APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.01.2009

BEFORE
THE HON'BLE V.M. SAHAI, J.
THE HON'BLE RAN VIJAI SINGH, J.

First Appeal From Order No.397 of 2008

National Insurance Company Ltd.
...Appellant
Versus
Smt. Jairani and others ...Respondents

Counsel for the Appellant:
Sri Vinay Khare
Sri R.K. Porwal

Counsel for the Respondents:
Sri Ramesh Singh
Sri Rajiv Gupta
Sri Rakesh Dubey

Motor Vehicle Act 170-application to contest-the case by insurer-neither allowed nor rejected-claim petition decided on merit-held-illegal-nullity-can be challenged in appeal-general mandamus issued for strict compliance of the order.

Held: Para 13 and 16

Therefore, we are of the considered opinion that section 170 being mandatory and award made by the tribunal without deciding the application would be a nullity and review application or any other application with whatsoever nomenclature, except for correction of clerical or arithmetical errors, would not be maintainable before the tribunal.

The question still is whether where no order is passed by the tribunal on an application under section 170, can it be challenged in an appeal under section 173(1) of the Act? It is true that an appeal under Section 173(1) of the Act lies only against the award of the Motor Accident Claims Tribunal but if the award is a nullity it can be challenged in an appeal under Section 173(1) of the Act and the appeal would be maintainable. The decision of the Apex Court in Bhanu Kumar Jain vs. Archana Kumar and another AIR 2005 SC 626 would apply and the insurance company would not be estopped from raising the question that the award of the tribunal is a nullity in an appeal under section 173 of the Act.

Case law discussed:
AIR 2002 SC 456, AIR 2006 SC 577, AIR 2006 SC 1255, AIR 2003 SC 1561, AIR 2003 SC 3127, 2007 (3) T.A.C. 456 (All), 2000 (2) T.A.C. 613 (SC), 2003 (1) T.A.C. 492 (SC), 1992 Supp (1) SCC 191, AIR 2005 SC 626

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

1. This appeal directed against the award of the Motor Accident Claims Tribunal (in brief the tribunal) gives rise to an interesting question of law, whether on an application filed under section 170 of the Motor Vehicles Act, 1988 (in brief the Act) by the insurance company, if no order is passed by the tribunal, what would be its effect on the award; whether the insurance company can be permitted to challenge the award of the tribunal in an appeal under section 173(1) if the application under section 170 of the Act is not decided?

2. The brief facts are that on 26.11.1999 Dr. Shiv Kumar was riding on his Motor Cycle No.UP-78/G-6967. On the pillion of the motor cycle Shiv Shankar Verma was sitting. The Truck No.UP-78/T-1896 dashed the motor cycle. Due to injuries received in the accident Dr. Shiv Kumar died on the spot. The pillion rider Shiv Shankar Verma was also seriously injured and he died at Regency Hospital. The truck was owned

by Smt. Satyawati and Shailendra Kumar. It was insured by the appellant.

3. The legal representatives of Dr.Shiv Kumar filed M.A.C.P. No.142 of 2000 claiming Rs.25,20,000/- as compensation under section 140 and 166 of the Act and Rs.30,000/- damages for motor cycle. The owners and insurer both filed written statements. The appellant insurance company filed an application under section 170 of the Act which remained pending and no order was passed on it by the tribunal.

4. The tribunal recorded a finding that the accident took place due to rash and negligent driving of the driver of the truck. The motor cyclist Dr. Shiv Kumar had a valid driving licence. The driving licence of the truck driver Ashok Kumar was valid. The claim petition was not bad for non-joinder of necessary parties. The claim petition was allowed by the tribunal and compensation of Rs.7,37,500/- was awarded to the claimants. The award of the tribunal dated 6.10.2007 has been challenged in this appeal.

5. We have heard Shri Vinay Khare, learned counsel for the appellant and Shri Ramesh Singh, learned counsel for the claimant's respondent nos.1 to 3. Shri Rajiv Gupta and Shri Rakesh Dubey learned counsel for the owner's respondent nos.4 and 5 have also been heard. With the consent of the counsel for the parties we have taken up this appeal for final hearing. The filing of paper book has been dispensed with.

6. The learned counsel for the appellant has urged that the tribunal has not passed any order on the application under section 170 either allowing or rejecting it which is a mandatory requirement of law, therefore, even in absence of availability of any grounds of breach of insurance policy mentioned in section 149(2) of the Act the appellant can challenge the award of the tribunal in an appeal under section 173 of the Act. He urged that if the tribunal does not pass any order on the application under section 170 then in law it would be deemed that the application under section 170 has been allowed. On the other hand the learned counsel for the respondents have urged that since no order had been passed on the application filed under section 170 it would be deemed that the application had been rejected by the tribunal and the appellant could maintain this appeal only on the grounds provided under section 149(2) of the Act.

7. For appreciating the arguments of learned counsel for the parties it is necessary to extract section 170 of the Motor Vehicles Act, 1988 as below,

"Section 170. Impleading insurer in certain cases - Where in the course of any inquiry, the Claims Tribunal is satisfied that-

(a) there is collusion between the person making the claim and the person against whom the claim is made, or

(b) the person against whom the claim is made has failed to contest the claim, it may for reasons to be recorded in writing, direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have, without prejudice to the provisions contained in sub section (2) of Section 149, the right to contest the claim on all or any of the grounds that are

available to the person against whom the claim has been made."

8. The title of the section is innocuous. It provides for impleadment of the insurer in certain cases. But in effect it gives importance to the right of the insurance company to contest the claim. It is only under this provision that the insurer can challenge the quantum of compensation etc., if the conditions mentioned in the section are satisfied. Two contingencies are contemplated. Sub-section (1) provides that if the tribunal during inquiry finds collusion between owner and the claimant, it would direct insurer to be impleaded. Secondly, if the proceedings are not been pursued by the owner the insurer shall be permitted to prosecute the matter and could raise all the pleas which could be raised by the insured. The rationale of the section is that the ultimate liability to pay compensation etc., being of the insurer, it must be permitted to safeguard its interest, not only on the grounds mentioned in section 149(2) but on merits. The importance of the right lies in the bar in law for the insurer to move further if the application of the insurer is rejected. Prima facie the right of the insurer under this section to move an application under section 170 or being impleaded as party does not appear to have much significance. But once the provisions of appeal etc., are examined closely, it results in serious consequences for the insurer, namely, if the application of the insurer is rejected, it does not have any remedy under the Act, either before the tribunal or before the appellate court to challenge it. The result of rejection of the application is that the insurer is precluded from challenging it under the Act any further and the finding on quantum of compensation etc., attains finality. In such circumstances the section has to be construed reasonably to advance the purpose and objective of its enactment. This section has come up for consideration before the Apex Court on number of occasions. It is well settled by the Apex Court that where an application under section 170 of the Act had been allowed by the tribunal, it is open to the insurance company to challenge the award not only on the grounds of breach of the insurance policy mentioned in section 149(2) of the Act, but to contest the claim on merits, namely, quantum of compensation and all or any other grounds which were available to the owner of the vehicle. A three judges Division Bench in **National Insurance Co. Ltd., vs. Nicolletta Rohtagi and others AIR 2002 SC 456** had held as under:-

"...it is open to an insurer to seek permission of the tribunal to contest the claim on the ground available to the insured or to a person against whom a claim has been made. If permission is granted and the insurer is allowed to contest the claim on merits in that case it is open to the insurer to file an appeal against an award on merits, if aggrieved. In any case where an application for permission is erroneously rejected the insurer can challenged only that part of the order while filing appeal on grounds specified in sub-sections (2) of section 149 of 1988 Act. But such application for permission has to be bona fide and filed at the stage when the insured is required to lead his evidence..."

9. The decision in **Nicolletta Rohtagi's case had been followed in National Insurance Co. Ltd., vs.**

Mastan and another AIR 2006 SC 577, Bijoy Kumar Dugar vs. Bidyadhar Dutta and others AIR 2006 SC 1255, Sadhana Lodh vs. National Insurance Co. Ltd. and another AIR 2003 SC 1561 and United India Insurance Co. Ltd. vs. Jyotsnaben Sudhirbhai Patel and others AIR 2003 SC 3127. The Apex Court in Jyotsnaben Sudhirbhai Patel's case has laid emphasis that the tribunal while deciding application under section 170 of the Act must record reasons. From these decisions the scope of section 170 stands clearly explained. The insurance company can file appeal under section 173 (1) on all the grounds which are available to the owner of the vehicle and the grounds mentioned in section 149(2) of the Act if the application under section 170 had been allowed by the tribunal. However, if the application under section 170 had been rejected by the tribunal then the insurance company can maintain the appeal only on the grounds available under section 149 (2) of the Act.

The question is whether on an application filed under section 170 of the Act by the insurance company, if no order is passed by the tribunal, what would be its effect on the award? An application may be allowed or rejected by the tribunal. If the application is allowed there is no difficulty. If the application has been rejected, the rejection order can be challenged as held by a Division Bench of this Court in **Oriental Insurance Co. Ltd. vs. Smt. Manju and others 2007 (3) T.A.C. 456 (All)** under the supervisory jurisdiction of this Court under Article 227 of the Constitution of India but not in an appeal under Section 173(1) of the Act.

10. But if no order is passed on the application under section 170 of the Act then the insurance company cannot challenge it under Article 227 of the Constitution of India. Is there any remedy? The tribunal may sometimes by mistake or oversight fail to pass an order on the application under section 170 of the Act and deliver the award. What would be the effect of such mistake or omission? Whether the omission to pass an order on the application filed under section 170 of the Act would result in deemed allowing or rejecting it? In law an act is deemed to be done if the law provides so or it is ancillary to the main order. For instance if an appeal or writ petition is allowed or dismissed then the applications ancillary to it are deemed to have been allowed or dismissed. If no order is passed by the tribunal allowing the application it cannot be deemed to be allowed for the simple reason that it could be allowed only if the facts, namely, collusion between the owner and claimant were proved or the owner was not contesting. In absence of this finding the application under section 170 cannot be allowed nor can it be deemed to be allowed. In Jyotsnaben Sudhirbhai Patel's case it was categorically held that since the insurance company's right to contest gets widened the recording of reasons and passing of the order was necessary. In other words, it cannot be implied or deemed to be allowed. The principle of deemed allow or reject may apply to formal applications which do not effect the merit of the matter. But the same cannot be said of those applications which stand on their own, namely, an application for substitution of legal heirs, etc. If the Court does not pass an order on a substitution application and a decree is passed in a suit or appeal then the decree

would be a nullity having being passed against a dead person. An application under section 170 of the Act, is not a formal application. It confers a statutory right on the insurance company. It enlarges the scope of contest by the insurance company. That is why the Apex Court has held that recording of reasons is mandatory. If no order is passed and award is made, then it would in our opinion, being in violation of mandatory provisions of law, be rendered invalid and would be nullity.

11. If an award is made without deciding the application under section 170 of the Act it may be bad for omission to deny the right to contest to the insurer which is a vital right. Section 170 of the Act confers a right on the insurance company to file an application if the conditions mentioned in the section are satisfied. It also casts a duty on the tribunal to decide it in accordance with law. If the tribunal has failed to perform its legal duty, the insurance company cannot be deprived of its right to contest on merits. In law, the insurance company cannot apply for review of the award as under the Act power of review had not been conferred on the tribunal. The Uttar Pradesh Motor Vehicle Rules, 1998 (in brief the Rules) applies only some of the provisions of the Code of Civil Procedure 1908 to the summary proceedings before the Motor Accident Claims Tribunal. The provisions of Rule 221 of the Rules 1998 is extracted below,

221. Code of Civil Procedure to apply in certain cases- The following provisions of the First Schedule to the Code of Civil Procedure, 1908, shall, so far as may be, apply to proceedings before the Claims Tribunal, namely, Rules 9 to 13 and 15 to 30 of Order V; Order IX; Rules 3 to 10 of Order XIII; Rules 2 to 21 of Order XVI; Order XVII; and Rules 1 to 3 of Order XXIII."

12. Order XLVII of the Code of Civil Procedure 1908 has not been made applicable to the proceedings before the tribunal. The insurance company is rendered remedy less if the application under section 170 of the Act is not decided. Since review application is not maintainable no other application with whatsoever nomenclature would be maintainable. By rule 221 of the rules only limited provisions of the Code of Civil Procedure, 1908 have been applied to the proceedings before the tribunal. Section 114 or Order 47 of the Code of Civil Procedure had not been made applicable to the proceedings before the tribunal. It is well settled that the right of appeal, revision or review are the creations of statute and no litigant has got an inherent right to prefer appeal, revision or review except if wrangled through fraud or misrepresentation [See **United India Insurance Co. Ltd. vs. Rajendra Singh and others 2000 (2) T.A.C. 613 (SC) and Rajendra Kumar and others vs. Rambhai and others 2003 (1) T.A.C. 492 (SC)].**

13. Therefore, we are of the considered opinion that section 170 being mandatory and award made by the tribunal without deciding the application would be a nullity and review application or any other application with whatsoever nomenclature, except for correction of clerical or arithmetical errors, would not be maintainable before the tribunal.

14. The next question is whether the insurance company can be permitted to

challenge the award of the tribunal in an appeal under section 173(1) if the application under section 170 of the Act was not decided? It is settled that right of appeal is a statutory right. The three Judges Division Benches of the Apex Court in Nicolletta Rohtagi's case and Sadhana Lodh's case has held that the insurance company has a statutory right to file an appeal under section 173 of the Act on limited grounds available under section 149(2). The Hon'ble Court further held that if permission under section 170 is granted by the tribunal, then the insurance company can contest the claim on merits and question the quantum of compensation. The Apex Court in Jyotsnaben Sudhirbhai Patel's case while taking the same view has added that section 170 is an enabling provision in the event of collusion between the claimant and the owner or the tortfeasor, the insurance company can be permitted by the tribunal under section 170 to contest the claim petition. A question arises as to whether where the owner has filed his written statement or has examined some witness or cross-examined some witness, can it be said that he is contesting the claim on merits of the claim. The Apex Court in **Darshan Singh vs. Rampal Singh and another 1992 Supp (1) SCC 191** had the occasion to consider the meaning of the expression "contest'. It held as under:-

"34. The meaning of the word "contest' is, according to Black's Law Dictionary, to make defence to an adverse claim in a court of law; to oppose, resist or dispute; to strive to win or hold; to controvert, litigate, call in question, challenge, to defend. The contest continues right up to the final decision or, in other words the right to contest comes to an end only when a final decision is given one way or the other putting an end to the litigation between the parties with regard to the alienation. It is well settled proposition of law that appeal is a continuation of suit and any change in law, which has taken place between the date of decree and the decision of the appeal, has to be taken into consideration. When a suit filed by the reversioner is dismissed and he files an appeal before the appellate court also he is contesting the alienation. If he does not contest the alienation, then he cannot achieve success. Therefore, when the axe has fallen before the contest was over, let the axe lie where it falls."

15. The contest of the claim on merits by the owner must be such as if he is trying to defeat the claim and is making every possible effort to win the case. The contest should be real and merely filing of written statement or leading some oral and documentary evidence or cross examination of some witnesses, would not be sufficient. The tribunal must come to a definite conclusion that the owner of the vehicle is making every possible effort to succeed in getting the claim petition dismissed. Only then the application of the insurance company under section 170 of the Act can be rejected. In absence of finding by the tribunal about genuineness of contest by the owner supported by cogent reasons the application under section 170 of the Act filed by the insurance company should not be rejected.

16. The question still is whether where no order is passed by the tribunal on an application under section 170, can it be challenged in an appeal under section 173(1) of the Act? It is true that an appeal

under Section 173(1) of the Act lies only against the award of the Motor Accident Claims Tribunal but if the award is a nullity it can be challenged in an appeal under Section 173(1) of the Act and the appeal would be maintainable. The decision of the Apex Court in **Bhanu Kumar Jain vs. Archana Kumar and another AIR 2005 SC 626** would apply and the insurance company would not be estopped from raising the question that the award of the tribunal is a nullity in an appeal under section 173 of the Act.

17. Before parting with the case we may point out that Motor Accident Claims Tribunal's in Uttar Pradesh are not following the mandate of section 170 of the Act and the law declared by the Apex Court Jyotsnaben Sudhirbhai Patel's case. While making the award the applications under section 170 of the Act are not being decided. Due to this approach of the tribunals the insurance companies who file an application under section 170 are seriously prejudiced. Under the Act the only right an insurance company has, is to file an application under section 170 to contest the claim on merits and also on the grounds which are available to the owner of the vehicle, if their application is allowed. The presiding officers of the Motor Accident Claims Tribunals are not performing their judicial duty to decide the application under section 170 first and then pass an award within reasonable time, so that if the insurance company is desirous of challenging the order under section 170 before a higher court, it may have reasonable time. We do not propose to direct any action at this stage. However, we direct the Registrar General to issue a circular forthwith to all Motor Accident Claims Tribunal functioning in State of Uttar Pradesh to pass appropriate orders by giving reasons on the applications filed under section 170 of the Motor Vehicles Act, 1988.

18. For the aforesaid reasons, we allow this appeal. The award of the Motor Accident Claims Tribunal dated 6.10.2007 being nullity is set aside. The claim petition is remanded back to the Motor Accident Claims Tribunal with a direction to decide the application filed by the insurance company under section 170 of the Act in accordance with law and thereafter decide M.A.C.P. No.142 of 2000 a fresh, only after a reasonable time.

Parties shall bear their own costs. Appeal allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.11.2008

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

Special Appeal No. (667) of 2008

State of U.P. and others ...Appellants
Versus
Ram Prakash Batham ...Opposite Party

Counsel for the Appellants:
Sri Pankaj Rai

Counsel for the Opposite Party:
Sri A.B. Singh

Constitution of India, Art. 226-Practic & Procedure-grant of interim order-in the garb of interim order final relief granted-held-illegal-petitioner challenging the retirement noticing challenging the age of supranuation by interim order leaned Single Judge allowed to continue till achieving the age of 60 years-held illegal.

Held: Para 7

In the present case, since one of the final relief sought in the writ petition was that the petitioner is entitled to be allowed to continue till the age of 60 years, the same could not have been granted by way of an interim order. It is always open to the Court to grant all reliefs permissible in law, when the writ petition is finally decided and, therefore, we are of the view that the order impugned, insofar as it has stayed the retirement notice dated 10.7.2007 and further permitted the petitioner to continue till he attains the age of 60 years unless the order or decision dated 20.6.2006 is modified cannot sustain.

Case law discussed:

Special Appeal No. 702 of 2005, Special Appeal No. 74 of 2007

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

1. Heard Sri Pankaj Rai, learned Standing Counsel for the appellant and Sri A.B. Singh, who has appeared on behalf of petitioner-respondent.

2. It is contended that the writ petition was filed by the petitioner-respondent challenging notice dated 10.7.2007, whereby he was informed of his date of retirement on attaining the age of 58 years though he was entitled to continue till he attains the age of 60 years. The learned Standing Counsel contended that his final relief included a mandamus directing the appellants to allow him to continue till he attains the age of 60 and by means of the interim order, the Hon'ble Single Judge has granted the final relief, which is not permissible in law in view of various judgments of this Court as well as the Apex Court.

3. Sri A.B. Singh, learned counsel for the petitioner-respondent, however, contended that in view of the Government Order dated 17.3.1994, all the Rules applicable to corresponding Government servants have been applied to the employees of District Rural Development Agency and, therefore, after the amendment of Fundamental Rule 58, when the age of retirement was extended from 58 years to 60 years, the petitioner-respondents was also entitled to continue till the age of 60 years and for this reason, the Hon'ble Single Judge has granted the relief. However, he could not dispute the legal position that by means of an interim order, a relief which is sought as final relief in the writ petition, ought not to have been granted.

4. It is settled legal proposition that no interim relief at the initial stage which amounts to final relief should be granted. The Hon'ble Apex Court has consistently and persistently held that the Court should not pass an order at the interim stage, which can be granted only at the time of disposal of the petition.

5. Following catena of decisions of the Apex Court on this aspect, a Division Bench of this court in **Special Appeal No. 702 of 2005, District Judge Baghpat Vs. Anurag Kumar** decided on 31st December 2005 has held as under:

"It is settled that a final relief cannot be granted at the interim stage. We are, therefore, of the view that the interim order under appeal is unsustainable.

It is settled legal proposition that no interim relief at the initial stage which amounts to final relief should be granted. The Hon'ble Apex Court has consistently and persistently held that the Court should not pass an order at the interim

stage, which can be granted only at the time of disposal of the petition."

6. This very aspect was considered by this Bench also in **Special Appeal No. 74 of 2007 U.P. Power Corporation Ltd. & others Vs. Suraj Bhan Sharma & others** decided on 30.1.2006 and after quoting with approval the Division Bench Judgement in Anurag Kumar (supra) we further observed as under:

"Now coming to the merit of the order, the part of the order under appeal whereby the direction has been issued to allow the petitioner respondent to continue till attaining the age of 60 years i.e. 31st January 2006, after staying the operation of the order dated 12th December 2005, amounts to granting final relief to the petitioner respondent and thus cannot be sustained. Whether the petitioner respondent is entitled to continue till the age of 60 years or 58 years is a matter subjudice in the aforesaid writ petition and in case the petitioner respondent succeeds he can be compensated by directing the appellant to pay his salary and other benefits as found due in accordance with Rules. However, if the petitioner respondent under interim order is allowed to continue to discharge duties till the age of 60 years and is paid full salary, then after dismissal of the writ petition, the salary already paid cannot be recovered since he may claim that since he has worked therefore salary cannot be asked to be refunded. The appellant cannot be compensated in such case and the petitioner respondent will enjoy the interim order like final order without any risk of losing salary for the extra period even if ultimately he has lost. This court while passing interim order has to adjust the interest and equity in favour of both the parties, since it is a settled law that the act of the court shall prejudice none.

Further before passing an interim order in favour of the petitioner, the relevant considerations like prima facie case, balance of convenience and irreparable loss have to be considered.

In Morgan Stanley Mutual Fund Vs. Kartick Das, (1994) 4 SCC 225, the Apex Court held that ex-parte injunction could be granted only under exceptional circumstances. It has held that the factors which should weigh for grant of injunction are - (a) whether irreparable or serious mischief will ensure to the plaintiff; (b) whether the refusal of ex-parte injunction would involve greater injustice than grant of it would involve; (c) even if ex-parte injunction should be granted, it should only be for limited period of time; and (d) general principles like prima facie case, balance of convenience and irreparable loss would also be considered by the Court.

In view of the discussion made above we are of the view that such an order could not have been passed and the order under appeal to the aforesaid extent cannot be sustained."

7. In the present case, since one of the final relief sought in the writ petition was that the petitioner is entitled to be allowed to continue till the age of 60 years, the same could not have been granted by way of an interim order. It is always open to the Court to grant all reliefs permissible in law, when the writ petition is finally decided and, therefore, we are of the view that the order impugned, insofar as it has stayed the retirement notice dated 10.7.2007 and further permitted the petitioner to continue till he attains the age of 60 years

unless the order or decision dated 20.6.2006 is modified cannot sustain.

8. In the result, this appeal is allowed. The impugned order dated 17.12.2007 of the Hon'ble Single Judge, insofar as it has granted the aforesaid interim order, is hereby set aside and is modified that in case, the writ petition is allowed, the petitioner may be entitled for all consequential benefits, if any, in accordance with law.

9. However, since the petitioner-respondent was seeking two years further continuance in service and one year has already passed, therefore, we are of the view that it is a case, which ought to have been decided expeditiously. We are informed that the pleadings have been exchanged between the parties. Therefore, as also requested by learned counsel for the parties, we direct that the writ petition shall be listed before the appropriate Bench in the first week of December' 2008 and we request the Hon'ble Single Judge to decide the writ petition expeditiously subject to His Lordship's convenience and other business of the Court. Learned counsels for the parties are also granted liberty to make mention before the Hon'ble Court, when the case is listed before the Hon'ble Single Judge.

10. We, however, clarify that we have not expressed any opinion on the merits of the case and the Hon'ble Single Judge shall consider the matter without being prejudiced by observation, if any, made in this judgment.

11. The special appeal is allowed subject to the above observations/directions. No costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2009

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

Criminal Misc. Writ Petition No. 784 of 2009

Kiran Pal and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri P.P. Srivastava
Sri Shishir Prakash

Counsel for the Respondents:
A.G.A.

Constitution of India Art. 226-Quashing of F.I.R.-offence under Section 2/3, Gangsters Act-all the cases referred in F.I.R. relates to minor offences-in one arrest stayed by High Court-hence lodging FIR a colorable exercise of power-held-in Kishan Pal Case-Apex Court restricted interference by High Court as the petitioners can appear before Trail Court-prayer for quashing refused-observation made for disposal of bail application on same day.

Held: Para 4 & 5

In the decision of *Kishan Pal alias K.P. vs. State of U.P. and another, 2006 (54) ACC, 1015,* it has been held that it would not proper in such matters for High Court to interfere in writ jurisdiction as petitioners can always appear before the Court concerned and make submissions there.

In this view of the matter, we find no ground for quashing the criminal proceedings under Sections 2/3 of Gangsters Act.

Case law discussed:
2006 (54) ACC, 1015

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

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

2. The petitioner is seeking quashing of the F.I.R. under sections 2/3 of the Gangsters Act, P.S. Indira Puram, district Ghaziabad, in Case Crime No. 55/2009.

3. It was argued by the learned counsel for the petitioners that the allegations in the F.I.R. were of preparing forged documents and earning a lot of money by sale of plots on the basis of forged documents. It is argued by the learned counsel for the petitioners that five cases were shown against them and in all those cases they have got themselves bailed out and in certain matters of 2008, the arrest of the petitioners was stayed in Criminal Misc. Writ petitions No. 22767 of 2008, 22768 of 2008, 22769 of 2008, 22770 of 2008 and 22771 of 2008.

4. In the decision of *Kishan Pal alias K.P. vs. State of U.P. and another, 2006 (54) ACC, 1015,* it has been held that it would not proper in such matters for High Court to interfere in writ jurisdiction as petitioners can always appear before the Court concerned and make submissions there.

5. In this view of the matter, we find no ground for quashing the criminal proceedings under Sections 2/3 of Gangsters Act.

6. However, it is directed that if the petitioners appear in the aforesaid case within three weeks before the Court concerned, their prayer for bail may be considered expeditiously in accordance with the provisions of Gangsters Act. With the aforesaid observations the writ petition is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.11.2008

BEFORE
THE HON'BLE V.M. SAHAI, J.
THE HON'BLE RAN VIJAY SINGH, J.

Special Appeal No. (859) of 2008

Sarvan Kumar ...Appellant
Versus
State of U.P. and others ...Respondents

Counsel for the Appellant:
Sri Anees Ahmad

Counsel for the Respondents:
Sri J.P. Pandey
Sri Saurabh Pathak
S.C.

Constitution of India- Art.226- Regularisartion of Service and claim of Minimum Pay Scale- Petitioner /Applicant engaged on daily wages basis in Power Corporation- stopped from working- writ seeking direction for regularization as number of post lying vacant -in absence of regularisation Policy or Rules-Court can't grant such relief- so for the claim of minimum basic pay concern-daily wager holds no post- hence no question of Basic Pay in absence of Pay Scale-held-learned Single Judge rightly declined to interfere.

Held: Para 6

There is nothing on the record to indicate that the petitioner is eligible for consideration for the purposes of regularisation, therefore, in view of the

above decisions of the Apex Court order for regularisation of the petitioner's services cannot be passed by this Court in absence of any statutory provisions.

Case law discussed:

1972 1 SCC 409, 2004 (Vol.II) SCC 377, 2004 7SCC 112, 2004 8 SCC 353, 2005 1 Supreme Court cases 639, 1996 (II) SCC 777, 1995 (5) SCC 210, 2003 (1) SCC 250, 2003 (6) SCC 123

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

1. List has been revised. No one appears on behalf of the appellant to press this Special Appeal.

2. This special appeal has been filed against the judgement and order dated 22.9.2008 passed by Hon'ble Single Judge in Civil Misc. Writ Petition No. 49242 of 2008 Sarvan Kumar Vs. State of U.P. The said writ petition was filed with the following prayers:

1. Issue a writ order or direction in the nature of mandamus commanding/directing the respondents to regularise the petitioner on the post of Line Man in the Electricity Department.
2. Issue a writ order or direction in the nature of mandamus commanding/directing the respondents to pay the salary to the petitioner month to month regularly as regular employee with all consequential benefits.
3. Issue a writ order or direction in the nature of mandamus commanding/directing the respondents to decide the representation/application of the petitioner dated 15.7.2008 (contained in Annexure NO.4 to the writ petition).

3. The writ petition was dismissed by learned Single Judge holding that in absence of any rule meant for regularisation no mandamus can be issued directing the respondents to regularise the services of the appellant/petitioner.

4. We have heard Shri Saurabh Pathak, holding brief of Shri J.P. Pandey and learned standing counsel for the respondents and perused the records.

The facts giving rise to this case are that the petitioner was engaged on daily wage basis in the power corporation. It appears after sometime the respondents have stopped taking work from the petitioner. The petitioner has filed the Writ petition before this Court on the ground that number of vacancies are still existing and the petitioner be regularised against the said post. It was also prayed that the petitioner be paid regular salary month to month as admissible to the regular employees.

5. The question of regularisation of daily wage employee and admissibility of the regular pay scale has been considered time and again by the Apex Court in the case of ***R.N. Nanjundappa Vs. T. Thimmiah reported in (1972) 1 SCC 409*** where the Apex Court has observed that:

"If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution illegality cannot be regularised. Ratification or regularization is possible of an act which is within the power and province of the authority but thee has been some non-compliance with procedure or manner which does not go to the root of the appointment Regularisation cannot be said to be a

mode of recruitment. To accede to such a proposition would be no introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules"

This view has been followed in many other cases like*:* ***Sultan Sadik Versus Sanjay Rai Subba reported in 2004 (Vol.!l) SCC 377, A. Aumrani VeJSus Registrar, Cooperative Societies and others reported in (2004) 7SCC 112*** where the Apex Court has observed:

"No regularisation is, thus, permissible in exercise of the statutory power conferred under Article 162 of the Constitution if the appointments have been made in contravention of the statutory rules.....Regularisation, in our considered opinion, is not and cannot be the mode of recruitment by any "State" within the meaning of Article 12 of the Constitution of India or any body or authority governed by a statutory Act or the Rules framed thereunder. It is also now well settled that an appointment made in violation of the mandatory provisions of the statute and in particular, ignoring the minimum educational qualification and other essential qualification would be wholly illegal. Such illegality cannot be cured by taking recourse to regularisation. "

In the case of ***Pankaj Gupta Versus State of J& K reported in 2004 8 SCC 353*** the Apex Court has observed: -

"No persons illegally appointed or appointed without following the procedure prescribed under the law, is entitled to claim that he would be continued in service. In this situation, we see no reason to interfere with the impugned order. The appointees have no right to regularisation in the service because of the erroneous procedure adopted by the authority concerned in appointing such persons"

In the case of ***Mahendra I. Jain and others Versus Indore Development Authority and others reported in (2005) 1 Supreme Court cases 639*** the Apex Court has observed:-

"The question, therefore, which arises for consideration is as to whether they could lay a void claim for regularisation of their services. The answer thereof must be rendered in the negative. Regularisation cannot be claimed as a mater of right. An illegal appointment cannot be legalised by takings recourse to regularisation. What can be regularised is an irregularity and not an illegality. The constitutional scheme which the country has adopted does not contemplate any back-door appointment. A State before offering public service to a persons must comply with the constitutional requirements of Articles 14 and 16 of the Constitution. All actions of the State must conform to the constitutional requirements. A daily wager in the absence of a statutory provision in this behalf would not be entitled to regularisation."

Similar view has been taken by the Constitution Bench decision of the Apex Court reported in ***2006 (Vol./V)SCC I, Secretary, State of Karnataka Versus Uma Devi, State of U.P. Versus Desh Raj reported in 2007 (Vol I) SCC 257 and Municipal Corporation Versus Om Prakash Dube, 2007 (1) SCC373.***

6. There is nothing on the record to indicate that the petitioner is eligible for consideration for the purposes of regularisation, therefore, in view of the above decisions of the Apex Court order for regularisation of the petitioner's services cannot be passed by this Court in absence of any statutory provisions.

7. So far as the availability of the minimum of pay scale to a daily wage worker is concerned it has also been considered in numerous decisions of the Apex Court. In the case of ***State of Haryana Versus Jasmer Singh reported in 1996 (Il) SCC 777*** the Apex Court has observed:-

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

In the case of ***Harbans Lal VelSus State of Himanchal Pradesh reported in 1989 (4) SCC 459*** and in the case of ***Ghaziabad Development Authority Versus Vikram Chaudhary reported in 1995 (5) SCC 210*** the Apex Court has held that daily rated workmen were entitled to be paid minimum of wages admissible to such workmen as prescribed and not minimum in the pay scale as applicable to similar employees in the regular service unless the employer had decided to make such minimum in the pay scale applicable to the daily rated workmen. The same view has been reiterated by the Apex Court in the case of ***State of Orissa Versus BaLram Sahu*** reported in ***2003 (1) SCC 250*** where the Apex Court has held that the daily rated employees are entitled for minimum wages not minimum of the pay scale.

In the case of State of ***Haryana Versus Tilakk Raj reported in 2003 (6) SCC 123*** the Apex Court has held that the pay scale is attached to a definite post and a daily wager holds no post, hence they cannot be compared with the regular and permanent staff for any or all purposes including claim for parity.

8. In view of the above settled position of law, we do not find any error in the order passed by the learned Single Judge. The special Appeal fails and is hereby dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.11.2008

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

Special Appeal No. 909 of 2007

Kapil Kumar ...Appellant
Versus
State of U.P. and others ...Respondents

Counsel for the Appellant:
Sri S.N. Pandey
Sri Havaldar Verma

Counsel for the Respondents:
Sri Ravindra Singh
S.C.

Constitution of India-Art.226- Compassionate appointment claimed by dependent of Seasonal worker-No Such Scheme providing compassionate appointment existed either prior or after the death of such seasonal employee-absence of policy or rule-can not be claimed as a matter of right-single judge rightly declined to grant any relief.

Held: Para 12

In the case in hand, it is admitted position that there is no scheme for providing compassionate appointment to the seasonal employee. The question as to whether the claim for compassionate appointment can be considered at par with the regular employee, we do not propose to repeat except to find it appropriate to record our agreement with detailed reasons given by the Hon'ble Single Judge considering the distinction between regular and seasonal employees and various terms and conditions of their services in order to hold that they do not stand at par but constitute two different classes.

Case law discussed:
AIR 1996 SC 580=1995 SCW4500, 2006 (1) ESC 316, 2007(3)SC398, 2006(7)SCC350, 1994(3)SC525, (2006)5 SCC 523, 1996(5)SCC308, (1994)2SCC718.

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

1. Aggrieved by the judgment dated 22.12007 passed by the Hon'ble Single Judge dismissing the appellant's Civil Misc. Writ Petition No. 40099 of 2006, this intra Court appeal under the Rules of the Court has been preferred by the appellant contending that there is no substantial distinction between a regular employee and a seasonal employee and, therefore, once the scheme for compassionate appointment was extended and adopted for regular employee, the same would be deemed applicable to the seasonal employees. It is further contended that being a seasonal employee, the father of the petitioner-appellant had a right to be engaged continuously in the successive seasons, meaning thereby, for all purposes he was a regular employees and, therefore, cannot be denied the benefit of the provisions of compassionate appointment only on the basis that the petitioner-appellant's father was engaged as seasonal employee. Lastly, it is contended that the Sugar company itself a Seasonal Department and, therefore, it can of be said that the seasonal employee, are not at par with the regular employee. For this purpose reliance has been placed on **Aspinwall & Co., Kulshekar, Mangalore versus lalitha Padugay & others, AIR 1996 SC 580 = AIR 1995 SCW 4500.** Placing reliance on a Division Bench judgment of this Court in the case of **State of U.P. & others Vs. Smt. Malti Devi, 2006 (1) ESC 316**, it is contended that in respect to a government

servant, this Court has taken a view that even a daily wager is entitled to get the benefit of the Rules pertaining to compassionate appointment and, therefore, there is no reason for not extending the same to the seasonal employees of the sugar mills and any view otherwise is violative of Articles 14 and 16 of the Constitution of India.

2. From the record it appears that the appellant's father late Sri Bir Singh was engaged as Seasonal Clerk in Sahkari Ganna Vikas Limited, Daurala, District Meerut sometimes in February, 1997 and died while working in the same capacity on 1.6.2005 leaving behind his widow and other children including the appellant. The appellant said to have filed applications on 13.7.2005 and 22nd December, 2005 before the Secretary, Ganna Vikas Limited, Daurala, District Meerut and the District Cane Officer, Meerut requesting them to grant compassionate appointment to him. The aforesaid authorities found that there is no provision for giving compassionate appointment to the legal heirs of Seasonal Employee, hence could not accept the request of the appellant. The petitioner appellant further made a representation to the Cane Commissioner, Meerut in this regard which was also rejected vide order dated 27th March, 2006 whereupon the appellant preferred Civil Misc. Writ Petition No. 40099 of 2006 challenging the order dated 27th March, 2006 of the Cane Commissioner, Meerut as also the order dated 26th May, 2000, copies whereof are enclosed as Annexures-1 and 6 to the writ petition. He also sought a writ of mandamus commanding the respondents to provide appointment on compassionate basis commensurating to his qualification. The Hon'ble Single Judge, having considered the submissions at length has dismissed the writ petition vide judgment dated 22.1.2007 which is impugned in this intra Court appeal.

3. Learned counsel for the appellant vehemently contended that the denial of beneficiary scheme of compassionate appointment to the legal heirs of the seasonal employee is patently arbitrary, particularly, when such a scheme is available to the legal heirs of regular employees and in support of the aforesaid submission placed reliance on the aforesaid decisions, namely, **Aspinwall (supra) and State of U.P. & others Vs. Smt. Matti Devi (supra).**

4. However, we do not find any reason to take a different view what has been taken by the Hon'ble Single Judge.

5. The learned counsel for the appellant could not dispute this fact that either on the date of death of his father or even thereafter no such provision or scheme was/is in existence which provides for appointment on compassionate basis to the legal heirs of seasonal employee in a Co-operative Sugar Development Society. Suffice it to mention at this stage that compassionate appointment is not a matter of right unless it is provided in the statute or in a scheme, having force of law or binding upon the employer or the employee of the concerned department. The appointment in harness is not a regular source of recruitment. It can be given only if it is provided in the statute, scheme or otherwise. In normal course, there are two sources of recruitment generally provided, one is direct and second is by promotion of the employees working in the establishment itself. In respect to the

direct recruitment a procedure consistent with Article 16 of the Constitution of India is to be followed, i.e. advertisement of the vacancies to public at large to ensure their right of consideration for employment of those persons, who are eligible for consideration for such employment. The Apex Court has observed, time and again, that the appointment on compassionate ground is an exception carved out to the general rule that recruitment to public services is to be made in a transparent and accountable manner providing opportunity to all eligible persons to compete and participate in the selection process. The dependants of the employees died in harness do not have any special or additional claim to public services other than the one conferred, if any, by the employer. (See. **State Bank of India & another Vs. Somvir Singh, JT 2007 (3) SC398).**

6. The whole object of granting compassionate appointment is to enable the family to tied over the sudden financial crisis. The object is not to give a member of such family a post much less a post held by the deceased. Deprecating the large scale appointments on compassionate basis ignoring the normal process of recruitment, in **Union of India & others Vs. M.T. Latheesh, 2006(7) SCC 350**, the Apex Court said that indiscriminate grant of employment on compassionate basis would shut the door for employment to the ever-growing population of unemployed youth. Since the appointment on compassionate basis is an exception to the general rule of recruitment, it has to be followed strictly and cannot be expanded by process of interpretation or by other means. The general judicial approach in such a matter is not in favour of widening the scope of compassionate appointment. The object is to provide appointments in accordance with the general rule of recruitment consistent with Article 16(1) of the Constitution, except strictly of such cases which fall within the four corner of the scheme meant for compassionate appointment.

7. **In Umesh Kumar Nagpal Vs. State of Haryana, JT 1994 (3) SC 525** the Apex Court held "*As a rule, appointments in public services should be made strictly on the basis of open invitation of applications and merit. No other mode of appointment nor any other consideration is permissible. Neither the Governments nor the public authorities are at liberty to follow any other procedure or relax the qualifications laid down by the rules for the post. However, to this general rule which is to be followed strictly in every case, there are some exceptions carved out in the interest of justice and to meet certain contingencies. One such exception is in favour of the dependents of an employee dying in harness and leaving his family in penury and without any means of livelihood. In such cases, out of pure humanitarian consideration taking into consideration the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made in the rules to provide gainful employment to one of the dependents of the deceased who may be eligible for such employment.*"

8. **In State Bank of India & another Vs. Somvir Singh (supra)** the Apex Court also observed that the compassionate appointment can be

considered only in accordance with the scheme framed by the employer and no discretion as such is left with any of the authorities to make compassionate appointment de hors the scheme. The Apex Court therein held "*in our considered opinion the claim for compassionate appointment and the right, if any, is traceable only to the scheme, executive instructions, rules etc. framed by the employer in the matter of providing employment on compassionate grounds, There is no right of whatsoever nature to claim compassionate appointment on any ground other than the one. if any, conferred by the employer by way of scheme or instructions as he case may be.*"

9. Earlier also similar view was taken **In Indian Durgs & Pharmaceuticals Ltd. Vs. Devki Devi &others, (2006) 5 SCC 523**. Referring to **State of Haryana Vs. Rani Devi, 1996(5) SCC 308** the Apex Court observed in para-11 of the judgment in I**ndian Durgs& Pharmaceuticals Ltd. Vs. Devki Devi &others (supra)** that the appointment on compassionate ground can not be claimed as a matter of right. Dying In harness scheme cannot be made applicable to all types of posts irrespective of the nature of service rendered by the deceased employee.

10. **In State of Haryana Vs. Rani Devi (supra)** the Apex Court held that a scheme regarding appointment on compassionate ground if extended to all types of causal or ad hoc employees including those who worked as apprentices cannot be justified on constitutional grounds. Such kind of claim though cannot be upheld on the touchstone of Article 14 and 16 of the Constitution of India but has been upheld only on the consideration of providing measure of sustenance to the family of the deceased employee due to sudden demise of the sole bread earner to save the family from starvation and penury.

11. **In LlC of India Vs. Asha Ramchandra Ambekar, (1994) 2SCC 718** the Apex Court held that if the regulations framed by LlC do not contemplate compassionate appointment, it is not permissible for the Court or the Tribunal to confer benediction impelled by sympathetic considerations.

12. In the case in hand, it is admitted position that there is no scheme for providing compassionate appointment to the seasonal employee. The question as to whether the claim for passionate appointment can be considered at par with the regular employee, we do not propose to repeat except to find it appropriate to record our agreement with detailed reasons given by the Hon'ble Single Judge considering the distinction between regular and seasonal employees and various terms and conditions of their services in order to hold that they do not stand at par, but constitute two different classes.

13. The judgement cited by the learned counsel for the appellant do not apply at all to the basic issue raised in this matter and, therefore, do not help him in any manner. In **Aspinwall (supra)** the dispute was with respect to computation of gratuity of seasonal workers under the Payment of Gratuity Act and there is nothing which may help the appellant in respect to the issues raised before this Court in this special appeal. Similarly **Smt. Malti Devi (supra)** also has no

application to the issue involved in this case.

14. In view of the aforesaid discussions, we do not find any error in the judgment of the Hon'ble Single Judge impugned in this appeal and, in our view, the writ petition has rightly been dismissed by his Lordship holding that the petitioner-appellant was not entitled for any relief.

15. The special appeal lacks merit and it is accordingly dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.11.2008

BEFORE
THE HON'BLE V.M. SAHAI, J.
THE HON'BLE RAN VIJAI SINGH, J.

Special Appeal No. 1092 of 2007

Regional Manager, U.P. State Road Transport Corporation, Agra ...Appellant
Versus
Compotar ...Respondents

Counsel for the Appellant:
Sri Samir Sharma

Counsel for the Respondents:
Sri B.P. Verma

Road Transport Corporation Act 1950, Section-4Motor Vehicle Act 1988-Section 173 readwith Motor Vehicle Rules 1988-Rule 204(1)-readwith Code of Civil Procedure Order 1 Rule 3-Appeal against motor accident claim Tribunal award-by Regional Manager of the Corporation-held the owner of vehicle is Corporation and not the Regional Manager-appeal not maintainable.

Held: Para 14

From reading of Rule 3 of Order 1 CPC with Rule 204 and 207 of the Rules it is clear that the owner of the vehicle and insurer of the vehicle, are necessary parties to a claim petition. The Regional Manager, U.P. State Road Transport Corporation, Agra is not owner of the Bus involved in the accident. The owner of the Bus is the U.P. State Road Transport Corporation, therefore, the appeal ought to have been filed by the U.P. State Road Transport Corporation through its Managing Director and the appeal filed by the Regional Manager who is simply an officer of the corporation is not maintainable.

Case law discussed:
1977 SC 1701, (2003) 3 SCC 472

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

1. This appeal under section 173 of Motor Vehicles Act, 1988 (in brief the Act 1988) has been filed by Regional Manager, U.P. State Road Transport Corporation, Agra challenging the award of the Motor Accident Claims Tribunal, Mathura dated 16.01.2007.

2. The brief facts are that an accident took place on 24.12.2000 at 5.30 P.M. with Bus No. UP-80/E-9852 which hit Moped on which the claimant and his friend were traveling. Due to injuries suffered in the accident the right hand of the claimant was amputated and the claimant filed the claim petition under section 166 of the Act claiming Rs.15,000/- as compensation along with 12% interest for the permanent disability suffered by him. The claim petition was contested by the applicant. The Motor Accident Claims Tribunal recorded a finding that the accident took place due to rash and negligent driving of the driver of the Bus. It further held that insurer of Moped was not necessary party. After considering the facts and circumstances of

the case the tribunal assessed the loss of the income and awarded Rs.8,11,351/- compensation along with 6% interest.

3. When the appeal was filed it was admitted on 19.04.2007 and a conditional stay order was passed by a division bench of this court. Feeling aggrieved by the order dated 19.04.2007 the appellant filed Special Leave Petition (Civil) No. 25771 of 2007 which was renumbered as Civil Appeal No. 1868 of 2008 which has been disposed by the Apex Court by the following order:-

"..... Tribunal awarded compensation of Rs.8,11,351/- along with interest at the rate of 6 % from the date of filling of the claim petition till the date of actual payment. While admitting the appeal the High Court, according to the appellant should not have directed deposit of the entire amount and should not have permitted the claimant to be paid the amount of deposit.

Notice has not yet been issued in this matter but we feel that the impugned order of the High Court is practically unreasoned and no reason has been indicated as to why the High Court felt that the amount was to be paid to the claimant on deposit. Therefore, we direct the High Court to reconsider the matter and ass fresh order.

We have passed this order to avoid unnecessary delay and inconvenience to the parties."

4. We have heard Shri Samir Sharma for the appellant and Shri B.P. Verma learned counsel appearing for respondents. The learned counsel for the claimant/respondent Shri B.P. Verma has raised a preliminary objection that the appeal filed by the Regional Manager, U.P. State Road Transport Corporation, Agra is not maintainable. The matter has been listed today for orders. With the consent of counsel for the parties, we have taken up this appeal for final hearing of the preliminary objection raised by learned counsel for the respondent.,

5. Learned counsel for the claimant/respondent has urged that Regional Manager, U.P. State Road Transport Corporation, Agra had no authority to file an appeal and the appeal could only be filed by U.P. State Road Transport Corporation. On the other hand Shri Samir Sharma learned counsel for the appellant has urged that since Regional Manager, U.P. State Road Transport Corporation, Agra was implemented as party to the claim petition, therefore, the appeal filed by the appellant is maintainable. He has further urged that before the Apex Court, U.P. State Road Transport Corporation through the Regional Manager, Shajadi Mandi, Gwalior Road, Agra had filed a Special Leave Petition (Civil) challenging the order dated 19.04.2007, therefore, the appeal filed by appellant has to be treated to have been filed by U.P. State Road Transport Corporation and is maintainable. He urged that he may be permitted to amend the array of appellant.

6. The first question is whether an appeal filed before this court by the Regional Manager, U.P. State Road Transport Corporation is maintainable. It is not disputed that the U.P. State Road Transport Corporation had been established under section 3 of the Road Transport Corporation Act, 1950 (in brief the Act, 1950).

Section 4 of the Act, 1950 is extracted below:-

"**4. Incorporation-** Every Corporation shall be a body corporate by the name notified under section 3 having perpetual succession and a common seal, and shall by the said name sue and he sued.

7. From a plain reading of section 4 it is clear that the U.P. State Road Transport Corporation can sue and he sued in its own name through its Managing Director in view of section 13 read with section 15 of the act, 1950. The Act, 1950 does not permit other officers to represent the U.P. State Road Transport Corporation.

8. Similar question have arisen with regard to Union of India as to whether Union of India can sue and be sued in the name of their officers. The Apex Court in Ranjeet Mal vs. General Manager, Northern Railway, New Delhi and another AIR 1977 SC 1701 has held in paragraphs no. 6 and 7 as below:-

*"**6.** It cannot be disputed that the appellant was a servant of the Union. It is equally indisputable that any order of removal is removal from service of the Union. The appellant challenged that order. Any order which can be passed by any Court would have to be enforced against the Union. The General Manager or any other Authority acting in the Railway Administration is as much a servant of the Union as the appellant was in the present case.*

***7**. The Union of India represents the Railway Administration. The Union carried administration through different servants. These servants all represents the Union in regard to activities whether in the matter of appointment or in the matter of removal. It cannot be denied that any order which will be passed on an application under Article 226 which will have the effect of setting aside the removal will fasten liability on the Union of India, and not on any servant of the Union. Therefore, from all points of view, the Union of India was rightly held by the High Court to be a necessary party. The petitioner was rightly rejected by the High Court."*

9. Almost similar question with regard to State came up before the Apex Court in Chief Conservator of Forests, Government of A.P. vs. Collector and others (2003) SCC 472. It was held that in view of Article 300 of the Constitution of India, the Government of India and also the Government of State may sue or sued by the name of Union of India or by the name of State respectively. The Apex Court had also considered the provisions of section 79 of the Code of Civil Procedure and Rule 1 of Order 27 C.P.C. and held as Under:-

*"**10**. A plain reading of Section 79 shows that in a suit by or against the Government, the authority to be names as plaintiff or defendant, as the case may be, in the case of the Central Government, the Union of India and in the case of the State Government, the State, which is suing or is being sued.*

***11**. Rule 1 or Order 27, as mentioned above, deals with suit by or against the Government or by officers in their official capacity. Rule 1 of order 27 CPC says that in any suit by or against the Government, the plaint or the written statement shall be signed by such person as the Government may by general or*

special order appoint in that behalf and shall be verified by any person whom the Government may so appoint."

10. The U.P. State Road Transport Corporation which is body corporate by the name notified under section 3 read with section 4 of the Act, 1950, can sue and be sued in its own name through the Managing Director of the Corporation. The other officers of the corporation, who may be holding various positions in the corporation are not a juristic person and the corporation could not sue or be sued through them. It is true that the officers of the corporation can be sued in their personal capacity. The officers of the corporation can be made parties to the suit, claim petition and writ petition along with U.P. State Road Transport Corporation through its Managing Director as party, then the claim petition etc. would be maintainable as ultimately the liability to pay compensation or compliance of the orders passed by the Courts would be of the corporation and officer cannot be held liable to pay compensation in their persona capacity. Therefore, we are of the considered opinion, that the appeal filed by the Regional Manager, U.P. State Road Transport Corporation, Agra before this court is not maintainable.

11. The next argument of learned counsel for the appellant is that since Regional Manager, U.P. State Road Transport Corporation was impleaded as party to the claim petition the appeal filed by the Regional Manager is maintainable.

12. We have gone carefully through the Act, 1988. It does not provide who would be respondent/opposite parties to the claim petition. Section 169 lays down the procedures and powers of the claim tribunals. It provides that subject to the rules which may be made the procedures to be followed would be summary procedures as is thought fit by the tribunal.

13. Section 169(2) gives power of civil court to the tribunal and provides that the claims tribunal shall be deemed to be a civil court. Therefore, the Order 1 Rule 3 Code of Civil Procedure Act, 1908, would apply and in a claim petition filed under section 166 of the Act 1988, the owner of the vehicle and the insurer of the vehicle, involved in the accident, would be necessary parties. Rule 204(1) of the U.P. Motor Vehicle Rules, 1988 provides that every application for payment of compensation made under section 166 shall as far as possible be made in form SR-48. In form SR-48 under paragraph 17 name and address of the owner of the vehicle and in paragraph 18 name and address of the Insurer of the vehicle has to be mentioned. Under Rule 207 of the Rules the claim tribunal is required to send notice to the owner of the Motor Vehicle involved in the accident and its Insurer, with a copy of the claim application intimating of the date on which it would hear the application. It shall further call upon the parties on that date to produce any evidence, which they may like to adduce.

14. From reading of Rule 3 of Order 1 CPC with Rule 204 and 207 of the Rules it is clear that the owner of the vehicle and Insurer of the vehicle, are necessary parties to a claim petition. The Regional Manager, U.P. State Road Transport Corporation, Agra is not owner of the Bus involved in the accident. The owner of the bus is the U.P. State Road

Transport Corporation, therefore, the appeal ought to have been filed by the U.P. State Road Transport Corporation through its Managing Director and the appeal filed by the Regional Manager who is simply an officer of the Corporation is not maintainable.

15. The last arguments of the learned counsel for the appellant is that before the Apex Court Special Leave Petition was filed by the U.P. State Road Transport Corporation through the Regional Manager, Agra, and it there was any defect in the appeal filed by the appellant before this court it stood Cured before the Apex Court.

16. We have carefully examined this aspect, and we have gone through the array of parties, as mentioned in the order of the Apex Court. It appears to us that the Special Leave Petition (Civil) No. 25771 of 2007 was filed by the appellant before the Apex Court without bringing to the notice of the Court that the appeal under section 173 had been filed before this Court by the Regional Manager, U.P. State Road Transport Corporation and not by the U.P. State Road Transport Corporation. The appellant had not filed any application before the Apex Court seeking permission or leave to file the appeal in the name of U.P. State Road Transport Corporation nor such application has been brought on record by the appellant, because if such a permission would have been granted by the Apex Court then U.P. State Road Transport Corporation through its Managing Director would have been impleaded as appellant no. 2 before the apex court along with Regional Manager as appellant no. 1. This fact does not appear to have been disclosed by the appellant before the Apex Court, therefore, did not stand cured. U.P. State Road Transport Corporation had not sued the claimants in accordance with section 4 of Act, 1950, hence it would not have the effect of amending the array of appellant in the appeal which is pending before this court. The request made by the learned counsel for the appellant seeking permission to amend the array of the appellant has to be rejected as the appellants did not disclose material facts before the apex court.

17. Since we have already held that U.P. State Road Transport Corporation was the owner of the bus but it had not filed any appeal under section 173 of the Motor Vehicle Act, 1988 before this court and the Regional Manager, U.P. State Road Transport Corporation, Agra was not the owner of the Bus and was not juristic person and he could not sue or be sued on behalf of U.P. State Road Transport Corporation in view of section 4 of the Act, 1950, we have no hesitation in holding that the appeal filed by the Regional Manager, U.P. State Road Transport Corporation, Agra before this court is not maintainable.

18. Accordingly, the appeal is dismissed as not maintainable.

19. The amount of Rs.25,000/- deposited by the appellants in this court under section 173 of the Motor Vehicle Act, 1988 shall be returned by the Registry to the appellant through their counsel by means of a bank draft within one month from today.

20. Parties shall bear their own costs. Appeal dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.11.2008

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

Special Appeal No. 1498 of 2008

Meena Srivastava ...Appellant
Versus
State of U.P. and others ...Respondents

Counsel for the Appellant:
Sri Sanjay Kumar Shukla

Counsel for the Respondents:
Sri Ghan Shyam Maurya
Sri V.K. Singh
S.C.

Constitution of India-Art.226-Writ Petition-maintainability- petitioner working as Shiksha Mitra-Challenge the advertisement-dismissal by Single Judge-as Shiksha Mitra not a Government servant held-action of state authorities questioned, being arbitrary and malafide-held writ petition very well maintainable.

Held: Para 7

We are of the view that the writ petition was maintainable. The mere fact that the Shiksha Mitra is paid honorarium by the state Government cannot be said to a ground for dismissing the writ petition as not maintainable when the actions of the State Officers are impugned in the writ petition. Petitioner can maintain a writ petition. We are of the view that the Hon'ble Single Judge has committed an error in dismissing the writ petition as not maintainable.

Case law discussed:
1990 SC 423, 1984 SC 1621

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

1. Heard Sri Sanjay Kumar Shukla, learned counsel for the appellant, Sri Shyam Maurya, learned counsel for respondent no. 5, Sri V.K. Singh, learned counsel for respondent no. 4 and learned Standing Counsel for respondent nos. 1 to 3.

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

3. This special appeal has been filed against the judgement and order passed by the Hon'ble single Judge dated 13th October 2008, whereby the writ petition filed by the appellant has been dismissed as not maintainable.

4. The Hon'ble Single Judge has observed that the appointment of Shiksha Mitra is contractual in nature and they are paid honorarium. They are not government servant in any case.

5. Learned counsel for the appellant submits that the Shiksha Mitra is appointed in accordance with the Government Orders issued from time to time and the amount of honorarium is paid by the State Government through Gram Shiksha Samiti. The appointment and selection are regulated by the Government Order and implemented by the State Authorities including the Gram Shiksha Samiti, District Basic Education Officer and District Magistrate.

6. In the writ petition the appellant has challenged the advertisement issued by the District Basic Shiksha Adhikari,

Gorakhpur. The appellant submitted before the Writ Court that he has already been selected as Shikshta Mitra and there was no occasion for issuing fresh advertisement inviting application for the post of Shikshta Mitra. The Challenge made in the writ petition is to the advertisement issued by the State-authority.

7. We are of the view that the writ petition was maintainable. The mere fact that the Shiksha Mitra is paid honorarium by the State Government cannot be said to be a ground for dismissing the writ petition as not maintainable when the actions of the state officers are impugned in the writ petition. Petitioner can maintain a writ petition. We are of the view that the Hon'ble Single Judge has committed an error in dismissing the writ petition as not maintainable.

8. Reference may be had to the judgment of the Hon'ble Supreme Court of India in the case of **Francis John vs. Director of Education & Ors.,** reported in AIR 1990 SC 423, wherein a writ petition was filed against the order passed by the Director of Education, the High Court dismissed the writ petition upholding the objections that the writ petition was not maintainable, since it was against a private school. The Hon'ble Supreme Court relying upon an earlier judgement in the case of **Tika Ram vs. Mundikota Shikshan Prasarak Mandal,** reported in AIR 1984 SC 1621 held that the writ petition was fully maintainable. Relevant paragraphs i.e. paragraphs nos. 7 and 9 of the judgement of the Hon'ble Supreme Court of India in the case of **Francis John (Supra)** are being quoted herein below:

"7. The appellant contended in the writ petition that the proceedings of the Disciplinary Committee are in contravention of the principal of natural justice and fair play and the approval given by the Director of Education was unsustainable. The appellant relied upon the decision of this Court in Tika Ram vs. Mundikota Shikshan Prasarak Mandal, (1985) 1 SCR 339:(AIR 1984 SC 1621) and contended that he was not asking for any relief against the private body but he was challenging the order of the Director of Education who had granted approval to his removal on the basis of a report submitted to him by the Dispute Settlement Committee and hence the Director of Education, who was a public authority and whose orders had been questioned before the Court was amenable to the jurisdiction of the High Court under Art. 226 of the Constitution. The High Court distinguished the above case by observing in Para 11 of its judgment thus(1988)(1)Lab LN 762 at p. 765):

".....Mr. Kakodkar had placed reliance on Tika Ram vs. Mundikota Shikshan Prasarak Mandal (AIR 1984 SC 1621) in support of his proposition that a writ petition would be maintainable in the case of a Headmaster of a private school who is dismissed by the management of a private school. In Tika Ram's case, the petitioner was not seeking any relief against the management on the basis of the clauses in the School's Code. But the Court observed (Para 3)

'In the instant case the appellant is seeking a relief not against a private body but against an officer of Government who is always amenable to the jurisdiction of the Court.'

Obviously, no decision of an Officer of Government is being challenged in the

present case and hence, Tika Ram's case is easily distinguishable."

9. In the instant case also we are concerned with the Grant-in-Aid Code. The decision which was challenged before the High Court was the order of the Director of Education Dated July 12, 1984 which is fully extracted above. It is further seen that a copy of the above order has been communicated by the Director of Education not merely to the management of the School but also to the Zonal Officer, North Educational Zone, Mapsa and the Grant-in-Aid Section of the Directorate of Education. If the impugned orders of the Director of Education and of the Dispute Settlement Committee to which he had referred the case are set aside then the order of termination of service of the appellant, which is pursuant to them would also have to fall. Any private school which receives aid from the Government under the Grant-in-aid-Code, which is promulgated not merely for the benefit of the Management but also for the benefit of the employees in the School for whose salary and allowances the Government was contributing from the public funds under the Grant-in-aid Code cannot escape from the consequences flowing from the breach of the Code and particularly where the Director of Education who is an instrumentality of the State is participating in the decision making process. Under these circumstances we find that the High Court was wrong in upholding that the orders of the Director of Education and of the Dispute Settlement Committee were not amenable to the jurisdiction of the High Court under Article 226 of the Constitution since the matter squarely falls within the principles laid down by this Court in Tika Ram's case (AIR 1984 SC 1621) (supra)"

9. In the facts of the present case writ petition has been filed against an action of a Government Officer, who is public authority. The writ petition under Article 226 of the Constitution of India is maintainable against a public authority. The public authorities, who are State-authorities and instrumentalities are not to act arbitrarily, irrationally or unreasonably. Any action of public authority can always be impugned in the writ petition and it cannot be said that the writ petition is not maintainable in such case.

10. In view of the aforesaid, we are of the view that the writ petition is maintainable and could not have been dismissed by the Hon'ble Single Judge on the ground that appointment of Shiksha Mitra is contractual in nature and they are paid honorarium. The judgment and order of the Hon'ble Single Judge dated 13th October, 2008 is hereby set aside. The writ petition is restored to its original number. Let the writ petition be placed before the Hon'ble Single Judge afresh for consideration in accordance with law in the next cause list.

11. This special appeal is allowed subject to the observation made above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.01.2009

BEFORE
THE HON'BLE V.M. SAHAI, J.
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No.1545 of 2009

Smt. Amrawati Devi ...Petitioner
Versus
Purvanchal Vidyut Vitran Nigam Ltd. and another ...Respondents

Counsel for the Petitioner:
Sri B.C. Rai

Counsel for the Respondents:
Sri H.P. Dube

U.P. Electricity Supply Code 2005-5-6 ©(iii)-Testing of defective meters of Electric supply-authorities found the meter of petitioner tempered-having very slow movement-after scale the meter-petitioner was required to be present in laboratory of Nigam for testing-without obtaining the consent of consumer in writing-held-illegal impugned order can not sustain-direction issued for fresh testing after taking consent of consumer by separate agency.

Held: Para 11

We are of the considered opinion that after sealing the meter the Nigam must serve a notice, on which it should be printed in bold capital letters, intimating the consumer or his representative to exercise his option either to get the meter tested by the electrical inspector or at the laboratory of the Nigam or the consumer may exercise his option to get his meter tested from one of the outside agencies approved by the Nigam mentioned in the notice. Once the consumer exercise his option then immediately a date has to be fixed for testing of the meter in the presence of the consumer.

Case law discussed:
AIR 1979 SC 621, (1867) LR 2 HL 43 at p. 57, (1920) 28 CLR 305 (Aus), (1846) 2 CB 706, (1937) AC 473,

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

1. The Purvanchal Vidyut Vitran Nigam Ltd. (in brief the Nigam) replaced the old electricity meter on 14.12.2004 and installed a new Secure Meter No. UPE 62373 at the hotel of the petitioner. Another China Meter No.LT-1089513 was installed outside the premises of the petitioner on 16.12.2007. The hotel of the petitioner was checked on 26.11.2008 and the officers of the Nigam found that the Secure Meter No. UPE 62373 was running slow by 12.61%. It was decided by the officers of the Nigam that the aforesaid meter would be tested at the laboratory of the Nigam. On the same day the Secure Meter No.UPE 62373 was sealed and the petitioner was intimated that the meter would be tested at the laboratory of the Nigam and the petitioner should be present on 4.12.2008. The Secure Meter No.UPE 62373 was taken away and a new meter was installed at the hotel of the petitioner.

2. At the laboratory of the Nigam on 4.12.2008 the seal of the Secure Meter No. UPE 62373 was opened in the presence of the petitioner. The meter and seal, after testing were found to have been tampered. Thereafter, provisional assessment notice dated 31.12.2008 was issued to the petitioner which has been challenged by the petitioner in this writ petition on the ground that the sealed meter should have been sent for testing by an independent agency as provided by Clause 5.6 (c)(iii) of U.P. Electricity

Supply Code 2005 (in brief the Code 2005).

3. We have heard Shri B.C. Rai, learned counsel for the petitioner and Shri H.P. Dube, learned counsel for the respondent. There is no dispute on facts and only interpretation of Clause 5.6 (c)(iii) of the Code 2005 is involved. With the consent of learned counsel for the parties we have taken up this petition for final disposal at the admission stage without calling for a counter affidavit.

4. Shri Rai has urged that the respondents should have informed the petitioner that she had a right to get the sealed meter tested either at the laboratory of the Nigam or at the laboratory of some independent agency. In absence of any information by the officers of the Nigam or knowledge the petitioner cannot be presumed to have waived her right to get the sealed Secure Meter tested at the laboratory of some other independent agency. On the other hand Shri Dube, learned counsel for the respondents has urged that the petitioner did not avail the opportunity when the meter was sealed and she was asked to appear on 4.12.2008, that she wants to get the sealed Secure Meter tested at the laboratory of some other independent agency. The seal of the meter was opened on 4.12.2008 and it was tested in the presence of the petitioner. Clause 5.6 (c)(iii) of Code 2005 provides for only one opportunity and that has not been availed by the petitioner on 26.11.2008 and now it is not open to the petitioner to claim that the Secure Meter No. UPE 62373 be tested by an independent agency.

5. Clause 5.6 (c)(iii) of U.P. Electricity Supply Code 2005 is extracted below,

"5.6 Defective Meters:

(a) The licensee shall have the right to test any meter and related apparatus if there is a reasonable doubt about the accuracy of the meter and the consumer shall provide the licensee necessary assistance in conduct of test. However, the consumer shall be allowed to be present during the testing.

(b) A consumer may request the licensee to test the meter installed on his premises if he doubts its accuracy of meter reading not commensurate with his consumption of electricity, stoppage of meter, damage to seal, by applying to the licensee in prescribed format (Annexure 5.1) along with the requisite testing fee. The licensee shall test the meter.

i. Within 15 days of the receipt of the application, at consumer's premises, or
ii. Within 30 days at Licensee's lab, or independent lab, or
iii. By installing a tested check meter in series with the existing meter within 7 days of filing of application.

(c) In cases of testing of meter at consumer's premises, the testing of meter shall be done for a minimum consumption of 1 KWH. The meter testing team of the licensee shall carry heating load of sufficient capacity to carry out the testing. Optical scanner may be used for counting the pulses/revolutions or meter shall be tested as per the procedure described in IS/IER 1956 or through Aqua Check for LT meters and through RSS for others. The Aqua Check and RSS shall be

calibrated in laboratory of national repute once in a year.

(i) In case the meter is found OK., no further action shall be taken.
(ii) In case the meter is found fast/slow by the licensee, and the consumer agrees to the report, the meter shall be replaced by a new meter within 15 days, and bills of previous three months prior to the month in which the dispute has arisen shall be adjusted in the subsequent bill as per the test results. In case meter is found to be slow, at the request of the consumer, these charges may be recovered in installments not exceeding three.
(iii) If the consumer disputes the results of testing, or testing at consumer's premises is difficult, the defective meter shall be replaced by a new tested meter by the licensee, and, the defective meter after sealing in presence of consumer, shall be tested at licensee's lab/independent lab/electrical inspector, as agreed by the consumer. The option once exercised by consumer shall not be changed. The decision on the basis of reports of the test lab shall be final on the licensee as well as the consumer.

(d) In cases of testing of a meter in the licensee's/independent test laboratory,

(i) Consumer shall be informed of the proposed date of testing at least 7 days in advance so that he may be present at the time of testing, personally or through an authorized representative;
(ii) the signature of the consumer or his authorized representative, if any present, shall be obtained on the Test Result Sheet;
(iii) the results of testing, billing, and in case the consumer disputes the results of testing, shall be same as provided in clause 5.6 (c) above.

Note: (i) The Licensee may submit a proposal, with a list of reputed and approved test labs, along with their test charges to the commission.
(ii) the provisions of IER 1956 shall however be followed until rules are made under sections 53 and 55 of the Act.

(e) In case a check meter is installed, and if after 7-15 days of the period of test, the existing meter is found to be fast or slow beyond the permissible limits, and the test results are not disputed by the consumer, then the same would be removed leaving the check meter in its place for future metering, and bills of previous three months prior to the month in which the dispute has arisen shall be adjusted in the next bill as per the test results. Where the test results are disputed, the procedure as per Clause 5.6 (c) as above, as the case may be, shall be followed."

6. From reading of Clause 5.6 (c)(iii) it is clear that this clause in unequivocal terms declares that the defective meter after sealing in presence of consumer, shall be tested, at licensee's lab/independent lab/electrical Inspector, as agreed by the consumer. Therefore, the agreement by the consumer is essential for testing of the meter either at the laboratory of the Nigam or at the laboratory of some other independent agency. It further provides that option exercised by consumer once cannot be changed. The clause, therefore, empowers

the authorities to seal the meter and get it tested with consumer's agreement. Since the clause operates harshly against the consumer it has to be construed strictly. The consumer has a right to get the meter tested with independent agency. The authorities, therefore, have a corresponding duty to apprise the consumer of the right. Failure to discharge this duty, which flows from sub-clause (c) (iii) by the authorities while exercising their right to sent the meter for testing, renders the entire proceedings for sealing the meter irregular and illegal. Annexure-3 dated 26.11.2008 does not comply with this requirement. The relevant portion is extracted below:-

"1. मीटर ऐक्यू चेक से चेक किया गया मीटर 12.61 धीमा पाया गया। CWh=-12.61%
2. मीटर संख्या यू०पी०ई० को उतार कर सील किया गया। मीटर का परीक्षण 04.12.2008 को मीटर लैब में होगा। उपभोक्ता को सूचित किया जाता है कि दिनांक 04.12.2008 को 12.00 बजे मीटर के परीक्षण हेतु उपस्थित हों।"

7. It only informs the consumer that the meter shall be tested at licensee's laboratory and she should be present on 4.12.2008. In absence of intimation that she has a right to get it tested at independent laboratory, the notice was contrary to law.

8. It has been argued by the respondents that the Code 2005 being the law, the petitioner cannot claim that she was not aware of it. On the other hand the counsel for the petitioner argued that 'ignorance of law is no excuse' does not apply universally. We do not consider it necessary to enter into this wider issue as we have found the notice dated 26.11.2008 Annexure-3 to be contrary to Clause 5.6 (c) (iii).

9. For the same reason the argument of the respondents that once the petitioner did not object, she waived her right to get the defective meter tested by independent laboratory cannot be accepted, unless she knew or had knowledge about the provisions of Clause 5.6 (c)(iii) of Code 2005. In such situation the doctrine of waiver can not pressed into service. The Apex Court in **M/s Moti Lal Padampat Sugar Mills Ltd. Vs. The State of U.P. and others AIR 1979 SC 621** had held in paragraph 6 as below:-

"Secondly, it is difficult to see how, on the facts, the plea of waiver could be said to have been made out by the State Government. Waiver means abandonment of a right and it may be either express or implied form conduct, but its basic requirement is that it must be "an intentional act with knowledge." Per Lord Chelmsford, L.C. in **Earl of Darnley v. London, Chatham and Dover Rly. Co., (1867) LR 2 HL 43 at p. 57.** There can be no waiver unless the person who is said to have waived is fully informed as to his right and with full knowledge of such right, he intentionally abandons it. It is pointed out in **Halsbury's Laws of England** (4th edn.) Volume 16 in paragraph 1472 at page 994 that for a "waiver to be effectual it is essential that the person granting it should be fully informed as to his rights" and Isaacs, J. delivering the judgment of the High Court of Australia in **Craine v. Colonial Mutual Fire Insurance Co. Ltd. (1920) 28 CLR 305 (Aus)** has also emphasized that waiver "must be with knowledge, an essential supported by many authorities."……Moreover, it must be remembered that there is no presumption that every person knows the law. It is often said that everyone is

presumed to know the law, but that is not a correct statement; there is no such maxim known to the law. Over a hundred any thirty years ago, **Maule, J.,** pointed out in **Martindale v. Falkner, (1846) 2 CB 706.** "There is no presumption in this country that every person knows the law: it would be contrary to common sense and reason if it were so." Scrutton, L.J., also once said: "It is impossible to know all the statutory law, and not very possible to know all the common law." But it was Lord Arkin who, as in so many other spheres, put the point in its proper context when he said in **Evans v. Bartlam, (1937) AC 473"**….the fact is that there is not and never has been a presumption that everyone knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application. It is, therefore, not possible to presume, in the absence of any material placed before the Court, that the appellant had full knowledge of its right to exemption so as to warrant an inference that the appellant waived such right by addressing the letter dated June 25, 1970. We accordingly reject the plea of waiver raised on behalf of the State Government."

10. In our opinion, in absence of intimation of Clause 5.6 (c)(iii) of the Code 2005, the petitioner could not be deemed to have waived her right to exercise her option to get her meter tested at independent laboratory. To be fair to the Nigam as well as consumer, a notice is required to be given by the Nigam to the consumer as to whether the consumer wants to get the defective meter tested at the laboratory of the Nigam or by electrical inspector or by an independent agency. The answer of the notice has to be given by the consumer. After the option is exercised by the consumer and he agrees to get the meter tested at the laboratory of the Nigam or electrical inspector, then the Nigam may fix the date for testing the meter. If the consumer exercise his option to get the meter tested from outside agency, the list of the names of the outside agency approved by the Nigam should be intimated to the consumer so that he may choose any one of the outside agency and according to the option of the consumer. The outside agency may test the meter and its finding about testing of meter would be final. It is after following this procedure that the option exercised by consumer cannot be changed. The decision on the basis of option exercised by the consumer, and the report of the test laboratory shall be final and binding on the licensee as well as on the consumer. But the Nigam did not inform the petitioner to exercise her option on 26.11.2008 when the meter of the petitioner was sealed and she was informed to appear on 4.12.2008 for testing of the meter.

11. We are of the considered opinion that after sealing the meter the Nigam must serve a notice, on which it should be printed in bold capital letters, intimating the consumer or his representative to exercise his option either to get the meter tested by the electrical inspector or at the laboratory of the Nigam or the consumer may exercise his option to get his meter tested from one of the outside agencies approved by the Nigam mentioned in the notice. Once the consumer exercise his option then immediately a date has to be fixed for testing of the meter in the presence of the consumer.

12. For the aforesaid reasons the writ petition succeeds and is allowed. The

provisional assessment notice dated 31.12.2008 issued by the respondents Annexure-6 to the writ petition is quashed. We further direct the respondents to send the meter of the petitioner for testing by an independent agency in accordance with clause 5.6 (c)(iii) and thereafter make provisional assessment provided the petitioner deposits an amount of Rs.2,50,000/- with the respondents within a period of fifteen days from today. The respondents are further directed to restore the power supply of the petitioner within 48 hours from the date petitioner deposits the aforesaid amount. The petitioner shall go on paying her regular electricity bills.

13. Parties shall bear their own costs. Petition allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.11.2008

BEFORE
THE HON'BLE V.M. SAHAI, J.
THE HON'BLE RAN VIJAY SINGH, J.

Special Appeal No. 1587 of 2008

Israr Mohammad ...Appellant
Versus
State of U.P and another ...Respondents

Counsel for the Appellant:
Sri Pankaj Kumar Srivastava

Counsel for the Respondents:
S.C.

Constitution of India- Art.226- Cancellation of appointment as Sankul Prabhari-certain lapses on the part of appellant in distribution of Scholarship-without following principle of Natural Justice-held-appointment of Head Master as Sankul Prabhari governed by Government Orders unless such provision contrary to constitution-can not be interfered-even-appointment on deputation-no right accure nor can be termed as reversion.

Held: Para 17 & 22

In view of the aforesaid decisions we are of the view that even if in the appointment letter of the petitioner the period of deputation is not mentioned it will make no difference as the petitioner's appointment as Sankul Prabhari has been made pursuant to the Government Order dated 29.06.2002 where the maximum period of deputation is provided for two years. Leaned Single Judge has rightly observed that the period of deputation cannot be extended beyond the period of two years and has rightly dismissed the writ petition.

We are of the view that the State Government is competent to make policy with regard to the appointment of coordinators and the policy under which the appointments have been made cannot said to be hit any of the provisions of the Constitution or any other statute governing the field.

Case law discussed:
2004 ESC 1911, JT 2000(6)SC 574, 2000(5)SCC 362, JT 1999(7)SC44, 2003(5)ALR 44, 1999(3)UPLBEC 2412, 2005(8)SCC 394, 2007(2)SCC 138,1992(4)SCC 23, 1978 SC 28, 2000(2)AWC1747, 1984 SC1543, 2006 AIR SCW 3601, 1989 SC 1899, 1990 SC 1277, 1965 SC 491, (1890)3 SCC 418

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

1. This special appeal has been filed by the appellant -petitioner against the judgment & order dated 20.01.2008 passed by learned Single Judge in writ petition no. 54217 of 2008 (Israr Mohammad vs. State of U.P. and others) by which the petition filed by the petitioner has been dismissed.

2. The facts giving rise to this appeal are that the petitioner was initially appointed on 19.09.1985 as Assistant Teacher in the Junior Basic School. In the year 1996, he was appointed as Sankul Prabhari while he was working as Assistant Teacher. In the year 2005, the petitioner was promoted on the post of Headmaster. After promotion on the post of Headmaster, he was again appointed as Sankul Prabhari, Karwa Buzurg on 31.08.2005 by the District Basic Education Officer, Etawah. The petitioner's appointment on the post of Sankul Prabhari was cancelled by the District Basic Education Officer, Etawah vide order dated 27.09.2008 on the ground of certain lapses on the part of the appellant with regard to the distribution of scholarship in the Junior Basic School and senior basic school Karwa Buzurg whereas the direction was issued to distribute the scholarship well within time. Another ground for cancellation of the appointment was that in spite of specific instructions for white washing of the school building from cement it was whitewashed by lime.

3. Shri Pankaj Kumar Srivastava, learned counsel for the petitioner has challenged the impugned order dated 20.10.2008 on the following grounds:

(a) Because the impugned order in the writ petition dated 27.09.2008 was passed in breach of principle of natural justice as no opportunity whatsover was given by the District Basic Education Officer, Etawah to the petitioner before cancelling his appointment as Sankul Prabhari, therefore, learned Single Judge has erred in dismissing the writ petition.
(b) Because the tenure of the appointment was not mentioned in the appointment letter, therefore, learned Single Judge has wrongly noticed that the terms of appointment of two years has expired and on this ground refused to interfere with the impugned order dated 27.09.2008.
(c) Because the impugned order in the writ petition dated 27.09.2008 amounts to reversion as the salary of Sankul Prabhari is higher than the post of Head Master/Teacher.

4. Learned Standing Counsel appearing for the State Respondent has submitted that at present the selection on the post of Coordinates (Sankul Prabhari) Block Resource Centres Coordinator and Nyaya Panchayat Resource Centres Coordinator (B.R.C.C. And N.P.R.C.C.) are made on deputation for the maximum period of two years pursuant to the Government Order dated 29.06.2002. This Government Order also put restriction that after completion of two years there will be fresh selection on the post and the persons once appointed as a coordinator will not be considered in the fresh selection.

5. Learned Standing Counsel also points out that the Government Order dated 29.06.2002 was challenged before this Court through various petitions and this Court had dismissed the writ petitions on 09.09.2004. The number of leading writ petition happens to be 27778 of 2003 (Shailendra Kumar Misra and others vs. State of U.P. and others).

6. This order was challenged through Special Appeal No. 535 of 2004 which too was dismissed on 11.05.2004.

7. He has also submitted that the petitioner's substantive post is of a teacher/Head master and he was only sent on deputation on the post of Sankul Prabhari, therefore, there is no illegality in repatriating the petitioner on the substantive post of Head Master/Teacher. He has further submitted that since this was a time bound appointment under a scheme, therefore, it will come to an end after the expiry of fixed period of two years. In his submission even if impugned order in the writ petition has been passed without affording an opportunity of hearing, it will make no difference as in any condition petitioner cannot work beyond the period of two years pursuant to the Government Order dated 29.06.2002 as he is bound by the terms and conditions of the aforesaid Government Order.

8. We have heard learned counsel for the petitioner Sri Pankaj Kumar Srivastava and learned Standing Counsel for the respondents.

Following question would arise to decide the present controversy.

(a) Whether the impugned order in the writ petition dated 27.09.2008 can be quashed on the ground of breach of principle of natural justice.
(b) Whether the impugned order passed in the writ petition dated 27.09.2008 amounts to reversion of the petitioner.
(c) Whether the terms of the deputation can be extended by the court.
(d) Whether the petitioner can travel beyond the terms of the Government Order dated 29.06.2002 pursuant there of the coordinators are appointed and are working in the State of U.P.

Point No. (a):-

9. From the perusal of the impugned order dated 27.09.2008 it transpires that the said order has been passed without affording an opportunity of hearing to the petitioner. Now the question would arise whether that order can be interfered with under the facts and circumstances of the present case where the petitioner is holding substantive post of teacher/Head Master and was sent on deputation on the post of coordinator under a scheme run by the State of U.P.

10. For applying the principle of natural justice there can be no straight jacket formula but it's observance depends upon the facts and circumstances of each case. It is settled law that observance of principle of natural justice is not a ritual which should be given in each and every case. If in a particular case even after giving an opportunity of hearing same result is likely to come and order has been passed without giving an opportunity then in that circumstances that kind of order should not be interfered with under Article 226 of the Constitution of India.

11. Learned counsel for the petitioner has not been able to dispute this fact that the appointment of coordinators (Sankul Prabhari) is governed under the Government Order dated 29.06.2002 where the maximum period of deputation is provided for two years, therefore, even if opportunity is given to the petitioner even then he will not be able to improve his case.

12. We are of the view that non observance of principle of natural justice before passing the impugned order dated 27.09.2008 will not vitiate the order and it is not worthwhile to interfere with under Article 226 of the Constitution of India, as even if opportunity if given to the petitioner he will not be able to improve his case in view of the Government Order dated 29.06.2002 which talks about the duration of deputation for the maximum period of two years.

13. Learned counsel for the appellant submits that impugned order dated 27.09.2008 amounts to reversion as now his salary will be reduced. It is noticeable that the Government Order dated 29.06.2002 under which the appointment or coordinator is made talks about the deputation. According to which a teacher eligible for appointment on the post of coordinator is sent on deputation only for a period of two years, therefore, even if the petitioner was getting higher salary on the post of coordinator even then the impugned order passed in the writ petition will not amount reversion as his original post if of a teacher/head master and he has been repatriated on the said post without any stigma. Reversion means reduction in rank than the original post which cannot be the case of the petitioner as his original post is of a teacher/head master. Therefore, we are of the view that the impugned order do not amount Reversion.

14. It is not in dispute that the petitioner has been sent on deputation and now he has been repatriated on his substantive post of headmaster/teacher. It is settled law deputationist has no right and he can be repatriated in the parent department even before the expiry of the period of deputation. This question in the case of coordinators has been considered by a Division Bench of this Court in the case of **Net Ram Gangwar & Ors vs State of U.P. and others** reported in 2004 ESC 1911 where it was observed:

"The appointment letters issued by the District Basic Shiksha Adhikari specifically provided that they were appointed on deputation on a purely temporary arrangements which can come to an end at any time without any prior information. The appointment order made it clear that the deputation is upto the period of the scheme or upto 31.03.2003 whichever is earlier and the post shall be treated to be sanctioned only till that time.

….....

The petitioner were not held out any assurance that they would be engaged as Coordinator/Assistant Coordinator for an indefinite period. The Scheme was treated to be sanctioned upto the year 2000 by the G.O. dated 18.08.1994 which was extended upto 31.03.2003. The appointment order specifically provided that he was appointed on deputation on a purely temporary arrangement which could come to an end at any time without prior intimation. The appointment order made it absolutely clear that the deputation is upto the period of the scheme or upto 31.03.2003 whichever is earlier, and the post shall be treated to be sanctioned only till that time.

.....

The appellants were on deputation and they have been repatriated to their substantive post. As rightly held by the learned Single Judge, the petitioner have no right to continue under the new scheme. They were on deputation, and it

is well settled that a person on deputation has no right to continue on deputation, and he can be repatriated to his parent department at any time vide **Kunal Nanda v. Union of India,** JT 2000(6) SC 574; **Kunal Nanda v. Union of India,** 2000(5) SCC 362; **Rameshwar Prasad v. Managing Director, U.P. Rajkiya Nirman Nigam Ltd. And others,** JT 1999(7) SC 44; **Dr. O.P.Singh vs State of U.P. & Others,** 2003(5)ALR44:**Rameshwar Prasad vs Managing Director, U.P. Rajkiya Nirman Nigam Ltd. And others** 1999(3)UPLBEC 2412."

15. This view has been reaffirmed by the Apex Court in **Union of India and another vs. B.Ramakrishnan and others 2005(8) SCC 394, U.P.Gram Panchayat Adhikari Singh and others vs. Daya Ram Saroj & others 2007 (2) SCC 138** etc.

16. Otherwise also the maximum period of appointment on the post of coordinator is two years, therefore, it will automatically lapse after that period in view of the decision on the Apex Court reported in **1992(4)SCC 23 Director Natural Manufacture Development U.P. v. Pushpa Srivastava.**

17. In view of the aforesaid decisions we are of the view that even if in the appointment letter of the petitioner the period of deputation is not mentioned it will make no difference as the petitioner's appointment as Sankul Prabhari has been made pursuant to the Government Order dated 29.06.2002 where the maximum period of deputation is provided for two years. Leaned Single Judge has rightly observed that the period of deputation cannot be extended beyond the period of two years and has rightly dismissed the writ petition.

18. It is settled law that one cannot travel beyond the terms of the scheme under which he has been appointed. The Apex Court in the case of **I.L. Honnegouda vs. The State of Karnataka and others,** AIR 1978 SC 28 as under:

"In view of our judgment in Appeals Nos. 883 and 898 to 905 of 1975: (Reported in AIR 1977 SC 876) which has just been delivered and the fact that the appellant acquiesced to the 1970 Rules by applying for the post of the Village Accountant, appearing before the Recruitment Committee for interview in 1972 and 1974 and taking a chance of being selected, the present appeal which question the constitutionality of Rules 4 and 5 of the 1970 Rules cannot be allowed. It is accordingly dismissed but without any order as to costs".

19. A Division Bench of this Court in the case of **Chandra Gupta v. State of U.P. and others** 2000 (2) AWC 1747 while dealing with the appointment petty diesel dealer who are appointed pursuant to the Government Orders has observed:

"They have no independent right to get supply of diesel for the purpose of sale. Therefore, they are bound by the terms and conditions of the aforesaid Government Orders. On the facts of the case, the petitioners cannot complain that any right guaranteed to them under Article 19(1)(g) of the Constitution has been violated."

20. Otherwise also the appointment of coordinators is based on policy

decision of the State Government pursuant to the Government Order dated 29.06.2002. Therefore, also it should not be interfered with unless the policy decision taken by the Government is against any statutory provision or is violative of fundamental right of the citizens.

21. The Apex Court in the case of **Maharashra State board of Secondary and Higher Education & Anr, vs Paritosh Bhupesh Kurmarsheth,** etc., AIR 1984 SC 1543 **Ekta Shakti Foundation v. Govt of NCT of Delhi,** 2006 AIR SCW 3601, **Ashif Hamid v. State of J&K** (AIR 1989 SC 1899), **Shri Sitaram Sugar Co. v. Union of India** (AIR 1990 SC 1277), **University of Mysore v. Govinda Rao** reported in AIR 1965 SC 491, **J.P.Kulshrestha v. Chancellor, Allahabad University** reported in (1980) 3 SCC 418 has taken the same view and elaborated the scope of Judicial interference in the policy matter of State Government.

22. We are of the view that the State Government is competent to make policy with regard to the appointment of coordinators and the policy under which the appointments have been made cannot said to be hit any of the provisions of the Constitution or any other statute governing the field.

23. In the result special appeal fails and is hereby dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.11.2008

BEFORE
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition No. 4228 of 2003

Akhtar Husain ...Petitioner
Versus
S.D.M., Saidpur, district Ghazipur and others ...Respondents

Counsel for the Petitioner:
Sri R.P. Singh
Sri Brij Raj Singh

Counsel for the Respondents:
Sri Q.H. Siddiqui
S.C.

Constitution of India, Art. 226-Recovery of excess amount given towards salary-the initial appointment being temporary nature can not be taken into consideration for grant of promotional pay scale-held-initial appointment being compassionate appointment to be treated regular appointment-such period can not be excluded-No question of excess payment-order of recovery of alleged excess amount quashed.

Held: Para 10

The Division Bench decision of this Court is binding. Learned Standing Counsel has not referred any decision to the contrary. Therefore, the appointment of the petitioner made on 22.12.1978 on compassionate ground considered to be temporary appointment though there is recital in the order. It should be considered as permanent appointment and, therefore, recovery of the amount of Rs.18,485/- on the ground that the services of the petitioner were regularized as Lekhpal on 26.10.1981 and not on 22.01.1979 is illegal.

Case law discussed:
1999 (2) ESC, 972 (Alld.), (2001) 2 UPLBEC, 2188, 1999 (2) ESC 972 (DB) and 1991 ALJ 1475

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

1. By means of the present writ petition, petitioner is challenging the order dated 31.12.2002 passed by Administrative Officer, Tehsil Saidpur, district Ghazipur, respondent no. 2, by which a sum of Rs.18,485/- is sought to be recovered.

2. The brief facts giving rise to the present writ petition are that that the father of the petitioner, Mohd. Islam was Lekhpal, who died in harness on 22.12.1978. Thereafter, petitioner applied for appointment on compassionate ground. Petitioner was given appointment on the post of Lekhpal on 22.01.1979 as per the letter issued by Parganadhikari, Saidpur, district Ghazipur, annexure-1 to the writ petition. Petitioner has been given charge of Lekhpal on 27.01.1979. Thereafter, on 20.08.1979 the petitioner was sent to Lekhpal Training Centre, Varanasi. After completing the training of Lekhpal when the petitioner returned back to Tehsil Saidpur, he moved an application to the respondent no. 1 on 01.07.1980 for providing him the charge. When charge was not given, he moved an application the District Magistrate, on which District Magistrate on 22.08.1980 district to provide a berth as per the Government Order and as such Bhulekh Adhikari sent a letter to the respondent no. 1, Sub Divisional Magistrate, Saidpur, district Ghazipur stating therein that the petitioner is appointed under dying in harness in place of his father and since then the petitioner is continuously working. After completing the service for ten years petitioner was given selection grade in the year 1989 alongwith other Lekhpals and thereafter, completing six years after getting the selection grade, petitioner was given promotional scale. Since then the petitioner is continuously working. By the impugned order a sum of Rs.18,486/- has been demanded on the ground that in the service book the petitioner was regularized as Lekhpal on 26.10.1981 and as such after completing ten years satisfactory service, he is entitled for selection grads on 06.10.1991 and thereafter, completing further six years satisfactory service for promotion scale. Since the petitioner was given selection grade on 27.01.1985 and promotion scale on 27.01.1995 as such excess amount paid is sought to be recovered.

3. Heard Sri Brij Raj Singh, learned counsel for the petitioner and learned Standing Counsel, appears on behalf of the respondent nos. 1 to 3.

4. Learned counsel for the petitioner submitted that the appointment of the petitioner was under dying in harness on compassionate ground and though in the letter the appointment is shown as temporary but the appointment under the compassionate ground is to be treated as permanent and regular appointment. He submitted that the training is consequence of his appointment and, therefore, his permanent appointment should be considered w.e.f. 22.09.1979. His subsequent joining in view of the order of the District Magistrate after the training could not be considered as fresh permanent appointment and, therefore, the recovery is wholly unjustified. In support of his contention he relied upon the Division Bench decision of this Court in

the case of **Ravi Kiran Singh Vs. State of U.P. and others, reported in 1999 (2) ESC, 972 (Alld.)** and the decision of learned Single Judge in the case of **Kamlesh Kumar Pandey Vs. State of U.P. and another, reported in (2001) 2 UPLBEC, 2188.**

5. Learned Standing Counsel submitted that the appointment letter dated 22.09.1979 shows that his appointment was temporary and his service is liable to be terminated without any notice. He submitted that after completing the training when he came back, District Magistrate has ordered for his permanent appointment, which was made on 06.10.1981. In the service book also, he is shown as permanent regular employee w.e.f. 06.10.1981 and, therefore, the consequential benefit is to be reckoned from 06.10.1981 and not from 22.09.1979.

6. Having heard learned counsel for the parties, I have given anxious considerations to the rival submissions of the parties and have also gone through the various documents annexed alongwith the writ petition and counter affidavit.

7. I find substance in the argument of learned counsel for the petitioner.

8. In the case of **Ravi Kiran Singh Vs. State of U.P. and others (Supra),** Division Bench of this Court held as follows:

"In our opinion, an appointment under the Dying in harness Rules has to be treated as a permanent appointment otherwise if such appointment is treated to be a temporary appointment then will follow that soon after the appointment the service can be terminated and this will nullify the very purpose of the Dying in Harness Rule because such appointment is intended to provide immediate relief to the family on the sudden death of the bread-earner. We, therefore, hold that the appointment under Dying in Harness Rule is a permanent appointment and not a temporary appointment and hence the provisions of U.P. Temporary Government Servant (Termination of Services) Rules, 1975 will not apply to such appointments."

9. In the case of **Kamlesh Kumar Pandey Vs. State of U.P. and another (Supra)**, learned Single Judge held as follows:

"**The appointment letter itself shows that petitioner offered appointment on the probation of one year. Earlier recital in the appointment letter to the effect that petitioner's services were temporary and liable to be determined without prior notice gets nullified by subsequent recital providing for appointment on probation. Even otherwise, it is now well settled through several decisions of this Court that appointment under Dying in Harness Rules on compassionate ground should not be for short term or on temporary basis. This Court has held time and again that compassionate-appointee is not to be left on the mercy of the authorities offering employment, refer to 1999 (2) ESC 972 (DB) and 1991 ALJ 1475."**

10. The Division Bench decision of this Court is binding. Learned Standing Counsel has not referred any decision to

the contrary. Therefore, the appointment of the petitioner made on 22.12.1978 on compassionate ground considered to be temporary appointment though there is recital in the order. It should be considered as permanent appointment and, therefore, recovery of the amount of Rs.18,485/- on the ground that the services of the petitioner were regularized as Lekhpal on 26.10.1981 and not on 22.01.1979 is illegal.

11. In the result, writ petition is allowed. Order dated 31.12.2002 passed by the respondent no. 2, Administrative Officer, Tehsil Saidpur, district Ghazipur is quashed. Petition allowed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.01.2009

BEFORE
THE HON'BLE R.M. CHAUHAN, J.

Criminal Misc. Application No. 5674 of 2007

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

Counsel for the Appellant:
Sri Gautam,
Sri N.K. Chaudhary

Counsel for the Opposite Party:
Sri R.D. Yadav
Sri S.U. Khan
A.G.A

Criminal Appeal-Bail in pending appeal-appellant already served more than half of punishment awarded-offence under Section 304 B,498 IPC read with Section 4 of D.P.Act 10 year RI and 2000-fine-accused already detained for more than 5 years-No possibility of final decision of appeal in coming future-held-entitled for Bail.

Held: Para 12 & 14

In this case, the accused has already spent more than the half of the sentence awarded by the trial court to him, i.e., he has spent five years and five months in jail out of the ten years sentence awarded by the trial court.

This appeal is pending since long and there is no possibility that it will be taken up for hearing in near future. Keeping in view of the observations of the Hon'ble Apex Court in the above cited cases as well as the submissions of the learned counsel for the appellant, without prejudice to the merit of the appeal, let the accused-appellant convicted and sentenced in the session trial mentioned above, be released on bail during the pendency of the appeal on his executing personal bond with two sureties each in the like amount to the satisfaction of the court concerned.

Case law discussed:
2001 SCC (Crl.)-714, (2006) 1 SCC (Crl.) 757, 2001 SCC (Crl.)-714, (2006) 1 SCC (Crl.) 757.

(Delivered by Hon'ble R.M. Chauhan, J.)

1. The learned A.G.A. Has already filed objection against the prayer of bail.

2. This appeal has been filed by the accused appellant Kisan Chandra, son of Vishwanath, resident of Village Madpawna, P.S. Ghanghata, district Sant Kabir Nagar, against the judgment and order dated 07.07.2007 passed by the learned Additional Session/Special Judge (E.C. Act), Basti in S.T. No. 202 of 2004 (Case Crime No. 366 of 2003) State Vs. Kisan Chandra and others, whereby the learned Sessions Judge held the accused guilty under section 304 B, 498 I.P.C. and section 4 of the D.P. Act, P.S. Ghanghata,

district Sant Kabir Nagar. Consequently, the learned Sessions Judge has convicted and sentenced the accused to undergo RI for ten years and to pay fine of Rs.2000/ under section 304 B I.P.C., to undergo RI for two years and to pay fine of Rs.1000/- under section 498 I.P.C. and to undergo RI of one year and to pay fine of Rs.1000/- under section 4 of the D.P. Act. The sentence further directs that in case the accused fails to pay the amount of fine, he will further undergo additional RI for one month for each of the offence i.e., under sections 304B, 498A and section 4 of the D.P. Act. All the sentence were ordered to run concurrently.

3. The prosecution case in brief is that the complainant Kauleshwar had married his daughter Anita to accused Kisan Chandra, son of Vishwanath, resident of Village Madpawna, P.S. Ghanghata, district Sant Kabir Nagar, sometimes three years back prior to the date of occurrence, when she went to her nuptial home following her marriage, her husband Kisan Chandra, her father in law Vishwanath and her younger father in law (Uncle in law) Jheenak expressed their dissatisfaction over the dowry, her father had presented to accused Kisan Chandra. They started a fresh demand of a golden chain and motorcycle from the deceased in the from of dowry. When their demand was not satisfied, they used to harass and torture her. They lastly caused her death on 31.10.2003 for demand of dowry. The complainant lodged the first information report of the occurrence at P.S. Ghanghata. The investigating Officer after investigation submitted charge sheet against the accused for the aforesaid offences, which later on gave rise to session trial as mentioned above.

4. Heard the learned counsel for the appellant and the learned A.G.A on the prayer of bail during the pendency of appeal.

5. The learned counsel for the appellant contends that all the three accused were tried by the learned Additional Sessions Judge for the aforesaid offences. The prosecution allegation against all the accused are the same. The prosecution led the same evidence against all the accused. The learned Additional Sessions Judge found that the charges levelled against Vishwanath and Jheenak were not proved beyond all reasonable doubt. Consequently, he acquitted them of the charges levelled against them. Since, the evidence led by the prosecution against the accused was the same. Therefore, the charges against the present accused, who is the husband of the deceased could not be held to have been established beyond doubt. The finding of the learned Sessions Judge as against the present accused apparently appears to be not based on proper appreciation of the evidence of record. The present accused like the other co accused was also entitled to the benefit of doubt.

6. The learned counsel further contends that in this case, accused is in jail since 30.10.2003. In this way, he has spent in jail more than the half sentence awarded by the trial court to him. There is no possibility that the appeal will be heard on merit in near future. The accused therefore, should not be detained till the disposal of the appeal. The accused deserves to be released on bail.

7. The learned counsel in support of his contention has placed reliance on the

case of A**khtari Bi (Smt.) Vs. State of Madhya Pradesh, 2001 SCC (Crl.)-714 and Kamal Vs. State of Haryana(2006) 1 SCC (Crl.)757** decided by Hon'ble apex Court.

8. The learned A.G.A. Opposed the bail and argued that the present accused is the husband of the deceased. Undisputedly, the deceased had met to unnatural death in her nuptial home within seven years of her marriage. The allegation of demand of dowry is there, which has been proved by the prosecution witnesses. As per prosecution case, the accused were demanding golden chain and motorcycle from the deceased in the form of dowry. The accused being husband of the deceased was beneficiary to the dowry. He therefore, cannot escape away from the criminal liability of the dowry death of his wife. In view of the nature of offence the accused does not deserve to be released on bail.

9. Considered the submissions of the learned counsel for the appellant and the learned A.G.A. And gone through the case laws cited by the learned counsel for the appellant impugned judgment and the trial court's record. 3.

10. In the case of **Akhtari Bi (Smt.) Vs. State of Madhya Pradesh, 2001 SCC (Crl.)-714,** the Hon'ble Apex Court has held that a criminal appeal filed by a convict should be decided by the High Court within five years of its filing. If the appeal is not disposed of within five years for no fault of the accused-appellant, the accused should be released on bail except in special circumstances. The relevant observation of the Hon'ble Apex Court is being extracted below:

"If an appeal is not disposed of within the aforesaid period of five years, for no fault of the convicts, such convicts may be released on bail on such conditions as may be deemed fit and proper by the court. In computing the period of five years, the delay for any period, which is requisite in preparation of the record and the delay attributable to the convict or his counsel can be deducted."

11. In case of **Kamal Vs. State of Haryana (2006) 1 SCC (Crl.) 757,** the Hon'ble Apex Court ordered to release an accused on bail in appeal filed by him where he had served two ears and four months in jail out of the seven years of imprisonment awarded to him by the trial court.

12. In this case, the accused has already spent more than the half of the sentence awarded by the trial court to him, i.e., he has spent five years and five months in jail out of the ten years sentence awarded by the trial court.

13. Considered the submissions of the learned counsel for the appellant and the learned A.G.A.

14. This appeal is pending since long and there is no possibility that it will be taken up for hearing in near future. Keeping in view of the observations of the Hon'ble Apex Court in the above cited cased as well as the submissions of the learned counsel for the appellant, without prejudice to the merit of the appeal, let the accused-appellant convicted and sentenced in the session trial mentioned above, be released on bail during the pendency of the appeal on his executing personal bond with two sureties each in

the like amount to the satisfaction of the court concerned.

15. The realisation of fine imposed by the trial court against the accused shall remain stayed during pendency of the appeal.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.02.2009

BEFORE
THE HON'BLE SHIV CHARAN, J.
THE HON'BLE V.K VERMA, J.

Criminal Appeal No.5736 of 2007
And
Criminal Appeal No. 5598 of 2007
And
Criminal Appeal No. 5681 of 2007
And
Criminal Appeal No. 5682 of 2007

Jadu Nath & others ...Appellants (In Jail
Versus
State of U.P. ...Opposite Parties

Counsel for the Appellants:
Sri V.P. Srivastava
Sri Sanjai Kumar Tiwari
Sri V.P. Mishra
Sri Pushpendra Singh Yadav
Sri Umesh Chandra Mishra
Sri Sushil Kumar Dubey
Sri A. Kumar Singh
Sri N.K. Singh
Sri J.K. Mishra
Sri Prem Babu Verma

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

Indian Penal Code Section 302- punishment of rigorous Imprisonment only-ignoring mandatory provision for imposition of fine also-held-court left no discretion against the statutory provision-copy of order be send to concerned Trail court for future guidens.

Held: Para 9

It is worthwhile to mention that the learned Trial Court has not imposed fine, whereas it is mandatory to impose fine in addition to the substantive sentence of imprisonment for the offence punishable under Section 302 IPC, as the language used in Section 302 IPC is, "and shall also be liable to fine". We have come across some other cases also, in which, fine was not imposed by the Trial Courts even for those offences where the expression used by the legislature in the Sections for which conviction was recorded was "and shall also be liable to fine". Where such expression is used in any Section, the Court is under obligation to impose fine also in addition to the substantive sentence of imprisonment. No discretion is left to the Court to levy or not to levy fine and imposition of both imprisonment and fine is imperative in such case, as held by Hon'ble Apex Court in the case of Zunjaraao Bhikaji Nagarkar vs. Union of India and others (AIR 1999 SC 2881), in which reference has been made to the case of Rajasthan Pharmaceuticals laboratory, Bangalore V. State of Karnataka (1981) 1 SCC 645).
Case law discussed:
AIR 1999 SC 2881, (1981) 1 SCC 645

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

1. All the above Criminal Appeals have been instituted against the judgment and other dated 29.6.2007 passed by Addl. Sessions Judge Court No.3 Farrukhabad in Sessions Trial No.346 of 1999 State Vs. Sone Lal and others u/ss 147, 148,149,307,302 IPC P.S. Kampil, District Farrukhabad. Prayer of bail has also been made in the above mentioned appeals on behalf of all the appellants, namely, Sone Lal, Jadu Nath, Pappu,

Udaiveer, Rahis, Sibban alias Sheo Nandan, Kalloo alias Lalaua, Sripal, Santosh, Rajendra, Rajveer, Raju, Mahesh, Libbi and Hari Nandan, hence the prayer of bail is disposed of by common order.

2. We have heard Sri V.P. Srivastava Senior Advocate, Sri U.C. Mishra, Sri S.K. Dube, Sri Pushpendra Singh Yadav, Sri Sanjai Kumar Tiwari, Sri A. Kumar and Sri V.P. Mishra learned counsel for the appellants, learned AGA for the State and Sri Prashant Saxena Advocate for the complainant and have also perused the trial court record as well as other relevant document.

3. At the outset learned counsel for the appellants argued that on a careful consideration of the manner in which the incident took place according to the prosecution story, the injuries sustained by the deceased and injured and number of the accused persons involved in the offence only inference can be drawn that the number of the accused persons is exaggerated. It is not possible to participate in the commission of the offence by as many as 15 accused persons and learned counsel for the appellants tried to make a distinction in the role played by each of the accused persons in the commission of offence and in this connection it has been argued that Pappu and Sri Pal appellants were armed with rifles and on perusal of the injuries of the deceased as well as of the injured only inference can be drawn that no injury was sustained by the rifles. On the strength of this argument learned counsel for the appellant tried to emphasize that the involvement of the accused persons is false. It has also been argued regarding Pappu that he was juvenile at the time of the incident. This point was agitated at the time of trial before the trial court at a subsequent stage but prior to judgment. The learned Sessions Judge declined to entertain the submission of the appellant on the ground that this point was not raised at the earliest available opportunity. And in this connection learned counsel for the appellant stated that this point can be raised even at the appellate stage. It has also been argued regarding Sone Lal that he was armed with country made pistol but role of exhortation has been assigned to him. However, later on it has also been alleged that all the accused persons opened fire from their weapons. And it has also been argued that his involvement is also doubtful. Learned counsel also argued that 12 accused persons were armed with gun and country made pistol, one accused was armed with sword and two armed with rifles and it appears highly improbable that there was no dispersal of the pellets of the fire arm. Learned counsel for the appellant tried to persuade us that when as many as 12 persons involved and actively participated in the commission of offence but the fire arm injuries sustained by deceased as well as injured are not in proportion to the weapons used and only inference can be drawn that they have been involved in this case falsely. Learned counsel for the appellants raised certain other points which are not necessary to be mentioned for the purpose of disposing of the matter of bail prayer. This will be considered at the time of final hearing. Further argued that they were on bail during trial and did not misuse the bail.

4. Learned AGA as well as counsel for the complainant opposed the prayer of bail of the appellants and argued that the incident was committed in a very

highhanded manner. All the 15 accused persons armed with lethal weapons and caused injuries by their respective weapons. It cannot be inferred at this stage that some of the accused are not involved in the commission of offence. Motive was available for committing the offence and even a baby of two years of age has not been spared. It has been argued that FIR was prompt. Incident took place on 11.6.99 at about 6.30 A.M. whereas FIR was lodged at the police station the same day at about 7.30 A.M. within an hour of the incident. Hence there was no opportunity available to the complainant to fabricate a false case against the appellants or to make embellishment by exaggerating the story. That as many as six persons sustained injuries by different weapons and there are numerous injuries on the body of the deceased of fire arm as well as sharp edged weapons. That the Sessions Judge was justified in convicting the appellants.

5. We have considered the facts and circumstances of the case as well as submissions made by learned counsel for the appellants, learned AGA for the State and counsel for the complainant. Numerous points have been raised by learned counsel for the appellants but it is not possible to give any finding on the points raised on behalf of the appellants and point raised by the learned counsel for the appellants shall be considered at the time of the final disposal of the appeal. But seeing the gravity of the offence we are of the opinion that all the appellants except Pappu and Sripal are not entitled for bail.

6. However, we are of the opinion that the case of the accused Pappu and SriPal is distinct from rest of the accused persons. They were armed with rifles but no injury of rifle was sustained by the deceased and the injured of Rifle. But injuries were caused by other fire arms and sharp edged weapons and without expressing any opinion on the merit regarding these two appellants we are of the opinion that considering the distinct role of these appellants they are entitled for bail.

7. Let the appellants Pappu and Sri Pal involved in the above sessions Trial be released on bail providedly on their furnishing personal bond with two sureties each in the like amount to the satisfaction of court concerned.

8. Prayer of bail of rest of the appellants named above is declined and rejected.

9. It is worthwhile to mention that the learned Trial Court has not imposed fine, whereas it is mandatory to impose fine in addition to the substantive sentence of imprisonment for the offence punishable under Section 302 IPC, as the language used in Section 302 IPC is, "**and shall also be liable to fine"**. We have come across some other cases also, in which, fine was not imposed by the Trial Courts even for those offences where the expression used by the legislature in the Sections for which conviction was recorded was "**and shall also be liable to fine"**. Where such expression is used in any Section, the Court is under obligation to impose fine also in addition to the substantive sentence of imprisonment. No discretion is left to the Court to levy or not to levy fine and imposition of both imprisonment and fine is imperative in such case, as held by Hon'ble Apex Court in the case of **Zunjaraao Bhikaji**

Nagarkar vs. Union of India and others (AIR 1999 SC 2881), in which reference has been made to the case of **Rajasthan Pharmaceuticals laboratory, Bangalore V. State of Karnataka (1981) 1 SCC 645)**.

10. Let a copy of this order be sent by Registrar General within a week to Sri Rajeev Kumar Tripathi (H.J.S) the then Additional Sessions Judge Court No.3 Farrukhabad for his future guidance.

11. However, hearing of the appeal is expedited. Office is directed to prepare the typed paper book of the record at the earliest and list this appeal for final hearing in the month of May, 2009.

Application rejected.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.01.2009

BEFORE
THE HON'BLE SHIV CHARAN, J.
THE HON'BLE VIJAY KUMAR VERMA, J.

Crl. Appeal No. 6305 of 2008

Sri Narain Trivedi & others ...Appellants
Versus
State of U.P. ...Opposite party

Counsel for the Appellants:
Sri Jagdish Singh Sengar

Counsel for the Opposite Party:
Sri Manish Srivastava
Sri Saurabh Sinha
Sri Vikas Srivastava

Criminal Appeal-Bail pending appeal-conviction u/s 3 (2)(5) SC/ST Act alongwith separate conviction u/s 307/34 IPC-conviction under SC/St Act simply because the injured belongs Schduled Cast-held-not proper against the sprit of section 3(2)(5) of SC/ST Act-entitled for Bail.

Held: Para 9

As would appear from the language used by the Legislature in section 3(2)(5) SC/ST Act, it is clear that this section does not constitute any substantive offence and if any person not being a member of a Scheduled Caste or a Scheduled Tribe commits any offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of Scheduled Caste or Scheduled Tribe or such property belongs to such member, then enhanced punishment of life imprisonment would be awarded in such case, meaning thereby that conviction and sentence under section 3(2)(5) SC/ST Act simplicitor is not permissible and in cases where an offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more is committed against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, then in such case the accused will be convicted and sentenced for the offence under Indian Penal Code read with Section 3(2)(5) SC/ST Act with imprisonment for life and also with fine. Therefore, in the present case, the appellants could not be convicted and sentenced under section 3(2)(5) SC/ST Act simplicitor.

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

Shri Saurabh Sinha and Sri Manish Srivastava, Advocates filed parcha pairvi on behalf of the complainant. It may be placed on record.

2. Objections filed on behalf of the State against the prayer of bail be placed on record.

3. Heard Sri Jagdish Singh Sengar, learned counsel for the appellants, A.G.A. for the State and Sri Vikas Srivastava, Advocate holding brief of Sri Saurabh Sinha, counsel for the complainant on the prayer of bail of appellant Sri Narain Trivedi, Ashok Kumar @ Khanna and Pramod Kumar @ Nanhkau convicted by Sri Dilip Singh, the then Addl. Sessions Judge/Special Judge, S.C./S.T. Act, Fatehpur in Special S.T. No. 9/2003 (State Vs. Sri Narain Trivedi and others) under sections 307/34, 504 I.P.C. and 3(2)(5) Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (in short, "the SC/ST Act") Act, P.S. Husaingan, District Fatehpur and perused the record.

4. Learned counsel for the appellants argued that learned Sessions Judge wrongly convicted and sentenced the appellants separately for the offence under section 307 I.P.C. and section 3(2)(5) SC/ST Act. Learned counsel also argued that the learned Sessions Judge was also not justified in convicting and sentencing the appellants for the offence under section 307/34 I.P.C. He further argued that although injuries are of fire arm, but are on the thigh, a non-vital part of the body. He also argued that the doctor has not alleged the injuries as grievous. Hence, the injuries can be called simple in nature and considering the nature of the injuries, these appellants are entitled for bail. He also argued that no case can be said to be made out under SC/ST Act, as the offence was not committed on the grounds that the victim belongs to Scheduled Caste. It is further contended that the appellants were on bail during trial and they have not misused the bail.

5. A.G.A. as well as counsel for the complainant opposed the prayer for bail. The learned counsel for the complainant argued that the accused persons uttered the word "sweeper (Bhangi)" at the time of committing the offence and hence the Sessions Judge was justified in convicting the appellants under SC/ST Act also.

6. We have considered the facts and circumstances of the case. Without expressing any opinion on merit, it is a fit case of bail.

7. Let the appellants Sri Narain Trivedi, Ashok Kumar @ Khanna and Pramod Kumar @ Nanhkau be released on bail in the above case till disposal of the appeal on their furnishing personal bond and two sureties each in the like amount to the satisfaction of the trial court concerned. Realization of fine to the extent of fifty per cent shall remain stayed till disposal of the appeal. Remaining fifty per cent fine shall be deposited in the trial court prior to the release.

8. It is worthwhile to mention that the learned Sessions Judge has convicted and sentenced the appellants to undergo imprisonment for life and to pay a fine of Rs.3000/- each under section 3(2)(5) SC/ST Act. They have also been convicted separately under section 307/34 I.P.C. and sentenced to undergo imprisonment for seven years and to pay a fine of Rs.2000/- each. This method of convicting and sentencing the appellants is not in accordance with law. Section 3(2)(5) SC/ST Act does not constitute any substantive offence and hence, conviction and sentence of the appellants under section 3(2)(5) SC/ST Act simplicitor is wholly illegal. Section 3(2)(5) SC/ST Act provides as under:-

3(2) Whoever, not being a member of a Scheduled Caste or a Scheduled Tribe.-
(i).....
(ii).....
(iii).....
(iv).....
(v) commits any offence under the Indian Penal Code (45 of 1860) punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine;

9. As would appear from the language used by the Legislature in section 3(2)(5) SC/ST Act, it is clear that this section does not constitute any substantive offence and if any person not being a member of a Scheduled Caste or a Scheduled Tribe commits any offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of Scheduled Caste or Scheduled Tribe or such property belongs to such member, then enhanced punishment of life imprisonment would be awarded in such case, meaning thereby that conviction and sentence under section 3(2)(5) SC/ST Act simplicitor is not permissible and in cases where an offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more is committed against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, then in such case the accused will be convicted and sentenced for the offence under Indian Penal Code read with Section 3(2)(5) SC/ST Act with imprisonment for life and also with fine. Therefore, in the present case, the appellants could not be convicted and sentenced under section 3(2)(5) SC/ST Act simplicitor.

10. Mistake which has been committed by the learned Sessions Judge in present case in convicting and sentencing the appellants under section 3(2)(5) simplicitor has been noticed by us in some other cases also.

The Registrar General is directed to send a copy of this order to Sri Dilip Singh, the then Addl. Sessions Judge/Special Judge, SC/ST Act, Fatehpur for his future guidance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.01.2009

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No.16579 of 2006

Phool Chand Yadav ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Sanjay Kumar Srivastava

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

Constitution of India-Art. 226- Cacellation of fair price shop-based on report submitted by official concern-in reply to show cause notice-alongwith reply the petitioner submitted affidavit of BPC card holder having full satisfaction with the distribution of petitioner-Non consideration of the

contents of affidavit-No use of calling issuing show cause Notice-cancellation order can not sustain.

Held: Para 9

From the perusal of both the orders i.e., the order passed by Sub Divisional Officer Azamgarh cancelling the petitioner's agreement to run the fair price shop and the order of the Commissioner Azamgarh on petitioner's appeal, it transpires that neither the reply of the petitioner to the show cause notice nor the affidavits filed by the B.P.L. card holders before the Sub Divisional Officer Azamgarh containing this fact that they are being supplied scheduled commodities on the fixed price by the Government have been properly considered and the orders have been passed on the basis of the report of task force. In case decision was to be taken only on the basis of the report of task force then there was no occasion to serve with a show cause notice and if the opportunity was offered then it would have been a real opportunity. The opportunity is offered to a person to have his version on the charge and if the version of the person has come then it has to be considered and due weight should be given to the reply and thereafter decision should be taken considering the version of both sides. Mere referring the filing of affidavits without discussing its contents while arriving at the final conclusion is unsustainable in the eye of law. In not doing so decision making process is vitiated. It is well settled that a decision reached without proper-self- direction or in ignorance of relevant material on record, detracts from a decision in the eye of law and is termed as perverse. Such a decision impugning upon civil rights is open to judicial review under Article 226 of the constitution in that the error committed permeates and vitiates the decision-making-process itself.

Case law discussed:

(2007) 11 SCC 35, (2006) 8 SCC 33, (2007) 11 SCC 447, 2008 (3) SCC 203

(Delivered by Hon'ble Ran Vijai Singh, J.)

1. This writ petition has been filed for issuing a writ of certiorari quashing the orders dated 19.1.2005 and 12.1.2006 passed by the Up-Zila Adhikari, Sadar, Azamgarh and Commissioner Azamgah Division Azamgarh (Respondents no. 3 and 2). Vide order dated 19.1.2005, the respondent no. 3 has cancelled the agreement to run the fair price shop of the petitioner and by the subsequent order dated 12.1.2006 the petitioner's appeal against the order of cancellation was dismissed by the respondent no.2.

2. The petitioner happens to be a fair price shop dealer appointed under an agreement executed between the petitioner on the one side and the collector on the other side. The agreement of the petitioner was suspended on 08.11.2004 on the ground that the petitioner has been distributing the scheduled commodities to the below poverty line card holders (in short B.P.L. card holders) on excessive price.

3. The petitioner was served with a show cause notice. A reply to the show cause notice was filed by the petitioner on 29.12.2004 stating therein that the petitioner was forced by the authorities to make a signature on the blank papers with respect to the return of excess amount charged by him from the B.P.L. card holders. He has also stated in his objection that the Supply Inspector Sri Satish Chandra Singh has been demanding Rs.1000/- per month as a bribe and when the petitioner has not paid the same he became angry and his anger emerged in the shape of suspension order.

4. It is also worthwhile to mention that 18 B.P.L. card holders have filed an affidavit before the Sub Divisional Officer Azamgarh stating therein that no excessive price has been charged by the fair price shop dealer and distribution of scheduled commodities have been made on the price fixed by the Government. In his submissions the suspension order was unsustainable in the eye of law.

5. The Sub Divisional Officer Azamgarh thereafter cancelled the agreement of the petitioner on 19.1.2005. From the perusal of the order it transpires that the Sub Divisional Officer did not consider the petitioner's objection to the show cause notice and the affidavits filed by the B.P.L. card holders and has passed the cancellation order on the basis that earlier before task force the petitioner has made signature on the papers containing the proof that he has returned the excess amount charged by him to the B.P.L. card holders.

6. Aggrieved from this order the petitioner has filed an appeal before the Divisional Commissioner, Azamgarh and the Divisional Commissioner too without considering the relevant materials available on record and placing reliance on the report of the task force has dismissed the petitioner's appeal.

7. Sri Sanjay Kumar Srivastava, learned counsel for the petitioner has submitted before the court that neither the Sub Divisional Officer nor the Commissioner has afforded a reasonable opportunity of hearing to the petitioner. He has also submitted that the impugned orders suffers from non consideration of the relevant materials i.e., the petitioner's objection the show cause notice and the affidavit filed by the B.P.L. card holders.

8. I have heard learned counsel for the petitioner, learned Standing Counsel for the State respondents and counsel for Gaon Sabha.

9. From the perusal of both the orders i.e., the order passed by Sub Divisional Officer Azamgarh cancelling the petitioner's agreement to run the fair price shop and the order of the Commissioner Azamgarh on petitioner's appeal, it transpires that neither the reply of the petitioner to the show cause notice nor the affidavits filed by the B.P.L. card holders before the Sub Divisional Officer Azamgarh containing this fact that they are being supplied scheduled commodities on the fixed price by the Government have been properly considered and the orders have been passed on the basis of the report of task force. In case decision was to be taken only on the basis of the report of task force then there was no occasion to serve with a show cause notice and if the opportunity was offered then it would have been a real opportunity. The opportunity is offered to a person to have his version on the charge and if the version of the person has come then it has to be considered and due weight should be given to the reply and thereafter decision should be taken considering the version of both sides. Mere referring the filing of affidavits without discussing its contents while arriving at the final conclusion is unsustainable in the eye of law. In not doing so decision making process is vitiated. It is well settled that a decision reached without proper-self- direction or in ignorance of relevant material on record, detracts from a decision in the eye

of law and is termed as perverse. Such a decision impugning upon civil rights is open to judicial review under Article 226 of the constitution in that the error committed permeates and vitiates the decision-making-process itself.

10. Otherwise also I am of the view that the impugned orders suffers from non consideration of the relevant materials available on the record. The Apex Court in the case of **Garrison Engineer (Utility) v. Narinder Singh (2007) 11 SCC 35** has observed as under:-

Para 6: From a perusal of the orders of the Labour Court and the High Court, it is noticed that the factual position has not been analysed in detail and an abrupt conclusion has been arrived at. Additionally, the legal issue regarding maintainability of the reference was not considered. Right from the beginning of the proceedings before the Labour Court and in the High Court, the appellant had taken specific plea that the Act was not applicable to it and it was not an industry. Unfortunately, as noted above, neither the Labour Court nor the High Court dealt with this issue.

Para 7: Above being the position, we set aside the orders of the Labour Court and the High Court and remit the matter to the Labour Court to decide the objection raised by the appellant about the maintainability of the proceedings under the Act, founded on the claim that it is not an industry. The other factual aspects shall also be considered on evidence being led by the parties.

11. In the case **of Narinder Singh v. State of Haryana (2006)8 SCC 33, Kusheshwar Prasad Singh v. State of Bihar (2007) 11 SCC 447 and Arun Kumar v. State of Bihar 2008 (3) SCC 203** same view has been reiterated by the Apex Court.

12. In view of the settled position of law about the non consideration of the relevant material available on record I am of the opinion that the impugned orders dated19.01.2005 and 12.01.2006 passed by respondents no. 2 and 3 respectively are illegal, arbitrary and deserves to be quashed. The writ petition succeeds and is allowed. The impugned order dated 19.1.2005 and 12.01.2006 are hereby quashed. The matter is remanded back before the Sub Divisional Officer,Azamgarh to pass an appropriate order after considering the relevant materials available on record particularly reply of the petitioner to the show cause notice and the affidavits filed by B.P.L. card holders containing the facts that the scheduled commodities have been distributed to them on the price fixed by the Government. Petition allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.11.2008

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

Civil Misc. Writ Petition No.22139 of 2006

Ram Bahal ...Appellant
Versus
Undion of India & others ...Respondents

Counsel for the Appellant:
Sri R.C.Maurya

Counsel for the Respondents:
Sri Govind Saran
Sri S.S. Srivastava

Railway Establishment Code Vol. Vii-(1987) Edition-Para 1343, 1344- Claim of Salary during suspension period-petitioner member of R.P.F subjected to face criminal proceeding for stolling 25 Kg. Article of Railway property-acquitted on technical ground-suspension period adjusted against medical leave-remaining period treated/ absent from duty-claim of salary rightly rejected considering cloud on his integrity.

Held-Para7

Learned counsel for the petitioned has cited a Division Bench Authority of this Court reported in Dr. Ram Khelawan Singh Vs. State of U.P. [2008(8) ADJ 324 (DB)]. In the said authority it has been held that if an employee was suspended on the basis of pendency of criminal case then after his acquittal he must be reinstated with all service benefits notwithstanding pendency of appeal against acquittal order including arrears of salary during suspension period. However, Supreme Court in AIR 1997 SUPREME COURT 608 "State of U.P. v. Ved Pal Singh" has held that after acquittal in the criminal case it is not necessary to award full salary for the suspension period. Petitioned was a constable in Railway Protection Force. He was responsible for protecting Railway Property but he himself was charged for stealing railway property. On a technical ground he was acquitted however cloud on his integrity remained.

Case law discussed:

AIR 1997 Supreme Court 608

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

1. Heard learned counsel for the parties.

2. Through this writ petition balance of salary for suspension period has been claimed.

3. Petitioner was a constable in Railway Protection Force. He was suspended on 22.10.1994 and thereafter a criminal complaint was filed against him in the court of A.C.J.M (Railway), Gorakhpur under Section-3 of Railway Property(Unlawful Possession) Act which was registered as criminal case no. 6 of 1995. In the criminal case petitioned was acquitted on 10.05.2000. Thereafter, petitioner was reinstated on 20.03.2001. In respect of suspension period an order was passed on 28.03.2003 through which part of the said period was adjusted in leave due and remaining part in leave without pay. Thereafter petitioner retired in the year 2005. After retirement petitioner gave notice on 05.07.2005 and demanded copy of order dated 28.03.2003. On 14.07.2005 petitioner was informed that the copy of the said order had already been sent to him. Thereafter petitioner gave another notice, reply of which was given on 23.03.2006 by Senior Divisional Security Commissioner, Lucknow-respondent no. 3. In the said reply it was mentioned that after notice and considering the reply of the petitioner part of suspension period was converted into leave due. It was further mentioned that as sufficient leave was not available in the account of the petitioner hence the period from 14.06.1996 to 20.03.2001 was converted into leave without pay.

4. Relevant Rules have been annexed as Annexure-C.A. 1 to the counter affidavit i.e. para 1343 and para 1344 of Indian Railway Establishment Code Vol. II (1987 Edition).

5. Order dated 28.03.2003 has not been annexed alongwith the writ petition.

6. By virtue of aforesaid paragraph 1343 and 1344 of Railway Establishment Code Vol. II, if the acquittal is on merit then full amount is to be paid for the suspension period. Copy of judgment of acquittal is Annexure-1 to the writ petition. The allegation against the petitioner was that he had stolen 35 kg of railway property and was apprehended while carrying that property on cycle. The criminal court acquitted the petitioner granting him benefit of doubt. The court held that the items which were recovered from the petitioner and sealed were not the same as the items produced and opened in the court. The court held that there were diversions in the evidence of different witness as to whether 15 items had been seized from the petitioner or 31 items.

7. Learned counsel for the petitioned has cited a Division Bench Authority of this Court reported in Dr. Ram Khelawan Singh Vs. State of U.P. [2008(8) ADJ 324 (DB)]. In the said authority it has been held that if an employee was suspended on the basis of pendency of criminal case then after his acquittal he must be reinstated with all service benefits notwithstanding pendency of appeal against acquittal order including arrears of salary during suspension period. However, Supreme Court in ***AIR 1997 SUPREME COURT 608 "State of U.P. v. Ved Pal Singh"*** has held that after acquittal in the criminal case it is not necessary to award full salary for the suspension period. Petitioned was a constable in Railway Protection Force. He was responsible for protecting Railway Property but he himself was charged for stealing railway property. On a technical ground he was acquitted however cloud on his integrity remained. Accordingly, he cannot claim balance of salary for the suspension period. Para-4 of the aforesaid authority of the Supreme Court is quoted below:

4. *Corruption is the result of deep-seated moral degradation and unsatiated greed for wealth. The office of public service affords an opportunity to the public servant to abuse of the office in that pursuit to accept illegal gratification for the discharge of official duty. Criminal prosecution launched against the public servant many a time may end may be due to technical defects in apathy on the part of the prosecution or approach in consideration of the problem or the witnesses, turn hostile or other diverse reasons but the meet of the matter is that on equitable consideration the Government servant claims re-instatement into service. Equity per settlement may not prevent the Government to take appropriate action under the conduct rules or under Article 311 of the Constitution but many a time they do become fruitless exercise. Resultantly public servant on re-instatement claims consequential benefits including back wages. On many a occasion, public servant avoids the detection of corruption or by skilful management proof of commission of corruption would be wanting. But his conduct gains notoriety in service and among public in that behalf payment of back wages and impetus and a premium on corruption. The society has to pay the price for corrupt officers from public exchequer. Therefore, when the Court directs payment of @ page-SC 610 back wages or re-instatement, the Court/Tribunal is required to consider the backdrop of the circumstances and pragmatically apply the principle of to the*

given set of facts. No abstract principle of universal application could be laid in that behalf. The confidential report of the officer prior to initiation of the prosecution do furnish the evidence of conduct of the public servant. It is the duty of the officer to place his material and of the Government to lace all the necessary record in that behalf before the court/tribunal for consideration and it would be for the court/tribunal to consider and decide the matter. This Court has pointed out in several cases the need to record confidential reports objectively and dispassionately with a reformative purpose to enable the public servant to reform himself to improve quality of the service and efficiency of the administration. Parochial, sectorial or nepotic approach would be deleterious to the efficiency of administration and maintenance of discipline in service. Confidential reports placed on record in this case do disclose such deleterious tendency in writing the confidential reports. One set of officers reported integrity of the appellant and while diametrically in opposite terms the predecessor officer had reported doubtful integrity of the appellant. They do demonstrate the lack of objectivity on the part of some officers in writing the confidential reports. This would be very sad state of affairs impinging upon efficiency of administration. We have confined to the question of payment of back wages with an intention that on reinstatement the appellant would reform himself purging from the proclivity of corrupt practices and prove himself to be a useful public servant to himself, to the family and to the society. In the light of the confidential reports indicating doubtful integrity, we are of the view that it is not expedient to direct payment of back wages, though he was acquitted by the criminal Court may be on technical grounds or on merits, he is not entitled to back wages. As stated earlier the circumstances of the case and conduct of he appellant do furnish justification in denying him the back wages lest it would be a premium on proclivity for corruption.

8. Accordingly, there is no merit in the writ petition hence it is dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.12.2008

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Misc. Application No. 22257 of 2008

Devmani Pandey ...Applicant
Versus
State of U.P. ...Respondents

Counsel for the Applicant:
Sri S.K.Pandey

Counsel for the Respondents:
Sri N.D. Shukla
A.G.A

Code of Criminal Procedure:1973-Section 216-Alteration Of Charges-Trail Court by impugned Order although allowed the application for correction of time of occurrence and nature of inquiry but refused to alter charge for offence under Section 326 IPC-It can be properly decided by Trail Court after having evidence-at this stage interference by High Court not proper.

Held: Para 6

Considering the submission made by learned counsel for the applicant,

learned counsel for the applicant, learned A.G.A. For State of U.P., learned counsel appearing on behalf of accused persons and from the perusal of the record it appears that in the present case the trial court has not framed the charge under section 326 IPC, at this stage, it is not proper to enter in to the controversy regarding framing of the charge either under section 324 IPC or 326 because it may prejudice the mind of trial court Judge, This issue may be properly decided by the trial court when such evidence is adduced because any court may alter or add to any charge at anytime before the judgement is pronounced as provided by section 216 of Cr.P.C. 1973. The trail court is a competent court to appreciate the evidence adduced in the court, at this stage no evidence is adduced, the material collected by the I.O. during investigation is available on the record. Therefore, it is not proper to this court to interfere with the order dated 05.08.2008 by expressing any opinion regarding framing of the charge, the prayer for quashing the impugned order dated 05.08.2008 is refused. But it shall be open to the applicant or the prosecution to move an application before the trial court for altering the charge or adding some other charge at the stage of the trial when such evidence is adduced as provided by the provisions of 216 Cr.P.C.

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

1. Heard Sri S.K. Dubey, learned counsel for the applicant, learned A.G.A. For the State of U.P. and Sri N.D. Shukla, learned counsel for the complainant who have not been impleaded as opposite parties.

2. This application has been filed with a prayer to set aside the order dated 05.08.2008 passed by learned Addl. Session Judge, Court No. 3, Bhadohi in S.T. No. 134 of 1997 and to direct the trial court to frame the charges against the accused persons under section 326 IPC.

3. The facts in brief of this case are that the FIR has been lodged by the applicant in case crime No. 225 of 1990 under section 324,325,504 IPC, P.S. Suriyawan, District Varanasi on 14.11.1990 against the accused Baduk Nath Tiwari, Shiv Kumar Tiwari and Saroj Tiwari with the allegation that the accused persons caused the injuries by using kicks, fists, lathi, Danda and Farsa blows consequently the applicant Devmani Pandey had sustained incised wound which was found grievous in nature caused by sharp object. The case was committed to the court of sessions which is pending in the court of learned Addl. Sessions Judge, Court No. 3, Bhadohi vide S.T. No. 134 of 1997. At the stage of the trial, an application has been moved from the prosecution side to correct the charge framed by the court by correcting the time of the incident as 6.00 P.M. at the place of 8.00 P.M. and to delete wording by which it has been mentioned that injuries were caused by lathi and danda and adding the words by which injuries were caused by Farsa. But the trial court has refused to frame the charge under section 326 IPC. Bring aggrieved from the order dated 05.08.2008 by which the charge has not been framed under section 326 IPC. This application has been filed by the applicant.

4. it is contended by learned counsel for the applicant that according to the medical examination report of the applicant he had sustained only three injuries which were grievous in nature which disclose the commission of the

offence under section 326 IPC even then the charge has been committed a manifest error by not framing the charge under section 326 IPC.

5. In reply of the above contention, it is submitted by learned A.G.A. And learned counsel Sri N.D. Shukla appearing on behalf of the opposite parties that the trial court has not committed any error by not framing the charge under section 326 IPC because at any stage of the trial the charge can be altered, if such evidence is adduced.

6. Considering the submission made by learned counsel for the applicant, learned counsel for the applicant, learned A.G.A. For State of U.P., learned counsel appearing on behalf of accused persons and from the perusal of the record it appears that in the present case the trial court has not framed the charge under section 326 IPC, at this stage, it is not proper to enter in to the controversy regarding framing of the charge either under section 324 IPC or 326 because it may prejudice the mind of trial court Judge, This issue may be properly decided by the trial court when such evidence is adduced because any court may alter or add to any charge at anytime before the judgement is pronounced as provided by section 216 of Cr.P.C. 1973. The trail court is a competent court to appreciate the evidence adduced in the court, at this stage no evidence is adduced the material collected by the I.O. during investigation is available on the record. Therefore, it is not proper to this court to interfere with the order dated 05.08.2008 by expressing any opinion regarding framing of the charge, the prayer for quashing the impugned order dated 05.08.2008 is refused. But it shall be open to the applicant or the prosecution to move an application before the trial court for altering the charge or adding some other charge at the stage of the trial when such evidence is adduced as provided by the provisions of 216 Cr.P.C.

With this observation, this application is finally disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.01.2009

BEFORE
THE HON'BLE ARUN TANDON, J.
THE HON'BLE DILIP GUPTA, J.

Civil Misc. Writ Petition No. 45169 of 2008

Ritesh Tewari and another ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri V.K. Upadhya
Sri Madhav Jain

Counsel for the Respondents:
Sri Atul Mehra
Sri Sanjay Kumar Om
Smt. Archana Srivastava
Sri R.P. Dwivedi
S.C.

Urban Land (Ceiling & Regulation) Act, 1976-Section 5, 10 (1) and 10 (4)-Land purchased from Registered Society who got the land from erstwhile owner-possessing surplus land-became final-sale of such plot already vested with State Government illegal void-Rejection of sanctioning the map-proper petitioner can not be declared owner under writ jurisdiction-no right to maintain his possession-rejection order passed by development Authority held/proper.

Held: Para 12 & 17

Therefore, in both the circumstances we have no hesitation to record that the transfer which have been effected by the recorded tenure holder in favour of Mayur Sahkari Awas Samiti on 20.04.1982 is deemed to be null and void by operation of law either under Section 5 (3) or under Section 10 (4) of the Act of 1976.

We, therefore, uphold the contention raised on behalf of the State Government and hold that no relief can be granted to the writ petitioners in view of the transfer effected in their favour being deemed to be null and void by operation of law.

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

1. This writ petition has been filed by one Ritesh Tewari in his personal capacity as well as in his capacity as proprietor of M/s. Ganpati Builders for the following reliefs:

"(i) to issue a suitable writ, order or direction in the nature of mandamus directing the respondents not to interfere in the actual physical peaceful possession and construction of the petitioners' multi storied building known as 'Ganpati Green Apartment' situated at Khasra Plot No. 258, Village Kakraitha, Tehsil Sadar, District Agra.

(ii) to issue a suitable writ, order or direction in the nature of certiorari and to quash the directions contained in the letters dated 30.06.2008 and 18.07.2008 (Annexures 19 & 20 to the writ petition.

(iii) to issue suitable writ, order or direction constituting an enquiry committee to enquire into the role of and to fix responsibility on the erring respondents for the illegal and undue harassment of the petitioners in respect of the construction in question as also for the publication of the press reports dated 26.08.2008 (Annexure 21 to the writ petition) damaging irredeemably the business, reputation as well as goodwill of the petitioners and to direct such authority found responsible for the said illegal acts to compensate the petitioners for the aforesaid damage caused to their business, reputation and goodwill."

2. The basic averments made in support of the aforesaid reliefs in the writ petition are that the petitioners have purchased 3440.50 sq. yards i.e. 2876.64 sq. metres of land of Khasra Plot No. 258 from M/s. Savy Homes (P) Ltd. through a registered sale deed dated 15.06 2006. The petitioners have thus become sole and exclusive owner of the said area of Khasra Plot No. 258. They applied for sanction of a plan to construct a multi storied building on the land. The Agra Development Authority vide letter dated 10.01.2007 raised a demand of Rs.23,19,956/- towards statutory charges for sanctioning the building plan as well as for compounding the construction already raised. The amount is stated to have been deposited by the petitioners on 10.01.2007. The Agra Development Authority vide letter dated 07.12.2007 made a further demand of Rs.25,10,466/- towards compounding of the unauthorized construction raised by the writ petitioners within seven days along with certain conditions mentioned therein. The petitioners is stated to have deposited the said amount on 10.12.2007. At this stage the petitioners were informed of the orders dated 30.06.2008 and 18.07.2008 (Annexures 19 & 20 to the writ petition), whereby the Sub Divisional Magistrate had informed the Additional District Magistrate (Admn.)/Competent Authority, Urban Land Ceiling, Agra that the

petitioners have raised constructions on a portion of the land which is vested in the State Government after ceiling proceedings were initiated under the Urban Land (Ceiling & Regulation) Act, 1976 (herein after referred to as the **Act of 1976**) against the-recorded tenure holder. Therefore, the map, if any, sanctioned by the Agra Development Authority be directed to be cancelled and appropriate action be taken for restoring the possession to the State Government. On the said report. the ADM (Admn.)/Competent Authority, Urban Land Ceiling Agra has called upon the SDM to take appropriate action in respect of the construction raised by the petitioners.

3. Counsel for the petitioner with reference to the record of the present writ petition, submits that proceedings under the Land Ceiling Act were initiated against the recorded tenure holders under the Act of 1976. On the basis of the statement filed by the recorded tenure holder an order dated 30.03.1981 in Case No. 5274/4787/76-77 (State vs. Ramo) was passed by the Competent Authority declaring amongst other 9006 sq. yard of land of Khasra Plot No. 258 as surplus. The order was not challenged any further by the recorded tenure holders.

4. The entire Khasra Plot No. 258 was transferred by way of sale by the recorded tenure holder in favour of Mayur Sahkari Awas Samiti vide registered sale deed dated 20.04.1982. The purchaser Mayur Sahkari Awas Samiti carved out various plots of different sizes and allotted the same to its members through various sale deeds. Large number of such members of Mayur Sahkari Awas Samiti in turn executed a sale deed of their plots in favour of M/s. Savy Homes (P) Ltd. and M/s. Savy Homes (P) Ltd. in turn have sold the above mentioned land in favour of the writ petitioners vide registered sale deed dated 15.06.2006. Petitioners alleged that the proceedings initiated against the recorded tenure holder under the Act of 1976 were illegal and without jurisdiction. The order dated 30.03.1981 was an ex parte order. In the alternative they have contended that actual physical possession of the surplus land in terms of the order dated 30.03.1981 has not been taken and, therefore, with the issuance of the Urban Land (Ceiling & Regulation) Repeal Act, 1999 (herein after referred to as the **Repeal Act**) the proceedings under the Act of 1976 stand abated and the recorded tenure holder and consequently the subsequent purchasers become lawful owners entitle to retain the possession of the land transferred in their favour. It is, therefore, submitted that the aforesaid two orders be quashed and the other reliefs qua restraining the respondents from interfering in the actual possession and the construction raised thereon be granted.

5. The writ petition is opposed by Smt. Archana Srivastava learned Standing Counsel and it is contended that from the facts as they stand on record, admittedly an order referable to Section 8 (4) of the Act of 1976 was issued against the recorded tenure holder declaring the land in question as surplus on 30.03.1981, the order has been permitted to become final inasmuch as no appeal was filed against the said order as provided under the Act of 1976 nor the order was challenged before any Court of law. Proceedings under Section 10 (1) and 10 (3) were taken in respect of the land in question. Along with the counter affidavit details of

notices dated 13.09.1993,18.09.1984 and 31.03.1993 under Section 10 (3) and 10 (5) of the Act have been referred to. Copy of the notice under Section 10 (5) of 1976 Act has been brought on record which in turn refer to the notification issued under Section 10 (3) bearing no. 943/5274/4287 dated 31.07.1993 (Annexure CA-2 to the present writ petition) as well as dated 16.10.1993. She, therefore, submits that in the facts of the present case it is admitted that the transfer by way of sale has been effected subsequent to the order dated 30.03.1981 and such sale is null and void in view of the provisions contained in Section 5 and Section 10 of the Act of 1976. Petitioners therefore, have no legal right to claim relief on the basis of such void sale deed over the land by means of the present writ petition nor the proceedings initiated under the Act of 1976 against the recorded tenure holder can be permitted to be questioned by them. She vehemently contends that in cases the writ Court entertains the writ petition and the reliefs prayed for are granted, it will amount to recognition of transfer by sale which stand declared null and void by operation of law as per the provision of the Act of 1976 on the date of transfer. She, therefore, submits that this writ Court may not interfere at the behest of the petitioner who claims title on the basis of null and void sale deed over the land in question.

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

7. Following facts emerge from the record: Proceedings were initiated against the recorded tenure holder of Khasra Plot No. 258 under the Act of 1976 which resulted in an order under Section 8 (4) of the Act of 1976 dated 30.03.1981. The recorded tenure holder was declared to be in possession of surplus land which amongst other included 5 bighas and 14 biswas of Plot No. 258. The order further records that the notification under Section 10 (1) is being forwarded in terms of the said Act of 1976 for publication in the official gazette. It is at this stage of the proceedings that the recorded tenure holder is stated to have sold the entire Khasra Plot No. 258 including the land declared surplus in favour of Mayur Sahkari Awas Samiti on 20.04.1982. The writ petition as well as the counter affidavit do not disclose the date of publication of the notification under Section 10 (1). On record of the counter affidavit are notices in writing dated 31.03.1993, 24.09.1993 and 18.02.1994 issued under Section 10 (5) of the Act of 1976, photostat copy of the same are enclosed as Annexure-2 to the counter affidavit filed on behalf of the State respondents through Kumar Chandra Jawaliya, Tehsil Sadar, District Agra. The aforesaid notices make specific mentions of the particulars of the notification published under Section 10 (3) as noticed above. The date of the said notifications is mentioned as 31.07.1993, 06.07.1993 and 13.03.1993 respectively.

8. From the aforesaid it is apparently clear that the transfer of the land which was subject matter of proceedings under Section 8 (4) the Act of 1976 has been effected by the recorded tenure holder subsequent to an order being passed under the Act of 1976. Since specific particulars qua the number and the date on which notification under Section 10 (1) had not been stated yet with reference to the date of that notification under Section 10 (3) and notice under Section 10 (5) noticed

above, it can be safely presumed that notification under Section 10 (1) must have preceded the aforesaid notification under Section 10 (3) and notice under Section 10 (5) inasmuch as all lawful acts are deemed to have been done in accordance with law by the authority concerned unless established otherwise. We can, therefore, safely record that notification under Section 10 (1) had been issued before taking steps in terms of Section 10 (3) and 10 (5) of the Act. It is worth mentioning that it is not the case of the writ petitioners that prior to issuance of notification under Section 10 (3) and notice under Section 10 (5), the required notification under Section 1 0 (1) had not been issued.

9, In view of the aforesaid conclusion, two situations may arise (a) either notification under Section 10 (1) was issued prior to the execution of sale deed by the recorded tenure holder in favour of Mayur Sahkari Awas Samiti i.e. 20.04.1982 (b) or the notification under Section 10 (1) was issued subsequent to the date of sale i.e. 20.04.1982. We are of the considered opinion that in both the circumstances the sale deed effected by the recorded tenure holder in favour of Mayur Sahkari Awas Samiti stands declared null and void in view of the provisions of Section 5 (3) in the first case and in view of the Section 10 (4) of the Act in the second case as would be clear from the following. Section 5 of the Act of 1976 reads as follows:

"**5. Transfer of vacant land. (1)** In any State to which this Act applies in the first instance, where any person who had held vacant land in excess of the ceiling limit at any time during the period commencing on the appointed day and ending with the commencement of this Act. has transferred such land or part thereof by way of sale, mortgage, gift, lease or otherwise, the extent of the land so transferred shall also be taken into account in calculating the extent of vacant land held by such person and the excess vacant land in relation to such person shall, for the purposes of this Chapter, be selected out of the vacant land held by him after such transfer and in case the entire excess vacant land cannot be so selected, the balance, or, where no vacant land is held by him after the transfer, the entire excess vacant land, shall be selected out of the vacant land held by the transferee:

Provided that where such person has transferred his vacant land to more than one person, the balance, or, as the case may be, the entire excess vacant land aforesaid, shall be selected out of the vacant land held by each of the transferees in the same proportion as the area of the vacant land transferred to him bears to be total area of the land transferred to all the transferees.

(2) Where any excess vacant land is selected out of the vacant land transferred under sub-section (1), the transfer of the excess vacant land so selected shall be deemed to be null and void.

(3) In any State to which this Act applies in the first instance and in any State which adopts this Act under Clause (1) of Article 252 of the Constitution, no person holding vacant land in excess of the ceiling limit immediately before the commencement of this Act shall transfer any such land or part thereof by why of sale. mortgage. gift, lease or otherwise until he has furnished a statement under Section 6 and a notification regarding the excess vacant land held by him has been published under sub-section (1) of Section

10; and any such transfer made in contravention of this provision shall be deemed to be null and void."

10. Section 5 (3) provides that any transfer of land or part thereof effected by a recorded tenure holder having land in excess of the ceiling limit subsequent to the commencement of Act of 1976 by way of sale, mortgage or lease until he has furnished a statement under Section 6, and a notification under Section 10 (1) has been published would be deemed to be null and void. Therefore, if in the facts of the present case notification under Section 10 (1) had not been issued qua the excess land held by the recorded tenure holder on the date of transfer i.e. 20.04.1982 then such transfer of land would be deemed to be null and void as per Section 5 (3).

11. We may now consider the alternative case i.e. if the notification under Section 10 (1) had been issued prior to the date of sale i.e. 20.04.1982. Reference be had to Section 10 (4) which reads as follows:

"**10. Acquisition of vacant land in excess of ceiling limit.--….**

(4) During the period commencing on the date of publication of the notification under sub section (1) and ending with the date specified in thee declaration made under sub section (3) -

(i) no person shall transfer by way of sale, mortgage, gift, lease or otherwise any excess vacant land (including any part thereof) specified in the notification aforesaid and any such transfer made in contravention of this provision shall be deemed to be null and void; and

(ii) no person shall alter or cause to be altered the use of such excess vacant land."

A bare reading of the same would establish that the transfer made by the recorded tenure holder during the period starting from to the date of publication of notification under Section 10 (1) and ending with the issuance of declaration under Section 10 (3) is rendered null and void. In the facts of the case declaration under Section 10 (3) has taken place in 1993. Therefore, the date of sale would fall between issuance of Section 10 (1) notification and Section 10 (3) notification rendering the sale null and void in view of Section 10 (4).

12. Therefore, in both the circumstances we have no hesitation to record that the transfer which have been effected by the recorded tenure holder in favour of Mayur Sahkari Awas Samiti on 20.04.1982 is deemed to be null and void by operation of law either under Section 5 (3) or under Section 10 (4) of the Act of 1976.

13. Since Mayur Sahkari Awas Samiti cannot claim any title on the basis of sale deed deemed to be null and void by operation of law, all subsequent purchaser of land of Khasra Plot No. 258 from Mayur Sahkari Awas Samiti cannot derive any title i.e. the members of Mayur Sahkari Awas Samiti, M/s. Savy Homes (P) Ltd. as well as the petitioners on the strength of such sale.

14. We therefore, hold that the learned standing Counsel is legally justified in contending that the Writ Court may not recognise the title of the petitioners in respect of the land, the

transfer by sale whereof is deemed under law to be null and void.

15. At this stage we may also deal with the contention raised on behalf of the writ petitioners that since the Act of 1976 has been repealed by means of Urban Land (Cei1ing & Regulation) Repeal Act, 1999, the petitioners are entitled to the relief prayed as actual possession of the surplus land in question had not been taken under Section 10 (6) by the State Government. Suffice is to refer to Section 6 of the General Clauses Act, 1897 which deals with the consequences which follow from the repeal of a Central Act. For ready reference Section 6 is being quoted herein below:

"Effect of repeal.-- Where this Act, or any [Central Act] or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not-

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

16. From a reading of Section 6 of the General Clauses Act, 1897, it would , be apparently clear that the Repeal Act will not revive anything not in force or existing at the time at which the repeal takes effect nor will it effect the previous operation of the enactment or anything suffered thereunder. It logically follows that if the transfer of the surplus land by the recorded tenure holder is deemed null and void by operation of law as was existing on the date of transfer then the Repeal Act will not infuse life in the said non est deed and nor will it effect the operation of the enactment in so far as it declares the said sale deed to be null and void. Consequently we arrive at a conclusion that the petitioner has no legal title over the land nor he can be permitted to question the order dated 30.03.1981 passed under the Act of 1976 against the recorded tenure holder after more than 25 years of the said order more so when he cannot represent the recorded tenure holder on the basis of a void sale deed.

17. We, therefore, uphold the contention raised on behalf of the State Government and hold that no relief can be granted to the writ petitioners in view of the transfer effected in their favour being deemed to be null and void by operation of law.

18. Writ petition lacks merit and is accordingly dismissed.

19. After the judgement was delivered in the open Court today, an oral request was made on behalf of the writ-petitioner for a certificate being granted in terms of Article 134-A of the Constitution of India that the case involves substantial question of law of general importance and needs to be decided by the Hon'ble Supreme Court.

In our opinion, no substantial question of law of public interest arises in the present case and, therefore, the certificate prayed for is refused.

Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.11.2008

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 54505 of 2008

Anil Sharma ...Petitioner
Versus
Rajan Pathak and others ...Respondents

Counsel for the Petitioner:
Sri Shashi Nandan
Sri D.K. Tripathi

Counsel for the Respondents:
Sri Ashok Kumar Gupta
Sri Rahul Sahai
S.C.

Code of Civil Procedure-section 115 read with order 40-Appointment of receiver-Trail Court directed both parties to suggest the name of two person-revision against that order-held-not maintainable after appointment of receiver-can be challenged in Appeal.
Case law discussed:
AIR 1986 Allahabad 355

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

1. An application was filed by the respondent No.1 for appointment of a receiver under Order 40 of the C.P.C. This application was allowed by an order dated 26.04.2008. The Civil Judge, while allowing the application, directed the parties to submit two names for the purpose of appointing a receiver. The petitioner, being aggrieved by the said order, filed a revision under Section 115 of the C.P.C. The said revision was dismissed as not maintainable. The petitioner, being aggrieved, has filed the present writ petition.

2. Heard Sri Shashi Nandan, the learned Senior Counsel assisted by Sri D.K. Tripathi, the learned counsel for the petitioner and Sri Rahul Sahai, the learned counsel appearing for respondent No.1.

3. The learned senior counsel submitted that at the present moment, a receiver has not been appointed and only an application of the opposite party was allowed. Consequently, till such time, as a receiver was not appointed, no appeal under Section 43 Rule l(s) of the C.P.C. could be filed. In support of his submission, the learned counsel for the petitioner placed reliance upon a division bench decision of this Court in **Ram Babu Verma vs. Om Prakash Verma and others, AIR 1986 Allahabad 355**, wherein it was held that till such time as an order, appointing a particular person, as a receiver was not made by a court, no appeal under Order 43 Rule 1 (s) was ' maintainable. The Court held that against an order recording a finding that it was just and convenient to appoint a receiver and creating an office of a receiver was

not sufficient for filing an appeal under Order 43 Rule l(s) of the C.P.C

4. In the light of the aforesaid judgment, the learned counsel for the petitioner submitted that a revision under Section 115 of the C.P.C was maintainable and was rightly filed by the petitioner, which was arbitrarily rejected by the revisional court, as not maintainable.

5. For convenience, the provision of Section 115 of the C.P.C., as applicable to U.P. is quoted hereunder:-

"**115. Revision.** (1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears-

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit:

[Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where-

(a) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings, or

(b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

(2) The High Court shall not; under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.

Explanation- In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceeding."

6. Upon hearing the learned counsel for the petitioner and in view of the division bench decision of this Court in the case of Ram Babu Verma (supra), admittedly, a receiver has not been appointed as yet by the trial court and names has been invited from the parties. Consequently, no appeal is maintainable under Order 43 Rule l(s) against the order dated 26.4.08.

7. The question is, whether a revision is maintainable under Section 115 of the C.P.C. or not?

8. From a perusal of the impugned order of the trial court, the application No.12 Ga for appointment of a receiver was allowed subject to certain conditions and one of the condition was, that the parties were directed to give the names of two persons for appointment of a receiver.

9. Consequently, this Court is of the opinion that the application No. 12 Ga of

the opposite party, has not been fully allowed as yet and is still subject to certain conditions. Consequently, the issue with regard to appointment of a receiver, has not been finally decided and does not come under the category of the explanation provided under Section 115 of the C.P.C. The impugned order is not a case which has been decided finally nor does the impugned order decides the issue finally. Final order would be passed when a receiver is appointed, against which, the petitioner has a remedy of filing an appeal under Order 43 Rule 1(s) of the C.P.C.

In view of the aforesaid, this Court is of the opinion that the court below has rightly rejected the revision, as not maintainable. The writ petition fails and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.11.2008

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 60517 of 2008

Somaroo ...Petitioner
Versus
Smt Prakriti Acharya and others ...Respondents

Counsel for the Petitioner:
Sri Sharad Chandra Upadhyay

Counsel for the Respondents:

Code of Civil Procedure-Order VIII Rule 1-written statement filed after the period-prescribed objection about taking on record-held-even after amendment this provision not mandatory-secondly when the exparte-Decree set a side at once written statement filed without any further delay-can not be discarded Court below rightly accepted the same.

Held: Para 5 & 6

In the present case, the order to proceed ex parte against the defendants was allowed on payment of cost, and pursuant thereto, the written statement was filed immediately. Once ex parte proceedings are recalled, the time elapsed during the interim period was liable to be ignored, for which, no explanation or reason was required to be given. The trial court passed an order on 17.4. 2007 recalling the ex parte decree against the defendants, and on the same day, the written statement was filed without any further delay.

Consequently, this Court is of the opinion that the order of the trial court keeping the written statement on the record, does not suffer from any error of law.

Case law discussed:
AIR 2005 SC 3353, (2005) 4 SCC 480, (2005) 6 SCC 705, AIR 2006 SC 396

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

1. The petitioner filed a suit for injunction. It transpires that the trial court proceeded ex parte against the defendants, but subsequently, an application for recall of the order was filed by one of the defendants, which was allowed by an order dated 17.11.2007 on payment of cost, pursuant to which, the written statement was filed and it was taken on record. The petitioner filed an application before the trial court praying that the written statement should not be taken on record and should be rejected in view of the fact that the written statement was filed after the stipulated period, provided under Order VIII, Rule 1 of the Code of Civil Procedure. The said application was rejected by the trial

court, against which, a revision was filed, which was also rejected. The petitioner, being aggrieved, has filed the present writ petition.

2. The learned counsel for the petitioner submitted that in view of Section 15 (b) (iv) of the Code of Civil Procedure (Amendment Act, 2002), the amended provision of the Order VIII, as made by the Amendment Act, would be applicable to the proceedings, which was pending prior to the enforcement of the Amendment Act. Consequently, no written statement could be filed after the expiry of the stipulated period as provided under Order VIII, Rule 1. The learned counsel, consequently, submitted that the trial court committed an error in keeping the written statement on record.

3. In my opinion, the submission of the learned counsel for the petitioner is bereft of merit.

4. The Supreme Court in a large number of decisions in **Salem Advocate Bar Association, Tamilnadu Vs. Union of India**, AIR 2005 SC 3353; **Kailash Vs. Nanhku &. Ors**. (2005) 4 SCC 480; **Rani Kusum (Smt) Vs. Kanchan Devi (Smt) &. Ors.**, (2005) 6 SCC 705; and **Shaikh Salim Haji Abdul Khayum sab Vs. Kumar &. Ors.** AIR 2006 SC 396 has held that even after the amendment of the provision of Order VIII, Rule 1, pursuant to the Amendment Act of 2002, the provision of the Order VIII, Rule 1 is still directory in nature and is not mandatory and that time could be extended on sufficient cause being shown.

5. In the present case, the order to proceed ex parte against the defendants was allowed on payment of cost, and pursuant thereto, the written statement was filed immediately. Once ex parte proceedings are recalled, the time elapsed during the interim period was liable to be ignored, for which, no explanation or reason was required to be given. The trial court passed an order on 17.4. 2007 recalling the ex parte decree against the defendants, and on the same day, the written statement was filed without any further delay.

6. Consequently, this Court is of the opinion that the order of the trial court keeping the written statement on the record, does not suffer from any error of law.

7. The writ petition is misconceived and is dismissed summarily.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.11.2008

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No.60787 of 2008

United India Insurance Co. Ltd. ...Petitioner
Versus
Motor Accident Claim Tribunal, Bareilly and others ...Respondents

Counsel for the Petitioner:
Sri S.N. Pandey
Sri Havaldar Verma

Counsel for the Respondents:
Sri Amaresh Sinha

Motor Vehicle Act 1988-Section 170-Rejection of application-Insurance company at the stage of final hearing of claim petition moved application to contest the case as the owner of vehicle not contesting-without disclosing any material of collusion between claimants as well as owner of vehicle-held-where the insurer already - in claim–petition-filed separate written statement-detail reasons as permission to contest the case not required-nor every order requires detail discussions-the rejection held-proper.

Held: Para 17 & 20

In my opinion Section 170 of the Motor Vehicles Act would come into force where the Insurance company is not party and therefore if it is not impleaded as party to contest the claim on behalf of the owner, who might be collusion with the claimants or has failed to contest the case. Since the petitioner was a party in the claim application, it could have filed separate written statement for contesting the claim. I am supported by a judgment in National Insurance Company Ltd. Versus B. Veer Swamy and others 1996 ACJ 394.

The case was admittedly listed for final hearing, witness had been cross examined and it was at this final stage of hearing that application u/s 170 of the Motor Vehicle Act was filed without any supporting documents or basis regarding collusion between the claimant and the owner or the owner not contesting the claim. It was an application filed mechanically which after hearing has been rejected by the court below as the petitioner failed to establish any collusion between the claimants and the owner except making bald allegations in this regard which did not make the application a genuine application.

Case law discussed:

2007 (1) TAC 233, (2003)7 SCC 212, 2006 (1) TAC 71, 2003 (3) TAC 293(SC), 1996ACJ 394.

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

1. Heard learned counsel for the parties.

2. The brief facts of the case are that Sri Himmat Arora died in an accident said to have been caused by Maruti Van No. U.P.25K-7081 which was insured by the petitioner's company. He was husband of respondent no. 2 Smt. Namita Arora aged about 43 years, father of Ms. Shweta Arora aged about 22 years and son Manish Arora aged about 20 years. The petitioner is a United India Insurance Ltd. filed an application under Section 170 of Motor Vehicles Act for granting permission to contest the claim petition on the ground that owner of the vehicle was not contesting the claim the claim petition properly.

3. The Motor Accident Tribunal rejected the application of the petitioner filed under Section 170 of the Motor Vehicle Act vide order dated 22.8,2008.

4. Learned counsel for the petitioner has strenuously argued that they have full right to file application under Section 170 of the Motor Vehicle Act to contest the claim. He has urged on two points that:-

(1) unless conditions precedent specified In Section 170 is satisfied, Insurance company will not be able to take any defence beyond the other provision of the Act in appeal or even if no appeal is preferred by the Insured against award of Tribunal AND

(2) The application of the petitioner under Section 170 of the Motor Vehicle Act has been illegally rejected by the

Tribunal vide order impugned dated 22.08.2008 by a non speaking order and therefore it the petitioner is not permitted by the Tribunal to contest the claim on merits by taking all the grounds available on behalf of the owner of the vehicle, it will undoubtedly prejudiced Insurer to a great extent.

5. In respect of his first contention the counsel for the petitioner has relied upon paragraph 10 of the judgment rendered by the Kerla High Court in **Oriental Insurance Company Ltd. Vs. Narayanan Nair and others:2007(1) TAC 233(Kerala).** In the aforesaid judgment the maintainability of the appeal was under challenge, which was opposed on the ground that the insurer was not entitled to file an appeal disputing involvement of the vehicle, since the Tribunal did not grant permission to appellant under Section 170 of the Act. The Court in the aforesaid circumstances considered the scope of Section of the Motor Vehicles Act for grant of permission to contest the case on all grounds available to the owner of the insured vehicle. The Court considered as to whether the Tribunal would without disposing of the application allow the insured to cross examine the claimant and thereafter pass the award directing the insurer to pay compensation whether it was permissible for insured to challenge the award on merits in appeal on grounds other than those are specified in Section 149 (2) of the Act, in absence of the specific order by the Tribunal under Section 170 of the Act granting permission?

6. It appears that Motor Accident Claims Tribunal in the case of Oriental Insurance Company (supra) had failed to disposed of the application filed under Section 170 of the Act and it was pleaded that in those circumstances the Insurance Company did not have any permission to contest the case on all grounds other than those specified in Section 149(2) of the Act.

7. The crux of the contention of learned counsel for the petitioner in that case was that the appeal was maintainable even in the absence of the specific order under Section 170 of the Act. Even if there is omission on the part of the Tribunal to pass order on the said application, it will not affect the right to file the appeal.

8. The High Court in that case, relying upon the judgment rendered by the Apex court in United India Insurance Co. Ltd. Vs. Jyotsnaben Sudhirbhai Patel, (2003) 7 SCC 212 for holding that award passed without disposal of an interlocutory application is unsustainable and deserves an interference for fresh consideration by the Tribunal. The Court in that case held that the Tribunal applied its mind to the condition stated in Section 170 and allows the Insurer's Company to contest the case on merit by cross-examining the claimant on merit as it was a case where the owner-cum-driver did not file any written statement and he failed to contest the case.

9. A perusal of the judgment shows that Tribunal in the aforesaid peculiar facts and circumstances had passed an order on the application filed insurer under Section 170, "granted as

prayed for", It was not a speaking order and in view of the settled legal position a non-speaking order passed under Section 170 of the Act is illegal and hence it was contended before the Supreme Court that the insurer was not entitled to file an appeal on merit in the absence of a legally valid order being passed under Section 170 of the Act. The Supreme Court after considering the various aspects held in Jyotsnaben's case as follows:

"Section 170 (b) of the M. V. Act states that the Tribunal while passing an order shall record its reasons. But it is very much evident in the present case that the driver and the owner of the motor vehicle did not file the written statement and failed to contest the proceedings. The Tribunal could have merely recorded that fact while allowing the application. For failure to do so, the appellant shall not suffer prejudice. Therefore, the appellant Insurance Company was justified in contesting the proceedings on grounds other than those enumerated under Section 149 (2) pursuant to the permission granted by Court. For the same reason, the Insurance Company can be legitimately considered to be a "person aggrieved" within the meaning of Section 173 of the Act. "

10. In case of Oriental Insurance Company (supra) while considering the case of Jyotsnaben, the Court observed in paragraph 8 to 12 as under:-

"8. As rightly argued by learned counsel for appellant, it would appear from the dictum laid down in Jytsnaben's case that the Supreme court is of the view that a mere commission on the part of a Court to do some thing shall not prejudice any party. If from the records, it can be inferred that the requirements of Section 170 are made out and that the Tribunal had also applied its mind to those relevant facts, a non-speaking order is to be treated as in consequential. Therefore, even though the order passed under Section 170 in Jyotsnaben's case did not specify that the conditions precedent for granting permission under Section 170 of the ACT are satisfied, the supreme Court held? that an appeal filed by insurer is still maintainable.

9. But, the situation herein is different. Unlike in Jyotsnaben's case, there is total lack of an order under Section 170 of the Act in this case. Further, the owner-cum-driver herein fled written statement, specifically disputing involvement of his vehicle in the accident. He also examined himself as a witness on his side. Despite all these the Tribunal had allowed the insurer to cross examine claimant at a stage when the owner failed to challenge his evidence on merits. This may be because the Tribunal was satisfied that the requirements of Section 170 of the Act are made out.

10. it is needless to say that even in cases where written statement is field by the owner or driver, and they examine themselves as witnesses, the Tribunal may be able to conclude elements of collusion between the claimant and the owner/ owner, depending upon the facts and circumstances of each case. It may be possible to infer that there is failure on the part of the owner or driver to contest the case, notwithstanding the positive steps taken by them like filing of written statement, examining witnesses etc. A contest, in this context

does not mean filing of written statement or examining a witness. A contest must be a genuine contest challenge or opposition and not a mere eye-wash

11. Looking into the various aspects, the Tribunal will be in a position to say whether there is bona fide contest or not, or whether there is any collusion or not. In cases where the driver and owner have filed written statement and examined witness, the Tribunal will have to scan through the relevant matters and decide whether there is collusion or not and whether they are actually contesting the matter or not. In such a situation, a reasoned order will be required, showing reasons to support the conclusions, either way .In the absence of a speaking order in writing, it will not be possible for this court to infer from vacuum, that the tribunal was satisfied of the requirements of Section 170 of the Act and it had granted permission.

12. This is a case where a speaking order ought to have been passed by the tribunal on the application filed under Section 170 of the Act without leaving it to this court or the parties to read its mind from emptiness. The failure to dispose off the application, doubtlessly, has prejudiced the insurer to a great extent. It, has jeopardised appellant's entitlement to file an appeal, since the very right of appeal of the insurer dangles on the decision that ought to have been taken by the tribunal on an application under Section 170 of the Act. This court is prevented from even deciding the question of maintainability of this appeal, in the absence of an order passed on the application filed under Section 170 of the Act.

11. As regards the second contention, learned counsel for the petitioner has relied upon the judgment of Single Judge rendered by National Insurance Company Ltd. Vs. Smt. Kamla Khaitan, 2006 (1) TAC 71 (Delhi). The paragraphs nos. 9 to 12 are as under:-

"9.lt is not disputed on behalf of the claimant that the owner and driver of the offending vehicle have omitted to file their written statement and also did not contest the claim otherwise. The learned counsel for the respondent submits that the cross-examination of the claimant on behalf of the appellant Insurance Company is not restricted to the statutory defences enumerated in Section 149 (2) of the Act only and stretches beyond that. He points out that the appellant sought to summon the owner and driver of -the offending vehicle in order to examine them as its witnesses but failed to secure their presence and eventually closed its evidence without examining them. He therefore, contends that the respondent having already examined the claimant on defences other than statutory ones available under Section 149 (2) of the Act and having availed the opportunity of producing their witness no prejudice has been caused to it on account of Tribunal's refusal to grant permission to it widen the scope of its defence.

10. Learned Counsel for the appellant however disputed that the cross-examination of the claimant is not restricted to statutory defences only as available under Section 149 (2) of the Act. He alternatively contended that even if it be accepted that the claimant had been cross-examined on the points beyond those permissible under Section

149 (2) of the Act, in the absence of a permission under Section 170 the appellant would be handicapped in asserting the defences other than the one contemplated under Section 149(2) of the Act while resisting the claim of respondent no. 1. Further he added that on an award being passed against it, in the absence of permission under Section 170 to widen its defences, it would be incompetent on its part to maintain its appeal against the award on grounds other than those available under Section 149(2) of the Act.

11. Learned counsel for the respondent argued that presently the matter is pending at the stage of final arguments and in the event of appellants application under Section 170 being granted it would amount to putting the clock back. This however would not appear to be a valid argument where it is found that the permission sought by the appellant under Section 170 of the act on an application in that regard has been wrongly refused by the tribunal. Since the impugned order declining the permission to widen the scope of ' its defences is found to have been erroneously declined to the appellant the same is liable to be set aside.

12. In the result, the appeal is allowed and the impugned order dated 26th March, 2004 is set side. Permission is granted to the appellant to widen the scope of its defences and to produce evidence in support thereof which would include an opportunity to further cross- examine the claimant. "

12. A perusal of the aforesaid case shows that the permission was sought by the Insurer under Section 170 of the Act, 1988, which was dismissed by the 'Tribunal, considering the scope and ambit of Section as well as justification of the order passed by the Court held that permission sought by the Insurer to widen scope of its defences where owner and driver had omitted to file their written statement and also did not contest the claim otherwise permission was wrongly refused by the Tribunal. It was in those circumstances the Court has set aside the order of Tribunal.

13. Learned counsel for the petitioner has then placed reliance In paragraph 19 of the judgment rendered in National Insurance Co, Ltd. Vs. Nicolletta Rohtagi and others 2003 (3) TAC 293 (SC) for the purpose of placing legislative intent and the scope of Section 170 of the Motor Vehicles Act, 1988. In paragraph 19 wherein the case of Sankaracharya and another Vs. United India Insurance Co. Ltd. and another has been considered by the Apex Court, learned counsel for the petitioner has relied upon in support of his argument that the order passed by the Tribunal should be a reasoned order. Paragraph 19 is as under:-

"In Shankarayya and another Vs. United Insurance Co. Ltd. and another, 1998 (3) SCC 140, it was held that an Insurance Company when impleaded as a party by the Court can be permitted to contest the proceedings on merits only if the conditions precedent mentioned in Section 170 are found to be satisfied and for that purpose the Insurance Company has to obtain an order in writing from the Tribunal and which should be a reasoned order by the Tribunal. Unless this procedure is followed, the Insurance Company cannot have a wider defence on merits than what is available to it by way of

statutory defences. In absence of the existence of the conditions precedent mentioned in Section 170, the Insurance Company was not entitled to file an appeal on merits 'questioning the quantum of compensation. "

14. After hearing the learned counsel for the petitioner and on perusal of the record as well as aforesaid judgments, it is necessary to refer the Section 170 of the Motor Vehicle Act, which is as under:-

"Impleading insurer in certain cases where in the course of any inquiry, the Claims Tribunal is satisfied that-

(a) there is collusion between the person making the claim and the person, against whom the claim is made, or

(b) the person against whom the claim is made has failed to contest the claim, it may, for reasons to be recorded in writing, direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding and the insurer so impleaded shall thereupon have without prejudice to the provisions contained in sub-section (2) of Section 149J the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made."

15. Perusal of the Section bring out the procedures and powers of the court and its scope within which the application may be made by the Insurer without impleading as party by the Court.

16. In the instant case, a perusal of annexure no. 6 the claim application shows that case was fixed for final hearing on 22.8.2008. The ground taken by the Insurance Company was that the owner of the Maruti Car contested the case in collusion with the claimant after filing of the written statement, hence they prayed for permission to defend the said case on behalf of the owner of the Maruti Car. A perusal of annexure no. 7 impugned in the writ petition shows that Insurance company was heard on the application. The owner of the vehicle was also present in the Court and had cross examined the witness i.e. Claimants, therefore it cannot be said that order rejecting the application is a non speaking order. The reasons for rejecting an application may be short but they do give an indication for rejection of the application of the Company and is a speaking order.

17. In my opinion Section 170 of the Motor Vehicles Act would come into force where the Insurance company is not party and therefore if it is not impleaded as party to contest the claim on behalf of the owner, who might be collusion with the claimants or has failed to contest the case. Since the petitioner was a party in the claim application, it could have filed separate written statement for contesting the claim. I am supported by a judgment in National Insurance Company Ltd. Versus B. Veer Swamy and others 1996 ACJ 394.

18. The Petitioner insurance company has also appended the copy of the claim petition. It is apparent from the array of parties that United India Insurance company Ltd. was also a party in the aforesaid claim petition. Hence it has the right to contest the

claim on all grounds available to the owners.

19. The Insurance company being a party before the Motor accident Claims Tribunal had filed written statement, they had to satisfy the tribunal that there was a collusion between the owner and the claimant which has power, authority and jurisdiction to either allow the application of the Insurance Company under Section 170 or to dismiss it giving cogent reasons.

20. The case was admittedly listed for final hearing, witness had been cross examined and it was at this final stage of hearing that application u/s 170 of the Motor Vehicle Act was filed without any supporting documents or basis regarding collusion between the claimant and the owner or the owner not contesting the claim. It was an application filed mechanically which after hearing has been rejected by the court below as the petitioner failed to establish any collusion between the claimants and the owner except making bald allegations in this regard which did not make the application a genuine application.

21. Per contra from the judgment in Oriental Insurance company (supra) relied upon by the petitioner it is clear that the tribunal has considered the facts and circumstances of each case and looking into the various aspects thereafter the tribunal was in a position to say as to whether there was a bonafide contest or not or whether there is any collusion or not. It appears that in the instant case there was no material brought on record by the tribunal for coming to the conclusion that there was any elements of collusion or improper contest of the case by the owner of the vehicle, Merely because bald statement in the application was made in this regard it would not be sufficient for allowing an application.

22. It may be noted that in paragraph 10 of the judgment cited by the petitioner it has also been observed that the contest must be a genuine. The challenge or opposition must not be a mere eyewash. If any person including the insurer, who contests the case, should move application based genuine reasons for challenging or opposing it.

It was incumbent upon the petitioner in the facts and circumstances to have brought all facts before the tribunal from which it could be deduced by it that there was an element of collusion between claimant and owner or the owner was not contesting the case properly. Even otherwise as stated above the petitioner could have produced its witnesses after filing his written statement in the case on all the grounds available to it for contesting the case.

The petitioner simply made an application mechanically under Section 170 of the Motor Vehicle Act.

The cases cited by the petitioner in fact do not help his case in the writ petition.

In my opinion the petitioner did not satisfy the ingredients of Section 170 of the Act for its applicability. The Court has given brief cogent reasons indicating the grounds and backdrop of passing the order impugned. The reasons may be given in a three line order to indicate the mind of the Court

and detailed reasons in every order is not a must. Since the application filed by the petitioner did not indicate any collusion or non contest between the parties, the order passed by the Court being based on sufficient reasons does not require interference in discretionary jurisdiction of the High Court under Article 226 of the Constitution.

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