 1908.
(vi) Rules in general Rules (Civil relating to the work and duties of the Amins. In exceptional circumstances the District Judge may exempt an official from such qualifications if he is satisfied that the official concerned is otherwise fit to hold the appointment.

(7) An official once promoted to the post of Amin shall not, for purposes of promotion to other posts in the general office be entitled to claim seniority by reasons of such promotion over other

clerks who were senior to him before his promotion as Amin."

11. A perusal of the aforesaid Rules make it clear that in the ministerial cadre after initial appointment in the lowest cadre further appointment in higher post are made by way of promotion by considering persons working in the lower grade though the criteria for promotion depends on the garde. To some cadre the criteria for promotion is seniority subject to efficiency and in higher grade it is for selection i.e. merit with due regard to seniority. To the Stenographers, their promotion against a post in ministerial cadre is not completely prohibited. It provides that when suitable clerical staff is not available for promotion, the claim of Stenographer may be considered for appointment to a selection post in Grade I but such an appointment shall not be made without previous approval of the High Court. Once it is clear that the respondent no. 3 was appointed and working in the cadre of Stenographer, he had no right or occasion to be considered on the post of Sadar Munsarim, which is a selection grade post in Grade I and liable to be filled in by promotion amongst the clerical staff working in the next lower grade. Rule 20(3) of 1947 Rules initially came up for consideration before a Division Bench of this Court in **Hari Mohan Lal Vs. Satya Deo Singh and others, 1975(1) SLR 699** and it was held that for making promotion to a selection post the seniority is to prevail if the junior is not of outstanding merit as compared to the senior. Mere higher merit to senior would not be sufficient but the requirement is that of outstanding merit qua senior otherwise it is the senior who has to be given promotion if he is otherwise fit i.e., not found unfit. In para 6 of the judgment the Court says that if the record of service of two officials is of the same category of the record of junior is slightly better than the senior that would not entitle the authority concerned to promote junior ignoring the senior one.

12. Another Division Bench (Lucknow Bench) of this Court considering the above Rule in **Iqbal Bahadur Srivastava Vs. District Judge, Sultanpur and another, 1989(2) UPLBEC 569** in para 5 of the judgement categorically observed that the post of Munsarim is a promotion post reserved for the members of clerical cadre and the promotion is to be made on merit with due regard to seniority.

13. The above authorities were followed by a Single Judge in **Syyed Muttaqui Raza Vs. District Judge, Banda and others, 2000(1) AWC 249** where also this Court held:

"A reading of Rule 20(3) makes it clear that the post of Sadar Munsarim is a post reserved for members of clerical cadre and the promotion is to be made on consideration of merit with due regard to seniority."

14. The claim of respondent no. 3 could have been considered by District Judge for promotion to the post of Sadar Munsarim only where it is found that no incumbent in clerical staff is suitable for promotion. Even at the time when the respondent no. 3 was made Incharge Sadar Munsarim it does not appear from the record that the claim of all the clerical staff was considered at that time and any recommendation was made finding no clerical staff working in the next lower grade suitable for promotion to the post of

Sadar Munsarim. The entire counter affidavit filed by respondents no. 2 and 3 nowhere show as to how and in what circumstances the respondent no. 3 could be appointed as Sadar Munsarim particularly when there was no recommendation that a suitable clerk is not available for promotion to the post of Sadar Munsarim. On the contrary, it appears that the selection committee found one Sri Sukhu Prasad who was senior most person in clerical staff working in the next lower grade suitable for promotion to the post of Sadar Munsarim but despite that the District Judge was chose to make respondent no. 3 as Incharge Sadar Munsarim and thereafter made him permanent on the post of Sadar Munsarim and later on promoted him on the post of Senior Administrative Officer. This is a circuitous way adopted by the District Judge to promote and confirm respondent no. 3 with undue benefit to give him promotion on the post of Sadar Munsarim as well as Senior Administrative Officer though it was not permissible under the Rules. The question as to when a Stenographer can be considered for promotion to the post of Grade I has been considered by Lucknow Bench of this Court in **Civil Misc. Writ Petition No. 1267 of 1988, Balwant Singh Vs. State of U.P. and others** and the Court held that promotion to the post of Sadar Munsarim is confined to clerical staff but when the clerical staff is not found suitable for promotion to the post of Sadar Munsarim only then a Stenographer may be considered and that promotion also cannot be made without previous approval of the High Court.

15. I, therefore, do not find that the promotion of respondent no. 3 has been made in accordance with law. In the circumstances, the writ petition is allowed. The impugned orders dated 31.07.2004 and 27.05.2006 (Annexures-6 & 7 to the writ petition) are hereby quashed. The District Judge shall proceed to make promotion to the post of Sadar Munsarim in accordance with law expeditiously. No costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.08.2009

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 44384 of 2009

Anil Kumar ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri D.P. Singh
Smt. Archana Singh
Sri S. Niranjan

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

U.P. Recognised Basic School (Junior High School) Recruitment and Condition Service of Teachers Rules 1978-Rule-28-Temporary appointment of Head master by management-could be extended 6 months only-term expired in the month of May 2009-come to an end on 30.6.09-No further extension permissible.

Held: Para 9

Consequently this Court holds that petitioner is not entitled to any further extension, inasmuch as period of six months subsequent to temporary appointment would expire in the month of May, 2009 and since the academic

session for the relevant period would be 2008-09, the same inturn would come to an end on 30th June, 2009. Therefore, there cannot be any further extension, even under the proviso to Rule-20 of Rules, 1978 in the facts of the case.

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

1. Heard Sri D.P. Singh, learned Senior Advocate, assisted by Smt. Archana Singh, learned counsel for the petitioner, Sri K. Ajit, learned counsel for respondent nos. 6 and 7 and learned Standing Counsel for the State-respondents.

2. Assistant Director of Education (Basic), Aligarh/Agra Division, Agra under the impugned order dated 22nd July, 2009 has held that temporary appointment of the petitioner as head master of a recognised junior high school, referable to Rule 20 of Uttar Pradesh Recognised Basic Schools (Junior High Schools) (Recruitment and Conditions of Service of Teachers) Rules, 1978 (hereinafter referred to as the 'Rules, 1978') could be made for a period of six months only. The said period of six months expired long back inasmuch as he was appointed on 30th November, 2008, under the approval dated 31st December, 2008. The Committee of Management, however, illegally forwarded a resolution for extension of the appointment of the petitioner, which was approved by the Basic Shiksha Adhikari on 3rd January, 2009. He has directed that the order of approval dated 3rd July, 2009 granted by the Basic Shiksha Adhikari, wherein temporary appointment of the petitioner on the post of headmaster was again extended for six months, was illegal and is therefore, set aside. A direction to hold fresh selection for regular appointment on the post of principal of the institution and in the meantime charge of the post of principal being given to the senior most teacher of the institution has also been issued.

3. Learned counsel for the petitioner with reference to proviso to Rule-20 of Rules, 1978 contends that such temporary appointment could be extended till the end of the academic session and in the facts of the present case, the academic session would expire only on 30th June, 2010.

4. The contention so raised on behalf of the petitioner is objected to by the respondents, on the ground that proviso to Rule-20 has to be read along with the main provision. He contends that the said proviso would be applicable only when the period of six months expires during an academic session, and in that circumstance appointment can be extended till the end of the academic session, the purpose being that the work of the institution may not suffer in absence of principal/headmaster, during mid-academic session. He clarifies that such extension of appointment cannot be overstretched so as to read that even after expiry of six months, further extension for next academic session can be asked for or granted. He further contended that the petitioner is not possessed of the prescribed minimum qualification qua the post of Principal.

5. I have considered the submissions made on behalf of the parties and have gone through the records of the present writ petition.

6. I am of the considered opinion that the contention raised on behalf of the

respondents has force. Rule-20 of Rules, 1978 reads as follows:

"20. ***Temporary appointment.---*** *Notwithstanding anything contained in these rules, the Management may, with the previous approval of the District Basic Education Officer, appoint for a period not exceeding six months any person as Headmaster or Assistant Teacher, as the case may be, provided that no person shall be so appointed, unless he possess the minimum qualification prescribed for the post :*

Provided further that the District Basic Education Officer may, for reasons to be recorded, extend the aforesaid period of six months for a period co-terminous with the end of the academic session in which extension is granted."

7. From a bare reading of the aforesaid Rule, it would be apparent that power to make temporary appointment with the approval of the District Basic Education Officer without following the procedure prescribed for regular appointment by direct recruitment on the post of Headmaster has to be for a limited duration of six months only with a condition that the person must be possessed of prescribed qualification. Proviso to Rule-20 confers a power for extension of such period of six months upto the period co-terminous with the end of the academic session in which extension is granted. Meaning thereby that if the term of temporary headmaster/teacher i.e. six months period expires, during mid academic session, than such temporary teacher/headmaster may be granted extension for the period co-terminous with the end of the academic session. For example, if the term of six months of a teacher/headmaster is to expire in the month of April, he may be granted extension till 30th June of the same year i.e. when the academic session would expire.

8. Proviso to Rule-20 cannot be overstretched, as suggested by the learned counsel for the petitioner and cannot confer a right for any extension of temporary appointment for any period after end of the academic session. The relevant point to determine the applicability of the proviso to Rule 20 is the date on which the period of six months expires and it is with reference to this date only that further extension of temporary appointment can be granted for the remaining term of the said academic session i.e. till the end of the academic session in which the period of six months expires.

9. Consequently this Court holds that petitioner is not entitled to any further extension, inasmuch as period of six months subsequent to temporary appointment would expire in the month of May, 2009 and since the academic session for the relevant period would be 2008-09, the same inturn would come to an end on 30th June, 2009. Therefore, there cannot be any further extension, even under the proviso to Rule-20 of Rules, 1978 in the facts of the case.

10. This Court is not inclined to enter into the issue as to whether the petitioner is possessed of the prescribed minimum qualification or not. The said issue is left open to be agitated at appropriate stage.

The writ petition lacks merit and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.07.2009

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 44297 of 1992

Suresh Prasad ...Petitioner
Versus
District Magistrate & others ...Respondents

Counsel for the Petitioner:
Sri Dr. R.G. Padia
Sri Prakash Padia

Counsel for the Respondent:
S.C.

Constitution of India-Article-226: Writ of Mandamus -petitioner was appointed for 42 days-extended from time to time-after 17.6.1992 no extension granted-appointment made dehores the Rule-working pursuant to interim order for four month only-no mandamus can be issued-either for continuance in service or regularization.

Held: Para 15

Something which is not conferred by rules cannot be given by means of a judicial order since it would amount to direct the respondents to act in the teeth of the statutory rules which is impermissible, therefore, this request is also rejected.

Case law discussed:
2009 (1) UPLBEC 321, 1975 (2) SCC 831, 1992 SC 2070, 2007(2) ESC 987, 1975 Allahabad 280, 1986 (4) LCD 196, 1994 Allahabad 273, 2009 (2) SC 520, 2006(4) SCC 1, 2009(6) SC 463

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

1. Heard Dr. R.G. Padia, learned Senior Advocate assisted by Sri Prakash Padia for the petitioner and learned Standing Counsel for the respondents.

2. The petitioner has sought the following the reliefs:

"A. *a writ, order or direction, including a writ in the nature of Mandamus commanding the respondent to permit the petitioner to continue as Class IV employee till such time regular selection is made by the respondent in case a permanent vacancy exists in respect of a Class IV post with respondent no. 3 or in case any person junior to the petitioner is being permitted to work as Class IV employee;*

B. a writ, order or direction including a writ in the nature of mandamus commanding the respondent to pay salary to the petitioner month-by-month as and when it falls due along with arrears of salary w.e.f. 18.6.1992;

C. a writ, order or direction including a writ in the nature of mandamus commanding the respondents to pass appropriate orders in respect of the judgment passed by this Hon'ble Court in a writ petition filed by the petitioner dated 31.08.1992;

D. any other writ, order or direction, which this Hon'ble Court may deem fit and proper in the circumstances of the case;

E. award costs of the writ petition throughout to the petitioner."

3. It appears that the petitioner was engaged for a limited tenure from time to time and his last engagement was for the

period of 07.05.1992 to 17.06.1992 and thereafter he was not required.

4. The petitioner is alleging that the sub-treasury officer, bareya, district Ballia had made a recommendation for continuance of petitioner on 21.07.1992 but no order thereon was passed by Senior Treasure Officer. Thereafter the petitioner filed Writ Petition No. nil of 1992 and this Court disposed of the writ petition on 31.08.1992, passing the following order:

"The petitioner was appointed as a peon on 14.8.1991 for a period of 42 days only. His services were extended from time to time. Thereafter a recommendation has been made by the respondent no. 3 on 21.7.1992 to respondent no. 2 for the extension of services. It appears that no order has been passed. The petitioner's case is that he has been working continuously but his salary has not been paid after 17th June, 92.

The petitioner has prayed for issue of a writ in the nature of mandamus directing the respondent to regularize his service and pay the salary. This relief cannot be granted by this Court unless the respondent no. 2 passes a final order on the recommendation made by respondent no. 3.

Accordingly we direct the respondent no. 2 to pass a suitable order on the recommendation made by the respondent no. 3 on 21.7.92 within a period of one month from the date of filing of a certified copy of this order before him.

With this observation, the writ petition is being disposed of finally.

A certified copy of this order may be issued to the learned counsel for the petitioner within a week on payment of usual charges.

5. Pursuant thereto Senior Treasury Officer, Ballia passed the order dated 18.11.1992 observing that there is no requirement of the petitioner for further engagement and his appointment being a tenure appointment has already ceased by efflux of time. This order has not been challenged by the petitioner. On the contrary, only a writ of mandamus has been sought to continue him as Class IV employees and pay him salary. It is not disputed by learned counsel for the petitioner that regular appointment on Class-IV post is governed by statutory Rules i.e. Group 'D' Employees Service (U.P.) Rules, 1985 but the petitioner has not been appointed following the procedure laid down therein.

6. However, Sri Padia contended that the termination of petitioner is illegal inasmuch as several allegations have been made for the petitioner's conduct in the counter affidavit and, therefore, in view of this Court's decision in **Tasneem Fatime (Smt.) Vs. State of U.P. and others, 2009(1) UPLBEC 321** and the Constitution Bench decision in **Shamsher Singh Vs. State of Punjab, 1975 (2) SCC 831** the petitioner's termination being stigmatic is liable to be set aside.

7. The submission, in my view, is thoroughly misconceived. Here it is not a case of termination of petitioner as such. The petitioner was appointed on tenure basis and after expiry of the period the appointment comes to an end by efflux of time. The Apex Court in the case of **Director, Institute of Management Development, U.P. Vs. Pushpa Srivastava, AIR 1992 SC 2070** has held,

where the appointment is made on tenure basis there is no requirement to pass an order of termination since it is automatic by efflux of time. Here the authority concerned was to consider whether there was any requirement of petitioner for the further engagement which would have necessitated a same fresh order of appointment.

8. It is next submitted that pursuant to an interim order passed by this Court the petitioner is continuing and therefore, it will be extremely harsh if as a result of dismissal of writ petition his service would be dispensed with after 17 years. The petitioner has already passed the maximum age and he now cannot get any alternative employment, therefore, this Court must permit him to continue in service.

9. It is no doubt true that on 01.12.1992 an interim order was passed by this Court to the following effect:

"*For a period of four months from today the operation of the order dated 18.11.1992 shall remain stayed. Petitioner will be entitled for salary for the period for which he actually worked."*

10. According to my understanding the said order nowhere direct the respondent to continue the petitioner in service for the reason that the order dated 18.11.1992 did not terminate him but only says that his term having completed, he cease to be in employment and the department does not require his service. Even if this order was stayed, it would not automatically result in treating as if a fresh order of appointment was issued. This order also does not say any where that the petitioner shall be allowed to continue to function. With respect to payment of salary, it only says that the petitioner will be entitled for salary for the period for which he actually work. The petitioner, therefore, was not granted any interim order by this Court to continue in service. Sri Padia, however, submitted that construing this Court's decision by the respondents as if he was entitled to continue, the respondent actually allowed him to continue and till today he is continuing.

11. Be that as it may, it is well established that act of the court shall prejudice none. The services rendered pursuant to an interim order would not give any benefit to petitioner. This issue has been considered by a Division Bench of this Court (in which I was also a member) in **Smt. Vijay Rani Vs. Regional Inspectress of Girls Schools, Region-1, Meerut and others, 2007 (2) ESC 987** and the Court held as under:

"*An interim order passed by the Court merge with the final order and, therefore, the result brought by dismissal of the writ petition is that the interim order becomes non est. A Division Bench of this court in* ***Shyam Lal Vs. State of U.P. AIR 1968 Allahabad 139,*** *while considering the effect of dismissal of writ petition on interim order passed by the court has laid down as under:*

"It is well settled that an interim order merges in the final order and does not exist by itself. So the result brought about by an interim order would be non est in the eye of law if the final order grants no relief. The grant of interim relief when the petition was ultimately dismissed could not have the effect to postponing implementation of the order of

compulsory retirement. It must in the circumstances take effect as if there was no interim order. "

The same principal has been reiterated in the following cases:

(A) ***AIR 1975 Allahabad 280 Sri Ram Chandra Das V. Pyare Lal.***

"*In Shyam Lal Vs. State of U.P., AIR 1968 all 139 a Bench of this Court has held that orders of stay of injunction are interim orders that merge in final orders passed in the proceedings. The result brought about by the interim order becomes non est in the eye of law in final order grants no relief. In this view of the matter it seems to us that the interim stay became non est and lost all the efficacy, the commissioner having upheld the permission which became effective from the order it was passed."*

(B) ***1986 (4) LCD 196 Shyam Manohar Shukla V. State of U.P.***

"It is settled law that an interim order passed in a case which is ultimately dismissed is to be treated as not having been passed at all (see Shyam Lal V. State of Uttar Pradesh) Lucknow, AIR 1968 Allahabad 139 and Sri Ram Charan Das V. Pyare Lal, AIR 1975 Allahabad 280 (DB)."

(C) ***AIR 1994 Allahabad 273 Kanoria Chemicals & Industries Ltd. V. U.P. State Electricity Board.***

"After the dismissal of the writ petitions wherein notification dated 21.4.1990 was stayed the result brought about by the interim orders staying the notification, became non est in the eye of law and lost all its efficacy and the notification became effective from the beginning."

12. Recently also in **Raghvendra Rao etc. Vs. State of Karnataka and others, JT 2009 (2) SC 520** the Apex Court has observed:

" *It is now a well -settled principle of law that merely because an employee had continued under cover of an order of Court, he would not be entitled to any right to be absorbed or made permanent in the service....."*

13. It is not the case of the petitioner that even in this interregnum period his selection has been made on regular basis. That being so, the law laid down by the Constitution Bench of the Apex Court in **Secretary, State of Karnataka Vs. Uma Devi, 2006 (4) SCC 1** that any such indulgence cannot be granted by the Court of continue the petitioner in service would squarely apply in this case also.

14. Learned counsel for the petitioner at this stage requested that in case the respondents proceed to hold regular selection, the petitioner if apply, may also be considered by granting relaxation in age to the extent he has served the department. However, from perusal of Rule 32 of 1985 Rules that no power has been conferred upon the State Government to relax the rules pertaining to recruitments. In **State of Uttranchal Vs. Alok Sharma and others, JT 2009 (6) SC 463** considering the matter of relaxation of Rules the Apex Court said:

"*An authority, unless a power is conferred on it expressly, cannot exercise a statutory power. Power of relaxation must be specifically conferred. Such power 16 having been envisaged to be conferred by reason of a rule made under*

the proviso appended to Article 309 of the Constitution of India, the contention of the learned counsel for the respondents that relaxation must be deemed to have been granted cannot be accepted. "

"The discretionary jurisdiction could be exercised for relaxation of age provided for in the rules and within the four corners thereof. "

15. Something which is not conferred by rules cannot be given by means of a judicial order since it would amount to direct the respondents to act in the teeth of the statutory rules which is impermissible, therefore, this request is also rejected.

16. The writ petition, therefore, lacks merit and is accordingly dismissed. Interim order, if any, stands vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.08.2009

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

Civil Misc. Writ Petition No.41029 of 2009

Chandrajeet Ram ...Petitioner
Versus
The State of U.P. & another ...Respondents

Counsel for the Petitioner:
Sri Dinesh Kumar Pandey

Counsel for the Respondents:
Sri N.P. Pandey
S.C.

U.P. Consolidation of Holding Rule 1956-Rule-109-A-Mutation of name-order alleged to be passed by consolidation authorities prior to 40 years-petitioner kept mum during 35 years-held-provisions of Rule 109-A utterly misused-can not be invoked after notification of section 52-court expressed its great concern-and warned the District authorities to be more vigilant in future-petition dismissed.

Held: Para 3

It is also the experience of the court that Rule 109-A is being utterly mis-used. It is not meant for rampant use. It cannot be invoked after notification under Section 52 of the Act to enforce orders passed before the notification.

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

1. The court is daily coming across such matters where people come out with certified copies of orders alleged to have been passed 25 to 40 years before by Consolidation courts and start asserting that the order must be mutated. In most of the cases such certified copies are forged. In normal course of things if an order is passed by Consolidation court in favour of a person then either it is implemented forthwith in normal course or he will immediately take steps for getting that mutated in the revenue records. A wait of more than 12 years always raises a grave doubt regarding the genuineness of the order sought to be enforced. In most of such cases certified copies of non existent orders are manufactured after the loss/weeding out of original records.

2. In the instant case the fantastic argument of the petitioner is that on 21.7.1973 some order was passed by the consolidation court in his favour, however, due to negligence of consolidation authorities the said order of 1973 was not mutated in the revenue records. For the said purpose for the first time petitioner filed application on

2.2.2008 i.e. exactly after 35 years. If the petitioner had waited for one more year, limitation to file suit for recovery of possession would have expired thrice. In such matters First Information Report must be lodged against such claimants for manufacturing the documents otherwise this menace would not be checked. However, the court is not issuing any particular direction in respect of the petitioner of this writ petition. The consolidation authorities/courts and other revenue authorities/courts of each district particularly Collector should be vigilant in future.

3. It is also the experience of the court that Rule 109-A is being utterly mis-used. It is not meant for rampant use. It cannot be invoked after notification under Section 52 of the Act to enforce orders passed before the notification.

4. During dictation of this judgment learned counsel for the petitioner prayed for dismissal of the writ petition as not pressed. However, the court is not inclined to grant that prayer.

5. The court is not at all convinced that any order was passed in favour of petitioner on 21.7.1973 hence this writ petition is dismissed.

6. Office is directed to supply a copy of this order free of cost to Shri N.P. Pandey, learned standing counsel.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.08.2009

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 39558 of 2009

Hemant Kumar and another ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Vashistha Tiwari

Counsel for the Respondents:
S.C.

U.P. Intermediate Education Act 1921-Chapter III Reg. 101-Appointment on class IV post-procedure for appointment-in absence of specific provision-by order dated 1.6.01 issued by Director-same procedure of U.P. Direct Recruitment on Group D posts Rule 1985 are applicable-by virtue of U.P. Direct Recruitment inclusion of Nominee of District Magistrate participation of Nominee of D.M. in selection committee-held mandatory otherwise constitution of selection committee itself irregular-Direction for fresh selection issued.

Held: Para 9 & 12

It may also be clarified that so far as the Rules of 2006 are concerned, the same made the nominee of District Magistrate is the Selection Committee for Group 'D' posts mandatory the said amendment has to be read along with the Rules of 1985 which have been incorporated by reference under Government order as per the letter of the Director 1.6.2001 for appointment on class III and class IV post in Recognized Intermediate Colleges. There is no challenge to the competence of State to issue the direction as per the letter of the director at 9.6.2000 in the present writ petition.

In these set of the circumstances of the Court is of the opinion and selection committee constituted for Class IV posts in the Institution in question is not in accordance with the procedure prescribed as per the letter of the Director dated 1.6.2001 and therefore any recommendation made by such Selection Committee need no consideration by the Education Authority under Regulation 101 of Chapter III of the Regulation framed under the Intermediate Education Act.

Case law discussed:

2008(3) E.S.C., page 1584 (Alld)
2003(2) SCC 111
AIR 2008 SCW 5817.

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

1. Petitioners before this Court seeks a writ of mandamus directing the respondents to approve the appointment of the petitioners and to provide salary from the State Exchequer. Facts in short are as follows:

2. Two vacancies on Class IV post in Hindu Inter College, Koshikala, Mathura are said to be available. The vacancies were advertised with the permission of District Inspector of Schools. The petitioners applied in response to it. A selection Committee was constituted and the petitioners were selected one of them is a general category candidate and other is of backward class category. Papers seeking approval qua the petitioners selection were transmitted to the District Inspector of Schools vide letter dated 12.02.2008. No orders have been passed by the authority hence this petition. Normally this Court would have required the District Inspector of Schools to pass orders on the papers received qua appointment on class IV posts in the recognized Intermediate College in view of the provisions of Chapter 3 of the Regulation framed under the Intermediate Education Act. However, such a course is not being adopted in the facts of this case for following reasons:

3. It is admitted on record that the selection committee which was constituted for the purpose of appointment on class IV post in the Institution did not include the nominee of the District Magistrate.

4. Counsel for the petitioner vehemently argued that under letter dated 1.6.2001 it has been provided that the procedure prescribed for appointment on class IV post in Government establishments would be applied for the purpose of selection on Class IV post in Intermediate Colleges. However the requirement of the nominee of District Magistrate stands excluded as per the letter dated 28th August 2008 as also in view of law laid down by this Court in the case of **Smt. Shiksha and Another Vs. State of U.P. and others, reported in 2008(3) E.S.C., page 1584 (Alld)**

5. It is not in dispute that Regulation 101 to 107 of Chapter III framed under the Intermediate Education Act provide for appointment on Class III and Class IV posts in recognized intermediate Colleges. Regulation 101 provide for prior approval of District Inspector of Schools before making any appointment. Other regulations deal with compassionate appointment etc. None of the regulations lay down the procedure which is to be adopted for appointment by direct recruitment against substantive vacancy in Intermediate Colleges on Class III and Class IV posts. It is for this reason that an order was issued under the signature of

the Director Education U.P. dated 1.06.2001 which provides that the procedure for appointment on Class III and Class IV posts by direct recruitment in recognized Intermediate Colleges shall be the same as that applicable qua appointment on group D post in the employment of the Government establishment. It has been provided that U.P. Direct Recruitment on Group D posts Rule 1985 (hereinafter referred to as Rules 1985) would be applicable. It is not in dispute that under the aforesaid 1985 Rules the vacancies have to be advertised in newspaper. The Selection Committee would include amongst others a nominee of the District Magistrate. For ready reference the letter dated 1.6.2001 is quoted below:

प्रेषक,

शिक्षा निदेशक, उत्तर प्रदेश,
शिक्षा सामान्य (१)तृतीय अनुभाग,

सेवा मे,

मण्डीय संयुक्त शिक्षा निदेशक,
उत्तर प्रदेश।

पत्रांक सामान्य (१)तृतीय /१०४४-११६६/२००१-०२ दिनांक १-६-२००१

विषयः <u>अशासकीय सहायक प्राप्त माध्यमिक विद्यालयों में चतुर्थ श्रेणी कर्मचारियों की नियुक्ति की प्रक्रिया के सम्बन्ध में</u>।

महोदय,

उपर्युक्त विषय की ओर आपका ध्यान आकर्षित करते हुए निवेदन हैं कि शासन ने अपने पत्र संख्याः ६६३/१५-१२-२००१-१६०१ (७६३)/२००० दिनांक ११-५-२००१ द्वारा यह निर्देश दिया हैं कि माध्यमिक शिक्षा संशोधित अधिनियम १६२१ के अध्याय-तीन-विनियम-२(१) में यह व्यवस्था दी गयी है कि अशासकीय मान्यता प्राप्त/सहायता प्राप्त उच्चतर माध्यमिक विद्यालयों के चतुर्थ श्रेणी कर्मचारियों की न्यूनतम शैक्षिक योग्यता वही होगी, जो राजकीय उच्चतर माध्यमिक विद्यालयों के समकक्षीय कर्मचारियों के लिए समय पर निर्धारित की गयी हैं, किन्तु अधिनियम में चतुर्थ श्रेणी कर्मचारियों के रिक्त पदों के भरने की प्रक्रिया स्पष्ट रूप से वर्णित नही की गयी हैं। यह स्पष्ट हैं कि अशासकीय सहायता प्राप्त माध्यमिक विद्यालयों में शासन की उक्त अधिसूचना संख्या- क्रार्मिक-२-२०१७-१६८६-- २(१), लखनऊ ८ सितम्बर, १६८६ द्वारा प्रख्यापित समूह ''घ'' (कर्मचारी सेवा प्रथम संशोधन) नियमावली- १६८६ के प्राविधान प्रभावी है।

अतः शासन के पत्र संख्या 693/15-12-2001-1601 (793)/2000 दिनांक 11-5-2001 में दिये गये उक्त निर्देशानुसार कार्यवाही सम्भावित कराये तथा प्रश्नगत नियमावली में दिये गये प्राविधानों के विपरीत की गयी नियुक्तियों को किसी भी दशा में मान्य न किया जाये तथा नियमावली में सशोधन करके नियुक्ति करने वाले प्रबन्धक /प्रधानाचार्य के विरूद्ध कार्यवाही सुनिश्चित की जाये।

भवदीय
(मित्र लाल)
अपर शिक्षा निदेशक(माध्यमिक)
उत्तर प्रदेश

6. By means of U.P. Direct Recruitment Inclusion Of Nominee Of District Magistrate In Selection Committee Rule 2006 the nominee of the District Magistrate in the selection committee has been made mandatory. It is with reference to the said Rules of 2006 that the Single Judge of this Court in the case of Shiksha and others (supra) has held that Rules of 2006, has been framed in exercise of power under Article 309 of the Constitution of India and, therefore, will not to applicable qua the procedure to be followed for appointment on class III and class IV posts under the Intermediate Education Act. It has been held that the Regulations 101 to 107 operate in different field vis-a-vis the Rules of 2006.

7. I have examined the judgment in the case of Shiksha and others (supra) and have considered Government order dated 1.6.2001 which provides that the Rules relating to appointment on Group D post in the State Government would be followed for appointment on Class III and Class IV post in recognized Intermediate College.

8. It is not in dispute that no procedure for direct recruitment on class III and Class IV post has been provided for under the Regulation framed under the Intermediate Education Act. It is for this reason that for filling up the vacuum that the State Government has by reference incorporated the Rules of 1985 as per the letter at 1.6.2001. This order of the State Government is also referable to Section 9 of the Intermediate Education Act. Therefore all appointment on Class III and Class IV posts in recognized Intermediate College have to be made after following the procedure prescribed for appointment on Group D posts in the employment of the State Government i.e. Rules 1985. The aforesaid aspect of the matter has not been examined in the judgment in the case of Smt. Shiksha (supra). This Court is, therefore, not included to follow the same.

9. It may also be clarified that so far as the Rules of 2006 are concerned, the same made the nominee of District Magistrate is the Selection Committee for Group 'D' posts mandatory the said amendment has to be read along with the Rules of 1985 which have been incorporated by reference under Government order as per the letter of the Director 1.6.2001 for appointment on class III and class IV post in Recognized Intermediate Colleges. There is no challenge to the competence of State to issue the direction as per the letter of the director at 9.6.2000 in the present writ petition.

10. I am of the considered opinion that all the judgments relied upon in the judgment and order of the learned Single Judge were clearly distinguishable. The Hon'ble Supreme Court in the case of **Bhavnagar University vs. Palitana Sugar Mills (Pvt.) Ltd. & Ors., reported in** *2003(2) SCC 111***,** has held as follows:

"It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision."

11. The said judgment has been followed in the recent judgment of the Hon'ble Supreme Court in the case of **Dr. Rajbir Singh Dalal vs. Chaudhari Devi Lal University, Sirsa & Anr.**, reported in *AIR 2008 SCW 5817*.

12. In these set of the circumstances of the Court is of the opinion and selection committee constituted for Class IV posts in the Institution in question is not in accordance with the procedure prescribed as per the letter of the Director dated 1.6.2001 and therefore any recommendation made by such Selection Committee need no consideration by the Education Authority under Regulation 101 of Chapter III of the Regulation framed under the Intermediate Education Act.

13. Accordingly, this writ petition is dismissed.

14. At this stage counsel for the petitioner prayed that this Court may leave it open to the Principal of the Institution to constitute a Section Committee in accordance with the letter of the Director including the nominee of the District Magistrate and to complete the process of selection subsequent to the advertisement published earlier afresh. Such liberty prayed is always available to the appointing authority.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.07.2009

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.

Civil Misc. Writ Petition No.37400 of 2006

Arvind Kumar Rai ...Petitioner
Versus
The State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri Awadh Narain Rai

Counsel for the Respondents:
Sri Arvind Kumar
SC

Arms Act Section-14-Grant of license of Non Prohibited fire arms-licensee authority endorsed single word-refused without disclosing any reason for refusal-held-arbitrary exercise of power-even administrative authority is bound to record reasons.

Held: Para 18

It is a basic principle of rule of law in a democratic society that a person against whom an adverse order is passed by administrative or quasi-judicial authorities, it must be reasoned so that the person must be aware of the grounds on which he has been denied his statutory right.

Case law discussed:
AIR 1978 SC 597, AIR 1991 SC 101, AIR 1978 Supreme Court 851.

(Delivered by Hon'ble Devi Prasad Singh, J.)

1. Heard learned counsel for the petitioner and learned Standing Counsel and perused the record.

2. With the consent of the parties' counsel, the writ petition is finally disposed of at admission stage.

3. The petitioner Arvind Kumar Rai has applied for grant of fire arm licence to the District Magistrate, Ghazipur. The application has been rejected, hence the present writ petition.

4. In brief, the petitioner has applied for grant of fire arm licence (revolver) along with a certificate given by the Pradhan of his village with regard to grant of licence. The application was kept pending by the respondents without taking a decision. Hence, the petitioner had approached this Court under Article 226 of the Constitution of India by preferring writ petition No2001 of 2006 which was decided finally vide judgment and order dated 11.5.2006. A mandamus was issued to the District Magistrate, Ghazipur to decide the petitioner's application for grant of fire arm licence within one week.

5. In pursuance to the judgment of this Court, the District Magistrate, Ghazipur had considered the petitioner's application and rejected the application by impugned order dated 29.4.2006. A perusal of the impugned order indicates that a report was submitted by the Superintendent of Police and revenue authorities indicating therein the criminal cases which were pending against the petitioner's uncles and father. The report indicates that the family members of the petitioner were involved in serious offences. It appears that the District Magistrate without recording a finding at his end made an endorsement on the said

report on 29.4.2006 with the word, "Aswikrit" (refused).

6. The submission of the petitioner's counsel is two-fold; firstly pendency of criminal cases against the petitioner's father or other family members should not be considered as a hurdle in grant of arm licence. The petitioner's case should be considered on merit keeping in view the necessity of arm licence in pursuance to power conferred by Sections 13 and 14 of the Arms Act, 1959, in short Act.

7. The second limb of argument is that the District Magistrate should have passed speaking order by applying his mind keeping in view the provisions contained in Sub Section (3) of Section 14 of the Act.

8. It shall be appropriate to consider the provisions contained in Section 13 and 14 of the Act which provides that after receipt of application for arm licence, the licensing authority shall call for a report of the officer incharge of the police station and after receipt of such report, it shall be open for the licensing authority to hold an enquiry as it may consider necessary. After receipt of the report, the licensing authority may either grant a licence or refuse to grant the same. For convenience, relevant portion of Section 13 is reproduced as under :

***"13. Grant of licences**.-(1) An application for the rant of a licence under Chapter II shall be made to the licensing authority and shall be in such form, contain such particulars and be accompanied by such fee, if any, as may be prescribed.*

[(2) On receipt of an application, the licensing authority shall call for the report of the officer in charge of the nearest police station on that application, and such officer shall send his report within the prescribed time.

(2A)The licensing authority, after such inquiry, if any, as it may consider necessary, and after considering the report received under sub-section(2), shall, subject to the other provisions of this Chapter, by order in writing either grant the licence or refuse to grant the same :

Provided that where the officer in charge of the nearest police station does not send his report on the application within the prescribed time, the licensing authority may, if it deems fit, make such order, after the expiry of the prescribed time, without further waiting for that report.]

9. Thus, from a plain reading of Section 13 shows that a citizen has got statutory right to apply for grant of arm licence and such application should be considered by the licensing authority keeping in view the para-meters given in Section 13 of the Act. The category of arm licence for which a licence may be granted by the licensing authority and its nature has been given in Sub Section (3) of Section 13 of the Act.

10. Apart from statutory right, while considering the application for grant of fire arm licence, the licensing authority shall also keep in mind that right to life is a fundamental right guaranteed under Article 21 of the Constitution of India. In case a person lacks criminal history and there is imminent danger to his life and liberty or grant of arm licence is necessary to save the property and life, then ordinarily, the licence should be granted to the citizen.

11. Section 14 of the Act deals with contingency with regard to refusal of arm licence. Sub Section (1) provides that in case the licensing authority has got reason to believe that the grant of arm licence is prohibited by law or a person or applicant is of unsound mind or or for any reason is unfit for a licence under the Act or the licensing authority deems it necessary for the security of the public peace or for public safety, then he can refuse such licence.

12. There cannot be refusal to grant licence only on the ground that the person does not possess sufficient property. It shall be obligatory on the part of the licensing authority while refusing to grant licence to apply his own mind giving a brief statement of facts which persuaded him to refuse the licence. For convenience, Section 14 of the Act is reproduced as under :

***"14. Refusal of licences**.-(1) Notwithstanding anything in section 13, licensing authority shall refuse to grant-*
(a) a licence under section 3, section 4 or section 5 where such licence is required in respect of any prohibited arms or prohibited ammunition;
(b) a licence in any other case under Chapter II,-
(i) where such licence is required by a person whom the licensing authority has reason to believe-
(1) to be prohibited by this Act or by any other law for the time being in force from acquiring, having in his possession or carrying any arms or ammunition, or
(2) to be of unsound mind, or
(3) to be for any reason unfit for a licence under this Act; or
(ii) where the icensing authority deems it necessary for the security of the public peace or for public safety to refuse to grant such licence.
(2) The licensing authority shall not refuse to grant any licence to any person merely on the ground that such person does not own or possess sufficient property.
(3) Where the licensing authority refuses to grant a licence to any person it shall record in writing the reasons for such refusal and furnish to that person on demand a brief statement of the same unless in any case the licensing authority is of the opinion that it will not be in the public interest to furnish such statement."

13. Keeping in view the letter and spirit of Section 14 of the Act, ordinarily, it shall always be incumbent on the licensing authority to pass a speaking and reasoned order while refusing to grant licence. It shall be pre-requisite for the refusal to grant arm licence to examine all relevant facts and material on record.

14. Now, it is trite in law that every unreasoned order shall be hit by Article 14 of the Constitution of India vide **Smt. Maneka Gandhi versus Union of India and another AIR 1978 SC 597 and Delhi Transport Corporation versus D.T.C. Mazdoor Congress AIR 1991 SC 101**.

15. In view of above, every order passed by the licensing authority while rejecting the application for grant of arm licence must be a reasoned order -may be precise, keeping in view the relevant material on record.

16. Sub Section (3) further provides that the licensing authority shall furnish

on demand a brief statement unless in his opinion it shall be against public interest or furnishing of such opinion is detrimental to national security.

17. In the present case, the licensing authority instead of passing a reasoned order by applying his own mind has declined to grant arm licence merely by endorsement viz. "refused". Such decision of licencing authority seems to be arbitrary exercise of power. As observed(supra), the citizen has statutory right to obtain arm licence keeping in view the mandate of Art. 21 of the Constitution of India and such a matter should not be dealt with mechanically without passing a reasoned order.

18. It is a basic principle of rule of law in a democratic society that a person against whom an adverse order is passed by administrative or quasi-judicial authorities, it must be reasoned so that the person must be aware of the grounds on which he has been denied his statutory right.

19. Needless to say that every order passed by the administrative or quasi-judicial authorities or the judicial authorities are subject to judicial review by the appellate forum or this Court and when a citizen approaches for judicial review of an order passed by the administrative authority, such higher forum should move to gather the reason from the order itself and not from their affidavits or pleading on record.

20. The Constitution Bench of Hon'ble Supreme Court in the case reported in **AIR 1978 Supreme Court 851 Mohinder Singh Gill and another versus The Chief Election Commissioner, New Delhi and others** has held that every order must stand on its own leg and it cannot be supplemented through an affidavit.

21. In the present case, learned Standing Counsel has tried to defend the action of the District Magistrate on the ground that the members of the petitioner's family are history sheeters, hence refusal was proper but he failed to point out any criminal case pending against the petitioner. However, under what circumstances, the petitioner has been involved in the criminal activity of his family members seems to be not on record. All these aspects of the matter should have been considered by the licensing authority while passing the order.

22. In view of the above, the writ petition deserves to be allowed. A writ in the nature of certiorari is issued quashing the impugned order dated 29.4.2006 passed by the District Magistrate, Ghazipur with consequential benefits. A writ in the nature of mandamus is issued commanding the District Magistrate, Ghazipur to re-consider the petitioner's application for grant of fire arm licence keeping in view the observation made hereinabove expeditiously and preferably within a period of three months from the date of receipt of a certified copy of this order.

23. The writ petition is allowed accordingly. Costs easy.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.08.2009

BEFORE
THE HON'BLE RAJESH CHANDRA, J.

Criminal Misc. Application No.17754 of 2009

Kamruddin ...Applicant
Versus
State of UP ...Opposite Parties

Counsel for the Applicant:
Sri R.S. Chauhan

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

Code of Criminal Procedure-Section 125-Maintenance-While granting maintenance-No special reason required to be recorded-but the order should be in expressed term-grant of maintenance from the date of application-No interference called for.

Held: Para 6

It is clear from the above noted observation that if the maintenance is allowed from the date of application then an express order is necessary in that regard but no special reasons are required to be given by the Court. In the present case, the learned Additional Sessions Judge has passed an express order that the maintenance shall be given from the date of application and thus the provisions of section 125 Cr.P.C. have been complied with.

(Delivered by Hon'ble Rajesh Chandra, J.)

1. This application under section 482 Cr. P.C. has been filed with a prayer that the order dated 12.6.2009 passed by the Additional Sessions Judge, Jaunpur in Criminal Revision No.14 of 2007, Waheeda Vs. State of U.P. may be stayed.

2. In brief the facts of the case are that Smt. Waheeda moved an application under section 125 Cr. P.C. against her husband Kamruddin in the Court of Judicial Magistrate 1st, Jaunpur. That application was decided on merit vide order dated 2.12.2006. The Magistrate rejected the application of Smt. Waheeda for her maintenance, but allowed the application for maintenance of her daughters Km. Hina and Km.Rina. Against that order Criminal Revision No.14/2007 was filed which was ultimately decided by the Additional Sessions Judge, Court No.4, Jaunpur. The revision was allowed and Smt.Waheeda was also allowed maintenance @ Rs.2000/- p.m. from the date of her application i.e.14.8.2002. In this application under section 482 Cr. P.C. this order of the Additional Sessions Judge, Jaunpur passed on12.6.2009 has been challenged.

3. The contention of the applicant is that as a normal rule the maintenance should be allowed from the date of order and if the maintenance is granted from the date of application moved under section 125 Cr. P.C. then special reasons should be given by the Court.

4. I have considered over the matter and also heard the learned counsel for the applicant.

5. Learned counsel for the applicant has relied upon the judgment of the Hon'ble Apex Court in Shail Kumari Devi Vs. Krishna Bhagwan Pathak 2008, Crl. Law Journal 3881. The answer to his

arguments has itself been given in the above noted judgment. The Hon'ble Apex Court has held as under in para 47 of the judgment reported in the above said journal.

"We, therefore, hold that while deciding an application under section 125 of Code, a Magistrate is required to record reasons for granting or refusing to grant maintenance to wives, children or parents. Such maintenance can be awarded from the date of order, or if so orders, from the date of the application for maintenance, as the case may be. For awarding maintenance from the date of application, express order is necessary. No special reasons, however, are required to be recorded by the Court. In our Judgment, no such requirement can be read in Sub-section (1) of Section 125 of the Code in absence of express provision to that effect."

6. It is clear from the above noted observation that if the maintenance is allowed from the date of application then an express order is necessary in that regard but no special reasons are required to be given by the Court. In the present case, the learned Additional Sessions Judge has passed an express order that the maintenance shall be given from the date of application and thus the provisions of section 125 Cr.P.C. have been complied with.

7. In view of the above I feel that there is no reason to interfere in the order passed by the Additional Sessions Judge, Court No.4, Jaunpur nor there is any reason to stay the aforesaid order.

8. The application under section 482 Cr. P.C. is therefore, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.07.2009

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

Civil Misc. Writ Petition No. 7776 of 2009.

Shiv Pujan Sahani. ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Raj Kumar

Counsel for the Respondents:
Sri Vishnu Pratap, S.C.

Mines & Minerals (Development & Regulation) Act 1957-Section 14-A (3), 15-Order passed by A.D.M.-challenged on ground of want of delegation of power-held misconceived under Section 14-A (3) and (4)-law itself authorities the Asstt. Collector to act on behalf of Collector-being subordinate to Collector-duty entrusted to him-can not be termed as without jurisdiction.

Held: Para 7

An argument as put forth by Mr. Raj Kumar, learned counsel appearing for the petitioner possibly in view of Section 26 of the Act of 1957 that unless and until notification is there Additional District Magistrate cannot act as District Magistrate in this regard. We are of the view that by virtue of the power specifically provided in this respect under Section 14-A (3) & (4) of the Act, the law itself authorises Additional Collector to act on behalf of the Collector. A notification means introduction of governmental circular, if any, to be known to every one. Unless it is known to every one by such

notification, one cannot be said to have an Additional Collector shall exercise such powers and discharge such duties of a Collector in such case or class of cases as the Collector may direct, the power of delegation by the Collector to the Additional Collector is inbuilt in the statute itself. Moreover, the Act as aforesaid and every other law for the time being applicable to a Collector shall also apply to Additional Collector when exercising any powers and discharging any duties under sub-section 3 of Section 14-A of the Act of 1957 as if he were the Collector of the district, therefore, the respective orders passed by the Additional District Magistrate cannot be said to be nonest in the eye of law and as such the argument put forth by the petitioner before this Court is unsustainable in nature, hence, the writ petition fails and is dismissed, however, without any order as to cost.

Case law discussed:
(A.I.R. 1986 SC 2160),
(1991 A.L.J. 901),
(1999 (3) AWC 2444).

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

1. This writ petition has been filed by the petitioner to get a writ or direction issued in the nature of Certiorari to quash the impugned notice dated 16th January, 2009 as well as order dated 22nd November, 2008 issued/passed by Additional District Magistrate (Finance & Revenue), Kushinagar.

2. It appears that vide an order dated 9th March, 2005 a mining lease was granted to the petitioner for excavating sand over an area of 5 acres for a period of 3 years, which was operated by the petitioner satisfactorily and thereafter the lease was renewed vide order dated 28th April, 2008 for a further period of 3 years. Pursuant to the order dated 28th April, 2008, the area was demarcated by a committee of three persons and demarcation report was submitted on 8th May, 2008. Ultimately, upon completion of formalities, the mining lease was executed on 14th May, 2008 and the petitioner started mining operation over the area demarcated. According to the petitioner, in the mean time some anti-social elements started illegal mining in the adjoining area, so he made an application to the District Magistrate, Kushinagar on 13th June, 2008 intimating about the same whereupon the Additional District Magistrate directed concerned Inspector in-charge of police to enquire into the matter and in case it is found that illegal mining is going on, penal action be taken against the guilty person. Thereafter, vide impugned notice dated 22nd November, 2008, petitioner was asked to show cause within a fortnight as to why the lease deed granted in his favour be not cancelled for excavation of sand illegally beyond the area allotted to him and to stop mining operation till disposal of the matter. The petitioner submitted reply to the said notice on 25th November, 2008 denying the allegations made against him and ultimately vide impugned order dated 16th January, 2009 it has been held that the explanation furnished by the petitioner was not found satisfactory and the allegations levelled against him in the notice have been proved, therefore, for illegal mining of 1,700 cubic meter sand, he has been directed to deposit Rs.34,000/- as royalty and Rs.1,70,000/- as cost of mineral (total Rs.2,04,000/-). Hence, the writ petition.

3. Mr. Raj Kumar, learned counsel appearing for the petitioner contended before this Court that the impugned order was passed by the Additional District

Magistrate who has no authority or jurisdiction to pass such order. In accordance with Uttar Pradesh Minor Minerals (Concession) Rules, 1963, the District Magistrate is empowered to discharge such duties. He has no power of delegation. In support of his contention, he has relied upon a judgement reported in **(A.I.R. 1986 SC 2160), A.K.Roy and another vs. State of Punjab and others**, and contended before this Court that where a power has been given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other modes of performance are necessarily forbidden. When the power of delegation is given by the Central Government or the State Government by general or special order, must be for a specific purpose, to authorise a designated person, which cannot be sub-delegated. On the other hand Mr. Vishnu Pratap, learned standing counsel has relied upon two judgements of this High Court to establish his contention. Firstly, he relied upon a Division Bench judgement of this Court reported in **(1991 A.L.J. 901) Ghanshyam and others vs. Sub Divisional Officer Salon and another,** to establish that the word "Collector" means an officer appointed as Collector under the provisions of **Uttar Pradesh Land Revenue Act, 1901** (for short the Act) and includes an Assistant Collector of Ist class empowered by the State Government by a Notification in the Gazette to discharge all or any of the functions of the Collector under the Act. The Collector is appointed under Section 14 of the Act, which provides that the State Government shall appoint in each district an officer who shall throughout his district, exercise all the powers and discharge all the duties conferred and imposed on a Collector by the Act or any other law for the time being in force. The Assistant Collector, whether of the first class or second class, is appointed under Section 15 of the Act and it is provided under Section 18(1) of the Act that the State Government may place any Assistant Collector of the first class in-charge of one or more sub-divisions of a district, and may remove him therefrom. Section 18(2) provides that such Assistant Collector shall be called Assistant Collector in-charge of sub-division of a district or a Sub Divisional Officer and shall exercise all the powers and discharge all the duties conferred and imposed upon him by the **Act or by any other law for the time being in force, subject to the control of the Collector**. It may be mentioned that various revenue courts have been constituted under the Act and by virtue of *Section 4 (8) thereof*, Collector and Sub Divisional Officer, both are revenue courts. He has further relied upon a judgement reported in **(1999 (3) AWC 2444) Naveen Chandra Seth and others vs. Commissioner Allahabad and others,** though a single Bench judgement but to persuade this Court on the strength of such judgment that the petitioner has not come with clean hands, therefore, he is not entitled to any discretionary relief. We are aware of well settled principles of law and there is no necessity to discuss any thing more in this regard.

4. The Act, as amended up to date is made to consolidate and amend the law relating to Land Revenue and the jurisdiction of Revenue Officers in Uttar Pradesh. Certain sums for such mines and minerals and fees for grant of such licences etc. on account of mines and minerals are to be recovered as arrears of land revenue by virtue of Section 25 of

the Mines and Minerals (Development and Regulation) Act, 1957 (herein after referred to as the Act of 1957) which is quoted hereunder:

"25. Recovery of certain sums as arrears of land revenue.- Any rent, royalty, tax, fee or other sum due to the Government under this Act or the rules made thereunder or under the terms and conditions of any reconnaissance permit, prospecting licence or mining lease may, on a certificate of such officer as may be specified by the State Government in this behalf by general or special order, be recovered in the same manner as an arrear of land revenue.

(2) Any rent, royalty, tax, fee or other sum due to the Government either under this Act or any rule made thereunder or under the terms and conditions of any reconnaissance permit, prospecting licence or mining lease may, on a certificate of such officer as may be specified by the State Government in this behalf by general or special order, be recovered in the same manner as if it were an arrear of land revenue and every such sum which becomes due to the Government after the commencement of the Mines and Minerals (Regulation and Development) Amendment Act, 1972, together with the interest due thereon shall be a first charge on the assets of the holder of the reconnaissance permit, prospecting licence or mining lease, as the case may be."

5. As per Section 25 of the Act of 1957, power of delegation to an officer is also there. Section 26 of the Act of 1957 is also quoted hereunder:

"26. Delegation of powers.-(1) The Central Government may, by notification in the Official Gazette, direct that any power exercisable by it under this Act may, in relation to such matters and subject to such conditions, if any, as may be specified in the notification be exercisable also by-

(a) such officer or authority subordinate to the Central Government; or

(b) such State Government or such officer or authority subordinate to a State Government,

as may be specified in the notification.

(2) The State Government may, by notification in the Official Gazette, direct that any power exercisable by it under this Act may, in relation to such matters and subject to such conditions, if any, as may be specified in the notification, be exercisable also by such officer or authority subordinate to the State Government as may be specified in the notification.

(3) Any rules made by the Central Government under this Act may confer powers and impose duties or authorise the conferring of powers and imposition of duties upon any State Government or any officer or authority subordinate thereto."

6. **Since the recovery of any sum as aforesaid is to be made as land revenue, the Act will be applicable for the purpose**. Sections 14, 14-A and 15 of the Act give clear answer in this respect that an Additional Collector includes the Collector. Sections 14, 14-A and 15 of the Act being respective sections are quoted below:

"14. Collector of the district.- The State Government shall appoint in each district an officer who shall be the Collector of the district, and who shall throughout his district, exercise all the powers and discharge all the duties conferred and imposed on a Collector by this Act or any other law for the time being in force.

14-A. Appointment powers and duties of Additional Collectors.- (1) The State Government may appoint an Additional Collector in a district or in two or more districts combined.

(2) An Additional Collector shall hold his office during the pleasure of the State Government.

(3) An additional Collector shall exercise such powers and discharge such duties of a Collector in such cases or classes of cases as the Collector concerned may direct.

(4) This Act and every other law for the time being applicable to a Collector shall apply to every Additional Collector, when exercising any powers or discharging any duties under sub-section (3), as if he were the Collector of the district.

15. Assistant Collectors.- (1) The State Government may appoint to each district as many other persons as it thinks fit to be Assistant Collector of the first or second class.

(2) All such Assistant Collectors and all other revenue officers in the district, shall be subordinate to the Collector."

7. An argument as put forth by Mr. Raj Kumar, learned counsel appearing for the petitioner possibly in view of Section 26 of the Act of 1957 that unless and until notification is there Additional District Magistrate cannot act as District Magistrate in this regard. We are of the view that by virtue of the power specifically provided in this respect under Section 14-A (3) & (4) of the Act, the law itself authorises Additional Collector to act on behalf of the Collector. A notification means introduction of governmental circular, if any, to be known to every one. Unless it is known to every one by such notification, one cannot be said to have such power **but when law itself says that an Additional Collector shall exercise such powers and discharge such duties of a Collector in such case or class of cases as the Collector may direct, the power of delegation by the Collector to the Additional Collector is inbuilt in the statute itself. Moreover,** the Act as aforesaid and every other **law for the time being applicable to a Collector shall also apply to Additional Collector** when exercising any powers and discharging any duties under sub-section 3 of Section 14-A of the Act of 1957 **as if he were the Collector of the district**, therefore, the respective orders passed by the Additional District Magistrate cannot be said to be nonest in the eye of law and as such the argument put forth by the petitioner before this Court is unsustainable in nature, hence, the writ petition fails and is dismissed, however, without any order as to cost.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 24.08.2009

BEFORE
THE HON'BLE SHRI KANT TRIPATHI, J.

Criminal Appeal No. - 3838 of 2009

Raj Pal Singh and another
...Applicants./Appellants
Versus
State Of U.P. ...Opposite Party

Counsel for the Appellants:
A.K. Mishra

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

Code of Criminal Procedure Section S-446-Recovery of the amount of bail bond-prior to order of recovery no show cause notice or calling the applicant to deposit certain amount-straightway recovery order contrary to provision of section 446-can not sustained.

Held: Para 8

In the instant case, the learned lower court forfeited the bail bonds furnished by the appellants, by the impugned order dated 21.4.2009 but instead of giving the appellants the notices as required by section 446 Cr.P.C. either to pay penalty or to show cause as to why it should not be paid, straightway issued warrants for recovery of the amount, which was not legal and contrary to the import of section 446 Cr.P.C. It was obligatory on the learned court to give notices calling upon the appellants to pay the penalty or show cause as to why it should not be paid. Without doing so, it was not open to the learned lower court to impose penalty and recover the same. In view of these reasons, the impugned order which has been passed in utter disregard to the provisions of section 446 Cr.P.C., can not be sustained.

(Delivered by Hon'ble Shri Kant Tripathi, J.)

The appellants Raj Pal Singh and Raj Kumar, who stood as sureties for the accused Fauran Singh in the sessions trial no. 173 of 2008 pending in the court of Additional Sessions Judge, Fast Track Court No.1, Firozabad, have preferred this appeal against the order dated 21.4.2009 passed by the learned Additional Sessions Judge, whereby the learned Additional Sessions Judge forfeited the bail bonds furnished by the appellants and issued warrants for recovery of the amount of their bail bonds.

2. With the consent of the learned counsel for the appellant and the learned A.G.A. the instant appeal is being finally disposed of at the stage of admission.

3. Heard the learned counsel for the appellants and the learned AGA and perused the lower court record.

4. The learned counsel for the appellants submitted that appellants were not given any notice as required by section 446 Cr.P.C. after forfeiture of their bail bonds and as such the recovery proceeding is illegal. It was further submitted that the accused Fauran Singh had been appearing in the court concerned and had lastly appeared on 13.2.2009 but remained absent on 20.2.2009 and also on subsequent dates. The accused Fauran Singh, however, appeared on 15.5.2009 and moved application for recall of the warrant but the learned Additional Sessions Judge rejected the application for recall of warrant and committed the accused to custody and since then the

accused Fauran Singh is in jail. The learned counsel further submitted that when the accused had appeared before the court concerned on 15.5.2009, there was no justification for the learned Additional Sessions Judge to proceed with the recovery against the appellants.

5. The learned AGA, on the other hand, submitted that when the accused absented from appearing in the court, the learned Additional Sessions Judge was justified in directing for making the recovery through warrants.

6. A perusal of the order dated 21.4.2009 reveals that the learned Additional Sessions Judge had issued notices to the appellants before passing the order dated 21.4.2009 but neither they appeared nor moved any application consequently the learned Additional Sessions Judge forfeited the bail bonds furnished by the appellants and directed for recovery of the amount of the bail bonds. It appears that the bail bonds of the appellants were not forfeited prior to 21.4.2009 and as such the notices served on the appellants prior to 21.4.2009, can not be regarded as notices as contemplated by section 446 Cr.P.C.

7. The law in this regard is well settled. As and when bail bond filed by any surety is forfeited, it is incumbent on the court forfeiting the bail bond to give a notice to the surety whose bail bond has been forfeited, calling upon him either to pay penalty or to show cause as to why it should not be paid. If he pays the penalty in pursuance of the notice, the matter ends. If he does not pay the penalty and offers some explanations showing reasonable causes of the non appearance of the accused, the court has to consider the causes and pass a reasoned order thereon. If the cause shown is not sufficient the amount of the penalty should be determined by the court and if the penalty so determined remains unpaid, the court has power to make recovery of the penalty as fine. If the person to whom the show cause notice is served, offers sufficient causes, the court has power to discharge the notice and remit the penalty. The order remitting the penalty wholly or partly must be based on reasons to be recorded by the court. The provisions of section 446(3) Cr.P.C. are very clear in this regard.

8. In the instant case, the learned lower court forfeited the bail bonds furnished by the appellants, by the impugned order dated 21.4.2009 but instead of giving the appellants the notices as required by section 446 Cr.P.C. either to pay penalty or to show cause as to why it should not be paid, straightway issued warrants for recovery of the amount, which was not legal and contrary to the import of section 446 Cr.P.C. It was obligatory on the learned court to give notices calling upon the appellants to pay the penalty or show cause as to why it should not be paid. Without doing so, it was not open to the learned lower court to impose penalty and recover the same. In view of these reasons, the impugned order which has been passed in utter disregard to the provisions of section 446 Cr.P.C., can not be sustained.

9. The learned lower court should also give due consideration to the fact that the accused has not only appeared but is also in the custody of the court before passing any order under section 446 Cr.P.C.

10. The appeal is allowed. The impugned order dated 21.4.2009 and thereof are set aside. The learned Additional Sessions Judge is directed to reconsider the matter and pass appropriate order afresh in the light of the observations made here in before, after providing a reasonable opportunity to the appellants to show cause as contemplated by section 446 Cr.P.C.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.08.2009

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

Civil Misc. Writ Petition No. 3502 of 1994

Jai Prakash Singh ...Petitioner
Versus
District Inspector of Schools, Jaunpur and another ...Respondents

Counsel for the Petition:
Sri R.N. Singh
Sri G.K. Singh
Sri S.N. Singh
Sri V.K. Singh

Counsel for the Respondents:
Sri A.K. Sinha
Sri P.C. Shukla
Sri I.R. Singh
S.C.

U.P. Secondary Education Service Selection Board (IInd Removal of Difficulties Order) 1981-Adhoc appointment or short term vacancy has no right to continue after conversion of short term vacancy into substantive vacancy in view of full Bench case of Pramila Misra.

Held: Para 22

However, as already held herein above, after the retirement of Raj Bahadur Singh, short term vacancy on the post of lecturer in History has been converted into a substantive vacancy on 30-6-2003. therefore, the petitioner cannot claim any right to continue after 30-6-2003 in view of the aforementioned Full Bench decision of this Court

Case law discussed:
(1997)2 UPLBEC 1329.

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

1. This writ petition had been filed inter- alia for the following reliefs:

(i) Issue a suitable writ, order or direction, in the nature of CERTIORARI quashing the order dated 18-10-1993

(ii) To issue a suitable writ, order or direction in the nature of mandamus directing the respondents to make payment of salary to the petitioner regularly along-with all arrears on that account"

2. The brief facts enumerated in the present writ petition are as follows:

3. Panchsheel Inter College Fatehganj, Jaunpur, (hereinafter referred to as "institution") is a duly recognized institution and is governed by the provision of U.P. Secondary Education Services Commission and Selection Board Act, 1982 and the Rules framed thereunder. The post of Principal fell vacant in the institution on 30-6-1993 on account of retirement of one Sri Raj Bahadur Singh.

4. The committee of management (in short "management") had already

notified the vacancy of the post of Principal to the Commission and it therefore promoted one Sri Raj Bahadur Singh, senior most lecturer as Principal on adhoc basis. On account of adhoc promotion of Sri Raj Bahadur Singh to the post of Principal, the post earlier occupied by him i.e. the post of lecturer in History fell vacant. The Committee of management proceeded to fill up the post of lecturer on adhoc basis under the provisions laid down under U.P. Secondary Education Service Selection Board (IInd Removal of Difficulties Order) 1981 (hereinafter referred to as Second Removal of Difficulties Order).

5. The Committee of management thereafter informed the District Inspector of Schools, Jaunpur (in short " DIOS") about the aforesaid vacancy and also advertised the post in question.. In pursuance of the aforesaid advertisement several candidates including the petitioner applied and were called for interview, which took place on 05-9-1993. A merit list was prepared on the basis of quality point marks and the petitioner was found to be the best candidate amongst all the applicants. The committee of management thereafter passed a resolution in favour of the petitioner on 08-9-1993 and thereafter sent the papers regarding selection of the petitioner to the DIOS on 29-9-1993. The papers were duly received in the office of DIOS Jaunpur on the same day i.e. 29-9-1993. The DIOS however, did not pass any order in the matter as required under the provisions laid down in Second Removal of Difficulties Order.

6. After waiting for a period of more than one week, the Committee of management issued an appointment letter in favour of the petitioner on 10-10-1993. In pursuance of the appointment letter, the petitioner joined duties on 11-10-1993 . The DIOS, Jaunpur however on 18-10-1993 passed an order rejecting the proposal submitted by the management regarding appointment of the petitioner on the post in question on the ground that the management has no power to make appointments on the post in question in view of the Ordinance dated 14-7-1992, wherein only the selection committee as provided therein has been empowered to make appointment . Therefore, the DIOS was of the opinion that the alleged appointment of the petitioner was in contravention of U.P. Secondary Education Service Commission and Selection Board Act, 1982 (in short "Act, 1982").

7. This Court by an interim order dated 31-1-1994 inter- alia had passed the following order:

"In the meanwhile in case the short term vacancy against which the petitioner had been appointed on 10-10-1993 could not be filled up by any promotion from the next below grade and there has not been any infirmity in following the procedure for making the appointment claimed by the petitioner, in that case the operation of the impugned order dated 18-10-1993 shall remain stayed and the petitioner will be entitled to the payment of salary hence forth admissible to a lecturer provided he has been discharging duties attached to the office.

The payment of salary made if any shall however, remain subject to the final result of the writ petition."

8. The counter affidavit dated 30-3-2008, the supplementary Counter affidavit

dated 18-12-2008 and the supplementary affidavit dated 22-1-2009 have been filed by the management respondent no.,2, wherein the impugned order passed by respondent no.1 has been justified. In the aforementioned affidavits inter- alia it has been stated that Raj Bahadur Singh, lecturer in History who was promoted to the post of Principal also retired on 30-6-2003, as such the post of lecturer in History in the institution became substantive on 30-6-2003 and it no longer remained a short term vacancy. Therefore the petitioner who was appointed on adhoc basis against short term vacancy ceased to have any right to continue against the substantive vacancy. It has been further stated that respondent no.2 notified the vacancy on the post of Lecturer in History to the Selection Commission on 5-7-2003. In pursuance of the same one Ajit Kumar Singh was selected by the Selection Board and appointment letter dated 28-10-2008 was issued in favour of Ajit Kumar Singh by the Committee of management of the institution and he joined the post of lecturer in History in the institution on 31-10-2008 . However, the DIOS Jaunpur in connievance with the petitioner sent a letter to the Selection Board to adjust Sri Ajit Kumar Singh in some other institution as the petitioner was working and getting, salary under the interim order dated 31-1-1994 of this Court . It has been further alleged in the aforementioned affidavits that in pursuance of the letter of the DIOS the Selection Board adjusted Ajit Kumar Singh in Ajhurai Intermediate College, Dharmraj Ganj Sherwa district Jaunpur by letter dated 31-12-2008. As soon as Ajit Kumar Singh came to know of the said order dated 31-12-2008 passed by the Selection Board, he immediately approached the selection Board, informed it that he has already joined the post of lecturer in History in the institution on 31-10-2008, therefore, his adjustment in another institution is illegal . Selection Board, consequently by letter dated 12-1-2009, cancelled his earlier order of adjustment dated 12-1-2009 . Copy of the order dated 31-12-2008 has been appended as ANNEXURE-1 to the affidavit filed by respondent no.2.

9. Heard Sri G.K. Singh, learned counsel for the petitioner, Sri A.K. Sinha, learned counsel for the respondent no.2 and the learned Standing counsel for the respondent no.1 and perused the record.

10. The post of Principal fell vacant in the institution on 30-6-1993 on account of retirement of one Raj Bahadur Singh. It has also not been disputed by the respondent no.2 that the short term vacancy on the post of lecturer in History had occurred on account of promotion of one Raj Bahadur Singh to the post of Principal on adhoc basis. Since the vacancy caused on the post of lecturer in History, was short term vacancy, it was governed by the provisions of Second Removal of Difficulties Order.

11. A bare perusal of the impugned order clearly reveals that the respondent no.1 had treated the vacancy that arose on the post of lecturer in History as substantive vacancy and had proceeded on the assumption that the adhoc appointment of the petitioner on the post of lecturer in History was not on short term vacancy, under the provisions of IInd Removal of Difficulties Order, but it was an appointment under section 18 of Act, 1982. Therefore, the DIOS Jaunpur was of the view that selection of the petitioner should have been made by the

Selection committee as constituted in accordance with Ordinance dated 14-7-1992(whereby Section 18 of the Act 1982 was amended) and not by the management.

12. Now the question for determination is whether the adhoc appointment of the petitioner was under the provision of the IInd Removal of Difficulties Order or it was under section 18 of the Act.

13. The Second Removal of Difficulties Order provides that short term vacancy is the vacancy which is substantive and is of limited duration. There is no dispute that the vacancy on the post of lecturer in History fell vacant on account of adhoc promotion of one Raj Bahadur Singh to the post of Principal. As such in accordance with IInd Removal of Difficulties Order vacancy was not substantive but was short term vacancy and the provisions of IInd Removal of Difficulties Order would have been applicable and the provision of Section 18 of Act, 1982 had no application, as the vacancy of the post of lecturer in History was not substantive. The appointment of the petitioner was on short term vacancy, therefore the Committee of management was fully empowered to appoint the petitioner on the said short term vacancy in accordance with Clause (2) & (3) of IInd Removal of Difficulties Order. Since the appointment of the petitioner was not under section 18 of the Act, 1982, Selection committee as provided under the said Ordinance, had no role to play.

14. Learned counsel for the respondents has vehemently argued that provision of Second Removal of Difficulties Order has not been complied with by the management and the appointment has been made without approval of the DIOS Jaunpur . As such the order is illegal. I do not subscribe to the view of learned counsel for the respondents.

15. To appreciate the contentions of the parties it would be useful to refer to clause (1) (2) and (3) of Second Removal of Difficulties Order, which is in the following terms:

"Procedure for filling up short term vacancies:

(1) If short term vacancy in the post of a teacher, caused by grant of leave to him or on account of his suspension duly approved by the District Inspector of Schools or otherwise shall be filled by the Management of the institution, by promotion of the permanent senior most teacher of the institution in the next lower grade. The Management shall immediately inform the District Inspector of Schools of such promotion along with the particulars of the teacher so promoted.

(2) Where any vacancy referred to in clause (1) cannot be filled by promotion due to non availability of a teacher in the next lower grade in the institution, possessing the prescribed minimum qualifications, it shall be filled by direct recruitment in the manner laid down in clause (3)

(3) (i) The management shall intimate the vacancies to the District Inspector of Schools and shall also immediately notify the same on the notice board of the institution, requiring the candidates to apply to the Manager of the institution along with particulars vein in Appendix-B to this order. The selection shall be

made on the basis of quantity point marks specified in the Appendix to the Uttar Pradesh Secondary Education Services Commission (Removal of Difficulties) Order, 1981 issued with Notification No. Ma-1993/ XV74 (79) -1981 dated 31st July 1981 hereinafter to be referred to as the First Removal Difficulties Order, 1981. The compilation of quality point marks shall be done under the personal supervision of the Head of institution."

(ii) The names and particulars of the candidate selected and also of other candidates and the quality point marks allotted to them shall be forwarded by the Manager to the District Inspector of Schools for his prior approval.

(iii) The District Inspector of Schools shall communicate his decision within seven days of the date of particulars by him failing which the Inspector will be deemed to have given his approval.

(iv) On receipt of the approval of the District Inspector of Schools or as the case may be, on his failure to communicate his decision within seven days of the receipt of papers by him from the manager, the Management shall appoint the selected candidate and an order of appointment shall be issued under the signature of the Manager."

16. Learned counsel for the petitioner has argued that the procedure as prescribed in Second Removal of Difficulties Order, has been fully complied with and has drawn my attention to few paragraphs of the writ petition. For ready reference paragraphs 7, 11, 12 and 13 of the writ petition are quoted below:

"7- That the Committee of management thereafter informed the District Inspector of Schools about the aforesaid vacancy and also advertised the post in question. A true copy of the advertisement dated 15-8-1993 is being filed as Annexure-1 to the writ petition.

11*- That the committee thereafter sent the papers regarding selection of the petitioner to the DIOS on 29-9-1993 .It is pertinent to point out that the papers were duly received in the office of DIOS on the same date i.,e, on 29-9-1993.*

12*- That the DIOS however did not pass any orders in the matter as required under the provisions laid down in the Second Removal of Difficulties Order.*

13*- That after waiting for a period of more than one week, the committee of management issued appointment order in favour of the petitioner on 10-10-1993. A true copy of the order dated 10-10-1993 is being filed herewith and marked as Annexure-4 to this petition."*

17. In the Counter affidavit filed by the State the respondent no.1 has not denied the aforesaid averments that management had sent papers regarding selection of the petitioner to the DIOS Jaunpur on 29-9-1993. However, the DIOS did not pass any order or communicated his decision within seven days. As such in view of clause- 3 of Second Removal of Difficulties Order, the DIOS will be deemed to have given his approval.

18. Thus the impugned order passed by DIOS can not stand the scrutiny of law and the view of DIOS Jaunpur cannot be sustained. It cannot be said that the

appointment of the petitioner in the post of Lecturer in History in short term vacancy, is contrary to the provisions of Second Removal of Difficulties Order. The impugned order dated 18-10-1993 is hereby quashed.

19. Let us now proceed to examine the second prayer made by the petitioner in the writ petition which is as under:

"To issue a writ, order or direction in the nature of mandamus directing the respondents to make payment of salary to the petitioner regularly along with all arrears on that account."

20. It has not been disputed by the respondents that Raj Bahadur Singh the lecturer in History (Adhoc Principal) also retired on 30-6-2003, as such, vacancy of lecturer in History became substantive.

21. It has been vehemently argued by learned counsel for respondent no.2, that in view of the Full Bench decision in the case of **Pramila Mishra Vs. Deputy Director of Education, Jhansi Division, Jhansi, and other** (1997)2 UPLBEC 1329, petitioner, who was appointed on ad hoc basis in a short term vacancy has no right to continue against substantive vacancy after the short term vacancy of lecturer in History converted into a substantive vacancy on 30-6-2003. The Full Bench in the case of Smt. Pramila Mishra (supra) has held as follows:

***"24**-Summing up our conclusions in the light of the discussions in the foregoing paragraphs, we hold that a teacher appointed by the management of the institution on adhoc basis in a short term vacancy (leave vacancy/ suspension vacancy), which **is subsequently converted into a substantive vacancy** in accordance with the provisions of the Act, Rules and Orders (on death, resignation, dismissal or removal of the permanent incumbent), cannot claim a right to continue. He has, however, right to be considered along with other eligibility candidates for adhoc appointment in the substantive vacancy if he possesses the requisite qualifications. Consequent, upon the view taken by us, as noted above, we hold that the decisions of this Court, like Km. Meena Singh's case (supra) and other cases taking contrary view, are declared to be no longer good law."*

22. It has not been disputed by the respondents that Raj Bahadur Singh, lecturer in History who was promoted on adhoc basis to the post of Principal in the institution has now retired on 30-6-2003 as such short term vacancy of lecturer in History in the institution has been converted into a substantive vacancy on 30-6-2003. Therefore, in view of the Full Bench decision in the case of Smt. Pramila Mishra (supra) the petitioner did not have any right to continue after 30-6-2003. It has also come on record that this substantive vacancy was also notified to the Selection Board and one Ajit Kumar Singh was selected by the Selection Board although the legality of the appointment of Ajit Kumar Singh ,in the institution is sub- judice before this Court in Writ Petition No.4734 of 2009. Therefore, since the matter with regard to the appointment of Ajit Kumar Singh in the institution is under consideration before this court, it is not desirable to make any observation in this writ petition regarding the claim of Ajit Kumar Singh. However, as already held herein above, after the retirement of Raj Bahadur Singh, short term vacancy on the post of lecturer in

History has been converted into a substantive vacancy on 30-6-2003. right to continue after 30-6-2003 in view of the aforementioned Full Bench decision of this Court .

23. Summing up my conclusions in the light of the discussions in the foregoing paragraphs, I hold that the initial appointment of the petitioner on adhoc basis to the post of lecturer in History was on short term vacancy in accordance with Second Removal of Difficulties Order, 1981. Thus, the initial appointment of the petitioner dated 10-10-1993 is held valid. However, when the short term vacancy in the post of lecturer in History was converted into substantive vacancy on 30-6-2003 after the retirement of Raj Bahadur Singh, the petitioner ceased to have any right to continue on the said post. As such, the continuance of the petitioner in the institution after 30-6-2003 cannot be said to be legal or proper in view of the Full Bench decision of this Court in Pramila Misra (supra). Even though the petitioner had no claim to continue in the post of lecturer in the institution, the salary or any renumeration paid to him however may not be recovered. Henceforth, the petitioner will neither be entitled to continue in the post of lecturer in History in the institution nor to any salary.

24. In the result writ petition is partly allowed subject to the aforesaid observations.

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therefore, the petitioner cannot claim any

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.08.2009

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 1246 of 1993

Jokhu Lal ...Petitioner
Versus
The District Inspector of Schools, Allahabad and others ...Opposite Parties

Counsel for the Petitioner:
Sri Sankatha Rai
Sri H.K. Mishra
Sri S.S. Shukla
Sri Jagannath Singh
Sri Surendra Nath Singh

Counsel for the Respondents:
Sri Ajai Kumar Singh
Sri Lal Chandra Srivastava
S.C.

U.P. High School and Inter mediate Colleges (Payment of Salaries of Teacher and other Employees) Act, 1971- appointment of petitioner as junior clerk in year 1977-in junior High School-duly approved by Basic Education Officer-approval order become final-after up gradation of institution from junior High School to Uchchatar Madhyamik Vidyalay in the year 1991-service of petitioner stood confirmed-payment of salary dined on ground petitioner being nephew of manager, appointment itself illegal-mis conceived when petitioner was appointed the provision of Inter Mediate Education Act were not applicable-prohibition on appointment came existence's in the year 1984-can not be made applicable with retrospective effect-petitioner regularly working and paid salary-direction for difference of

salary with 6% per annum interest given.

Held: Para 12

In the circumstances, the appointment of the petitioner is held to be legal and valid as the approval to the appointment of the petitioner was granted by the Basic Shiksha Adhikari and the order of approval passed by the Basic Shiksha Adhikari has not been either challenged in this writ petition or controverted any where. At the time of appointment of the petitioner as Clerk in Junior High School in 1977 the provisions of U.P. Intermediate Education Act were not applicable, hence they have no relevance to the appointment of the petitioner.

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

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

2. The petitioner was appointed as Clerk in Junior High School Lokmanpur, District Allahabad on 1st July, 1977. The said institution is run by a Society which had initially started the Junior High School in village Lakmanpur, District Allahabad. It was granted permanent recognition with effect from July, 1974 by letter dated 10th July, 1976 of the Deputy Director of Education V Region, Allahabad. The Committee of Management of the aforesaid Junior High School sought approval of the Basic Shiksha Adhikari for appointment of the petitioner which was approved from the date of his appointment i.e. 1st July, 1977. The aforesaid Junior High School was upgraded to the level of High School which was then recognized by the Board of High School and Intermediate Education under the provisions of Section 7-A of the U.P Intermediate Education Act, 1921. The post of Clerk was also sanctioned by the Directorate of Education, Allahabad vide his order dated 22nd September, 1990. The institution was taken in grants-in-aid list and as such the U.P. High School and Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 1971 became applicable w.e.f. 1st April, 1991.

3. It is claimed that as a consequence the petitioner who was a permanent clerk working in the Junior High School since Ist July, 1977 automatically became permanent clerk w.e.f. 23rd December, 1981 of Sarvodaya Shiksha Sadan Uchchatar Madhyamik Vidyalaya, Lokmanpur, District Allahabad, according to Regulation 4 read with Regulation 100 of Chapter II of the U.P. Intermediate Education Act as the petitioner possessed the necessary qualification for appointment as clerk in the Intermediate College, he was regularly paid his salary by the Committee of Management from the date of his appointment dated 1st July, 1977 till 31st March, 1991.

4. The grievance of the petitioner is that the Committee of Management has submitted his salary bill to the DIOS, Allahabad from Ist April, 1991 regularly but his salary was not paid, rather a notice was sent by the DIOS on 11th June, 1992 to the Committee of Management to show cause as to why the appointment of the petitioner as Clerk in the Junior High School may not be treated as invalid on the ground that he happened to be the nephew of the Manager of the institution. This letter was sent under the Basic Shiksha Sanhita in which there was restraint on the appointment of the relative of the Manager of the institution.

Copy of the notice etc. was not served upon the petitioner. However, the Committee of Management sent a reply of the aforesaid letter of the DIOS on 20th October, 1992, which has been appended as Annexure-VIII to the writ petition.

5. The petitioner also moved a representation to the respondents on 27th October, 1992 for payment of salary w.e.f. Ist April, 1991 which remained unactioned .

6. In the above backdrop the petitioner has sought a writ of mandamus directing the opposite parties to pay his salary as Clerk from 23rd December, 1991 and also to decide his representation.

7. In the counter affidavit filed by the respondents the Standing counsel has placed reliance upon paragraphs 5 and 6 in which it has been averred that after the Junior High School was upgraded a complaint was received by the DIOS, Allahabad that the petitioner is real cousin of the Manager of the institution and on enquiry it was found to be correct as such approval for appointment of his salary was not accorded w.e.f. 1st April, 1991 in view of the provisions contained in Section 12(1)(2) of the U.P. Basic Shiksha Act, 1972. In the circumstances, the liability for payment of salary to the petitioner was denied by the DIOS on the ground that the petitioner could not have been appointed under the U.P. Intermediate Education Act on its upgradation.

8. In the rejoinder affidavit the averments made in the counter affidavit have been denied as incorrect and further that the provisions relating to U.P. Intermediate Education Act relied upon by the learned counsel for the respondents are not applicable.

9. It appears that the High Court vide its ad interim order dated 9.1.1998 after hearing counsel for the parties directed that until further orders, the petitioner shall be paid salary of clerk in the institution in question. The aforesaid order was later on confirmed by the High Court vide order dated 20.8.99. Aggrieved by the aforesaid order dated 20.8.99 the respondents filed Special Appeal No. 154 of 2000 before the Division Bench of this Court, which was dismissed vide order dated 4.4.2000. Then the respondents approached the Apex Court against the order dated 4.4.2000 by filing Special Leave to Appeal (Civil) No.14097/2000, State of U.P. and others versus Jokhu Lal and another, which too was dismissed vide order dated 19.2.2001.

10. After hearing learned counsel for the parties and on perusal of the record it emerges that it is not in dispute that the petitioner was working as permanent Clerk in Junior High School, Lakmanpur since 1st July, 1977 and became a permanent clerk w.e.f. 23rd December, 1981 of Sarvodaya Shiksha Sadan Uchchatar Madhyamik Vidyalaya, Lokmanpur on its upgradation according to regulation 4 read with regulation 100 of Chapter II of the U.P. Intermediate Education Act but it has not been stated by the respondents that the petitioner did not possess requisite qualification for appointment as clerk. Since no rules were framed by the State Government at the relevant time in regard to the appointment of the petitioner by which the appointment of the relative of the Manager of the institution was barred,

hence it can not be said that the petitioner was not qualified either educationally or otherwise for being appointed as Clerk in the Junior High School on its upgradation in Sarvodaya Shiksha Sadan Uchchatar Madhyamik Vidyalaya, Lokmanpur. It may be noted that service rules dealing with the service condition of the clerk in Junior High School was framed in the year 1984. Rule 12 contains the list of relations of the Manager who can not be appointed if they are relatives of the Manager. In the said list nephew is also mentioned in the category of person who can not be appointed in the institution in question as relative of the Manager. Since the petitioner was appointed in 1977 and the aforesaid rules came in the year 1984 as such they are not applicable to the case of the petitioner. Regard may also be had to the fact that the petitioner was not appointed afresh on upgradation of the Junior High School, rather he became permanent clerk in the institution by operation of law, therefore, it can not be said that the Manager had appointed the petitioner as clerk in the Intermediate college afresh on its upgradation. The provisions of Intermediate Education Act, therefore, have no relevance in case of appointment of the petitioner,especially when there was no specific bar in the appointment of the clerk in 1977 in the institution. Learned counsel for the petitioner has taken to the Court to the averments made in the rejoinder affidavit wherein it has been stated that complaint against the petitioner was only due to enmity and Basic Shiksha Adhikari has rightly approved the appointment of the petitioner. In the facts and circumstances of the case, the initial appointment of the petitioner was valid and as such he is entitled to get his salary in view of the provisions of U.P. High School and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971.

11. No rule or position of law could be shown by the learned Standing counsel which prohibits the appointment of the petitioner as clerk in the Junior High School at the relevant time in 1977. The DIOS in his letter/notice dated 11th June, 1992 had made a reference at page 186 of the Basic Shiksha Sanhita, appended as Annexure-7 to the writ petition, which does not apply to the facts of the case. No opportunity of hearing appears to have been given to the petitioner by the DIOS before passing the impugned order and he has also not received any notice from the Committee of Management to show cause as to why his service may not be terminated as such giving of any reply to the show cause by the petitioner does not arise. It has not been denied in the counter affidavit that the petitioner had in fact raised this point before the DIOS by his representation dated 27th October, 1992, appended as Annexure-9 to the writ petition though it was received by the DIOS. A teacher is not expected to keep record of the office of the DIOS and if the same is not on the record, the office of the DIOS is responsible as the representation of the petitioner had been sent to the DIOS under registered post AD.

12. In the circumstances, the appointment of the petitioner is held to be legal and valid as the approval to the appointment of the petitioner was granted by the Basic Shiksha Adhikari and the order of approval passed by the Basic Shiksha Adhikari has not been either challenged in this writ petition or controverted any where. At the time of

appointment of the petitioner as Clerk in of U.P. Intermediate Education Act were not applicable, hence they have no relevance to the appointment of the petitioner.

13. For all the reasons stated above, the impugned order is quashed and the writ petition is allowed. Since the petitioner has already been paid his salary w.e.f. 9.1.98 vide order dated 10.4.2003. The only direction remains regarding payment of salary to the petitioner of clerk in Intermediate College from 23rd December, 1991 on which it has been stopped. The DIOS, Allahahabd is accordingly, directed to pay arrears of salary of the petitioner w.e.f. 23rd December, 1991 till 8.1.98 i.e. the date from which he is being paid his salary with interest at the rate of 6% per annum along with all consequential benefits.

No order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2009

BEFORE
THE HON'BLE C.K. PRASAD, C.J.
THE HON'BLE A.P. SAHI, J.

Special Appeal No.1118 of 2009

Smt. Ramawati ...Appellant
Versus
State of U.P. and others ...Respondents

Counsel for the Appellant:
Sri Deo Dayal
Sri Amulya Ratna Srivastava

Counsel for the Respondents:
Sri Awadhesh Kumar Singh
Sri M.S. Pipersenia, Addl. C.S.C.
Sri R. Yadav

Junior High School in 1977 the provisions

High Court Rules-Chapter VIII Rule-5-Special Appeal-against the order passed by learned Single Judge-petition filed against the order passed by election Tribunal-u/s 12-C of U.P. Punchayat Raj Act-recounting already taken place-not challenged-under this background petition dismissed with liberty to challenge final order if so advised-held-against the order passed by Tribunal-Special Appeal not maintainable.

Held: Para 6

We find substance in the submission of Mr. Pipersenia, learned Additional Chief Standing Counsel and following the aforesaid two Division Bench judgments, hold that the Prescribed Authority exercising the power under Section 12-C of the U.P. Panchayat Raj Act, is a Tribunal. Once it is held so, the appeal under Chapter VIII Rule 5 of the Allahabad High Court Rules, is not maintainable.

Case law discussed:
(1999) 1 UPLBEC 697, (2008) 1 UPLBEC 538.

(Delivered by Hon'ble C.K. Prasad, CJ.)

1. Writ petitioner-appellant, aggrieved by order dated 30.6.2009 passed by a learned Single Judge in Civil Misc. Writ Petition No.29110 of 2008, has preferred this appeal under Rule 5 of Chapter VIII of the Allahabad High Court Rules.

2. Short facts giving rise to the present special appeal are that the writ petitioner, a successful candidate in the election of the office of the Gram Pradhan challenged the order dated 12.6.2008, whereby the Prescribed Authority in exercise of the power under Section 12-C of the U.P. Panchayat Raj Act, had summoned the ballot papers. In the light

of the aforesaid order, the ballot papers were produced and its recounting had taken place on 19.6.2008. Writ petitioner-appellant had not challenged the order dated 19.6.2008.

3. Taking into account the aforesaid facts, the learned Single Judge declined to interfere in the matter and has observed as follows:-

"Having considered the submissions made by the learned counsel for the parties and having perused the records of the present writ petition, I am of the considered opinion that this writ petition does not warrant any interference by this Court at this stage. Writ proceedings initiated against the order dated 12th June, 2008 have lost all efficacy in view of the recount of votes, which has taken place, more so when order dated 19th June, 2008, has not been challenged.

However, order passed today by this Court shall not prejudice the rights of the petitioner to challenge the final order passed in the election petition by the Election Tribunal, if the same is found adverse to him including challenge to the order dated 12th August, 2008, whereby recounting has been directed, by way of revision under Section 12-C of the U.P. Panchayat Raj Act."

4. We have heard Mr. Amulya Ratan Srivastava for the appellant, Mr. Awadhesh Kumar Singh for respondent no.3 and Mr. M.S. Pipersenia, learned Additional Chief Standing Counsel for respondents 1 and 2.

5. Mr. Pipersenia, raises a preliminary objection in regard to the maintainability of this appeal. He points out that the order passed by the Prescribed Authority under Section 12-C of the U.P. Panchayat Raj Act, 1947 was assailed before the learned Single Judge, and the same having been dismissed, on the face of the language of Chapter VIII Rule 5 of the Allahabad High Court Rules, the appeal shall not be maintainable. He points out that the Prescribed Authority is nothing, but a Tribunal within the meaning of Chapter VIII Rule 5 of the Allahabad High Court Rules. In this connection, he has drawn our attention to the Division Bench judgements of this Court in **Jai Prakash Agarwal Vs. Prescribed Authority (Sub-Divisional Magistrate), Sadar, District Deoria and others,** reported in (1999) 1 UPLBEC 697 and **Mohd. Talib Khan Vs. State of U.P. & Others,** reported in (2008) 1 UPLBEC 538.

6. We find substance in the submission of Mr. Pipersenia, learned Additional Chief Standing Counsel and following the aforesaid two Division Bench judgements, hold that the Prescribed Authority exercising the power under Section 12-C of the U.P. Panchayat Raj Act, is a Tribunal. Once it is held so, the appeal under Chapter VIII Rule 5 of the Allahabad High Court Rules, is not maintainable.

7. Even otherwise also, as observed by the learned Single Judge, if the result of the election petition goes adverse to her, she has liberty to prefer a revision against that.

We do not find any merit in the appeal and it is dismissed accordingly.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.08.2009

BEFORE
THE HON'BLE C.K. PRASAD, C.J.
THE HON'BLE A.P. SAHI, J.

Special Appeal No.1112 of 2009

Mahendra Kumar Gond ...Appellant
Versus
District Inspector of Schools, Azamgarh and others ...Opposite Parties

Counsel for the Appellant:
Sri Ranjeet Asthana

Counsel for the Opposite Parties:
Sri Indra Raj Singh
S.C.

U.P. Intermediate Education Act, 1921 Section 16-G-Chapter III Regulation –2-Promotion-Quota-vacancy of Class III post occur in Intermediate College-under 50% Quota No SC/S.T. candidates available in the institution-all the posts occupied by General candidates appointment by direct recruitment-held-proper.

Held: Para 15

Therefore, we do not find any substance in the submission of Mr. Singh.

Mr. Singh, lastly attempted to assail the appointment of the appellant. As the selection of the appellant is under consideration of the Regional Committee, we do not want to express any opinion in this regard. However, we hasten to add that the writ petitioner-respondent no.5, is not a member of the Scheduled Caste category and, therefore, is not eligible to be promoted to the post, which has been reserved for the Scheduled Caste category. This is an additional reason why we are not inclined to entertain the said submission.
Case law discussed:
AIR 2007 SC 71.

(Delivered by Hon'ble C.K. Prasad, CJ.)

1. Respondent no.5-appellant, aggrieved by order dated 29.6.2009 passed by a learned Single Judge in Civil Misc. Writ Petition No.4380 of 2007, has preferred this special appeal under Rule 5 Chapter VIII of the Allahabad High Court Rules.

2. Shorn of unnecessary details, the facts giving rise to the present appeal are that the writ petitioner-respondent no.5, is a Class-IV employee of Moti Lal Nehru Smarak Inter College (hereinafter referred to as 'the College'), which receives grant-in-aid. On 28.2.2003, a vacancy of Clerk in the College occurred due to the retirement of the incumbent. There are three posts of Clerks including the post of Head Clerk out of which two are occupied by the members of the General category.

3. Regulation 2 of Chapter III of the Regulations made in exercise of the power under Section 16-G of the U.P. Intermediate Education Act, 1921, inter alia, provides that 50% of the sanctioned posts of Head Clerk and Clerk shall be filled up by promotion from Class IV employees. Undisputedly, respondent no.5 does not belong to the reserved category. As no candidate of the Scheduled Caste was available, the District Inspector of Schools by order dated 15.4.2005 took a decision to fill up the post by direct recruitment from amongst the members of the Scheduled Caste and in the light of the aforesaid, an advertisement was published in the

Newspaper. The appellant, herein, who happens to be a member of the Scheduled Caste, offered his candidature and was selected for the appointment. After the said selection, matter is under consideration of the Regional Committee.

4. Writ Petitioner-respondent no.5, herein, filed a writ application, inter alia, praying for a direction for his promotion to the post of Clerk. Said writ application was registered as Civil Misc. Writ Petition No.69585 of 2005 (Vinod Kumar Singh Vs. District Inspector of Schools and others) and by order dated 9.11.2006, this writ application was disposed of with a direction to consider his claim. In the light of the aforesaid order, the District Inspector of Schools, considered his claim and by order dated 4.12.2006, rejected his representation. He challenged the aforesaid order in the writ application, which has given rise to the present appeal.

5. It was contended before the learned Single Judge that in view of Regulation 2 (2) of Chapter III of the Regulations, 50% of Class III post is to be filled up by promotion and filling up the said post by direct recruitment in the light of the Government Order dated 18.12.1990 is illegal. The aforesaid submission found favour with the learned Single Judge and the learned Single Judge has held that in view of the aforesaid Regulation, 50% of the posts have to be filled up by promotion and the same cannot be filled up by direct recruitment. The observation of the learned Single Judge in this connection reads as follows:-

"It is not in dispute that the third vacant Class III post was required to be filled up by promotion in accordance with Regulation 2 (2) contained in Chapter III of the Act. What is, however, contended by the respondents is that this vacant post should be filled up by a Scheduled Caste candidate and since no Scheduled Caste candidate was available, the said post was required to be filled by direct recruitment. Regulation 2 (2) contained in Chapter III of the Act clearly provides that 50% of the Class III posts have to be filled up by promotion and indeed even the respondents do not dispute this position. The Government Order dated 18th December, 1990 which has been referred in the impugned order has not been filed either by the State or by the contesting respondents and nor was it produced before the Court at the time of hearing of the petition. Even otherwise, it is not possible to accept the contention advanced by respondents as under the relevant Regulation 2 (2) contained in Chapter III of the Act at least one post has necessarily to be filled up by promotion and if this is not done, the said provision would be rendered futile."

6. As would be evident from the aforesaid passage of the judgment of the learned Single Judge, the Government Order dated 18.12.1990 was not produced before him. Accordingly, the learned Single Judge set aside the order impugned in the writ application as also the appointment of the appellant herein. The learned Single Judge further directed the Committee of Management to fill up the vacant Class III post by promotion from amongst the Class IV employees working in the College.

7. Before we enter into the merit of the case, it is expedient to consider the reservation policy of the State Government in regard to promotion. It is relevant here to state that the U.P. Public

Services (Reservation for Scheduled Castes/Scheduled Tribes/Other Backward Classes) Act, 1994, provides for reservation in the public services and the post, and by virtue of its definition under Section 2 (c), it applies to educational institutions owned and controlled by the State Government or which receive grant-in-aid. Section 3 thereof provides for reservation at the stage of direct recruitment and sub-section (7) thereof makes applicable such prevalent Government Orders that provide for reservation against posts to be filled up by promotion. In view of the aforesaid provisions, all Government Orders providing for reservation in promotion continue to be applicable till they are modified or revoked.

8. It is relevant here to state that the Government Order dated 18.12.1990 considered the issue of filling up such vacancies reserved for the members of the Scheduled Caste and Scheduled Tribe, which remain unfilled due to their unavailability. The aforesaid Government Order, inter alia, provides that against such posts where appointment is to be made by promotion, and for which reservation is provided, if the candidates of the reserved category are not available, same shall be filled up by direct recruitment from amongst the members of the said category. In the light thereof, the District Inspector of Schools had taken a decision to fill up the vacancy of the Clerk by direct recruitment reserved for the member of the Scheduled Caste and in fact, an advertisement to that effect was issued and in response thereof, the appellant herein had offered his candidature. Writ petitioner-respondent no.5, neither challenged the said decision of the District Inspector of Schools nor the advertisement nor for that matter the selection of the appellant herein. It is only when the matter of his appointment was before the Regional Committee, he chose to file the writ application.

9. While assailing the judgment of the learned Single Judge, Mr. Ranjit Asthana, appearing on behalf of the appellant, submits that in view of the Government Order, which is saved by Section 3 (7) of the U.P. Act No.4 of 1994, all the Government Orders regarding promotion shall continue to be applicable. He submits that the Government Order dated 18.12.1990 clearly provides that when a candidate of the reserved category is not available for promotion, such post shall be filled up by direct recruitment from amongst the members of the said category. He submits that in the light thereof, the decision was taken to fill up the post of Clerk by direct recruitment from amongst the members of the Scheduled Caste and the appellant was duly selected for appointment.

10. Mr. Indra Raj Singh, however, appearing on behalf of respondent no.5, submits that in view of Regulation 2 (2) of Chapter III of the Regulations referred to above, the post has to be filled up by promotion from amongst the Class IV employees. He submits that in case of conflict between the Regulation and the Government Order, Regulation will prevail and as such the post of Clerk falling vacant on retirement of the incumbent is to be filled up by promotion and not by direct recruitment.

11. Having appreciated the rival submissions, we find substance in the submission of Mr. Asthana. Regulation 2 (2) of Chapter III of the Regulations

provides for filling up 50% of the post of Clerk by promotion. It is not in dispute that the Government Order provides for reservation in promotion and in the light thereof, the post which had fallen vacant, is to be filled up by the member of the Scheduled Caste category. Undisputedly, the writ petitioner, who claims promotion to Class III post does not belong to the Scheduled Caste category. In view of the aforesaid, the post of Clerk has to be filled up by promotion from amongst the members of the Scheduled Caste category.

12. Regulation 2 (2) of Chapter III of the Regulations provides for promotion to a Class III post of such Class IV employees, who are eligible. Undisputedly, the post of Clerk was to be filled up by way of promotion of a Scheduled Caste employee and the writ petitioner being not its member, was not eligible to be considered for such promotion. True it is that in case of conflict between the provisions of Regulation and the Government Order, the former will prevail. However, in the present case, we do not find any conflict between the Regulation and the Government Order providing for filling up the post by direct recruitment due to non-availability of the candidate of the reserved category for promotion. Regulation 2 (2) of Chapter III of the Regulations does provide for promotion of Class IV employees and the Government Order provides for reservation in promotion. The Regulation is silent as to what would happen, if a Class IV employee of the reserved category is not available for promotion and then how it is to be filled up. This is supplemented by the Government Order dated 18.2.1990, and hence it cannot be said that the Government Order had supplanted the Regulation, and shall not hold the field.

13. While defending the impugned order, Mr. Indra Raj Singh, further submits that one post had fallen vacant in the recruitment year and in case it is filled up by a member of the Scheduled Caste, it shall tantamount to 100% reservation, which is not permissible under Article 16 of the Constitution of India. In support of the submission, reliance has been placed on a judgment of the Apex Court in the case of **M. Nagaraj & Ors. Vs. Union of India & Ors.,** reported in AIR 2007 SC 71, and our attention has been drawn to paragraph 67 of the judgment.

14. We do not find any substance in the submission of Mr. Singh and the decision relied on, instead of supporting his contention, goes against him. Here, in matter of promotion roster is followed and undisputedly, two posts having been occupied by the members of General category, it was to be filled up by a member of the Scheduled Caste category. This is permissible in view of the judgment of **M. Nagaraj & Ors. (supra)** relied on by Mr. Singh itself. Paragraph 68 of the judgment, which is relevant, reads as follows:-

"68. However, in R.K. Sabharwal (1995 AIR SCW 1371) which was a case of promotion and the issue in this case was operation of roster system, the Court stated that entire cadre strength should be taken into account to determine whether reservation up to the required limit has been reached. With regard to ruling in Indra Sawhney case that reservation in a year should not go beyond 50% the Court

held that it applied to initial appointments. cadre strength, by itself ensures that the reservation remains within the 50% limit. In substance the court said that presuming that 100% of the vacancies have been filled, each post gets marked for the particular category of candidate to be appointed against it and any subsequent vacancy has to be filled by that category candidate. The Court was concerned with the possibility that reservation in entire cadre may exceed 50% limit if every year half of the seats are reserved. The Constitution (Eighty-first Amendment) Act, 2000 added Article 16 (4B) which in substance gives legislative assent to the judgement in R.K. Sabharwal."

15. Therefore, we do not find any substance in the submission of Mr. Singh.

Mr. Singh, lastly attempted to assail the appointment of the appellant. As the selection of the appellant is under consideration of the Regional Committee, we do not want to express any opinion in this regard. However, we hasten to add that the writ petitioner-respondent no.5, is not a member of the Scheduled Caste category and, therefore, is not eligible to be promoted to the post, which has been reserved for the Scheduled Caste category. This is an additional reason why we are not inclined to entertain the said submission.

16. In the result, the appeal is allowed, the impugned order dated 29.6.2009 passed by the learned Single Judge is set aside. However, there shall be no order as to costs.

The operation of a roster, for filling the

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.08.2009

BEFORE
THE HON'BLE C.K. PRASAD, C.J.
THE HON'BLE A.P. SAHI, J.

Special Appeal (D) No. 870 of 2009

State of U.P. and others
...Appellants/Respondents
Versus
Anand Kumar Mishra and others
...Opposite Parties

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

Counsel for the Opposite Parties:
Sri Amit Srivastava

Constitution of India-Art. 14 & 21-Benefits of Vth Pay Commission-given to all the employees w.e.f. 1.1.1996-petitioner/Respondent working in U.P. Police Radio department given such benefit w.e.f. 30.10.2004-highly discriminatory, arbitrary without any basis-single Judge committed no illegality by placing reliance on Ghanshyam Singh case-warrant no interference-appeal misconceived-dismissed.

Held: Para 8 & 9

It is not in dispute that other employees of the State Government on the very same recommendation of the Pay Revision Committee and Equivalence Committee, have been given the benefit of revised pay-scale with effect from 1.1.1996. Simply because the decision in regard to these employees was taken later on, it will not give a right to the State Government to give them the scale of pay from the date the decision is taken. We do not find any justification

for giving the benefit of the revised scale of pay to the employees from the date the decision was taken for extending such benefit and not to give it from 1.1.1996.

We are of the opinion that the consideration of the matter by the learned Single Judge does not suffer from any error calling for interference in this appeal.

(Delivered by Hon'ble C.K. Prasad, C.J.)

1. Respondents-appellants, aggrieved by the order dated 4.9.2008 passed by a learned Single Judge in Civil Misc. Writ Petition No. 44344 of 2006, have preferred this appeal under Rule 5 Chapter VIII of the High Court Rules.

2. Writ petitioners-respondents are employed in U.P. Police Radio Department. In the light of the recommendation of the Pay Commission followed by the report of the Equivalence Committee, their pay-scale has been revised but the benefit of the said pay-scale was given from the date of issuance of Government Order dated 30.10.2004 and not from 1.1.1996 as given to other employees of the State Government. They filed writ petition no. 67340 of 2005 before this Court and by order dated 24.10.2005, the writ application was disposed of with a direction to the appellants herein to take decision in accordance with law within stipulated period. In the light of the aforesaid direction of this Court, the State Government by its memo dated 11.5.2006, rejected their claim and held that they shall not be entitled to the revised pay-scale from 1.1.1996. While doing so, it was observed that the State Government had taken a policy decision to give the revised scale of pay from the date of the Government Order. Writ petitioners-respondents challenged the aforesaid order, which has given rise to the impugned order.

3. The learned Single Judge relying on an earlier decision of this Court dated 21.8.2008 passed in Writ Petition No. 5902 (S/S) of 2005 (**Ghanshyam Singh and another vs. State of U.P. and others**) disposed of the writ application with a direction to take appropriate decision in the light of the aforesaid decision.

4. As the direction of the learned Single Judge is founded on the reasoning of this Court in the case of **Ghanshyam Singh (supra),** we deem it expedient to reproduce the same, which reads as follows:

"The revision of the pay-scale in pursuance to the report of the Pay Commission, followed by the report of the Equivalence Committee is done from the date noticed by the Equivalence Committee. A perusal of the order (Annexure-2) reveals that the revised pay-scale has been enforced from 1.1.1996. Once the Equivalence Committee in pursuance to the Pay Commission's report has decided the revision of the pay-scale from 1.1.1996, then the grant of revised pay-scale to the petitioners from the date of the issuance of the impugned order dated 30.10.2004 appears to be an arbitrary act on the part of the State Government. Right to livelihood is a fundamental right guaranteed under Art. 21 of the Constitution of India. In case, the Pay Commission has revised the pay-scale and the same has been considered by the Equivalence Committee, then that should be implemented equally for all the

employees from the specified date. The State Government has no right to revise the pay-scale from a different date that what has been recommended by the Equivalence Committee.

It has not been disputed that most of the employees of the Wireless Department have been given the revised pay-scale in pursuance to the report of the Equivalence Committee w.e.f. 1.1.1996. Accordingly, there appears to be discriminatory treatment having been done against the petitioners while issuing the impugned order dated 30.10.2004. It was incumbent on the respondents to pay the revised pay-scale to the petitioners and other similarly situated persons from 1.1.1996. Virtually, the earlier circular dated 16.8.2001 (Annexure-2) seems to have been passed in conformity with law on the subject keeping in view the report of the Equivalence Committee. The State was not justified in deviating from the grant of revised pay-scale in pursuance to the circular dated 16.8.2001 (Annexure-2). In view of the above, the order dated 30.10.2004 seems to be an arbitrary act on the part of the State and does not survive."

5. Mr. Piyush Shukla appearing on behalf of the appellants submits that when the State Government decided not to grant the scale of pay with effect from 1.1.1996, the learned Single Judge ought not to have interfered with the same. He points out that it is for the State Government to decide as to from which date the benefit of pay-scale shall be given to its employees and the impugned direction of the learned Single Judge is in breach of the said policy, which is not permissible in law.

6. We do not find any substance in the submission of Mr. Shukla.

7. It is well settled that every State action has to be founded on valid reason. A State action which is unreasonable and arbitrary, strikes at the very root of Article 14 of the Constitution of India. Testing the decision of the State Government on the aforesaid anvil, we find that it is absolutely arbitrary.

8. It is not in dispute that other employees of the State Government on the very same recommendation of the Pay Revision Committee and Equivalence Committee, have been given the benefit of revised pay-scale with effect from 1.1.1996. Simply because the decision in regard to these employees was taken later on, it will not give a right to the State Government to give them the scale of pay from the date the decision is taken. We do not find any justification for giving the benefit of the revised scale of pay to the employees from the date the decision was taken for extending such benefit and not to give it from 1.1.1996.

9. We are of the opinion that the consideration of the matter by the learned Single Judge does not suffer from any error calling for interference in this appeal.

10. In the result, we do not find any merit in the appeal and it is dismissed accordingly.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2009

BEFORE
THE HON'BLE C.K. PRASAD, C.J.
THE HON'BLE A.P. SAHI, J.

Special Appeal (Defective) No.[864] of 2009

Zila Basic Shiksha Adhikari, Kanpur Nagar ...Appellant
Versus
Smt. Dhoopa Devi & anr. ...Respondents

Counsel for the Appellant:
Sri K. Shahi

Counsel for the Respondents:
Sri Shri Kant Shukla
Sri Praveen Kumar

Uttar Pradesh Junior High School (Recognised Basic Schools) Junior High School (Recruitment and condition of Service of Ministrial Staff and Group-D Employees) Rules 1984-Rule 13- Cancellation of appointment without show cause notice without opportunity of hearing-appointment on the post of Maharajin/Sevika-without advertising in News papers without following the provision contained in Rule 14 & 15-illegal-grant of approval of no use if appointment itself illegal-cancellation held proper-order passed by Single Judge-set-a-side.

Held: Para 6

There is nothing on record to show that the writ petitioner - respondent No.1 was appointed in accordance with the said rules. Neither the advertisement nor the averments regarding constitution of the Selection Committee has at all been pleaded. In absence thereof the appointment of Respondent No.1 was absolutely illegal and once it is held so, nothing prevented the Basic Education Officer to rescind the same after it had come to his notice. The contention that the order of cancellation was in violation of principles of natural justice does not hold water as even otherwise no material has been brought forth before us to demonstrate that the appointment was valid and in accordance with the rules applicable.

(Delivered by Hon'ble C.K. Prasad, C.J.)

1. Respondent No.1 - appellant, aggrieved by the order dated 12.05.2009 passed by a learned Single Judge in Civil Misc. Writ Petition No.30 of 1996, has preferred this Appeal under Rule 5 Chapter VIII of the Allahabad High Court Rules, 1952.

2. Short facts giving rise to the present Appeal are that writ petitioner - respondent No.1 was engaged as Maharajin/Sevika in Bal Niketan Balika Junior High School, Jajmau Colony, Kanpur Nagar. The appointment was made in pursuance of a resolution of the Committee of Management of the said institution. While appointing respondent No.1, it was resolved to seek approval of the Basic Education Officer, Kanpur Nagar. The approval was granted by the Basic Education Officer in May, 1994. Thereafter, by order dated 22nd November, 1995, the Basic Education Officer cancelled the appointment *inter alia* on the ground that earlier approval for appointment was taken on misrepresentation of facts and her appointment was absolutely illegal.

3. Respondent No.1 challenged the aforesaid order in the writ petition which has given rise to the present appeal. The learned Single Judge allowed the writ

petition and while doing so, the learned Single Judge observed as follows :

"A perusal of the interim order reveals that no opportunity of hearing was afforded before issuing the order of cancellation. She was appointed against a clear, permanent vacancy and after obtaining the approval of then Basic Shiksha Adhikari in the year 1994. The approval was granted by the Basic Shiksha Adhikari and a government servant have continued for a sufficiently long period, her appointment could not be suddenly cancelled without affording any opportunity of hearing in violation of the principles of natural justice. Accordingly, the order appears to be ex-facie punitive and it has resulted in removal and dismissal of the petitioner and recovering salary from petty employee of a Junior High School and that too after rendering services in the college appears to be too harsh and is not sustainable. Accordingly, the order dated 22.11.1995 is quashed. The petitioner is already in service. Consequences shall follow. The writ petition is allowed.

4. Mr. K. Shahi appears on behalf of the appellant. Respondent No.1 is represented by Mr. Shri Kant Shukla.

5. It is common ground that the matter of appointment on the post in question is governed by the Uttar Pradesh Recognised Basic Schools (Junior High School) (Recruitment and Condition of Service of Ministerial Staff and Group 'D' Employees) Rules, 1984 (hereinafter referred to as the Rules). Rule 13 of the said Rules *inter alia* provides for advertisement of the vacancy at least in one newspaper having wide circulation in the locality. Rule 14 thereof further provides for constitution of a Selection Committee and Rule 15 thereof provides procedure for Selection.

6. There is nothing on record to show that the writ petitioner - respondent No.1 was appointed in accordance with the said rules. Neither the advertisement nor the averments regarding constitution of the Selection Committee has at all been pleaded. In absence thereof the appointment of Respondent No.1 was absolutely illegal and once it is held so, nothing prevented the Basic Education Officer to rescind the same after it had come to his notice. The contention that the order of cancellation was in violation of principles of natural justice does not hold water as even otherwise no material has been brought forth before us to demonstrate that the appointment was valid and in accordance with the rules applicable.

7. We are of the opinion that the learned Single Judge without taking into account the aforesaid aspect of the matter ought not to have interfered with the order rescinding the appointment of respondent no.1.

8. In the result, the Appeal is allowed. Impugned order of the learned Single Judge is set aside and the writ petition stands dismissed. No order as to cost.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.08.2009

BEFORE
THE HON'BLE RAKESH SHARMA, J.

First Appeal No. 565 of 1989
Alongwith
First Appeal No. 554 of 2001

U.P. Avas Evam Vikas Parishad ...Appellant
Versus
Din Mohammad & others ...Respondents

Counsel for the Petitioner:
Sri Shri Kant

Counsel for the Respondents:
Sri N.C. Rajvanshi
Sri M.K. Rajvanshi

U.P. Awas Avam Vikas Parishad Adhiniyam-Section 32 (1)-Enhancement of compensation-land acquired on 21.10.59-reference Court inhanced compensation excluding plot No.135-poor land owner could not challenging due to dispute of third party regarding award-26.02.85 reference court enhanced compensation as the rate of Rs.10/- per sqr. Yard-while other land inferior quality land amount enhanced at the rate of Rs.25/-held- order passed by reference court perfectly justified can not be interfered.

Held: Para 17

In the present case, the claimants, land owners, are poor farmers of the Meerut District, not Builders or Colonisers or Developers. It is noteworthy that for the land acquired in the same vicinity, reference had been allowed and compensation was awarded at the rate of Rs.10/= per sq. yard. Even inferior quality of land was rated at a higher price. This Court has also scrutinised the impugned judgment in the light of a recent judgment of the Hon'ble Apex Court reported in 2009 (2) AWC 1617 (SC), Revenue Divisional Officer-cum-L.A.O. Vs. Shaik Azam Saheb etc. and found that the impugned judgment order of the Reference court is a legally sound, detailed and reasoned judgment, which does not require any interference.

Case law discussed:
1996 AWC 1238,
1995 (2) SCC 689.

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

1. Since both these First Appeals have been preferred against the same land acquisition proceedings claiming enhanced compensation and are inter-knitted, therefore, these First Appeals are being decided by this one and common judgment.

2. Heard Sri Shri Kant, learned counsel for the U.P. Avas Evam Vikas Parishad and Sri N.C. Rajvanshi, learned Senior Counsel, assisted by Sri M.K. Rajvanshi, learned counsel for the respondents in First Appeal No. 565 of 1989 and for the Appellants in First Appeal No. 554 of 2001 and perused the materials on record.

3. The present First Appeals, under Section 54 of the Land Acquisition Act, 1894 (hereinafter referred to as the Act) have been preferred by the U.P. Awas Evam Vikas Parishad against the respondents, land owners, farmers, and by the land owners against the U.P. Avas Evam Vikas Parishad (hereinafter referred as the Parishad) for enhancement of their compensation. These First Appeals have been filed assailing the judgment and decree dated 6th May, 1989, passed by the District Judge, Meerut, rendered while answering Land Acquisition Reference No. 182 of 1988, by which the Reference

Court has enhanced the compensation for the land acquired and fixed the same at the rate of Rs.10/= per sq. yard. The Reference Court has also awarded additional amount of compensation as interest at the rate of 12% per annum on the amount of compensation from the date of issuance of notification under Section 4(1) of the Act. In addition to this, solatium and other benefits have also been allowed to the land owners.

4. The connected First Appeal No. 554 of 2001 has been filed by Din Mohammad and others seeking higher compensation at the rate of Rs.25/= per sq. yard, that is, more than Rs.10/= per sq. yard as awarded by the Reference court, that is, District Judge, Meerut.

5. It has emerged from the record that the U.P. Awas Evam Vikas Parishad, in furtherance of implementing a Housing Scheme in the urban area of District Meerut, has initiated land acquisition proceedings for which a notification under Section 36 of the U.P. Awas Evam Vikas Parishad Adhiniyam, as is applicable to the U.P. Awas Evam Vikas Parishad, was issued on 22.10.1956. Notification under Section 32(1) of the U.P. Awas Evam Vikas Parishad Adhiniyam, which is equivalent to Section 6 of the Land Acquisition Act, was issued on 21.10.1959. The possession of the land was taken over. The references were adjudicated upon. The Reference court, that is, District Judge, Meerut, vide the judgment and decree dated 26.2.1985 had enhanced compensation, except for one plot, that is Plot No. 135 as no challenge was made in respect of Plot No. 135 alongwith other plots. The reason for not challenging the award in respect of this plot was that there was a dispute pending with some third party. Under these compelling circumstances, the land owners did not seek a reference for Plot No. 135. The respondent nos. 1 to 6, herein, agriculturists of Village Aurangshahpur, District Meerut, had filed an application under Section 18 of the Land Acquisition Act seeking a reference before the District Judge in respect of the plot No. 135, acquired by the Parishad.

6. Lateron, the provisions of the Land Acquisition Act was amended and Section 28-A was inserted by an amending Act No.68 of 1984. This Section provides for re-determination of amount of compensation.

7. The land owners, who claim themselves to be poor farmers of the District Meerut, immediately sought a reference and submitted a formal application to the Special Land Acquisition Officer within three months of the said judgment of 26.2.1985. This reference was adjudicated upon and the District Judge, Meerut, maintaining the parity with the other cases and the compensation awarded to the land owners of the adjoining plots had allowed them the same compensation, that is, at the rate of Rs.10/= per sq. yard.

8. The State of U.P. as well as U.P. Awas Evam Vikas Parishad had resisted the reference on the ground that the reference on the ground that the reference itself was not maintainable under Section 28-A of the Act. The claimant, landowners, did not choose to seek a reference against Plot No. 135 at the time when they had availed the opportunity of challenging the award in respect of other plots. Their conduct would amount to waiver of their rights to claim the

compensation in respect of the said plot. The reference was barred by the principles of estoppel as indicated under Order 2, Rule 2 C.P.C.

The following issues were framed by the Reference court:-

(i) Whether the application moved under Section 28-A of the Land Acquisition Act is maintainable?
(ii) Whether the claimants are entitled to claim compensation on the basis of the compensation awarded earlier in L.A. Reference No. 169/ 1978, Allah Mehar Vs. State of U.P. and another?
(iii) To what relief, if any, are the claimants entitled?

9. The impugned judgment and order of the Reference court has been challenged by the Parishad on the ground that it was patently illegal and unwarranted. The respondents, land owners, are not entitled for enhanced compensation, solatium and interest etc. The Reference court had ignored that the reference was barred by limitation under Order 2, Rule 2 C.P.C. The respondents, land owners, were estopped from claiming enhanced compensation. The provisions of Section 28-A of the Act were to be invoked within the period of limitation. The Reference court erred in holding that the reference was maintainable.

10. The court below has acted illegally in proceeding with the case treating as a reference under Section 28-A(3) of the Act, which was not permissible. There was a delay in approaching the Court and there existed no provision under U.P. Awas Evam Vikas Parishad Adhiniyam equivalent to Section 5 of the Indian Limitation or under the relevant provisions dealing with Acquisition proceedings under the Act. The acquisition of the land was made under the provisions of the U.P. Awas Evam Vikas Parishad Adhiniyam and as such the provisions of amending Section 28-A of 1984 of the Act are not applicable.

11. Considered the arguments of leaned counsel for the parties and perused the materials on record as well as impugned judgment and decree passed by the learned Reference court, that is, the District Judge, Meerut.

12. The District Judge, Meerut, while interpreting Section 28-A of the Act has held in the impugned judgment that it was clearly provided in the new Section 28-A of the Act that where in an award, the court allows to the land owners any amount of compensation in excess of the amount awarded by the Collector, the persons interested in all the other lands covered by the same notification under Section 4(1) and who are also aggrieved by the award of the Collector **may, notwithstanding that they had not been made an application to the Collector under Section 18 required to be made within three months of the date of the award that the amount of compensation may be re-determined on the basis of the amount of compensation earlier awarded by the court.** The court of the District Judge, Meerut had already allowed amount of enhanced compensation at the rate of Rs.10/= per sq. yard in respect of the similarly situated land having similar potential, nature and status situated in the same vicinity.

13. It was also submitted by the land owners before the Reference court as well as in this Court in the connected Appeal No. 554 of 2001, Din Mohammad and others Vs. State of U.P. and another that for inferior quality of land, the Reference court had allowed compensation at the rate of Rs.10/= per sq. yard. The respondents, land owners, land was of superior quality and located near the urban area of the Meerut City at a better place and approachable having all the urban facilities. Thus, they are also entitled for similar compensation at the same rate.

14. It was also demonstrated before the Court that the same land, after some time, was leased out by the Parishad at the rate of Rs.600/= per sq. yard, that is, more than sixty times of the amount of compensation allowed to the poor farmers, who had lost their land, which was their only source of livelihood for establishing a Housing Colony by the Parishad. It has been rightly held by the learned Reference court, the District Judge, Meerut that the provisions of Section 28-A of the Act were applicable in the present case.

15. The judgment rendered by the District Judge, Meerut finds strength from a Division Bench's judgment of this Court comprising of Hon'ble Mr. Justice M. Katju and Hon'ble Dr. Justice B.S. Chauhan, reported in 1996 AWC 1238, Nanak and others Vs. State of U.P. and others. Some observations of the said judgment are being reproduced below:

"7. The scope of provisions of Section 28A was considered by the Supreme Court in Mewa Ram v. State of Haryana (1986) 4 SCC 151 and the Court placed particular emphasis on Para 2 (ix) of the objects and reasons which provided for a special and particular discriminatory advantage for inarticulate and poor people to apply for re-determination of the compensation amount on the basis of the court award in a land acquisition reference filed by the comparatively affluent land owner. The Apex Court observed as under:

"Section 28A in terms does not apply to the case of the petitioners.....they do not belong to that class of society for whose benefit the provision is intended and meant, i.e., inarticulate and poor people who by reason of their poverty and ignorance have failed to take advantage of the right of reference to the civil court under Section 18 of the Land Acquisition Act, 1894. On the contrary, the petitioners belong to an affluent class.

....

9. In Babua Ram v. State of U.P., 1995 (2) SCC 689, the Apex Court again approved and reiterated the law laid down in Mewa Ram (supra) and observed as under:

"Legislature made a discriminatory policy between the poor and inarticulate as one class of persons to whom the benefit of Section 28A was to be extended and comparatively affluent who had taken advantage of the reference under Section 18 and the latter as a class to which the benefit of Section 28A was not extended. Otherwise, the phraseology of the language of the non-obstante clause would have been differently worded.....It is true that the Legislature intended to relieve hardship to the poor, indigent and inarticulate interested persons who generally failed to avail the reference under Section 18 which is an existing bar and to remedy it,

Section 28A was enacted giving a right and remedy for re-determination.....The Legislature appears to have presumed that the same state of affairs continue to subsist among the poor and inarticulate persons and they generally fail to avail the right under sub-section (1) of Section 18 due to poverty or ignorance or avoidance of expropriation.....Parliament made conscious discrimination between the poor and inarticulate as a class and comparatively affluent as another class and conferred the rights under Section 28A in favour of the former.....Section 28A is just and fair and does not violate Article 14. The procedure, therefore, is just and fair and does not violate Article 21."

16. Their Lordships, in similar circumstances, had held that the provisions of Section 28-A of the Land Acquisition Act, 1894 (as amended) are applicable only in the cases of 'Little Indians' because of their poverty. Paragraph 12 of the judgment is being reproduced below:-

"12. Thus, it is clear from the above, that the provisions of Section 28A is applicable only in a case of 'Little Indians' who because of their poverty and ignorance cannot afford to file the reference under Section 18 of the Act and if an application under the said provision is filed by a person of that class, the same cannot be decided unless the Court's award on the basis of which the said application has been filed does not attain the finality. However, the provisions of Section 28A are not intended to be windfall for every landholder whose land had been acquired under the same land acquisition proceedings."

17. In the present case, the claimants, land owners, are poor farmers of the Meerut District, not Builders or Colonisers or Developers. It is noteworthy that for the land acquired in the same vicinity, reference had been allowed and compensation was awarded at the rate of Rs.10/= per sq. yard. Even inferior quality of land was rated at a higher price. This Court has also scrutinised the impugned judgment in the light of a recent judgment of the Hon'ble Apex Court reported in 2009 (2) AWC 1617 (SC), Revenue Divisional Officer-cum-L.A.O. Vs. Shaik Azam Saheb etc. and found that the impugned judgment order of the Reference court is a legally sound, detailed and reasoned judgment, which does not require any interference.

18. In view of the discussions made above, the First Appeals, being devoid of merits, are dismissed.

No order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.08.2009

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

Civil Misc. Writ Petition No. 40369 of 2009

Doodh Nath and others ...Petitioner
Versus
D.D.C. Jaunpur & another ...Respondents

Counsel for the Petitioner:
Sri C.B. Prasad
Sri V.K. Dwivedi

Counsel for the Respondent:
Sri B.P. Yadav
S.C.

U.P. Consolidation of Holdings Act-1963-Section 48-Revision-after 16 yrs without affidavit in support of condonation allowed by D.D.C. In cryptic manner ignoring objection filed against condonation on application- held - provision of section 27 of limitation Act are equally applicable, accordingly general direction issued to all the consolidation authorities for further action.

Held: Para-4

In respect of other claims, expiry of period of limitation only bars the remedy but not the right. However, by virtue of Section 27 of Limitation Act, in respect of claims to properties particularly immovable properties, expiry of period of limitation bars both, i.e. remedy as well as right (popularly known as maturity of title by adverse possession). On the principle of the said Section, delay condonation application in appeal/ revision involving right, title or interest in immovable property must be construed more strictly.

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

1. This writ petition is directed against judgment and order dated 24.12.2008 passed by D.D.C. Jaunpur in Revision No.3227 of 2008, Babu Nandan Vs. State. For recalling the said order, an application was filed, which was rejected on 28.07.2009. That order has also been challenged through this writ petition.

2. Revision was filed after 16 years. Petitioners filed objections to the delay condonation application, which are Annexure-5 to the writ petition. Objections were supported by affidavit, which is Annexure-6 to the writ petition. However, learned D.D.C. in his order dated 24.12.2008 simply mentioned that there was no objection to the delay condonation application, hence in the interest of justice delay was being condoned. Firstly there was very serious objection. Secondly, delay of 16 years cannot be condoned in such a cryptic manner without even mentioning in the order the reason of condonation of delay mentioned in the delay condonation application.

3. I am constantly finding that litigants, advocates and consolidation authorities are labouring under the misconception that under consolidation, there is no concept of limitation. Such mind-set requires to be changed.

4. In respect of other claims, expiry of period of limitation only bars the remedy but not the right. However, by virtue of Section 27 of Limitation Act, in respect of claims to properties particularly immovable properties, expiry of period of limitation bars both, i.e. remedy as well as right (popularly known as maturity of title by adverse possession). On the principle of the said Section, delay condonation application in appeal/ revision involving right, title or interest in immovable property must be construed more strictly.

5. Accordingly, learned counsel for the respondent No.2, the only contesting respondent, who has appeared through caveat, i.e. Sri B.P. Yadav, learned counsel is directed to file counter affidavit within one month. Rejoinder affidavit may be filed within one month thereafter.

6. List for admission after four months.

7. Unless this order is modified or vacated earlier, for a period of one year

order dated 24.12.2008 passed by D.D.C. shall not be given effect to.

8. Office is directed to supply a copy of this order free of cost to learned Chief Standing counsel within a week, who must send it to the Commissioner/ Director of Consolidation for being circulated to all the consolidation authorities i.e. C.Os., S.O.Cs. ad D.D.Cs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.08.2009

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

Civil Misc. Writ Petition No. 6057 of 2007

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

Counsel for the Petitioner:
Sri Pankaj Kumar Srivastava,
Sri P.C. Sharma
Sri Himanshu Upadhyay

Counsel for the Respondent:
Sri K. Shahi,
Sri V.K. Singh
Sri Anil Kumar Sharma
S.C.

Constitution of India Article-226-.Selection of Shiksha Mitra- Respondent No.5 got appointed proceeding forged marks sheet-stood top in merit-petitioner as well as Respondent No.5 worked as Anudeshak under non formal Education Scheme-authorities accepted the correction of mark sheet of Respondent No.5 further in view of G.O. 24.04.06 -possess longer experience under NFE as such got selected-held-wholly mis conceived G.O. relied by authorities has no retrospective effect-impugned order rejecting claim of petitioner quashed with direction to D.M. For fresh consideration in light of observations made by Court.

Held: Para-10

Apart from this, it is also evident that Respondent No.5 first attempted to get herself selected on the strength of incorrect marks having been reflected. This conduct of Respondent No.5 also cannot be appreciated. The fact of the correction of marks reflected in the selection has been admitted in the counter-affidavit. For all the reasons aforesaid and keeping in view the Division Bench decision in the case of Smt. Parvati Devi (supra), the order impugned is unsustainable. The impugned order dated 14.12.2006 (Annexure-7 to the writ petition) is quashed. The matter is remitted back to the District Magistrate, Etawah, to pass a fresh order in the light of the observations made herein above after considering the claims of the parties as expeditiously as possible but not later than 3 months from the date of production of a certified copy of this order before him.

Case Law discussed:
2007 (2) ESC 788 (DB),
2007 (2) ESC 788 (DB),
2008 (1) ADJ 712 (DB).

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

1. The petitioner prays for quashing of the order dated 14.12.2006 passed by the District Magistrate, Etawah, rejecting the claim of the applicant for being appointed as Shiksha Mitra against the advertisement dated 27.10.2005.

2. The petitioner along with respondent No.5-Smt. Shiv Kumari applied for the post of appointment as Shiksha Mitra in terms of Government Order dated 10.10.2005; copy whereof is Annexure No. 4 to the writ petition. The

Applications were processed and it is alleged by the Petitioner that the contesting Respondent deliberately provided incorrect mark-sheets which resulted in the award of higher marks to Respondent No.5. Respondent No.5, in fact, had only 47.04 % marks whereas on account of the incorrect mark sheets and clerical error that had crept into, she was placed higher in merit than the petitioner indicating that she had obtained 57.40 % marks. The petitioner was awarded an aggregate of 51 % according to the Government Order. Respondent No.5 was shown to have been selected. It is further relevant to point out that the Petitioner and Respondent No.5 both had worked as informal Instructor (Anudeshak) and, as such, according to Government Order dated 10.10.2005, these 2 candidates had to be given "first preference" as against the other candidates, who had applied.

3. The petitioner's claim was not being considered, as such, the Petitioner approached this Hon'ble Court by filing Writ petition No.17943 of 2006 and a direction was issued on 3.4.2006 commanding the District Magistrate, Etawah, to decide the claim of the petitioner. A Contempt Petition was also filed for non-compliance of the said direction where after the District Magistrate decided the matter vide order dated 14.12.2006 impugned in the present petition.

4. I have heard Mr. Pankaj Kumar Srivastava, learned counsel for the petitioner, Sri A.K. Sharma for Respondent No.5, the learned Standing Counsel for Respondent Nos. 1 to 3 and Sri K. Sahi for Respondent No.6.

5. The finding recorded by the District Magistrate while disposing of the application is that so far as the incorrect projection of mark-sheets are concerned, the same was a clerical error which was corrected before the final selection list was published and the matter pertaining to the alleged forged mark sheets was got inquired into and it was found that the correct mark sheets, which was submitted by Respondent No.5, was cross checked with the documents available in the institution from where Respondent No.5 had passed the examination. The District Magistrate further found that since the petitioner and Respondent No.5 both had worked as informal education teachers, therefore, according to Government Order dated 24.4.2006, a candidate, who had worked as informal education teacher for a longer period, would be entitled to be appointed as Shiksha Mitra. The District Magistrate, on facts, found that Respondent No.5 had worked for a longer period as against the petitioner as an informal education teacher and, therefore, she was entitled to continue after having been selected as Shiksha Mitra.

6. Learned counsel for the Petitioner contended that Respondent No.5 had attempted to obtain selections by manipulating her marks and that as a matter of fact while moving her application, had reflected the incorrect marks in her favour which resulted in her placement higher in merit as against the petitioner. The subsequent correction attempted by the authorities was only to help Respondent No.5 to retain her selection. He further contends that the District Magistrate has wrongly concluded that Respondent No.5 would be given preference over the petitioner.

7. Learned counsel for the respondent contended that she was correctly given the benefit of preference according to the Government Order dated 24.4.2006 and the error indicated in the projection of the marks by the said respondent at the time of moving her Application had been already rectified even before the final selections were made. He contends that keeping in view the lower merit of Respondent No.5 as against the petitioner, Respondent No.5 was still entitled for being selected as she had a longer period of experience as an informal education teacher and, therefore, according to the Government Order dated 24.4.2006, she was rightly given the benefit.

8. I have considered the rival submissions and the matter now stands narrowed down to the question, as to whether while assessing the first preference claimed by the Petitioner and Respondent No.5, the District Magistrate had rightly on an application of the Government Order dated 24.4.2006, come to the conclusion that Respondent No.5 having a longer period of experience was entitled to be selected. The aforesaid issue is no longer res-integra. The question as to whether an informal education teacher is entitled to first preference or not as against the other candidates, has been settled by the Full Bench in the case of Daya Ram Singh Vs. State of U.P. and others, reported in 2007 (3) AWC 2946 (FB). The words "first priority/first preference" has been interpreted to mean that the said preference is over and above the other candidates and, therefore, the word means priority or precedent and not mere preference. Accordingly, the Full Bench held that such informal education teachers, in spite of their low merit, would be entitled to first priority for being appointed. This was the law as existing on the date when the advertisement was issued in the present case in the year 2005.

9. It is undisputed that both petitioner and Respondent No.5 had applied as against the advertisement dated 27.10.2005. The last date of applications in the said advertisement was also indicated therein and the proposal for appointment was made on 5.12.2005. Thus, the selection had also been completed by 5.12.2005. The Government Order dated 24.4.2006 came later on and was not in existence when the advertisement and selection in the present case was made. The issue of the applicability of such a Government Order came up for consideration in respect of similar selections of the year 2005 in the case of Parvati Devi Vs. State of U.P. and others, 2007 (6) ADJ 384. The Division Bench, while upholding the judgment of the learned single Judge, ruled that the Government Order dated 24.4.2006 would not apply retrospectively and even otherwise the Government Order dated 10.10.2005 did not provide for inter se first priority or preference on the strength of a longer experience. The Government Order dated 24.4.2006 would not apply retrospectively in the present case as well and the District Magistrate appears to have erred in applying the same. The said view has been approved by this Court in the case of Km. Rita Yadav Vs. State of U.P. and others, reported in 2007 (2) ESC 788 (DB) and followed in Smt. Neelam Singh Vs. State of U.P. and others, reported in 2008 (1) ADJ 712 (DB).

10. Apart from this, it is also evident that Respondent No.5 first attempted to

get herself selected on the strength of incorrect marks having been reflected. This conduct of Respondent No.5 also cannot be appreciated. The fact of the correction of marks reflected in the selection has been admitted in the counter-affidavit. For all the reasons aforesaid and keeping in view the Division Bench decision in the case of Smt. Parvati Devi (supra), the order impugned is unsustainable. The impugned order dated 14.12.2006 (Annexure-7 to the writ petition) is quashed. The matter is remitted back to the District Magistrate, Etawah, to pass a fresh order in the light of the observations made herein above after considering the claims of the parties as expeditiously as possible but not later than 3 months from the date of production of a certified copy of this order before him.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.08.2009

BEFORE
THE HON'BLE ARUN TANDON, J.

Criminal Misc. Writ Petition No. 399 of 2009

Anita ...Petitioner
Versus
Indrawati and others ...Respondents

Counsel for the Petitioner:
Sri Shashi Nandan
Sri P.P. Pandey

Counsel for the Respondent:
Sri Ravi Kant
Sri Arvind Srivastava, Sri Arun Kumar
S.C.

Constitution of India-Article 226-Election of Nagar Panchayat-petitioner obtains highest votes-but she was under age-finding of fact recorded by election Tribunal -held justified-writ Court cannot re-appreciate the evidence-sitting as appellate authority.

Held: Para 5:

This Court after examining the records of the proceedings, as they stand, is satisfied that the finding of fact recorded by the Election Tribunal qua the age of the elected candidate Anita on the date of submission of nomination paper, being less that 30 years, is based on true and correct appreciation of the evidence led by the parties. Such findings of fact needs no interference under Article 226 of the Constitution of India nor can be reversed after re-appreciation of the evidence I n exercise of power under writ jurisdiction. Reference may be had to the judgment of the Hon'ble Supreme Court in the case of Birad Mal Singh vs. Anand Purohit, reported in AIR 1988 SC, 1796, wherein the Hon'ble Supreme Court had laid down the legal preposition with regard to material to be examined qua the age of the contestant. Judged on the aforesaid principle, the finding of the Tribunal that the petitioner wad undergo on the relevant date needs no interference. This Court, therefore, records that on the date Anita had submitted the nomination paper she was below the prescribed age of 30 years and therefore disqualified for contesting the election. The declaration of her election as null and void by the Election Tribunal is accordingly upheld.

(B) Representation of people Act 1950-Section 101 readwith Section 25 of U.P.L Participation Act 1916 Section 25-election of President of Nagar Panchayat-the candidate having highest vote-declared disqualify being under age-the Second position holder will not be declared elected automatically.

Held Para-13:

Thus under the said judgment of the Hon'ble Supreme Court it has been explained that, if there are more than two candidates in the field for a single seat and elected candidate is found to be disqualified, it cannot be securing the next highest number of votes will be declared elected. The court has emphasised that in such a case, question of notice to the voters may assume significance for the voters. They may not have, if aware of the disqualification, voted for the disqualified candidate.

Case law discussed:

2001(92) R.D. 551, 1988 SC 1796, 1988 SC 1796, 1993 JT (6) S.C. 345, 1962 SC 338, 2008(2) ALJ 260 (DB), 2001(92) R.D. 551, 2004 SC 230, (1969) 2 SCR 90, 1993 JT, 2003 SC 185, (1770) 4 Burr 2527, 2004 SC 230.

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

1. Heard learned counsels for the parties. Fact sin short giving rise to this writ petition as follows:

2. Election for the office of the President of the Nagar Panchayat Pipiganj, Tehsil Campariganj, District Gorakhpur was held in the year 2006. The writ petition as well as the contesting respondent Indrawati along with other persons contested the said elections. The petitioner Anita was declared elected after counting on 06th November, 2006. The election of Anita was challenged by means of Election Petition No. 4 of 2006 under Section 19/20 of the U.P. Nagar Palika Adhiniyam. Amongst other one of the basic issue raised for questioning the election was that the elected candidate was underage on the relevant date and therefore ineligible to contest the elections. The acceptance of her nomination paper was therefore illegal, resulting in material irregularity and therefore the same be set aside.

3. The issue, as to whether on the relevant date the elected candidate was minor, was considered on the basis of the evidence led by the parties. After consideration of material and oral evidence led, a finding of fact has been recorded by the Election Tribunal, that on the date of submission of the nomination paper the candidate Anita had not reached the age of 30 years and therefore, declared null and void. The Election Tribunal thereafter proceeded to declare respondent no. 1 (election petitioner) as the elected candidate having regard to the fact that she had secured the second highest number of vote. Such declaration is stated to have been issued with reference to the judgment of the High Court reported in the case of ***Smt. Meenu vs. Third Additional District Judge, Kanpur Dehat,*** reported in 2001(92) R.D. 551. This order of the Election Tribunal has been challenged before this Court by means of the present writ petition.

4. Initially an attempt was made on behalf of the writ petitioner to question the findings recorded qua her ago on the date of submission of nomination paper. However, subsequently it was realized that such plea raised on behalf of the writ petitioner will not stand the scrutiny and therefore the issue with regard to the disqualification suffered by the writ petitioner on the ground of her being underage on the date of submission of nomination paper was more or less given up.

5. This Court after examining the records of the proceedings, as they stand,

is satisfied that the finding of fact recorded by the Election Tribunal qua the age of the elected candidate Anita on the date of submission of nomination paper, being less that 30 years, is based on true and correct appreciation of the evidence led by the parties. Such findings of fact needs no interference under Article 226 of the Constitution of India nor can be reversed after re-appreciation of the evidence I n exercise of power under writ jurisdiction. Reference may be had to the judgment of the Hon'ble Supreme Court in the case of **Birad Mal Singh vs.Anand Purohit**, reported in AIR 1988 SC, 1796, wherein the Hon'ble Supreme Court had laid down the legal preposition with regard to material to be examined qua the age of the contestant. Judged on the aforesaid principle, the finding of the Tribunal that the petitioner wad undergo on the relevant date needs no interference. This Court, therefore, records that on the date Anita had submitted the nomination paper she was below the prescribed age of 30 years and therefore disqualified for contesting the election. The declaration of her election as null and void by the Election Tribunal is accordingly upheld.

6. The other issue seriously contested and which requires consideration is as to whether the second part of the direction issued under the order of the Election Tribunal declaring the respondent no. 1 as elected on the basis that she had secured second largest number of votes polled is legally justified or not.

7. On behalf of the writ petitioner it has been stated that in view of the lad laid down by the Hon'ble Supreme Court in the case of **Birad Mal Singhvi vs. Anand Purohit,** reported in AIR **1988 SC, 1796 (para 17 and 18)** and in the case of **Godakh Yashwantrao Kankarrao vs. E.V. Alias Balasaheb Vikhe Patil & Ors.,** reported in **1993 JT(6) S.C. 345 pages 79, 80 and 81,** such a delclaration in the facts of the case could not have been issued.

8. The contention so raised is opposed by Shri VKS Chaudhary, Senior Advocate, it is stated that there is a distinction between the language used in Section 101 of the Representation of Peoples Act, 1950 viz a viz the language used in Section 25 of the Municipalities Act. According to the counsel the distinction between two provisions is apparent from a simple reading of the statutes. He submits that under Section 25 of the Municipalities Act a discretion is conferred upon the Election Tribunal to grant the relief of declaration where-ever the District Judge finds it more appropriate to do so. It is contended that the discretion conferred under the said statutory provision upon the District Judge has been exercised in favour of respondent no. 1. Such exercise of discretion in the facts of this case cannot be said to be arbitrary, in view of the fact that petitioner had secured the second largest number of votes. No interference against such exercise of discretion is called for. It is stated that votes pooled in favour of Anita have to be treated as wasted votes. Learned counsel has referred to the judgment of the Apex Court in the case of **Badri Narayan Singh vs. Kamdeo Prasad Singh and another** reported in **AIR 1962 SC 338 (Para 1 & 2)** and of this Court in the case of **Amrendra Singh vs. State of U.P** reported in 2008 (2) ALJ 260 (DB)(Para 3,13,20,24&28) and **Smt.**

Meenu vs. Third Additional District Judge, Kanpur Dehat reported in 2001(92) R.D. 551 wherein, on similar facts, declaration of the candidate, securing second highest number of votes, as elected, has been upheld.

9. Lastly it is contended that the persons like the petitioner cannot be permitted to take benefit of their own wrong and cannot be permitted to maintain this petition and to insist upon re-election only because in between they have acquired the required age for the purpose. Reference has been made to the judgment of the Apex Court in the case of **Sushil Kumar vs. Rakesh Kumar,** reported in AIR 2004 SC, 230(Para 30).

10. From the contention raised on behalf of the parties, it has to be examined is as to under which category the votes polled in favour of Anita would fall. Whether they are to be treated as invalid votes liable to be ignored or they are to be treated as wasted/thrown away votes and to be excluded from counting and therefore result is required to be declared on the basis of the votes received by the other candidates or else the entire elections are liable to be set aside, inasmuch as such votes which were case in favour of a disqualified candidates would have fallen in favour of which contesting candidate cannot be ascertained.

11. A Constitution Bench of the Hon'ble Supreme Court in the case of **Konappa Rudrappa Nadgouda v. Vishwanth Reddy & Anr.** Reported in (1969) 2 SCR 90, while dealing with more or less identical situation under Section 101 of the Representation of People Act, has hedl as follows:

"...We are again unable to see any logic in the assumption that votes case in favour of a person who is regarded by the Returning Officer as validly nominated, but who is in truth disqualified, could still be treated as valid votes, for the purpose of determining whether a fresh election should be held. When there are only two statutory disqualification., votes case in favour of the disqualified candidate may be regarded as thrown away, irrespective of whether the votes who voted for him were aware of the disqualification. This is not to say that where there are more than two candidates in the field for a single seat, and on alon is disqualified, on proof of disqualification all the votes case in his favour will be discarded and the candidates securing the next highest number of votes will be declared elected. In such a case question of notice to the voters may assume significance for the voters may not, if aware of the disqualification have voted for the disqualified candidate."

12. The said judgment has been followed in the case of **Gadakh Yashwantrao Kankarao vs. E.V. Alias Balasaheb Vikhe Patil & Ors. Reported in** 1993 JT page (6) (para 79,80, and 81)

13. Thus under the said judgment of the Hon'ble Supreme Court it has been explained that, if there are more than two candidates in the field for a single seat and elected candidate is found to be disqualified, it cannot be securing the next highest number of votes will be declared elected. The court has emphasised that in such a case, question of notice to the voters may assume

significance for the voters. They may not have, if aware of the disqualification, voted for the disqualified candidate.

14. In the facts of the case in had it is not in dispute that more than two candidates contested the election and the elected candidate namely the petitioner was declared disqualified.

15. There is nothing on record to establish that there not notice to the voters about the disqualification suffered by the elected petitioner nor any such finding has been recorded by the Tribunal, while declaring the election petitioner as elected. The Hon'ble Supreme Court has specifically laid down that in these set of circumstances the person securing the second highest votes cannot be declared as elected.

16. This Court may emphasis that the judgment of the High Court giving rise in the case of **Gadakh Yashwantrao Kankarao vs. E.V. Alias Balasaheb Vikhe Patil & Ors. (supra)** was set aside by the Hon'ble Supreme Court after recording that there is n o discernible cogent reason in the order of the High Court to support the conclusion that the candidate securing highest votes be declared elected. The said legal principle applies with full force in the facts of the case.

17. This Court may record that except for recording that the election petitioner had secured the second highest votes, no other reasons can be deciphered by the Tribunal for declaring her elected.

18. The Court may not examine the language used under Section 101 of the Representation of People Act, 1950 viz-a-viz that of Section 25 of the Uttar Pradesh Municipalities Act, 1916, as much emphasis has been laid thereon by the counsel for the respondent for distinguishing the law laid down in the case of Konappa Rudrappa Nadgouda (supra). For ready reference the aforesaid two sections are quoted below:

"**R.P. Act Section 101. Grounds for which a candidate other than the returned candidate may be declared to have been elected-**If any persons who has lodged a petition has, in addition to calling in question the election of the returned candidate, claimed a declaration that he himself of any other candidate has been duly elected and [the High Court] is of opinion-

(a) that in fact the petitioner or such other candidate received a majority of the valid votes or

(b) that but for the votes obtained by the returned candidate by corrupt practices the petitioner or such other candidate would have obtained a majority of the valid votes,

[the High Court] shall, after declaring the election of the returned candidate to be void declare the petitioner or such other candidate, as the case may be, to have been duly elected."

U.P. Municipalities Act, Section 25. Finding of [the District Judge].-[(1) if the [District Judge], after making such inquiry as it deems necessary, finds in respect of any person whose election is called in question by a petition, that his election was valid, it shall dismiss the petition as against such person any may award costs at its discretion and may also pass such order for return or forfeiture of

the security or part thereof as he may deem fir].

(2) If the [District Judge] finds that the election of any person was invalid, [or that nomination paper of the petitioner was improperly rejected,] it shall either,-

(a) declare a casual vacancy to have been created; or

(b) declare another candidate to have been duly elected, whichever course appears, in the particular circumstances of the case, the more appropriate, and in either case may award costs at its discretion.

19. It is no doubt true that a discretion has been conferred upon the District Judge while hearing election petitions to grant the relief of declaration of the election petitioner as elected, if he finds it more appropriate to do so. It has, however, to be kept in mind that the discretion has to be exercised only in accordance with law and not de hors the same. If the law, as explained by the Hon'ble Supreme Court in the aforesaid judgment in the case of Konappa Rudrappa Nadgouda (supra) lays down that on the elected candidate being declared disqualified it is not possible to declare the candidate securing second highest as elected if there are more that two contesting candidates, inasmuch as it cannot be decided as to in whose favour the votes polled in favour of disqualified candidate could have gone, then in my opinion the only course open is to direct re-election it will be seen that if the contention raised on behalf of the election petitioner is accepted, namely that votes polled in favour of a disqualified candidates are to be treated as wasted votes, the result would be that the candidate securing second highest votes would be declared elected in view of Section 101 (a) of the Representation of Peoples Act, inasmuch as he would be held to have secured the majority of the remaining valid votes. Such contention stands repelled under the judgment of the Constitution Bench of the Apex Court in the case of Konappa Rudrappa Nadgouda (supra). The Hon'ble Supreme Court has held that it is only where two persons alone contest the election and one found to be disqualified that second can be declared elected.

20. This Court has no hesitation to record that any exercise of discretion, contrary to the law laid down by the Hon'ble Supreme Court, by the District Judge would be per se illegal. The District Judge cannot exercise his discretion as suggested by the counsel for the respondent to declare the election petitioner elected after he had come to a conclusion that the elected candidate was disqualified for one reason or other and the election petitioner had secured the second highest votes. The legal principle as laid down by the Hon'ble Supreme Court is that the number of valid votes polled in favour of the disqualified candidate cannot be ignored nor it can be adjudicated as to in favour of which candidate such votes would have fallen provided there are more than two candidates contesting the election. In such circumstances the person getting the second highest votes cannot be declared elected. The said legal preposition would apply with full force in the case of election held under the Municipalities Act also and the discretion vested in the District Judge under Section 25 has to be

in conformity with the las laid down by the Hon'ble Supreme Court and not in a manner which may negate the law so declared.

21. The judgments relied upon by the learned counsel for the contesting respondent are clearly distinguishing in the facts of the case, inasmuch as law laid down by the Constitution Bench of the Apex Court in the Case of Konappa Rudrappa Nadgouda (supra) has not been noticed n or considered therein. This Court, therefore, feels justified in relying upon the Apex Court judgment in the case of Konappa Rudrappa Nadgouda v. Vishwanath Reddy & Anr.

22. The Apex Court in **Dwarka Dass & Ors. vs. State of Haryana AIR 2003 SC 185,** has held that even discretionary power has to be exercised in accordance with the known principles of law and not otherwise. In **R.V. WILKES (1770) 4 Burr 2527** it has been held as follows:

"*Discretion when applied to a Court of justice, means sound discretion guided by law, it must be governed by rule, not by humor, it must not be arbitrary, rogue and fanciful, but legal and regular.*

The Court may now consider the last contention raised on behalf of the respondent to the effect that the petitioner being disqualified cannot be permitted to maintain the present writ petition, inasmuch as she was admittedly held to be underage on the relevant date. Reliance in the regard has been placed the judgment reported in 2004 SC 230; **Sushil Kumar vs. Rakesh Kumar.**

23. I am of the considered opinion that the right of the petitioner to maintain the present writ petition against an order of the election tribunal, which has held her to be underage on the relevant date and therefore disqualified, cannot be questioned . She has a right to maintain the petition. However, in view of the fact that this Court has found that the finding recorded by the Election Tribunal qua the petitioner being disqualified is based on true and correct appreciation of the evidence, the first part of the relief has been refused. However, so far as the challenge to the later part of the order of the Election Tribunal, declaring respondent no. 1 as elected candidate is concerned, this Court finds that such a challenge can always be maintained by the petitioner, inasmuch as if the elections are now declared after setting aside the earlier election, she heaving reached the requisite minimum age will be entitled to contest the fresh elections.

24. In the facts and circumstances noticed above, I am of the considered opinion that the writ petition as filed by the petitioner, is clearly maintainable. She is entitled to question the later part of the order of the Election Tribunal also, which declared the respondent no. 1 as elected. No relief is being granted to the petitioner qua her earlier election nor the order, which is proposed to be passed by this Court, will in any manner result in restoration of any illegal order.

25. In the totality of the circumstances, this Court finds that the second issue raised on behalf of the petitioner qua respondent no. 2 being declared elected has to be answered in her favour and it is held that election Tribunal is not justified in declaring

respondent no. 1 as elected only on the ground that she has secured the second highest votes.

26. Accordingly, the writ petition is allowed in part. The order of the Election Tribunal to the extent it declares the respondent no. 1 as elected is quashed. The authorities are directed to hold fresh elections for the office of the President, Nagar Panchayat in question at the earliest.
