APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.12.2008

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Second Appeal No. 778 of 2008

Mahendra Dhar Dubey (Dead) and others
...Defendants-Appellants
Versus
Prashu Ram Pandey and others
...Plaintiffs Respondents

Counsel for the Appellants:
Sri Sankatha Rai
Sri Dr. Vinod Kumar Rai
Sri Vijay Kumar Rai
Sri Santosh Kumar Mishra

Counsel for the Respondents:
Sri V.D. Ojha
Sri S.A. Lari

Code of Civil Procedure-Section 2 (2), 2 (9), 100 Order 41 rule 3 c Order 43 Rule 1 (w)-Second Appeal-challenging the order passed by 1st Appellate Court dismissing appeal as abated under section 5 (2) of U.P. Consolidation of Holding Act-by review apart from word 'Appeal' suit also included-such order not within the meaning of judgement and Decree-held-Second Appeal not maintainable-except F.A.F.O. under order 43 rule 1 (4).

Held: Para 24 & 26

After testing the requirements of a judgment and decree as contained under the relevant provisions of C.P.C. since I have held that so called judgment and decree dated 29.03.2008 do not contain any ingredients of the judgment and decree and the Second Appeal can only be filed against the judgment and decree of the lower appellate court, therefore, I am of the considered opinion that Second Appeal is not maintainable against the so called judgment and decree dated 29.3.2008

The Code of Civil Procedure is self contained code and there is a remedy for the appellant for filing an appeal from such order under Order 43 Rule 1 (w) of the C.P.C. Therefore, the appellant can file First Appeal From Orders under Order 43 Rule 1 (w) of the C.P.C.

Case law discussed:
AIR 1960 SC 941, AIR 1945 Alld. 266, AIR, 2001, Supreme Court, 279, AIR 2004 Karnataka 75

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

1. This Second Appeal has been filed against the judgment and decree dated 29.3.2008 passed by Additional District Judge, Court No.2, Deoria in appeal no. 8 of 1976 Parashuram Pandey and others vs Mahendra Dhar Dubey and others and also against the judgment and decree dated 28.5.2008 passed by the same court in review petition No. 6 of 2008 Parashuram Pandey and others vs. Rajendra and others by which the original suit no. 433 of 1972 has been abated under Section 5 (2) of the U.P. Consolidation of Holdings Act.

2. The Stamp Reporter has raised two objections namely:-

(1) If the limitation for filing Second Appeal is counted from the date of the order of review then the appeal is well within time and if the limitation is counted from the date of original decree passed by the Appellate Court then the appeal is barred by time.
(2) The Second Appeal is not maintainable against the order passed in Review Application.

3. Sri V.D. Ojha, learned counsel who has filed caveat on behalf of the plaintiffs respondents has also raised the same preliminary objection. In his submissions in case the appeal is treated against the order dated 28.05.2008 passed on the review application then Second Appeal is not maintainable and the remedy is to file miscellaneous appeal under Order 43 Rule 1 (W) of the Code of Civil Procedure (in short C.P.C.) and in case, it is treated an appeal against the judgment and decree dated 29.03.2008 then the appeal is barred by time. Since there is no application under Section 5 of the Indian Limitation Act for condoning the delay in filing Second Appeal, therefore, it should be dismissed as barred by time. He has further submitted that both the orders cannot be challenged together in one Appeal.

4. Sri Sankatha Rai, learned counsel for the appellants has submitted before the Court that the limitation will be counted from the date of the last order passed in the review application and not from the date of original judgment dated 29.03.2008. In his submission the Second Appeal is well within time and it is maintainable.

5. I have heard Sri Sankatha Rai, learned counsel for the appellants, Sri V.D.Ojha and Sri S.A. Lari, learned counsel for the respondents.

6. This case has got a chequered history. The respondents plaintiffs have filed a suit for cancellation of the sale deed on 22.4.1972 before the IIIrd Additional Munsif, Deoria. In the said suit the defendants appellants have filed an application for abating the suit under Section 5 (2) of U.P. Consolidation of Holdings Act on 08.01.1975. The plaintiffs respondents have raised an objection that the case should not abate before the Consolidation Authority, as it is the suit for cancellation of the sale deed on voidable ground. The application of the defendants appellants was rejected by the Trial Court on 30.5.1975. This order has never been challenged.

7. However, later on after contest the suit was dismissed by the Trial Court on 27.11.1975. Aggrieved from that order the plaintiffs- respondents have filed an appeal. The appeal was also dismissed by the IV th Additional District Judge, Deoria on 20.09.1977. It appears that the aforesaid appeal was decided on merit in absence of the plaintiffs-respondents.

8. The plaintiffs-respondents have filed a Second Appeal challenging the judgment and decree of the lower appellate court dated 20.09.1977 before the High Court. This appeal was numbered as Second Appeal No. 2646 of 1977 and was allowed by this Court vide judgment and order dated 28.10.2005 holding that in view of the explanation to Order 41 Rule 17 (1) of C.P.C., in absence of appellant counsel the appeal could not be decided on merit. Hence the judgment and decree dated 20.09.1977 was set aside and the matter was remanded back to the lower appellate court for deciding the case afresh.

9. After the case was remanded an application was filed by the plaintiffs-respondents under Order 6 Rule 17 of the C.P.C. before learned Additional District Judge Court No.16, Deoria for amendment of the plaint by adding para 15-A to the effect that village has already been de notified under Section 52 of

Consolidation of Holdings Act, therefore, the suit is barred by Section 49 of Consolidation of Holdings Act. This was vehemently opposed by the appellant, defendant, however, the appeal was abated by the lower appellate court on 29.3.2008 under Section 5(2) of the U.P. Consolidation of Holdings Act.

10. Thereafter the plaintiffs respondents have filed a review application for correcting the error apparent on the record on the ground that if the appeal has abated the suit stands abated because the appeal is the continuation of the suit. This error was corrected and the review application was allowed vide order dated 28.5.2008.

11. Sri Sankatha Rai, learned counsel for the appellant has submitted before the Court that the impugned judgment and decree dated 29.3.2008 is barred by principle of res judica as once defendants appellants application for abating the suit under Section 5 (2) of the U.P. Consolidation of Holdings Act has been rejected then on the same set of facts and for the same reason the impugned order could not be passed. In support of his submissions he has placed reliance upon the judgment of Apex Court reported in **AIR 1960 SC 941 Satya Narain Ghosal and others Vs Deo Raji Devi and others**.

12. Apart from the above submissions learned counsel for the appellant has made many other submissions but that will be discussed later on if the occasion so arises as this Court at present intends to decide the preliminary objections raised by the Stamp Reporter and the learned counsel for the respondents with regard to the maintainability of Second Appeal.

13. As noted above, two objections are raised by the Stamp Reporter one with regard to the limitation and another with regard to maintainability of Second Appeal. This Court desires to deal with the second objection i.e., with regard to maintainability of Second Appeal first and in case this point is decided in affirmative then there will be no occasion to decide the objection no.1.

Second Objection of the Stamp Report as well as Counsel for the respondents.

14. For deciding this point it will be essential to look into the substantive provisions meant for filing of Second Appeal as contained under Section 100 as well as Orders 41 and 42 of the C.P.C. which talks about the appeal from original as well as from appellate decrees. Section 100 as well as Order 42 of the C.P.C. are reproduced below:-

Section 100. Second appeal-(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.

Order XLII

" 1. The rule of Order XLI and Order XLIA shall apply, so far as may be, to appeals from Appellate decrees, subject to the following proviso:

Every memorandum of appeal from an appellate decree shall be accompanied by a copy of the decree appealed from unless the Court sees fit to dispense with either or all of them-

(1) a copy of the judgment on which the said decree is found,
(2) the judgment of the Court of the first instance, and
(3) a copy of the finding of the Civil or the Revenue Court, as the case may be, where an issue was remitted to such Court for decision."

15. From the bare perusal of Section 100 C.P.C. it is apparent that Second Appeal shall lie to the High Court from every decree passed in appeal by any court subordinate to the High Court and while filing Second Appeal copy of the judgment on which the decree is found has to be appended. Now this has to be looked into what is judgment and what is the decree under the C.P.C., for the purpose of filing Second Appeal. The judgment has been defined under Section 2 (9) of the C.P.C. and what the judgment should contain has been detailed under Order 41 Rule 32 of the C.P.C. both the provisions are reproduced below:

Sec.2 (9) "Judgment" means the statement given by the Judge on the grounds of a decree or order.

Order 41 Rule 32 deals that What judgment may direct- The judgment may be for confirming, varying or reversing the decree from which the appeal is preferred, or, if the parties to the appeal agree as to the form which the decree in appeal shall take, or as to the order to be made in appeal, the Appellate Court may pass a decree or make an order accordingly.

16. From the bare perusal of the meaning of the judgment as contained under Section 2 (9) of the C.P.C. and Order 41 Rule 32 of the same code, it transpires that judgment may be for confirming varying or reversing the decree from which the appeal is preferred. Otherwise also the judgment must contain the pleadings of the parties, evidence led and the conclusion drawn thereon.

17. Now the question would arise what is the decree. The word 'decree' has been defined under Section 2 (2) of the C.P.C. which is reproduced below:

Sec. 2 (2)- "decree" means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines

rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include-

(a) any adjudication from which an appeal lies as an appeal from an order, or
(b) any order of dismissal for default.

Explanation:- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.

18. In order that decision of a Court should become a decree there must be an adjudication in a suit and such adjudication must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit and such determination must be of a conclusive nature. For that purpose the operative portion of the judgment dated 29.03.2008 passed in Appeal No. 8 of 1976 is required to be looked into which is reproduced below:

"चूँकि उ० प्र० जोत चकबन्दी अधिनियम की धारा-५ ;२द्ध के अन्तर्गत यह अपील उपशमित हो चुकी है इस कारण अपील में निहित अन्य बिन्दुओं पर गुण-दोष के आधार पर विचार किये जाने की कोई आवश्यकता नहीं है ।

आदेश

वर्तमान अपील उत्तर प्रदेश जोत चकबन्दी अधिनियम की धारा -५ (२) के अन्तर्गत प्रशमित हो चुकी है इसलिये दाखिल दफ्तर की जाय ।"

19. From the perusal of the operative portion of the so called judgment dated 29.03.2008 and the conclusion drawn by the Additional District Judge Court No.2, Deoria, it is apparent that this do not contain either contents of judgment or decree as defined under Section 2 (9) read with Order 41 Rule 32 and 2 (2) of the C.P.C. as nothing has been adjudicated by the lower appellate court on merit of the case. The lower appellate court has only abated the case before the consolidation authorities where denovo proceeding has to be started by the consolidation authorities.

20. In view of the definition of the judgment and decree, the court has to examine whether the judgment impugned in the present Second Appeal falls under the category of judgment & decree. The Full Bench of Allahabad High Court, as reported in **AIR 1945 Alld. 266 (Mt. Chauli alias Subnaddra Devi Vs Mt. Meghoo & Ors),** has held as under:

"A decree is a formal document which must be drawn up in accordance with some decision of a Court. A finding in itself is not a decree."

21. The Apex Court in the case of **Ratansingh Vs. Vijaysingh and others reported in AIR, 2001,** Supreme Court, 279 has held as under:

"In order that decision of a Court should become a decree there must be an adjudication in a suit and such adjudication must have determined the rights of the parties with regard to all or any of the matters in controversy in the suit and such determination must be of a conclusive nature. If those parameters are to be applied then rejection of application for condonation of delay will not amount to a decree. Consequently, dismissal of an appeal as time barred is also not a decree.

We are aware that some decisions of the High Courts have taken the view that even rejecting an appeal on the ground that it was presented out of time is a decree within the meaning of the said definition. We are also aware of the contrary decisions rendered by High Courts on the same point. Dealing with some of those decisions a Full Bench of the Calcutta High Court (S.P. Mitra, CJ, Sabyasachi Mukherjee, J. (as he then was) and S.K. Datta, J) has held in Mamuda Khateen Vs. Beniyan Bibi, AIR 1976 Cal. 415 that " if the application under Section 5 of the Limitation Act was rejected the resultant order cannot be decree and the order rejecting the memorandum of appeal is merely an incidental order." The reasoning of the Full Bench was that when an appeal is barred by limitation the appeal cannot be admitted at all until the application under Section 5 of the Limitation Act is allowed and until then the appeal petition, even if filed, will remain in limbo. If the application is dismissed the appeal petition becomes otiose. The order rejecting the memorandum of appeal in such circumstances is merely an incidental order. We have no doubt that the decisions rendered by the High Courts holding the contrary view do not lay down the correct principle of law."

22. Similar view has been taken by the Full Bench of Karnataka High Court in the case of **Commissioner Hubli-Dharwad Municipal Corporation vs Shrishail and others reported in AIR 2004 Karnataka 75**.

23. Now if the so called judgment and decree in appeal is tested on those parameters as contained in Section 100, Sections 2(2),2(9), Order XLI Rule 32 and Order XLII of the C.P.C. then it will transpire that the ingredients of the judgment and decree as contained under the relevant provisions of the C.P.C., are not satisfied. Therefore, the so called judgment and decree appended to this Second Appeal cannot be termed as judgment and decree. I am of the view that decree dated 29.03.08 as appended in Second Appeal could not be drawn as it do not contain any ingredients of the decree. It is well known that there can be no roof without any wall/pillar, likewise there can be no decree without having the essence of the judgment as contained under Section 2(9) read with Order 41 Rule 32 of the C.P.C.

24. After testing the requirements of a judgment and decree as contained under the relevant provisions of C.P.C. since I have held that so called judgment and decree dated 29.03.2008 do not contain any ingredients of the judgment and decree and the Second Appeal can only be filed against the judgment and decree of the lower appellate court, therefore, I am of the considered opinion that Second Appeal is not maintainable against the so called judgment and decree dated 29.3.2008

25. Now the question remains what will be the remedy available to the appellant against the order dated 28.5.2008 passed in review application. The lower appellate court while passing the impugned order dated 29.3.2008 has held that nothing has been decided on merit of the case and only appeal is being abated under Section 5 (2) of the U.P. Consolidation of Holdings Act. Now the question would be what is Appeal? It is well settled that the Appeal is the creature of the statute and it is deemed as

continuation of the suit proceeding. The lower appellate court on the review application of the appellant has modified/reviewed the earlier order dated 29.3.2008 to the extent of mentioning 'the suit' instead of 'Appeal' in the order dated 28.5.2008 and it is well settled that the appeal is the continuation of the suit, therefore, there is no substantial difference between the earlier order dated 29.3.2008 and the subsequent order dated 28.5.2008 passed by lower appellate court. In fact when the review application has been allowed the original order dated 29.3.2008 has merged in the subsequent order passed in the review application dated 28.5.2008. Now the effect will be that at present the suit has abated under Section 5 (2) of the U.P. Consolidation of Holdings Act. Since the order for abating the suit has been passed in the review application and the application has been allowed under Rule 4 Order 47 of the C.P.C., therefore, the question would arise that what is the remedy available to the appellant to challenge the order dated 28.5.2008 passed in the Review application.

26. The Code of Civil Procedure is self contained code and there is a remedy for the appellant for filing an appeal from such order under Order 43 Rule 1 (w) of the C.P.C. Therefore, the appellant can file First Appeal From Orders under Order 43 Rule 1 (w) of the C.P.C.

27. The Court has taken a view that no Second Appeal is maintainable against the so called judgment and decree dated 29.3.2008, therefore, there is no occasion to decide the objection no.1 as reported by the Stamp Reporter with regard to the limitation for filing Second Appeal. The appellant is given liberty to file an application for conversion of this Second Appeal into F.A.F.O. In case such application is filed by the appellant within a week from the date of delivery of the order, the matter may be placed as fresh before the appropriate court dealing with First Appeal From Orders.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.12.2008

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

Special Appeal No. 1858 of 2008

State of U.P. and others ...Appellants
Versus
Gaya Ram ...Respondents

Counsel for the Appellants:
Sri C.K. Rai

Counsel for the Respondents:
Sri G.P. Gupta

Basic Education Regulation Regulation-44, 46-Retirement benefits-petitioner working as Class IV-employee in the institution run by Basic Shiksha Parishad retired after completing 9 years service-claimed retirement benefit-learned Single Judge following the judgment of Hans Raj Pandey Case allowed the petition-held-Hans Raj Pandey being appointed as fixed salary basis wrongly counted for pension purpose-hence no good law-in regulation except regular or temporary appointment no provision of fixed salary-hence working of petitioner prior to regularization can not be counted for pension purposes-However petitioner may approach before state government for exemption of period which fall short in 10 years.

Held: Para 15

There is a difference in the nature of the appointment of temporary employee vis-a-vis an employee who is appointed on fixed salary. A temporary appointment can be made against a permanent or temporary post, whereas for the appointment on fixed pay there is no requirement of a post. Thus there is a major difference in the nature of appointment of two classes of employees. Thus, the judgment in the case of Hans Raj Pandey (supra), in so far as it holds that the period of service rendered on fixed pay, prior to regularization, shall also be added in his qualifying service, cannot be upheld.

Case law discussed:

(2002) 3 UPLBEC 2521

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

1. Heard Sri C.K. Rai, learned Standing Counsel for the appellants and Sri G.P. Gupta, learned counsel appearing for the respondent.

2. This is an intra Court appeal against the judgment and order of learned Single Judge dated 05th August, 2008 whereby the writ petition filed by the respondent has been allowed by directing payment of pension w.e.f. 03.12.2004 following the judgment of learned Single Judge in the case of Hans Raj Pandey vs. State of U.P.; 2007(2) UPLBEC 2073.

3. Against the said judgment the State of U.P., Finance and Account Officer, Basic Education Officer as well as Secretary, Basic Shiksha Parishad, Allahabad have filed this appeal. Parties agree that the appeal be disposed of without calling for any further affidavits.

4. The brief fact necessary for deciding the issues raised in the appeal are that: the respondent petitioner was appointed as a Class-IV employee in an institution of the U.P. Basic Shiksha Parishad. Initial appointment of respondent was on fixed emolument. By an order dated 30th November, 1995 the services of the respondent were regularized in the pay scale of Rs.750-940. The respondent retired from service on 31.12.2004. His claim with regard to payment of pension was forwarded by the Basic Shiksha Adhikari. The Finance and Account Officer, Basic Education, Sonebhadra on 02nd June, 2005 wrote a letter to the Basic Shiksha Adhikari pointing out that the services of respondent prior to his regularization i.e. 30th November, 1995 were on fixed salary, therefore, cannot be treated as qualifying service. The period of qualifying service for pension is only 09 years, hence he is not entitled for pension. The respondent challenged the said order by means of the writ petition, praying for quashing the order of the Finance and Account Officer, Basic Education, Sonebhadra and a mandamus for payment of pension w.e.f. 31.12.2004.

5. In the writ petition a counter affidavit was filed by the Finance and Account Officer. In paragraph 3 of the counter affidavit it was clearly stated that appointment of the petitioner-respondent w.e.f. 01st August, 1973 was as a Peon on fixed emolument and in such capacity respondent continued till 30th November, 1995. Thereafter he was regularized in the pay scale of 750-940 w.e.f. 30th November, 1995. It has been stated that the services of the respondent prior to 30th November, 1995 being on fixed salary were not to be taken into account for pension and the respondent, having not completed 10 years of qualifying service, is not entitled for pension.

6. The learned Single Judge by the impugned judgment has allowed the writ petition relying on the judgment of this Court in the case of Hans Raj Pandey (supra).

7. Sri C.K. Rai, learned counsel for the appellant challenging the judgment contended that the services of respondent on fixed emolument were not to be added for determination of qualifying period for pension, the regular services of the respondent being less than 10 years, he is not eligible for pension. Sri Rai submits that provisions of Regulations 44 and 45 were applicable only to the teachers while the respondent, who was only a Class IV employee, was to be dealt with under Regulation 46, which provide that only after completion of 10 years of eligible service, an employee becomes entitled for pension. He further contended that the judgment in the case of Hans Raj Pandey (supra) did not examine that the services of an employee on fixed emolument are not to be add in the eligible period for pension. He submits that the decision in the case of Hans Raj Pandey (supra), which is based on earlier judgment of this Court in the case of Shakuntala @ Brahmo Devi (Smt.) vs. Director of Pension; (2002) 3 UPLBEC 2521, is not applicable in the case of fixed pay employees. He clarifies that the judgment in the case of Shakuntala (supra) was in respect of a temporary employee and in that context the Court has held that the temporary employees, who completed 10 years of service, are entitled for pension by virtue of the Government Order dated 01.07.1989.

8. Learned counsel for the respondent supported the impugned judgment and contended that the services of the respondent prior to 30th November, 1995 have also to be treated as temporary. He submits that he was paid fixed salary but at the initial of the scale prescribed by the State Government, which was revised with every revision of the pay scale. He submits that the judgment in the case of Hans Raj Pandey (supra) is fully applicable in the facts of the present case and the earlier period of service is liable to be added for the purposes of pension. He further contends that Regulations 44 and 45 also become applicable to the Class-IV employee in view of Regulation No. 1 of Chapter 5 of the Regulations framed under the U.P. Basic Education Act, 1972.

9. We have considered the submissions and perused the records.

10. A Class-IV employee working under the control of Basic Shiksha Parishad, having rendered 10 years' qualifying service, is eligible for grant of pension. There is no dispute to the entitlement of a Class-IV employee who has put in 10 years of qualifying service. The issue in the present case is as to whether the period of service rendered by the respondent prior to 30th November, 1995 can be treated as qualifying service. According to Regulation 44, the temporary and officiating appointment can be added, if on the same post or another post the person has been confirmed subsequently, as qualifying service. The said Regulation 44 (Kha) does not help the respondent since the appointment of the respondent cannot be termed as temporary or officiating. The appointment of respondent was on fixed emoluments.

11. Sri C.K. Rai, learned counsel for the appellant has brought to our notice a Government Order dated 08th August, 1994, whereby recommendation of Basic Shiksha Parishad for giving the benefit of general provident fund, group insurance and pension to the fixed pay Class-IV employee was turned down by the Government on the ground that since the fixed pay employees are not appointed against any post, they cannot be treated to be regular employee.

12. The judgment in the case of Hans Raj Pandey (supra), on which much reliance has been placed by the learned counsel for the respondent, relied on earlier judgment in the case of Shakuntala (supra). The judgment in the case of Shakuntala is on the facts where the husband of the petitioner was employed as Panchayat Mantri on 12th August, 1958. Subsequently the post of Panchyat Mantri was designated as Gram Vikas Adhikari. The said employee was compulsory retired on 21.12.1992. In that context the question arose qua payment of pension. In the counter affidavit, filed in that case, it was stated that the said employee was a temporary government servant. This Court interpreting the Civil Services Regulation as well as Government Order dated 01st July, 1989 took a view that a temporary government servant, who has rendered 10 years service as such, is also entitled for the pension. The relevant paragraphs of the judgment in the case of Shakuntala (supra), as has been relied and quoted in the judgment of Hans Raj Pandey's case, read as follows:

"11. *From the aforesaid guidelines it is clear that the said guidelines are not an independent provision in force but the said guidelines have been issued for guidance of pension sanctioning authority. Thus the consequence of the Government Order dated 1.7.1989 has to be looked into while deciding as to whether the temporary Government Servant compulsory retired is entitled or not entitled for the pensionary benefits. As observed above the aforesaid Government Order was issued with intent and object of Government extending pensionary benefits to temporary Government Servants who have completed ten years of regular service. The provisions of Rule 56(c) of Fundamental Rules has clearly provided that notwithstanding anything contained in clause (a) or clause (b), the Appointing Authority may, at any time, by notice to any Government Servant whether permanent or temporary, without assigning any reason, require him to retire after he attains the age of fifty years..... Thus, the provisions of Fundamental Rule 56 are applicable both on permanent and temporary employees as noted above, sub-rule (e) of Rule 56 mandates grant of retiring pension to every Government Servant who retires or is required or allowed to retire under this rule. The opening line of Rule 56(e) are of significance which provides .... retiring pension shall be payable. Thus, the intendment of Rule 56(e) is to provided retirement pension to every Government Servant who retires or is required to retire under Rule 56. Thus, the intendment of statutory Rule 56(e) is to extend benefit of retiring pension to both category of person i. e. , persons compulsory retired or persons voluntary retired. From the above intendment of rule it is clear that no distinction or discrimination has been maintained with regard to payment of retiring pension to persons voluntary retired or compulsory retired. Thus, by*

Government Order dated 1.7.1989 the temporary Government Servant compulsory retired cannot be excluded from benefits of retiring pension. When the statutory Rule i. e., 56(e) does not maintain any distinction with regard to payment of retiring pension to person compulsory retired and voluntary retired, no such classification can be created by a Government Order, which is an executive order. The object of the Government Order as noted above was to extend pensionary benefits to temporary Government Servants who have rendered ten years regular service. Thus, the persons compulsory retired cannot be excluded from the pensionary benefits and if it is accepted that the Government Order dated 1.7.1989 creates such classification then the said classification will be arbitrary and unreasonable. It is, thus, held that the benefit of Government Order dated 1.7.1989 is also available to the temporary Government Servants who are compulsory retired. There is no rational basis for any such classification nor there can be any valid object for such classification.

12. *Learned Standing Counsel Sri Ajay Bhanot has laid much emphasis on the words "nl o"kZ dh fu;fer lsok " as used in the Government Order dated 1.7.1989. The submission of the learned Standing Counsel as that the petitioner was only temporary Government Servant hence he cannot be said to have rendered regular ten years service; hence he is not entitled for the benefit of Government Order dated 1.7.1989. The words "दस वर्ष की नियमित सेवा पूर्ण कर ली हो ।" used in the Government Order dated 1.7.1989, means completion of ten years regular service. Words 'regular service' has not been defined in the Government Order. From a reading of the Government Order it is clear that the word "ten years regular service" has been referred to the service rendered and not to the status of employee, an employee substantively appointed and permanent is automatically entitled for pension. The Government Order dated 1.7.1989 does not contemplate ten years substantive service. The words "regular service" used in the Government Order is not anonymous to substantive service. Admittedly the benefit by Government Order is to be extended to temporary Government Servant. The temporary Government Servant cannot be said to have substantive or regular service. Thus, the words "regular service" used in the Government Order dated 1.7.1989 has not been used as specifying he capacity or status of its holder rather the words "regular service" has been used to denote and specify the nature of service rendered. The emphasis is that service should be regular. While defining the word "regular" the Apex Court is AIR 1980 Supreme Court 1464, Mrs. Raj Kanta v. The Financial Commissioner, Punjab and another, has held in paragraph 10 as under:*

"To begin with, the word "regular" is derived from the word "regular" which means 'rule" and its first and legitimate signification, according to Webster, is conformable to a rule, or agreeable to an established rule, law, or principle to a prescribed mode. In Words and Phrases (Vol. 36-A, P. 241) the word "regular' has been defined as steady or uniform in course practice or occurrence, etc. and implies conformity to a rule, standard, or pattern. It is further stated in the said Book that 'regular' means steady or uniform in course, practice, or occurrence, not subject to unexplained or irrational variation. The word "regular" means in a regular manner, methodically,

in due order. Similarly, Webster's New World Dictionary defines 'regular' as 'consistent or habitual in action' not changing, uniform, conforming to a standard or to a generally accepted rule or mode of conduct."

14. *Government Order dated 1.7.1989 meant ten years of temporary Government Servant should be regular in nature meaning thereby that if the temporary Government Servant has performed his duties irregularly i.e., with gaps of years, his service may not be treated to be regular. Thus, the contention of the learned Standing Counsel that the words "regular service" used in the Government Order means substantive service or service rendered by an employee in regular capacity cannot be accepted. Sri Som Dutt Sharma had admittedly rendered 34 years service and District Panchayat Raj Officer who is Appointing Authority has already recommended for grant of pensionary benefits by holding that his entire 34 years' service qualify for pension. In view of the above, Sri Sharma had completed ten years of regular service as contemplated in the Government Order dated 1.7.1989."*

13. The judgment of Shakuntala's case was thus on different facts where the status of the employee as temporary was not denied. In Hans Raj Pandey's case also the Court noticed that petitioner was a Class-IV employee on the fixed pay, who was subsequently regularized and after regularization he had not completed ten years of service.

14. In Hans Raj Pandey's case the employee was appointed on 06.02.1970 and was regularized on 15.10.1996. Subsequently he retired after obtaining the age of superannuation on 30th June, 2002. He had rendered six years regular service. Learned Single Judge although noticed that the employee was appointed on fixed pay but the consequence of being on fixed pay was not considered in its true prospective and the judgment in the case of Shakuntala (supra) was relied for giving benefit to the said employee. In paragraph 14 of the said judgment the learned Single Judge observed that it has not been disputed that nature of appointment of petitioner was temporary in nature. Learned Single Judge, in paragraph 3 having noticed that he was a fixed pay employee, proceeded to decide the case with an observation that nature of appointment was temporary.

15. There is a difference in the nature of the appointment of temporary employee vis-a-vis an employee who is appointed on fixed salary. A temporary appointment can be made against a permanent or temporary post, whereas for the appointment on fixed pay there is no requirement of a post. Thus there is a major difference in the nature of appointment of two classes of employees. Thus, the judgment in the case of Hans Raj Pandey (supra), in so far as it holds that the period of service rendered on fixed pay, prior to regularization, shall also be added in his qualifying service, cannot be upheld.

16. Learned counsel for the respondent submits that in the service-book of the petitioner the word "temporary" has been mentioned, he was a temporary employee. Petitioner has also produced photo copy of the service-book, which we have perused. From the perusal of the service-book it is clear that the respondent was initially appointed on fixed emolument of Rs.165/- per month

and the said fixed emolument was subsequently increased w.e.f. 01.01.1986 to Rs.750/-, which emolument was paid till he was regularized. While fixing the scale w.e.f. 01.01.1986 it has been mentioned that his salary was Rs.750/-. In the order dated 02.06.2005 the Finance and Account Officer has also noted that the respondent, prior to regularization, was working on fixed pay of Rs.750/-.

17. In view of the aforesaid, the contention that respondent was a temporary employee cannot be accepted.

18. At this stage learned counsel for the respondent contended that by virtue of Regulation 45, the controlling authority have been given power to condone the period up to six months in qualifying service.

19. In the present case the respondent, after being regularized on 30th November, 1995, retired on 31st December, 2004. He has rendered more than 9 years service. The controlling authority has been empowered to exempt a period up to six months only. We are of the view that this is a fit case in which the Basic Shiksha Adhikari-appellant no. 4 may recommend the claim of the respondent for exemption of period, which falls short of 10 years period, to the State Government-appellant no. 1.

20. In view of the aforesaid the judgment and order of the learned Single Judge dated 05.08.2008 is modified by issuing a direction to Secretary, Basic Shiksha Parishad to forward the claim of respondent petitioner for exemption of the period of the service to the extent it falls short of 10 years for payment of pension. Respondent No. 1 may take an appropriate decision regarding the retiral benefits to be paid to the respondent in accordance with law. Necessary recommendation shall be forwarded by the authority within one month from today and the State Government shall take appropriate decision expeditiously, preferably within four months.

21. Before we close the order it is necessary to observe that the distinction between a fixed pay appointee and a temporary appointee for denial of the benefit of service rendered as such, as indicated by the Government Order dated 08th August, 1994, is that fixed pay employee are not employed against any post.

22. Counsel for the respondent before us has contended that respondent was appointed against a post. Substantial material has not been brought on the record of the writ petition for this Court to come to a definite conclusion as to whether the respondent, who was engaged on fixed pay, was employed against a post or not.

23. It is open for the State Government to obtain necessary reports with regard to the fact as to whether the respondent was appointed against a post or not. If it is found that he was appointed against a post, Government may further consider the question of treating the services rendered on fixed pay as the qualifying service.

24. With the aforesaid observations/directions the appeal is disposed of. The judgment and order of the learned Single Judge is modified accordingly.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.09.2008

BEFORE
THE HON'BLE VIJAY KUMAR VERMA, J.

Criminal Misc. Restoration/Recall Application No. 166376 of 2007
In
(Criminal Revision No. 4693 of 2006)

Mithaee Lal ...Applicant/revisionist
Versus
State of U.P. & others ...Opposite parties

Counsel for the Applicant:
Sri Shekhar Srivastava

Counsel for the Respondents:
Sri Dashrath Lal
A.G.A.

Code of Criminal Procedure-Section 482-Criminal Revision-dismissed in default-recall application-objected provision of order 9 rule (4) (a) (13) and Order 41 Rule 19 C.P.C. not applicable in Criminal proceeding-held-No provision of dismissing criminal revision in absence of counsel-such error can be corrected by exercising inherent power-both orders dismissal of revision in default as well as order on merit in absence of counsel can be recalled by either the session court or by High Court.

Held: Para 11 & 17

Therefore, keeping in view the law laid down in above mentioned cases, there is no legal impediment for this Court to recall the order dated 30.03.2007 passed in criminal revision no. 4693 of 2006.

Therefore, having regard to the observations made in the cases referred to above, the order dismissing criminal revision in default or non prosecution as well as the order deciding the revision on merit in absence of any or both parties can be recalled in exercise of inherent powers not only by the High court, but by the Court of Session also.

Case law discussed:
2007 (59) ACC 788 (SC), 1958 ALJ 389, Faridabi (1986) 2 Kant LJ 65, (1995 Crl L.J. 2319, AIR 1959 Allahabad 315, AIR 1987 Rajasthan 83, AIR 1981 Supreme Court 1156, 1999 (39) ACC 889, 2005(52) ACC 372, 2006 (55) ACC 541

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

"Whether criminal revision can be dismissed in default or non-prosecution and whether such order can be recalled" are two cardinal questions that fall for consideration in this restoration application, by means of which, the order dated 30.03.2007 passed in criminal revision no. 4693 of 2006 Mithaee Lal vs. State of U.P. and others is sought to be recalled.

2. From the record, it transpires that criminal revision referred to above was listed on 30.03.2007. When the case was called out, the counsel of the revisionist was not present even in the revised list. Hence, Hon'ble Vinod Prasad, J. passed the following order:-

"List is revised. Even in the revised list, learned counsel for the revisionist is not present.

This revision is dismissed for non prosecution.

Interim order dated 24.08.2006 stands vacated."

3. Prayer to recall above mentioned order has been made in this restoration/recall application, which is accompanied by the affidavit of revisionist. No counter affidavit has been

filed by the opposite parties although their counsel are present today.

4. Heard argument of Sri Shekhar Srivastava, learned counsel for the applicant-revisionist, Sri Dashrath Lal, learned counsel for opposite parties no. 2 and 3 and learned A.G.A. for the State.

5. It is contended by learned counsel for the applicant-revisionist that there is no provision in the Code of Criminal Procedure (in short, the Cr.P.C.) to dismiss the revision in default or for non prosecution and since the revision in present case was dismissed for non-prosecution, hence the order dated 30.03.2007 passed in criminal revision 4693 of 2006, being illegal, should be recalled by this Court in exercise of inherent powers under Section 482 Cr.P.C.

6. On the contrary, it was vehemently contended by learned counsel for the opposite parties that there is no provision in Cr.P.C. analogous to order 9 Rules 4, 9 or 13 and order 41 Rule 19 C.P.C. and hence, the order dated 30.03.2007 passed by another Bench of this Court in criminal revision no. 4693 of 2006 cannot be recalled, as there is no provision in Cr.P.C. to recall such orders.

7. Having given my thoughtful consideration to the rival submissions made by the learned counsel for the parties, I find force in the aforesaid submission of the learned counsel for the applicant-revisionist that criminal revision cannot be dismissed in default or for non-prosecution. It is settled law that criminal revision has to be decided on merit, even if the counsel of the parties are not present to make their submissions. Reference in this regard may be made to the case of **Madan Lal Kapoor Vs. Rajiv Thapar and others 2007 (59) ACC 788 (SC),** in which the Hon'ble Apex Court has held that criminal revision cannot be dismissed in default or for non-prosecution and it has to be decided on merit. It is also held by the Hon'ble Apex Court that criminal appeal also cannot be dismissed in default. Therefore, in view of this specific law laid down by the Hon'ble Apex Court, the order dated 30.03.2007, whereby criminal revision no. 4693 of 2006 was dismissed for non-prosecution, is not in accordance with law.

8. Now the question remains whether the order dismissing criminal revision for default or non-prosecution can be recalled. In my considered opinion, such order can certainly be recalled by the Court in exercise of inherent powers, which are vested in all Courts whether Civil or Criminal. In this regard, I may refer the case of **Bishambhar Dayal Vs. State of Shaghir Ahmad 1958 ALJ 389**, in which criminal revision was dismissed in default by the Sessions Judge. That order was subsequently recalled on the application of the revisionist. The order of recalling was challenged by opposite party in this Court. It has been held by this Court that revision dismissed for default of appearance can be reheard by a Sessions Judge. It is further held that the Sessions Judge not having justified in dismissing the revision on the ground of default in appearance, the question of sufficiency or otherwise of the reason for absence does not arise.

9. The Karnataka High Court in **Ibrahimsab V. Faridabi (1986) 2 Kant LJ 65** has held that **the expression *"final order disposing of the case" means a***

considered order on merits and not an order of dismissal for default and the provision contained in Sec. 362, does not come in the way of the Court recalling such order and restoring the revision dismissed for default.

10. While answering formulated points, the Division Bench of Kerala High Court in the case of **K.G. Keralakumaran Nair Vs. State of Kerala and another (1995 Crl L. J. 2319)** has held that "***the High Court has inherent power to restore any matter dismissed for default or non prosecution on sufficient reason being shown.***

11. Therefore, keeping in view the law laid down in above mentioned cases, there is no legal impediment for this Court to recall the order dated 30.03.2007 passed in criminal revision no. 4693 of 2006.

12. Before parting with this order, it is worthwhile to mention that order deciding criminal revision on merit in absence of any or both parties can also be recalled, although this matter is not involved in present case. The Full Bench of this Court in the case of ***Raj Narayan and others Vs. State (AIR 1959 Allahabad 315)*** in context of Section 561-A Cr.P.C. (correspondent to Section 482 new Cr.P.C., 1973) has held that High Court has power to revoke, review, recall or alter its own earlier decision in criminal revision and rehear the same in cases falling under one or the other of the three conditions mentioned in Section 561-A namely:-

(1) For the purpose of giving effect to any order passed under the Code of Criminal Procedure.

(2) For the purpose of preventing abuse of the process of any Court, and

(3) For otherwise securing the ends of justice.

13. The Full Bench of Rajasthan High Court in the case of ***Habu Vs. State of Rajasthan (AIR 1987 Rajasthan 83)*** on a reference made to it has held that ***"the power of re-call is different than the power of altering or reviewing the judgement, and powers under S.482, can be and should be exercised by the High Court for re-calling the judgement in case the hearing is not given to the accused and the case falls within one of the three conditions laid down under S.482". It is further observed that "while considering the scope of right of hearing due consideration has to be given to S.304 Cr.P.C., Arts. 21 and 39-A of the Constitution. Section 482 Cr.P.C. will have to be considered in the light of the aforesaid provisions. In all civilized and democratic societies right of hearing has been considered to be one of the most fundamental of the fundamental rights flowing from principles of natural justice and principles enshrined in well known maxim audi ateram partem".***

14. In the case of ***Makkapati Nagaswara Sastri Vs. S.S. Satyanarayan (AIR 1981 Supreme Court 1156),*** criminal revision was decided on merit without hearing the respondent. The High Court refused to recall the exparte order holding that the respondent is not entitled to be heard as of right in revision. The Hon'ble Apex Court while setting-aside the order of High Court held that the view taken by the High Court is manifestly contrary to the audi ateram partem rule of natural justice, which was applicable to the proceedings before the High Court.

After setting-aside the order of High Court deciding the revision without hearing the counsel of respondent, the case was sent back to the High Court with the direction to decide the revision afresh after hearing both the parties.

15. This Court in the case of ***Badloo Vs. State [1999 (39) ACC 889]*** has held that the Court is empowered to recall the order of dismissal of criminal revision without hearing the revisionist or his counsel under inherent jurisdiction to secure the ends of justice. Similar view was taken by this Court in the case of ***Smt. Manju Singh Vs. Tara Chandra and another [2005(52) ACC 372].***

16. The Hon'ble Supreme Court in the case of ***Minu Kumari and another Vs. State of Bihar and others [2006 (55) ACC 541]*** has held that all Courts whether civil or criminal, possess in the absence of any express provision, as inherent in their constitution, all such powers as are necessary to do the right or to undo wrong in the course of administration of justice on the principle, "quando lex aliquid alicui conceditconcedere videtur et id sine quo res ipsae esse non potest (when the law gives a person anything it gives him that without which it cannot exist). It is also observed by Hon'ble Apex Court that it is neither possible nor desirable to lay down any inflexible rule, which would govern the exercise of inherent jurisdiction and no legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from expressed provisions of law, which are necessary for proper discharge of functions and duties imposed upon them by law.

17. Therefore, having regard to the observations made in the cases referred to above, the order dismissing criminal revision in default or non prosecution as well as the order deciding the revision on merit in absence of any or both parties can be recalled in exercise of inherent powers not only by the High court, but by the Court of Session also.

18. For the reasons mentioned herein-above, the restoration/recall application dated 20.07.2007 is allowed and order dated 30.03.2007 dismissing the criminal revision no. 4693 of 2006 for non prosecution is hereby recalled, but interim order dated 24.08.2006 will not automatically be restored.

19. List the revision before appropriate Bench for final hearing in the next cause list.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.11.2008

BEFORE
THE HON'BLE VIJAY KUMAR VERMA, J.

Crl. Misc. Application No. 33133 of 2008

Abdul Aziz and others ...Applicants
Versus
State of U.P. & another ...Opposite parties

Counsel for the Applicants:
Sri Shahabuddin

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

<u>Code of Criminal Procedure-Section 482</u>-Order passed by Magistrate under Section 156 (3)-directing the S.O. concern to register and investigate the same-whether can be challenged by

prospective accused either by way of criminal revision or under 482 proceeding? Held-'No'.

Held: Para 6

Having given my thoughtful consideration to the rival submissions, I find force in the aforesaid preliminary objection raised by the learned AGA. As stated herein-above, the application moved by opposite party no. 2 Smt. Baby under section 156(3) Cr.P.C. has been allowed by the court below vide impugned order and S.O. P.S. Kareli (Allahabad) has been directed to investigate the case after registration of the FIR. In my considered opinion, such order can not be challenged by the prospective accused either in Revision or in the proceeding under section 482 Cr.P.C. Reference in this regard may be made to the case of *Gulam Mustafa @ Jabbar Vs. State of U.P. and others 2008 (61) ACC 922.* This matter was also considered by this court in the case of Prof. Ram Naresh Chaudhary and another Vs. State of U.P. and others 2008(60) ACC 476.

Case law discussed:

2008 (61) ACC 922, 2008(60) ACC 476, 1976 ACC 230, 1997 (34) ACC 163, 2000(41) ACC 435, 2006 (56) ACC 910, 2007(57) ACC 508, 2001 (42) ACC 451

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

"Whether the prospective accused can challenge the order directing investigation of the case after registration of the FIR", is the main question that falls for consideration in this application under section 482 of the Code of Criminal Procedure (in short, 'the Cr.P.C.') by means of which, the order dated 12.11.2008 passed by the Judicial Magistrate, Court No. 8, Allahabad on application no. 293/XII of 2008 (Smt. Baby Vs. Abdul Aziz and others) has been challenged.

2. By the impugned order, the application moved by Smt. Baby (Opposite party No. 2) under section 156(3) Cr.P.C. has been allowed and S.O. P.S. Kareli (Allahabad) has been directed to investigate the case after lodging the F.I.R. on the basis of that application.

3. Heard Sri Shahbuddin, learned counsel for the applicants, learned A.G.A. for the State and perused the record.

4. At the outset, a preliminary objection has been raised by the learned AGA about maintainability of the application under section 482 Cr.P.C. against the impugned order and it is contended by him that the order passed under section 156(3) Cr.P.C. directing investigation of the case after registration of the FIR can not be challenged by the prospective accused either in the proceeding under section 482 Cr.P.C. or in Revision under section 397 Cr.P.C. and hence the application in present case moved by the applicants under section 482 Cr.P.C. is liable to be rejected on this ground alone.

5. It is submitted by learned counsel for the applicants that with mala fide intention with a view to harass the applicants, application under section 156(3) Cr.P.C. was moved by Smt. Baby with entirely false allegations and hence, impugned order can be quashed by this Court in its inherent jurisdiction under section 482 Cr.P.C.

6. Having given my thoughtful consideration to the rival submissions, I find force in the aforesaid preliminary objection raised by the learned AGA. As stated herein-above, the application moved by opposite party no. 2 Smt. Baby

under section 156(3) Cr.P.C. has been allowed by the court below vide impugned order and S.O. P.S. Kareli (Allahabad) has been directed to investigate the case after registration of the FIR. In my considered opinion, such order can not be challenged by the prospective accused either in Revision or in the proceeding under section 482 Cr.P.C. Reference in this regard may be made to the case of ***Gulam Mustafa @ Jabbar Vs. State of U.P. and others 2008 (61) ACC 922.*** This matter was also considered by this court in the case of **Prof. Ram Naresh Chaudhary and another Vs. State of U.P. and others 2008(60) ACC 476**.

7. In Para 9 of the case of **Prof. Ram Naresh Chaudhary Vs. State of U.P. (supra),** following observations have been made:-

"At this stage accused does not come into picture at all, nor can he be heard. He has no locus to participate in the proceedings. He can at the most stand and watch the proceedings. It must be remembered that it is pre-cognizance stage. The nature of the order passed by the Magistrate under Section 156(3) Cr.P.C. directing registration and investigation of case is only a peremptory reminder or intimation to the police to exercise its power of investigation under Section 156(1) Cr.P.C, as has been held by Hon'ble Apex Court in the case of ***Devarappalli Lak-Shaminarayana Reddy and others Vs. V. Narayana Reddy and others (1976 ACC 230).*** *How such a reminder is subject to revisional power of the Court is something which goes beyond comprehension. From the nature of the order itself, it is clear that it is an interlocutory order, not amenable to revisional power of the Court. Section 397(2) Cr.P.C. specifically bars revision filed against interlocutory orders."*

8. This Court in the case **of Karan Singh Vs. State (1997 (34) ACC 163**), has observed as follows:-

"Where an order is made under section 156 (3) Cr.P.C. directing the police to register FIR and investigate the same, the Code no where provides that the Magistrate shall hear the accused before issuing such a direction, nor any person can be supposed to be having a right asking the Court of law for issuing a direction that an FIR should not be registered against him. Where a person has no right of hearing at the stage of making an order under section 156(3) or during the stage of investigation until Courts takes cognizance and issues process, he can not be clothed also with a right to challenge the order of the Magistrate by preferring a revision under the Code. He can not be termed as an "aggrieved person" for purpose of section 397 of the Code."

9. Thus at the stage of Section 156(3) Cr.P.C. any order made by the Magistrate does not adversely affect the right of any person, since he has got ample remedy to seek relief at the appropriate stage by raising his objections. It is incomprehensible that accused can not challenge the registration of F.I.R. by the police directly, but can challenge the order made by the Magistrate for the registration of the same with the same consequences. The accused does not have any right to be heard before he is summoned by the Court under the Code of Criminal Procedure and that he has got no right to raise any objection till

the stage of summoning and resultantly he can not be conferred with a right to challenge the order passed prior to his summoning. Further, if the accused does not have a right to install the investigation, but for the limited grounds available to him under the law, it surpasses all suppositions to comprehend that he possesses a right to resist registration of F.I.R.

10. Distinguishing Division Bench ruling in the case of ***Ajay Malviya Vs. State of U.P., 2000(41) ACC 435***, this Court in the case of ***Rakesh Puri and another Vs. State of U.P. and another 2006 (56) ACC 910*** has held as under:-

"To sum up the discussions made above, it is clear that the alleged accused has no right to challenge an order passed under section 156(3) Cr.P.C. at pre-cognizance stage by a Magistrate and no revision lay against such an order at the instance of the alleged accused under section 397(1) Cr.P.C. being barred by section 397(2) Cr.P.C. nor at his instance an application under Section 482 Cr.P.C. is maintainable for the simple reason that if cognizable offence is disclosed in an application filed by the aggrieved person, then his such an application must be investigated to bring culprits to books and not to thwart his attempt to get the FIR registered by rejecting such an application which will not amount to securing the ends of justice but will amount to travesty of it.

11. Again this matter was considered in detail by this Court in the case of ***Chandan Vs. State of U.P. and another 2007(57) ACC 508*** in which, it was held that accused does not have any right to challenge an order passed under Section 156(3) Cr.P.C.

12. Relying upon the decision of the Apex Court in the case of ***Central Bureau of Investigation Vs. State of Rajasthan (2001 (42) ACC 451)***, it was held by this Court in the case of **Rakesh Puri Vs. State (supra)** as follow:-

"It is preposterous even to cogitate that a person has a right to appear before the Magistrate to oppose an application seeking a direction from him for registration and investigation of the offence when he has no right to participate in the said ex-pare proceeding. If permitted this will amount to killing of foetus of investigation in the womb when it was not there at all. Such power has not been conferred under the law on the prospective accused.

When the accused does not have any right to participate in a proceeding, how can he be permitted to challenge an interlocutory order passed in such a proceeding. If an accused cannot stop registration of a complaint under section 190(1)(a) Cr.P.C. howsoever fanciful, mala fide or absurd the allegations may be, he certainly does not possess the power to stall registration of FIR of cognizable offence against him."

13. In view of the law laid down in the aforesaid cases, I am of the considered opinion that the prospective accused has no right to stop the registration of the FIR and its investigation by the police either by filing Revision or moving application under section 482 Cr.P.C. Although after registration of the case in pursuance of the order passed under section 156(3) Cr.P.C., the accused can move the High Court in its writ jurisdiction under Article

226 of the Constitution of India for quashing of the FIR, but prior to the registration of the F.I.R., the prospective accused has no right to challenge that order. Therefore, in present case also, the application moved by the applicants under section 482 Cr.P.C. to set aside the impugned order deserves to be rejected.

14. Consequently, the application under section 482 Cr.P.C. is hereby rejected.

Let a copy of this order be sent by the office to the Judicial Magistrate, Court No. 8, Allahabad, who is directed to ensure that proper investigation is made after lodging the F.I.R. in pursuance of the impugned order dated 12.11.2008 passed by him on application no. 293/XII of 2008 (Smt. Baby Vs. Abdul Aziz and other) under section 156(3) Cr.P.C. P.S. Kareli (Allahabad). Application rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.11.2008

BEFORE
THE HON'BLE SABHAJEET YADAV, J.

Civil Misc. Writ Petition No. 40506 of 2000

Prithvi Nath Misra ...Petitioner
Versus
Regional Administrative Committee, Uttar Pradesh Primary Agricultural Co-operative Credit Societies Central Service, Basti & others ...Respondents

Counsel for the Petitioner:
Sri K.M. Misra
Sri Triloki Nath

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

U.P. Primary Agricultural Co-operative Credit Societies Centralised Services Regulation 1978-Reg.-59 (1)(a)-dismissal of secretary of primary Agricultural Society by member secretary without decision of the D.A.C.-disciplinary proceeding conducted in utter violation of principle of natural justice and contrary to Regulation-held-illegal-dismissal order quashed for limited purpose to conduct the disciplinary proceeding in accordance with law-from the date of suspension to reinstatement till conclusion of enquiry subsistence allowance be given-payment of salary during these period shall be subject to decision by the action taken by the authority.

Held: Para 17

The reply of aforesaid paragraphs of the writ petition has been given in para 15 of the counter affidavit but there appears neither any specific denial of the averments contained in paras 25, 26 and 27 of the writ petition nor any material has been enclosed in support of fact that the petitioner was afforded adequate opportunity to defend his case before the Inquiry Officer, as such I have no option but to hold that entire disciplinary inquiry was held in utter violation of principles of natural justice embodied under Regulation 59 (1) (a) of 1978 Regulations, as such could not be acted upon by the disciplinary authority. Further dismissal order was passed on the basis of show cause notice dated 21.6.1999 sent to the petitioner which was not accompanied by inquiry report submitted by Inquiry Officer, as such on this count also the impugned order of dismissal of the petitioner from service dated 5.8.1999 cannot be sustained and for the same reason the order of Appellate authority dated 16.6.2000 can also not be sustained.

Case law discussed:
1997 (3) UPLBEC 1747 to 66, 1997 (3) UPLBEC 1747, S.C. 647, (1987) 1 SCC 213 : (AIR 1987 SC 1073, (2003) 2SCC 111 : (AIR

2003 SC 511, 2005(4) ESC 2899=2005 ALJ 3721, 2006(4) ALJ-90.

(Delivered by Hon'ble Sabhajeet Yadav, J.)

1. By this petition, the petitioner has challenged the orders dated 5.8.1999 and 16.6.2000, contained in Annexures-9 and 11 respectively to the writ petition whereby the petitioner has been dismissed from service while working on the post of Secretary, Sadhan Sahakari Samiti Ltd., Madanpur Vikas Khand, Uska Bazar, District Siddhartha Nagar after holding disciplinary inquiry against him and appeal preferred by the petitioner has been dismissed by Regional Level Administrative Committee, U.P. Primary Agricultural Co-operative Credit Societies Centralized Service, Basti.

2. The brief facts leading to the case are that the petitioner was placed under suspension while working as Secretary in Sadhan Sahakari Samiti, Madanpur, District Siddhartha Nagar by Member Secretary, District Administrative Committee, Siddhartha Nagar on 25.3.1998 in contemplation of disciplinary inquiry. It is stated that an Inquiry officer was appointed by the Member Secretary without any decision of District Administrative Committee to initiate disciplinary proceeding against the petitioner. It is further stated that on the basis of false flimsy allegation District Administrative Committee, Siddhartha Nagar in its meeting held on 31.7.1999 decided to dismiss the petitioner from service. The order of dismissal was communicated to him by Member Secretary vide letter dated 5.8.1999. The petitioner preferred appeal against the aforesaid order of dismissal before Regional Administrative Committee which too has been dismissed, hence this petition.

3. Heard Sri Triloki Nath, Advocate for the petitioner and Sri Hemant Kumar, Advocate for the respondents.

4. Learned counsel for the petitioner has submitted that the service of petitioner who was member of U.P. Primary Agricultural Co-operative Credit Societies Centralized Service is governed by U.P. Primary Agriculture Co-operative Credit Societies Centralized Service Rules-1976, herein after referred to as Rules-1976 and U.P. Primary Agricultural Co-operative Credit Societies Centralized Service Regulations, 1978 (herein after referred as Regulations-1978). It is further submitted that the petitioner was placed under suspension by the Member Secretary, District Administrative Committee, Siddhartha Nagar-respondent no.4 on a report dated 7.1.1998 received from Assistant Development Officer (Co-operative) Bansi pertaining to Sadhan Sahakari Samiti, Mau, Harbanspur Block Birdpur and Sadhan Sahakari Samiti Ltd., Madanpur Block Uska Bazar, which was not placed before the District Administrative Committee but the respondent no.4 acted in undue haste in issuing the order of suspension without any decision of the District Administrative Committee to initiate disciplinary proceeding against the petitioner. It is further submitted that a Full Bench of this court in **Ram Chandra Pandey Vs. District Administrative Committee and others, 1997 (3) UPLBEC 1747 to 66**, has held that a member of service can neither be suspended by Member Secretary, District Administrative Committee nor any enquiry officer can be appointed by him

in absence of any decision of the District Administrative Committee to initiate disciplinary proceedings against the member of service but in instant case aforesaid suspension order was passed without any such decision of District Administrative Committee to hold disciplinary inquiry against the petitioner, which is appointing authority of the petitioner under rule 13 of the said Rules.

5. It is also submitted that the inquiry officer was also appointed by respondent no.4 in gross violation of Regulation 59(i)(e) of Regulations and against the view expressed by Full Bench of this court referred above inasmuch as charge sheet was issued to the petitioner without approval of the District Administrative Committee, which is appointing authority of the petitioner and further entire disciplinary inquiry was conducted in utter violation of aforesaid Regulations and principles of natural justice, therefore entire disciplinary proceeding is vitiated under law. The Appellate authority has also ignored the aforesaid grounds taken by the petitioner, as such impugned orders passed by the disciplinary authority and appellate authority are not sustainable at all.

6. Contrary to it, learned counsel for the respondents has attempted to justify impugned orders at the strength of various averments made in the counter affidavit filed on behalf of respondents wherein the averments contained in various paragraphs of the writ petition have been refuted and disputed by the contesting respondents as detailed in the counter affidavit. However, while replying para 22 and 23 of the writ petition in para 13 of the counter affidavit it is stated that the charge sheet containing 26 charges has been issued to the petitioner on 28.9.1998 after due approval but it was not disclosed in the said paragraph that by which authority it was approved.

7. At very outset it is necessary to point out that order of suspension dated 25.3.1998 has been merged in the order of dismissal dated 31.7.1999 communicated to the petitioner on 5.8.1999, therefore, the same cannot be held to be in existence so as to enable the court to examine its validity and correctness of the said order of suspension as the same has already been lapsed. However, question remains to be considered is that as to whether in given facts and circumstances of the case the disciplinary inquiry held against the petitioner is faulted with on account of alleged illegality in appointing inquiry officer and further on account of violation of relevant regulations and principle of natural justice while holding disciplinary inquiry against the petitioner.

8. In this connection, it is necessary to point out that from perusal of the order of suspension dated 25.3.1998, it is clear that while passing the order of suspension the Member Secretary, District Administrative Committee has also appointed Addl. District Co-operative officer as inquiry officer directing him to hold detail inquiry with regard to the alleged misconduct of petitioner in Sadhan Sahakari Samiti, Madanpur, Mau and Harbanspur and submit inquiry report and prepare charge sheet against the petitioner. Thus the order of suspension cannot be said to be passed by Member Secretary after any decision taken by the District Administrative Committee to hold formal disciplinary inquiry, therefore at the most order of suspension alone could be faulted with in view of decision of Full

Bench of this Court rendered in ***Ram Chandra Pandey Vs. District Administrative Committee and others, 1997 (3) UPLBEC 1747***, but in my considered opinion the aforesaid illegality in the order of suspension can not vitiate disciplinary inquiry held against the petitioner, unless it is otherwise faulted with because of the simple reason that the suspension of employee is different from disciplinary inquiry and suspension has to be resorted to merely to facilitate the disciplinary inquiry under certain contingencies warranting such suspension. It is not that in each and every circumstances, the suspension of an employee can be resorted to. In my view the suspension can not be held to be concomitant to disciplinary inquiry. It is always open for the employer to place the employee under suspension or not while holding disciplinary inquiry against employee.

9. Before proceeding further it would be useful to refer aforesaid Full Bench decision of this court rendered in Ram Chandra Pandey's case wherein this Court in para 15 and 16 of the judgement has observed as under:-

"15. In all these writ petitions the Member/Secretary while suspending the petitioners has appointed Inquiry Officers to make inquiry into the alleged misconduct of the petitioners and submit their report. The Member/Secretary can appoint an Inquiry Officer for conducting disciplinary inquiry; but he can do so only after the disciplinary proceeding had been taken by the District Committee. It is admitted position in all these cases that the District Committee has not taken a decision initiating or contemplating the disciplinary proceedings against the petitioners. Under the circumstances, the Member/Secretary could not have appointed Inquiry Officers for conducting inquiry. From the tenor of the impugned orders, it is apparent that the Member/Secretary while suspending the petitioners has also initiated the disciplinary proceedings. Such a course is not open to him. That apart, no attempts have been made by the respondents to justify the impugned orders by placing the relevant materials before the Court inspite of the averments, alleging the orders to be arbitrary and illegal. The impugned orders, therefore, cannot be sustained.

16. Our answer to the questions referred to before are as under:

(i) The Member/Secretary can suspend a member of the centralised service under Regulation 69 (1)(f)(i) in the absence of a decision of the District Committee. Similarly, he can suspend a member under Regulation 59(1)(f)(iii) without any decision of the District Committee. But a member of the service cannot be suspended by the Member/Secretary under Regulation 59(1)(f)(ii) in the absence of a decision by the District Committee contemplating or initiating disciplinary inquiry. The decisions of this Court taking the view contrary to what is contained in this judgement stand over-ruled.

(ii) When the District Assistant Registrar is himself a Member/Secretary of the District Committee, he can suspend a member of the centralised service without any concurrence of Assistant Registrar. In such a case the provisions requiring the prior concurrence of the Assistant Registrar stand dispensed with.

(iii) The District Committee is fully competent to suspend a member of the centralised service.

(iv) The Member/Secretary cannot appoint an Inquiry Officer to conduct the disciplinary proceedings in the absence of decision of the District Committee initiating or contemplating the disciplinary proceedings.

(v) The impugned orders of suspension are illegal and cannot be sustained."

10. Now before analyzing said decision, it would be useful to refer some decisions of Hon'ble Apex court, wherein it has been held that a decision is only an authority for what it actually decides and not what logically follows from various observations made in it. In this connection, reference of few such decision can be made herein after.

11. In **State of Orissa Vs. Sudhansu Shekhar Misra, A.I.R. 1968 S.C. 647,** wherein Hon'ble Apex Court in para-13 of the decision has observed as under:

"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it."

12. In ***Ambica Quarry Works Vs. State of Gujarat & others (1987) 1 SCC 213 : (AIR 1987 SC 1073*** (vide para 18) Hon'ble Apex Court observed:--

"The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it."

13. In ***Bhavnagar University Vs. Palitana Sugar Mills PVt. Ltd. (2003) 2SCC 111 : (AIR 2003 SC 511)*** (vide para 59), Hon'ble Apex Court observed:--

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

14. Now applying the law laid by Hon'ble Apex Court, I am of considered opinion that Full Bench of this court has decided only issue of suspension of member of Centralized Service in circumstance under which suspension can be resorted to. It has nothing to do with legality or otherwise validity of disciplinary proceeding. Therefore, the aforesaid decision can not be further stretched to apply in the disciplinary inquiry held against the petitioner.

15. Now next question arises for consideration is as to whether entire disciplinary proceeding held against the petitioner can be faulted with on account of alleged illegality in appointment of inquiry officer? In this connection it is necessary to point out that from the records, it transpires that inquiry officer was not appointed after the decision of District Administrative Committee to hold disciplinary inquiry against the petitioner, contrary thereto it appears that member/secretary has appointed inquiry officer without any decision of District Administrative Committee to hold disciplinary inquiry against the petitioner and charge sheet was also issued without prior approval of District Administrative Committee, but the question for consideration is that as to whether such illegality in appointing inquiry officer and issuing charge sheet in given facts and

circumstances of the case would vitiate further proceeding or it could be ratified by the disciplinary authority subsequently? In this connection it is necessary to point out that since the case can be decided on other points, therefore, I do not propose to decide the aforesaid questions leaving it open to the decided in appropriate case.

16. Now next question arises for consideration is that as to whether disciplinary inquiry held against the petitioner is vitiated for want of observance of principle of natural justice and relevant provisions of Regulations? In this connection, it is necessary to point out that in paras 25, 26 and 27 of the writ petition it is stated that notice dated 14.5.1999 was sent to the petitioner to appear in meeting of District Administrative Committee to be held on 22.5.1999, in pursuance thereof when the petitioner reached to the Cooperative Bank Ltd., Siddharth Nagar on 22.5.1999, there was no such meeting on 22.5.1999 and without further intimation to the petitioner a meeting of District Administrative Committee is shown to have been held on 25.5.1999. It is further stated that on 25.5.1999 earlier inquiry officer was changed and Sri Abdul Hasan, Additional District Cooperative Officer was appointed as inquiry officer, who has neither given personal hearing nor given opportunity to cross-examine any witness nor any opportunity to the petitioner to adduce his defence evidence was given but inquiry officer has submitted inquiry report without holding any inquiry merely on the basis of record and ex-parte version of the department.

17. The reply of aforesaid paragraphs of the writ petition has been given in para 15 of the counter affidavit but there appears neither any specific denial of the averments contained in paras 25, 26 and 27 of the writ petition nor any material has been enclosed in support of fact that the petitioner was afforded adequate opportunity to defend his case before the Inquiry Officer, as such I have no option but to hold that entire disciplinary inquiry was held in utter violation of principles of natural justice embodied under Regulation 59 (1) (a) of 1978 Regulations, as such could not be acted upon by the disciplinary authority. Further dismissal order was passed on the basis of show cause notice dated 21.6.1999 sent to the petitioner which was not accompanied by inquiry report submitted by Inquiry Officer, as such on this count also the impugned order of dismissal of the petitioner from service dated 5.8.1999 cannot be sustained and for the same reason the order of Appellate authority dated 16.6.2000 can also not be sustained.

18. The view taken herein before also finds support from two recent decisions of two Division Benches of this Court rendered in ***Gopal Chandra Sinha Vs. State of U.P. and others 2005(4) ESC 2899=2005 ALJ 3721*** and ***Shiv Shanker Saxena Vs. State of U.P. 2006(4) ALJ-90*** wherein this Court, after examining almost all the relevant case laws on the subject has decided somewhat similar issue in quite detail.

19. In view of aforesaid discussion and observations, the impugned orders dated 05.08.1999 and 16.06.2000 passed by disciplinary authority and appellate authority are quashed. In the result the petitioner shall be reinstated in service, but only for the limited purpose of

holding disciplinary inquiry against him. He shall be reinstated within a period of 15 days from the date of production of certified copy of the order passed by this Court before competent authority but the petitioner shall be treated to be under suspension during fresh disciplinary inquiry to be held against him.

20. Although I have not expressed any opinion about the validity of charge sheet issued to the petitioner on merits but as abundant caution it would be proper for the disciplinary authority to issue fresh charge sheet to the petitioner within a period of one month from the date of his reinstatement in service for the purpose of holding fresh disciplinary inquiry on the charges already levelled in the charge sheet of the petitioner. The petitioner shall be given fresh opportunity to make reply of the said charge sheet and after considering the reply of the charge sheet, in case the disciplinary authority finds it necessary to hold fresh disciplinary inquiry against the petitioner it is open for the authority to proceed further with disciplinary inquiry and conclude the same within another period of three months. It is needless to say that while holding fresh disciplinary inquiry the petitioner shall be given adequate opportunity of hearing including cross-examination of witnesses to be examined on behalf of department and adduce his own defence evidence and witnesses. The petitioner shall also be paid subsistence allowances during disciplinary inquiry admissible to his current pay scale and salary.

21. In case, the petitioner succeeds in disciplinary inquiry finally, the disciplinary authority shall also pass appropriate order with regard to the continuity of service and remuneration payable to the petitioner from the date of his dismissal to the date of his reinstatement while concluding disciplinary inquiry.

22. With the aforesaid observation and direction, writ petition succeeds and is allowed to the extent indicated hereinabove.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.11.2008

BEFORE
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition No.23090 of 2008

Vijay Kumar Yadav ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Akhilanand Mishra

Counsel for the Respondents:
Sri Ravi Ranjan
S.C.

U.P. Govt. Servant (Disciplined and Appeal, Rules 1999-Rule-9 (4)- Termination order-passed after giving charge sheet-after receiving explanation of the concerned employees-petitioner got appointed at the age of 14 years by playing fraud-vitiated the initial appointment itself-No denial of entry of date of birth made in Transfer certificate-except the ignorance on the basis of wrong information given by his mother-nothing explained-held-fraud, misrepresentation vitiate every thing-can not be interfered by writ court.

Held: Para 9

In this view of the matter, at the time of appointment the petitioner was only 14 years and was not major, therefore, his appointment was abinitio illegal. It is not the case where the petitioner has been subjected to punishment during the course of his service. The petitioner has been given fullest opportunity of hearing. Therefore, the decisions cited by the petitioner in the case of Mohd. Aslam Versus State of U.P. and others (supra) and Vijay Sankar Tiwari, Etc. Versus Food Corporation of India and others etc. (supra) are not applicable in the present case.

Case law discussed:

2008 (1) ESC, 493 (All), (2006) 3 UPLBEC, 2499

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

1. The petitioner has filed the present writ petition challenging the order dated 23.04.2008 passed by respondent no.5 by which he has been removed from service.

2. The petitioner was appointed on the post of Runner in Tube well Construction Division, Gonda on 24.03.1988 on compassionate ground under the Dying in Harness Rules, 1974. Later on, the petitioner was transferred to Tubewell Division-1, Gorakhpur in which he joined on 10.09.1992. On the receipt of the complaint, enquiry was made from the Principal, Cooperative Inter College, Pipraich, Gorakhpur and it was found that his date of birth was 1.7.1974. On these facts, the petitioner has been given charge sheet dated 31.07.2007, which is Annexure-2 to the writ petition. In the charge sheet in paragraph 2, it has been specifically stated that in the service book the date of birth of the petitioner was 11.12.1969, while in a certificate issued by Cooperative Inter College, Pipraich, Gorakhpur the date of birth of the petitioner was 1.7.1974 and, therefore, at the time of appointment the age of petitioner was only 14 years while it should be 18 years. It has also been stated that by committing fraud and concealing the correct date of birth, the appointment has been obtained. The petitioner has been asked to file the reply. The petitioner has been asked to file the reply. The petitioner filed the reply to the aforesaid charge sheet, which is Annexure 3 to the writ petition.

3. Perusal of the reply filed by the petitioner reveals that the allegation made in the charge sheet about the certificate issued by the Cooperative Inter College, Pipraich, Gorakhpur and the date of birth mentioned in the College record has not been denied. It has also been stated that by ignorance his mother and grand-mother has informed about the date of birth to the College. Having regard to the reply of the charge sheet filed by the petitioner and the enquiry report, the petitioner has been removed from service by the impugned order inasmuch as the appointment of the petitioner was abinitio illegal.

4. Learned counsel for the petitioner submitted that after the enquiry report the petitioner should have given opportunity of hearing as contemplated under section 9 (4) of the U.P. Government Servant (Discipline and Appeal) Rules, 1999. Since it has not been complied with the order of removal is patently illegal. In support of his contention, he relied upon the decisions of this Court in the case of **Mohd. Aslam Versus State of U.P. and others reported in 2008 (1) ESC, 493 (All) and Vijay Sankar Tiwari, Etc Versus Food Corporation of India and**

others etc. reported in (2006) 3 UPLBEC, 2499.

5. Learned Standing Counsel submitted that before passing the impugned order, the petitioner was given full opportunity. The petitioner has been issued charge sheet, which has been replied by the petitioner. He submitted that the charges against the petitioner have not been disputed in the reply and no evidence has been adduced to substantiate the claim that date of birth in the record of the Cooperative Inter College, Pipraich, Gorakhpur from where the petitioner admittedly obtained education, the date of birth as 1.7.1974 was wrongly mentioned. This fact has not been denied in the reply filed to the charge sheet and, therefore, it is wrong to say that the impugned order has been passed without giving opportunity of hearing. He submitted that present is the case of abinitio illegal appointment of the petitioner on the basis of fraud and mis-representation made by the petitioner, while seeking the appointment on compassionate ground. It is not the case where during the course of service on account of certain act, the petitioner has been subjected to penal action.

6. Having heard the learned counsel for the parties, I have perused the impugned order, various documents annexed with the writ petition and counter affidavit.

7. I do not find any substance in the argument of the learned counsel for the petitioner.

8. Admittedly, the petitioner has been given charge sheet, which is annexure-2 to the writ petition in which it was categorically stated that the petitioner had education in Cooperative Inter College, Pipraich, Gorakhpur wherein the date of birth was shown as 1.7.1974. Certificate of the Principal, Cooperative Inter College, Pipraich, Gorakhpur also reveals that date of birth shown was 1.7.1974. In the charge sheet, it was stated that the petitioner by committing fraud and concealing the correct date of birth has sought the appointment in the year, 1988 when he was minor aged about 14 years. In the reply to the said charge sheet, the petitioner has not disputed the certificate issued by the Principal, Cooperative Inter College, Pipraich, Gorakhpur. The petitioner has also not disputed that he studied in the said college. In the reply, the petitioner has simply stated in paragraph 7 that his mother or grand-mother inadvertently told the date of birth as 1.7.1974. On these facts, it is apparent that the petitioner has concealed his date of birth which was 1.7.1974, which is apparent from the record of the college, namely, Cooperative Inter College, Pipraich, Gorakhpur where the petitioner had studied upto Junior High School.

9. In this view of the matter, at the time of appointment the petitioner was only 14 years and was not major, therefore, his appointment was abinitio illegal. It is not the case where the petitioner has been subjected to punishment during the course of his service. The petitioner has been given fullest opportunity of hearing. Therefore, the decisions cited by the petitioner in the case of **Mohd. Aslam Versus State of U.P. and others (supra) and Vijay Sankar Tiwari, Etc. Versus Food Corporation of India and others etc.**

(supra) are not applicable in the present case.

10. In this view of the matter, the writ petition is devoid of any merit and is, accordingly, dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.12.2008

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

Special Appeal No.1628 of 2008

Maharishi Shiksha Sansthan and another ...Petitioners
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioners:
Sri Shakti Swarup Nigam

Counsel for the Respondents:
Sri K.R. Sirohi
Sri Rajesh Tiwari

Employees State Insurance Act, 1948-Section 10-Establishment-Notification of central Government challenged by management-running CBSE school-ground taken education institution not defined in the Act-provisions of ESD Act not applicable-held- wholly misconceived-word 'otherwise' used under this section-vide enough to cover educational Institution-view taken by Single Judge needs no interference.

Held: Para 4 & 6

The Hon'ble Single Judge by means of the impugned judgment and order dated 22nd October, 2008 held that the contentions so raised on behalf of the petitioner is misconceived, the word 'otherwise' as used in the said is wide enough to cover educational institutions. Reliance has been placed upon the judgment of the Supreme Court in the case of *Hindu Jea Band, M/s Jaipur vs. Regional Director, Employees' State Insurance Corporation, Jaipur* reported in AIR 1987 SC 1166.

We are of the considered opinion that the Hon'ble Single Judge has rightly held that educational institution would be covered under the definition of establishment specifically in view of the use of the word 'otherwise'. It has rightly been held that the word 'otherwise' is of wide amplitude covering all other establishments including educational institutions.

Case law discussed:
AIR 1987 SC 1166, A.I.R. 1963, AIR 1988 SC 1700

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

1. Heard Sri Shakti Swarup Nigam for the appellants and Sri K.R. Sirohi, Senior Advocate, assisted by Sri Rajesh Tiwari for the respondents.

2. The appellant No. 1 before this Court is an unaided institution said to be recognized by the Central Board of Secondary Education. The institution had approached this Court by means of Writ Petition No.53277 of 2008 challenging the notification issued in exercise of powers under Section 1(5) of ESI Act, 1948 dated 30th June, 2008 whereby educational institutions have been brought within the purview of the ESI Act, 1948.

3. Learned counsel for the appellants had contended before the Hon'ble Single Judge that word 'establishment' has not been defined under the ESI Act. Education Institutions cannot be treated to be an establishment within the meaning of Section 1(15) of the ESI Act, 1948 inasmuch as the words 'other

establishments' as used in the said section would necessary take it's colour from the preceding words industrial, commercial, agricultural or otherwise, being read as ejusdem generic. The educational institutions do not perform any industrial or commercial activity and therefore it cannot be included within the purview of ESI Act, 1948.

4. The Hon'ble Single Judge by means of the impugned judgment and order dated 22nd October, 2008 held that the contentions so raised on behalf of the petitioner is misconceived, the word 'otherwise' as used in the said is wide enough to cover educational institutions. Reliance has been placed upon the judgment of the Supreme Court in the case of ***Hindu Jea Band, M/s Jaipur vs. Regional Director, Employees' State Insurance Corporation, Jaipur*** reported in AIR 1987 SC 1166.

5. We have heard learned counsel for the parties and have gone through the record.

6. We are of the considered opinion that the Hon'ble Single Judge has rightly held that educational institution would be covered under the definition of establishment specifically in view of the use of the word 'otherwise'. It has rightly been held that the word 'otherwise' is of wide amplitude covering all other establishments including educational institutions.

7. Reference may also be had to the following judgments of the Apex Court wherein a University as well as a School has been held to be an industry (a) A.I.R. 1963; ***University of Delhi vs. Ram Nath*** and (b) AIR 1988 SC 1700; ***Miss. A. Sundarambal vs. Government of Goa, Daman & Diu and others***, on the same logic education institutions would also answer the description of establishment as per Section 1 (5) of the ESI Act.

8. In view of the aforesaid, the special appeal lacks merit and is dismissed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.11.2008

BEFORE
THE HON'BLE VIJAY KUMAR VERMA, J.

Criminal Revision No. 131 of 2005

Kailash Yadav and others ...Revisionists
Versus
State of U.P. & another ...Opposite parties

Counsel for the Revisionists:
Sri Praveen Kumar Singh

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

U.P. Prevention of Cow Slaughter Act 1995-Section 3,5, 5A-ceasure of bullock by police during transformation-release application also rejected by Magistrate on investigation they were carried out for slaughter purpose in Bihar State-from the version of F.I.R. no offence made out under the Act-ownership of these Bullock can be decided by the Court below-court expressed it great concern considering the lack of judicial knowledge of these judicial officer or under deep devotion towards cow-held-impugned order rejecting release application wholly illegal-direction issued for fresh consideration of release application.

Held: Para 14

Certain guidelines were issued by the Hon'ble Apex Court in the case of *Sunderbhai Ambalal Desai Vs. State of Gujarat AIR 2003 Supreme Court 638* regarding disposal of the property. While passing the impugned order, the learned Court below did not care to see those guidelines. When no offence under the Cow Slaughter Act is made out in the present case, then there was no justification for the court below to decline to release the seized bullocks merely on the assumption that the said cattle were being carried to Bihar for slaughtering.

Case law discussed:

1991 (supal) ACC 110, AIR 2003 Supreme Court 638

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

"Whether carrying the cow, bull or bullock from one place to another place within the State of Uttar Pradesh for the purpose of slaughtering constitutes any offence under the Uttar Pradesh Prevention of Cow Slaughter Act 1955 (in short, 'the Cow Slaughter Act')?" is the main question that falls for consideration in this revision, which has been preferred against the order dated 04.01.2005 passed by the Chief Judicial Magistrate Ghazipur.

2. By the impugned order, the Court below has declined to release the bullocks seized in case crime no. 1062 of 2004 under section 3, 5-A, 8 of Cow Slaughtering Act and Section 11 of the Prevention of Cruelty to Animals Act (in short, 'the Animals' Cruelty Act'), P.S. Nonahra, District Ghazipur.

3. The facts emerging from the record leading to the filing of this revision are that an FIR was lodged by S.I. S.Tiwari on 20.12.2004 at 10.00 a.m. at P.S. Nanahra (Ghazipur), where a case under section 3, 5-A and 8 of Cow Slaughter Act and Section 11 of Animals' Cruelty Act was registered at crime no. 1062 of 2004 against (1) Radhey Shyam Yadav, (2) Subhash Navik, (3) Baladin Pasi, (4) Ramesh Yadav; and (5) Chottey Lal Yadav. Shorn of unnecessary details, the allegations made in the FIR, in brief, are that on getting information from an informer, S.I. S. Tiwari with the help of other police personnels arrested the accused named above on 20.12.2004 at 6.15 a.m. near village Shankerpur within the limits of P.S. Nanahra, District Ghazipur. The accused persons were carrying fifteen bullocks, which were seized by the police. It is alleged that the bullocks were being carried by the accused to Bihar for the purpose of slaughtering. The Revisionists moved an application on 24.12.2004 in the Court of Chief Judicial Magistrate, Ghazipur for release of the bullocks with the averments that they are the owners of seized bullocks, which they had purchased for agriculture purpose from District Jaunpur and they had engaged Radhey Shyam Yadav, Subhash Navik, Baladin Pasi, Ramesh Yadav and Chottey Lal on labour for carrying the bullocks, which were seized by the police when its demand of illegal money was not fulfilled and the accused persons were also arrested. The learned Chief Judicial Magistrate Ghazipur vide impugned order has declined to release the bullocks in favour of the Revisionists assuming that the bullocks were being carried to Bihar for the purpose of slaughtering. Hence, this revision.

4. When the case was taken up in the revised list, the counsel for the Revisionists did not come. Hence, I have heard arguments of learned AGA for the

State. The revision is being decided on merit after going through the record.

5. It was contended by the learned AGA that the seized bullocks were being carried to Bihar for the purpose of slaughtering by the accused persons named in the FIR and hence the learned Court below did not commit any illegality in declining to release the said cattle in favour of the Revisionists.

6. Having given my best of consideration to the submission made by the learned AGA, I find no force in the said contention. The Uttar Pradesh Prevention of Cow Slaughter Act was enacted to prohibit and prevent the slaughter of cow and its progeny in Uttar Pradesh. Slaughter has been defined in section 2 (d) which reads thus:-

"Slaughter' means killing by any method whatsoever and includes maiming and inflicting of physical injury which in the ordinary course will cause death."

7. Section 3 of Cow slaughter Act lays down that "no person shall slaughter or cause to be slaughtered, or offer or cause to be offered for slaughter, a cow, bull or bullock in any place in Uttar Pradesh, anything contained in any other law for the time being in force or any usage or custom, to the contrary notwithstanding."

8. Section 5-A of Cow Slaughter Act although is not relevant for the present case, but it will be useful to have a look on this section also, which read thus:-

5-A Regulation on transport of Cow etc-(1)

"No person shall transport or offer for transport or cause to be transported any cow, or bull or bullock, the slaughter whereof in any place in Uttar Pradesh is punishable under this Act, from any place within the State to any place outside the State, except under a permit issued by an officer authorised by the State Government in this behalf by notified order and except in accordance with the terms and conditions of such permit."

9. The contravention of Section 3, 5 & 5-A of Cow Slaughter Act is punishable under section 8 which reads thus:-

"(1) Whoever contravenes or abets the contravention of the provisions of Section 3, Section 5 or Section 5-A shall be punished with imprisonment for a term which may extend to seven years and with fine which may extend to ten thousand rupees.
(2) Whoever attempts to commit an offence punishable under sub section (1) shall be punished with imprisonment for a term which may extend to one-half of the longest term of imprisonment provided for that offence and with such fine as is provided for the offence."

10. As mentioned herein-above, the allegations made in the First Information Report lodged at P.S. Nanahra on 20.12.2004, in brief, are that the accused Radhey Shyam Yadav, Subhash Navik, Baladin Pasi, Ramesh Yadav and Chottey Lal Yadav were arrested by the police carrying fifteen bullocks for the purpose of slaughtering. Having regard to the term 'Slaughter' as defined in section 2(d) of Cow Slaughter Act and provisions of Section 3, even if the entire version of

FIR is accepted to be true, no offence under Cow Slaughter Act would be made out in this case. Although merely due to carrying the bullocks by the accused persons named in the FIR, it can not be presumed that they were carrying the said cattle for slaughtering, but even if it is assumed for the sake of argument that the accused persons were carrying the bullocks for the purpose of slaughtering, then also no offence under Cow Slaughter Act would be made out in present case, because all the bullocks were healthy and neither they were being offered to any other person for slaughtering nor any attempt for slaughtering was being made by the accused persons carrying them. No bullock was found maimed and no injury sufficient in the ordinary course of nature to cause death was caused to any bullock. If the entire version of the FIR is taken to be true on its face value, the case would not travel beyond the stage of preparation, which is not punishable under Cow Slaughter Act or any other law for the time being in force. There was no contravention of section 3 or any other section of Cow Slaughter Act and hence, no offence punishable under section 8 of the said Act would be made out in this case. Attempt to commit the offences described in section 3, section 5 and section 5-A of Cow Slaughter Act is punishable under section 8(2) of the Act. If neither any attempt of slaughtering the cow, bull or bullock is made nor these cattle are offered to any person for slaughtering and if all the cattle during transportation or carrying them on foot remained healthy and no cattle is killed or maimed and no injury sufficient in the ordinary course to cause death is caused to them, then no offence under the Cow Slaughter Act would be made out, even if these cattle are carried with the intention of Slaughtering, because intention of the offence of slaughtering is not punishable under any law for the time being in force.

11. Mere transportation of cow, bull or bullock from one place to another place within the State of Uttar Pradesh or carrying them on foot can not amount to **'attempt'** of slaughtering and this act at the most can be said to the **'preparation'** of slaughtering, which is not punishable under Cow Slaughter Act or any other law for the time being in force. Reference in this regard may be made to the case of **Babu vs. State of U.P. 1991 (supal) ACC 110**. In that case bullocks were being transported in trucks which were seized at Bihar border. FIR was lodged under section 5 & 8 of Cow Slaughter Act and Section 11 of Animals' Cruelty Act. It is held by the Allahabad High Court that Uttar Pradesh Prevention of Cow Slaughter Act prohibits slaughter of cow or bullocks and possession of beef, but there is nothing in the act prohibiting preparation for cow slaughtering. It is also held that there can not be reasonable presumption or inference that the bullocks were being transported for slaughtering. In present case also, barring the so called confession of the accused persons before the police, there is no other material on record to show that the seized bullocks were being carried to Bihar for the purpose of slaughtering as alleged in the FIR. An affidavit has been filed in this Revision by the Revisionist Kailash Yadav, who has stated that the Revisionists had purchased the bullocks from different agriculturists by means of sale letters after making payment of reasonable and considerable amount. Annexure-II to the said affidavit is the copy of release application, which was moved by the Revisionists on 24.12.2004

in the Court of Chief Judicial Magistrate, Ghazipur. In that application also, it was averred that the applicants had purchased the bullocks from District Jaunpur for agriculture purpose and they had engaged Radhey Shyam Yadav, Subhash Navik, Baladin Pasi, Ramesh Yadav and Chottey Lal on labour for carrying the said bullocks to District Ghazipur. Therefore, keeping all these facts in view, it can not be presumed in the present case that the accused persons were carrying the seized bullocks for slaughtering.

12. The offence of **'abatement'** of slaughtering would also not be made out in present case, as the accused persons at the time of their arrest were neither offering the bullocks to any other person for slaughtering, nor they were providing any other kind of aid to any person for the offence of slaughtering. Mere transporting the cow, bull or bullock or carrying them on foot from one place to another place within the State of Uttar Pradesh can not be said to the **'abatement'** of any offence under Cow Slaughter Act, unless these cattle are either offered to any other person for slaughtering or any other kind of aid is provided to any person for the offence of slaughtering.

13. It is often seen now-a-days that whenever the cow, bull or bullocks are transported by any goods carriage or carried on foot, they are generally seized either by the police or some anti-social elements. The Uttar Pradesh Police also is helpless before such anti-social elements, who are violating the Fundamental right of citizens to carry the trade of purchasing and selling the cattle. Cow Slaughter Act prohibits slaughter of cow and its progeny and possession of beef, but neither this Act, nor any other law for the time being in force prohibits the trade of cow or its progeny within the State of Uttar Pradesh. Unfortunately the police of Uttar Pradesh is also helping such anti-social elements by seizing the cattle and vehicles carrying them, even no offence under Cow Slaughter Act or Animals' Cruelty Act is made out. Even more unfortunate state of affairs in Uttar Pradesh is that the Magistrates and Judges in subordinate courts are also not looking to this matter and either due to excessive devotion to cow or lack of legal knowledge, they are not only declining to release the seized cattle or vehicles carrying them, but without applying their mind, they are rejecting the bail applications also in such cases, although no offence under Cow Slaughter Act is made out and all the offences under Animals' Cruelty Act are bailable. While making Inspection of **Rampur judgship** as **Administrative Judge**, I found that a large number of bail applications in such cases were rejected not only by the magistrates, but unfortunately the then Sessions Judge and some Additional Sessions Judges also did not care to see whether any offence under Cow Slaughter Act is made out or not and without applying the mind, the bail applications even in those cases were rejected where two or three bullocks were being carried on foot by the accused. This unfortunate practice of rejecting the bail applications without applying mind by merely seeing section 3, 5, 5-A and 8 of Cow Slaughter Act in FIR is prevalent almost in the whole Uttar Pradesh, which is unnecessarily increasing the work-load of High Court. By declining bail to the accused persons under Cow Slaughter Act, although no offence under this act is made out and the offences punishable under Animals' Cruelty Act are bailable, the personal liberty of the accused

protected under Article 21 of the Constitution of India is also unnecessarily curtailed till their release on granting bail by the High Court.

14. Certain guidelines were issued by the Hon'ble Apex Court in the case of ***Sunderbhai Ambalal Desai Vs. State of Gujarat AIR 2003 Supreme Court 638*** regarding disposal of the property. While passing the impugned order, the learned Court below did not care to see those guidelines. When no offence under the Cow Slaughter Act is made out in the present case, then there was no justification for the court below to decline to release the seized bullocks merely on the assumption that the said cattle were being carried to Bihar for slaughtering.

15. The bullocks in question were seized from the possession of the accused persons named in the FIR, which was lodged at P.S. Nanahra, whereas the application for their release was moved by the Revisionists claiming themselves to be the owners of the said bullocks. The Court below while passing the impugned order has not decided the matter of ownership of bullocks. The accused persons named in the FIR do not appear to have been heard at the time of passing the impugned order. Therefore, the bullocks can not be released by this Court in favour of the Revisionists, as the matter of their ownership has to be decided by the Court below after giving opportunity to the accused persons named in the FIR. The Court below vide its impugned order appears to have declined to release the bullocks assuming that the said bullocks were being carried to Bihar for slaughtering. As I have stated above, mere carrying or transporting the cow, bull or bullock from one place to another place within the State of Uttar Pradesh does not constitute any offence under Cow Slaughter Act unless there is contravention of section 3 and 5-A of the Act. As stated herein-above, there was no contravention of section 3 or any other section of Cow Slaughter Act in the present case. Therefore, the impugned order being wholly illegal can not be sustained.

16. Consequently, the Revision is allowed. The impugned order is set-aside and the court below is directed to dispose of the release application of the Revisionists for release of the bullocks seized by the police of P.S. Nanahra, District Ghazipur in crime no. 1062 of 2004 keeping in view the observations made in this judgement. The claim of ownership of seized bullocks will be decided by the Court below after informing the accused Radhey Shyam Yadav, Subhash Navik, Baladin Pasi, Ramesh Yadav and Chottey Lal Yadav by sending notices to them by registered post.

The office is directed to send a copy of this Judgment within a week to the lower court concerned for necessary action.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.09.2008

BEFORE
THE HON'BLE V.M. SAHAI, J.
THE HON'BLE PANKAJ MITHAL, J.

Special Appeal No.1252 of 2008

Bhagwati Prasad & another...Appellants
Versus
State of U.P. and others ...Respondents

Counsel for the Appellants:
Sri Ashok Khare
Sri Siddharth Khare

Counsel for the Respondents:
Sri P.N. Saxena
Sri Awadhesh Kumar Malviya
S.C.

Intermediate Education Act 1921-Chapter III Regulation 2 readwith Subordinate Officers Ministerial Employees Service (Direct Recruitment) Rules 1985-Promotion-class IV employees on Class III post-practice of written examination ignoring seniority-cum-suitability-in absence of specific provision for written test-entire selection proceeding vitiated being contravention of Rule-can not sustained.

Held: Para 7

As per rule 2, promotions are to be made on the basis of seniority subject to rejection of unfit and not through a written test from amongst eligible class IV employees working in the institution. Subordinate Offices Ministerial Employees Service (Direct Recruitment) Rules, 1985 do not provide for any written examination for promotion, therefore, selection of respondent no.5 was vitiated being in contravention of rules.

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

1. The short question that arises for consideration in this appeal is whether for making promotion from class IV to class III post in a government aided institution a written examination is permissible?

2. In Mahavir Inter College, Malikpura, Ghazipur a vacancy of class III employee occurred which was to be filled by promotion from class IV employees. The respondent no.5 was considered for promotion and the District Inspector of Schools, Ghazipur by order dated 24.1.2008 granted promotion to Raj Narain Singh Chauhan, respondent no.5 who was recommended for promotion on the basis of some written test conducted by the selection committee.

3. The approval granted to the promotion of respondent no.5 Raj Narain Singh Chauhan was challenged by the appellants by means of Civil Misc. Writ Petition No.37763 of 2008 on the ground that no written test was permissible for promotion from class IV post to class III post and the appellants possessed minimum educational qualification of High School prescribed for promotion but their claim for promotion on class III post was not considered by the selection committee. The writ petition filed by the appellants has been dismissed by the learned single Judge on 30.7.2008 on the ground of laches.

4. We have heard Sri Ashok Khare, learned senior counsel assisted by Sri Siddhartha Khare, for the appellants and Sri P.N.Saxena, learned senior counsel assisted by Sri A.K.Malviya for respondent no.5 and the learned standing counsel appearing for respondents no.1 to 3. With the consent of learned counsel for the parties, we have taken up this appeal as well as the writ petition for final disposal.

5. Chapter III Regulation 2 of the Regulations framed under the U.P. Intermediate Education Act, 1921 provides for appointment and promotion of class III and class IV employees. It lays down that the minimum educational qualification of clerks and class IV employees would be same as is applicable

to the employees of government higher secondary institutions. Regulation 2 of Chapter III of the Regulations is quoted below:-

"2 (1) किसी संस्था में नियुक्ति हेतु लिपिक एवं चतुर्थ वर्गीय कर्मचारियों की न्यूनतम शैक्षिक योग्यता वही होगी जो राजकीय उच्चतर माध्यमिक विद्यालयों के समकक्षीय कर्मचारियों के लिए समय पर निर्धारित की गई हो।

(2) प्रधान लिपिक एवं लिपिक श्रेणी के स्वीकृत पदो की कुल संख्या का ५० प्रतिशत संस्था में कार्यरत लिपिकों एवं चतुर्थ श्रेणी कर्मचारियों मे से पदोन्नति द्वारा भरा जायेगा यदि कर्मचारी पद हेतु निर्धारित अर्हता रखता हो तथा वह आगे पद पर ५ वर्ष की अविरल मौलिक सेवा कर चुका हो तथा उनका सेवा अभिलेख अच्छा हो पदोन्नति अनुपयुक्त को छोडकर ज्येष्ठता के आधार पर की जायेगी।"

6. The aforesaid rule does not lay down any written test for the purposes of promotion from class IV posts to class III posts. Subordinate Offices Ministerial Employees Service (Direct Recruitment) Rules, 1985 are equivalent rules which are applicable to government educational institutions. Rule 6 of the 1985 Rules clearly provides that 15% of the vacancies would be filled in pursuance to the government orders issued from time to time by promotion of group D employees to group C. Group D is equivalent to class IV post of the educational institutions.

7. It is not disputed by the learned counsel for the parties that the appellants have passed High School examination. From the list filed as Annexure-1 to the writ petition, it is apparent that large number of candidates who are working on class IV post in the institution and who have passed High School Examinations were eligible for promotion, but they could not be considered for promotion along with respondent no.5 as the selection committee conducted a written test which was not provided under the rules. As per rule 2, promotions are to be made on the basis of seniority subject to rejection of unfit and not through a written test from amongst eligible class IV employees working in the institution. Subordinate Offices Ministerial Employees Service (Direct Recruitment) Rules, 1985 do not provide for any written examination for promotion, therefore, selection of respondent no.5 was vitiated being in contravention of rules. Moreover, the learned single Judge committed error in dismissing the writ petition on the ground of laches which has been fully explained by the appellants in paragraph 6 of the appeal. Had an opportunity been given by the learned single Judge to the petitioners in the writ petition, they would have explained the laches.

8. For the aforesaid reasons, the impugned selection made by respondents and the approval granted by the District Inspector of Schools dated 24.1.2008 is wholly illegal and cannot be maintained.

9. In the result, this special appeal succeeds and is allowed. The order of learned single Judge dated 30.7.2008 passed in Civil Misc. Writ Petition No.37763 of 2008 is set aside. The order dated 24.1.2008 passed by District Inspector of Schools, Annexure-4 to the writ petition, is quashed. Respondent No.4 is directed to hold a fresh selection for filling the vacancies of class III posts by promotion of class IV employees, in accordance with law.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.09.2008

BEFORE
THE HON'BLE S.N.H. ZAIDI, J.

Criminal Revision No. 3158 of 2005

Krishna Kumar Rai ...Revisionist
Versus
State of U.P. & another ...Opposite parties

Counsel for the Revisionist:
Sri Satish Trivedi
Sri P.K. Rai

Counsel for the Opposite Parties:
Sri Raj Kumar Khanna
A.G.A.

Code of Criminal Procedure-Section 319-Summoning of applicant-during trail-Magistrate after examine the prosecution witness for offence under Section 323/325/336/506 I.P.C.-next day allowed the application summoning applicant-challenged on ground of delay as well as plea of "Alibi"-held-plea of alibi can be decided only after giving opportunity to the prosecution for cross examination during trail-summoning order perfectly justified-No inference required.

Held: Para 10

So far as the involvement of the revisionist in the incident is concerned, it appears that the Investigating Officer had accepted the plea of alibi that the revisionist was not present on the place of occurrence and was present in Patna where he was posted as Assistant Statistician in the Industry Department. The Hon'ble Supreme Court in Rajendra Singh Vs. State of U.P. and another (2007) 7 SCC 378 has observed that the burden to prove the plea of alibi lies upon the accused. This could be done by leading evidence in the trial and not by filing some affidavits or statements purported to have been recorded under section 161 Cr.P.C. In such a case the prosecution would have got an opportunity to cross examine the witness and demonstrate that their testimony was not correct. The Hon'ble Apex Court has also observed that the statements recorded under section 161 Cr.P.C. by the Investigating Officer are wholly inadmissible as it is not a substantive piece of evidence and in view of the proviso to sub-section (1) of section 162 Cr.P.C. the statement can be used only for the limited purpose of contradicting the plea taken therein in the manner laid down in the said proviso. The alleged plea of alibi that the revisionist was not present at the place of occurrence and was present at Patna cannot be taken into account for deciding the application moved under section 319 Cr.P.C.

Case law discussed:
1993 SCC (Cr) 407, (2007) 4 SCC 773, (2007) 7 SCC 378

(Delivered by Hon'ble S.N.H. Zaidi, J.)

1. This revision has been directed against the order dated 19.3.2005 passed by C.J.M. Ballia in Criminal Case No.2336 of 1998 State Vs. Amit Rai and others whereby the application of opposite party no.2 under section 319 Cr.P.C. was allowed and the revisionist was summoned for trial together with the accused persons.

2. The facts which gave rise to this revision, in brief, are that Opposite Party no.2 Tap Narain had lodged a report on 2.8.98 at Police Station Narahi district Ballia against 4 persons, including revisionist Krishna Kumar Rai under sections 328/336/504/506 I.P.C. The police, however, after investigation submitted a charge sheet under sections 323/325/336/504/506 I.P.C. against 3

persons only excluding the name of the revisionist. The Magistrate took cognizance and tried the case. In the trial, after the examination of first informant as P.W.1, an application under section 319 Cr.P.C. was moved by the prosecution to summon Krishna Kumar Rai. An objection against that application was filed by the accused persons. The learned trial Court (C.J.M. Ballia), after hearing the parties, allowed the application and ordered for summoning Krishna Kumar Rai for trial under sections 323, 325, 336, 504, 506 I.P.C. together with the accused persons by the impugned order. Feeling aggrieved with the said order, Krishna Kumar Rai has preferred this revision before this Court.

3. I have heard the learned counsel for opposite party no.2 and the learned A.G.A. for the State and perused the materials on record as none appeared for the revisionist.

4. The impugned order has been challenged, according to memo of revision on the following ground:

5. It has been contended in the memo of revision that there is absolutely no legal evidence on record to connect the revisionist with the alleged crime.

6. The Hon'ble Apex Court in **Kishun Singh Vs. State of Bihar 1993 SCC (Cr) 407** has observed in para 11 that:-

"11. On a plain reading of sub-section (1) of section 319 Cr.P.C. there could be no doubt that it must appear from the evidence tendered in accordance with any inquiry or trial that any person not being the accused has committed any offence for which he could be tried together with the accused. This power can be exercised only if it so appears from the evidence at the trial and not otherwise."

7. In **Y. Saraba Reddy Vs. Puthur Rami Reddy and another (2007) 4 SCC 773** the Supreme Court has observed that the word "evidence" in section 319 Cr.P.C. contemplates the evidence of witness given in court.

8. The revisionist was named in the F.I.R. along with other accused persons. It was after the investigation that the Investigating Officer had dropped the name of the revisionist. In his statement P.W. 1 has stated that Krishna Kumar Rai had also arrived along with other accused persons on the place of occurrence and all of them abused his brother and pelted stones and when his son Vijay Shanker came to the rescue of his uncle then he was hit with stones as a consequence thereof he received severe injuries and besides him Jang Bahadur and Rajiv Kumar had also received injuries in the incident. In view of this it cannot be accepted that there was no evidence on record to connect the revisionist.

9. It has also been contended that during the investigation of the case, the Investigating Officer did not find any evidence against the revisionist and the application was moved belatedly at the middle of the trial. So far as the moving of the application with delay is concerned, it appears from Annexure 3 to the affidavit of the revision that the statement of P.W.1 was recorded on 18.9.2004 and the application was moved on the same date by the complainant Tap Narayan. Therefore, there appears no delay on the

part of the prosecution to move the said application.

10. So far as the involvement of the revisionist in the incident is concerned, it appears that the Investigating Officer had accepted the plea of alibi that the revisionist was not present on the place of occurrence and was present in Patna where he was posted as Assistant Statistician in the Industry Department. The Hon'ble Supreme Court in **Rajendra Singh Vs. State of U.P. and another (2007) 7 SCC 378** has observed that the burden to prove the plea of alibi lies upon the accused. This could be done by leading evidence in the trial and not by filing some affidavits or statements purported to have been recorded under section 161 Cr.P.C. In such a case the prosecution would have got an opportunity to cross examine the witness and demonstrate that their testimony was not correct. The Hon'ble Apex Court has also observed that the statements recorded under section 161 Cr.P.C. by the Investigating Officer are wholly inadmissible as it is not a substantive piece of evidence and in view of the proviso to sub-section (1) of section 162 Cr.P.C. the statement can be used only for the limited purpose of contradicting the plea taken therein in the manner laid down in the said proviso. The alleged plea of alibi that the revisionist was not present at the place of occurrence and was present at Patna cannot be taken into account for deciding the application moved under section 319 Cr.P.C.

11. Another contention raised in the memo is that the F.I.R. was lodged by opposite party no.2 Tap Narayan whereas Satya Narayan Rai was examined before the Magistrate as P.W. 1 and the Magistrate without fixing the identity of first informant Tap Narayan Rai and witness Satya Narayan Rai as one and the same person, has taken into consideration the statement of P.W.1. This contention is liable to be rejected because the learned trial Magistrate has considered this circumstance and after observing that the signatures of Tap Narayan Rai had been put on the statement given before the court and the complainant had informed that Tap Narayan and Satya Narayan was the same person, there is nothing on record to show that the person examined before the Magistrate as P.W.1 was some one else than the first informant Tap Narayan Rai. This contention has therefore no legs to stand.

12. The Hon'ble Apex Court in a recent case of Y.Saraba Reddy Vs. Puthur Rami Reddy and another (supra) has observed that "the trial court has no doubt jurisdiction to add any persons not being the accused before it to face the trial along with other accused person, if the court is satisfied at any stage of the proceedings on the evidence adduced that the persons who have not been arrayed as accused should face the trial. It is further evident that such person even though had initially been named in the F.I.R. as an accused, but not charge sheeted can also be added to face the trial. The trial court can take such a step to add such persons as accused only on the basis of evidence adduced before it and not on the basis of materials available in the charge sheet or the case diary, because such materials contained in the charge sheet or the case diary do not constitute evidence." In the case of Rajendra Singh (supra) the Hon'ble Apex Court has observed that "the statements of the witnesses under section 161 Cr.P.C. being wholly inadmissible in evidence

could not at all be taken into consideration." It is also observed that the court need not be satisfied that he has committed the offence but it should appear to it that he has committed an offence. In other words from the evidence, it need only appear that someone else has also committed an offence to exercise jurisdiction under section 319 Cr.P.C. The court has further observed that "it did not see any reason to describe the power as an extraordinary power or to confine the exercise of it only in compelling reasons exist for taking cognizance against any other person against whom action has not been taken. After all, the section only gives power to the court to ensure that all those persons involved in the commission of an offence are tried together and none left out."

13. In view of what has been stated above, there appears no illegality in the impugned order of the Magistrate in summoning the revisionist under section 319 Cr.P.C. to face the trial together with other accused persons as it appears from the evidence on record that the revisionist was present and involved in the commission of the offence along with other accused persons. This revision has, therefore, no force and is accordingly dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.12.2008

BEFORE
THE HON'BLE VIJAY KUMAR VERMA, J.

Criminal Misc. Application No. 33157 of 2008

Satish Kumar and others ...Applicants
Versus
State of U.P. & another ...Opposite parties

Counsel for the Applicants:
Sri Amit Daga

Counsel for the Opposite Parties:
Sri bhaskar Mali
A.G.A.

Code of Criminal Procedure-Section 482-Quashing of Criminal Proceeding-matrimonial dispute-offence under section 498A, 323, 504, 506 IPC and ¾ D.P. Act-parties settled their dispute out of Court-even whole life maintenance given and accepted by the respondent in counter affidavit-held-continuance of proceeding amounts to abuse of the process of Court-proceeding quashed.

Held: Para 9

In view of the discussion made herein-above, I am of the considered opinion that it would be an abuse of the process of the Court, if the criminal proceeding of case no. 950 of 2007 (State Vs. Satish Kumar and others) under section 498-A, 323, 504, 506 I.P.C. and 3/4 D.P. Act arising out of crime no. 527 of 2005, P.S. Vijay Nagar, Ghaziabad pending in the Court of Addl. Chief Judicial Magistrate, Court No. 2, Ghaziabad is allowed to continue. Therefore, to do the complete justice, the proceedings of the criminal case should be quashed by this Court in its inherent jurisdiction under section 482 Cr.P.C.

Case law discussed:
2003(46) ACC 779, 2006 (30 JIC 135 (Alld.)), 2005 (51) ACC 217, 2007 (59) ACC 123, 2007 (59) ACC 148

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

1. By means of this application under section 482 Cr.P.C. of the Code of Criminal Procedure (in short, 'the Cr.P.C.'), the applicants (1) Satish Kumar, (2) Shree Pal, (3) Smt. Kamlesh and (4) Smt. Gyanu @ Gyanwati have invoked inherent jurisdiction of this Court for quashing of the proceedings of criminal case no. 950 of 2007 (State Vs. Satish Kumar and others) under section 498A, 323, 504, 506 I.P.C. and 3/4 D.P. Act arising out of crime no. 527 of 2005, P.S. Vijay Nagar, Ghaziabad pending in the Court of Addl. Chief Judicial Magistrate, Court No. 2, Ghaziabad.

2. Shorn of unnecessary details, the facts leading to the filing of the application under section 482 Cr.P.C., in brief, are that marriage of applicant no. 1 Satish Kumar and opposite party no. 2 Smt. Kavita took place on 15.04.2001, but subsequently some misunderstanding and disputes were developed between the couple, as a result of which Smt. Kavita lodged an FIR against the applicants at P.S. Vijay Nagar (Ghaziabad), where a case under section 498-A, 323, 504, 506 I.P.C. and 3/4 D.P. Act was registered at crime no. 527 of 2005. After investigation, one chargesheet against the applicant no. 4 Smt. Gyanwati and another chargesheet against other applicants were submitted, on the basis of which, criminal case no. 2504 of 2006 was registered, which was renumbered as case no. 950 of 2007. An application for granting maintenance under section 125 Cr.P.C. was also moved by opposite party no. 2 Smt. Kavita against her husband applicant no. 1 Satish Kumar in case no. 3 of 2007. During the pendency of these cases, due to intervention of some well-wishers and relatives, the parties settled their dispute, in consequence whereof the applicant no. 1 paid Rs.70,000/- to Smt. Kavita as whole time maintenance and streedhan. After payment of that amount, a compromise was filed by the parties in the proceeding under section 125 Cr.P.C. On the basis of the compromise and settlement arrived at between the parties, the Addl. Civil Judge (J.D.)/J.M., Court No. 3, Ghaziabad vide his order dated 25.09.2008 dismissed the case under section 125 Cr.P.C. as withdrawn. As a result of the compromise entered into between the parties, the applicants have invoked the inherent jurisdiction of this court to quash the proceeding of criminal case referred in para 1 above.

3. I have heard arguments of Sri Amit Daga, learned counsel for the applicants, Sri Bhaskar Mall, learned counsel for the opposite party no. 2 and learned AGA for the State of U.P.

4. Drawing my attention towards the case of ***B.S. Joshi and others Vs. State of Haryana and another 2003(46) ACC 779***, it was submitted by the learned counsel for the applicants that in view of the compromise entered into between the parties, this Court should invoke its inherent jurisdiction to quash the entire proceedings of criminal case no. 950 of 2007 (State Vs. Satish Kumar and others) under section 498-A, 323, 504, 506 I.P.C. and 3/4 D.P. Act arising out of crime no. 527 of 2005, P.S. Vijay Nagar, Ghaziabad pending in the Court of Addl. Chief Judicial Magistrate, Court No. 2, Ghaziabad, as matrimonial dispute has

been settled by the parties and with their consent, they have separated themselves and whole time maintenance also been paid to opposite party no. 2 Smt. Kavita in the proceeding under section 125 Cr.P.C.

5. Opposite party no. 2 Smt. Kavita has filed counter affidavit in this proceeding. In para 9 of the counter affidavit, she has admitted that Rs.70,000/- have been paid to her by applicant no. 1 as one time maintenance allowance as well as streedhan. In para 12 of the counter affidavit, it is also admitted by Smt. Kavita that all the differences and disputes occurred between the couple have been settled by them and after compromise, she and her husband Satish Kumar are living separately and they are trying to give new shape to their bright future. In para 14 and 15 of the counter affidavit, it is further stated that in view of the compromise entered into between the parties, no useful purpose would be served to continue the criminal proceedings of case no. 950 of 2007 pending against the applicants in the court of Addl. Chief Judicial Magistrat Court No. 2, Ghaziabad.

6. Since the parties have settled their matrimonial dispute amicably, hence this Court can quash the proceedings of aforesaid criminal case in its inherent jurisdiction under section 482 Cr.P.C. The Hon'ble Apex Court in the case of ***B. S. Joshi Vs. State of U.P (supra)*** has made the following observations in para 12 of the report at page 784:-

"There is no doubt that the object of introducing Chapter XX-A containing section 498-A in the Indian Penal Code was to prevent the torture to a woman by her husband or by relatives of her husband. Section 498-A was added with a view to punishing a husband and his relatives who harass or torture the wife to coerce her or her relatives to satisfy unlawful demands of dowry. The hyper-technical view would be counter productive and would act against interests of women and against the object for which this provision was added. There is every likelihood that non-exercise of inherent power to quash the proceedings to meet the ends of justice would prevent women from settling earlier. That is not the object of Chapter XXA of Indian Penal Code."

7. It is also held by the Hon'ble Apex Court in para 13 of the report of ***B.S. Joshi Vs. State of U.P (supra)*** that the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint and section 320 of the Code does not limit or affect the powers under section 482 of the Code.

8. In the case of ***Ausaf Ahmad Abbasi vs. State of U.P. And another 2006 (30 JIC 135 (Alld.)),*** the proceeding of criminal case under section 498A, 323, 504, 506 IPC and 3/4 D.P. Act was quashed on the basis of the compromise entered into between the parties. Reference in this regard may be made to the case of ***Ruchi Agarwal vs. Amit Kumar Agrawal & others 2005 (51) ACC 217*** also, in which the Hon'ble Apex Court quashed the proceedings of the criminal case under section 498A, 323, 506 IPC and 3/4 D.P. Act, due to the compromise entered into between the parties in the proceeding under section 125 Cr.P.C. Following this case, this court in the case of ***Shikha Singh & others vs. State of U.P. & another 2007 (59) ACC 123,*** quashed the proceedings of criminal

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

9. In view of the discussion made herein-above, I am of the considered opinion that it would be an abuse of the process of the Court, if the criminal proceeding of case no. 950 of 2007 (State Vs. Satish Kumar and others) under section 498-A, 323, 504, 506 I.P.C. and 3/4 D.P. Act arising out of crime no. 527 of 2005, P.S. Vijay Nagar, Ghaziabad pending in the Court of Addl. Chief Judicial Magistrate, Court No. 2, Ghaziabad is allowed to continue. Therefore, to do the complete justice, the proceedings of the criminal case should be quashed by this Court in its inherent jurisdiction under section 482 Cr.P.C.

10. Consequently, the application under section 482 Cr.P.C. is allowed. The proceeding of criminal case no. 950 of 2007 (State Vs. Satish Kumar and others) under section 498-A, 323, 504, 506 I.P.C. and 3/4 D.P. Act arising out of crime no. 527 of 2005, P.S. Vijay Nagar, Ghaziabad pending in the Court of Addl. Chief Judicial Magistrate, Court No. 2, Ghaziabad is hereby quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.09.2008

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

Civil Misc. Writ Petition No. 42625 of 1998

Smt. Rafiqan and others ...Petitioners
Versus
Jia-ul-Nabi and others ...Respondents

Counsel for the Petitioners:
Sri Prabha Kant Mishra
Sri Somnath Seth

Counsel for the Respondents:
S.C.

U.P. Urban Building (Regulation of Letting Rent & Eviction) Act 1972-Section 30-Deposit of rent by the heir of tenant with the name of deceased land lord-neither taken steps to brought the heirs of land lord on record nor given notice to the land lord before deposit of such rent-held-deposit no valid-heirs of tenant can not claim benefit under Section 30 by the petitioner.

Held: Para 8

For the aforesaid reasons I do not find any error in the impugned judgments. Continuance of deposit of rent in the case under Section 30 of the Act after the death of original landlord/opposite party in the said case on 03.09.1988 was utterly invalid and heirs of original landlord could not withdraw the said amount.

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

1. At the time of hearing no one appeared on behalf of respondent hence only the arguments of the learned counsel for the petitioners were heard.

2. Property in dispute is a *Khaperail* shop of 10 feet x 12 feet. Rent is Rs.20/- per month. However, under interim order passed in this writ petition tenants are paying Rs.100/- per month rent.

3. This is tenants' writ petition. Landlords respondent nos. 1 to 9 filed S.C.C. Suit no.19 of 1990 against tenants petitioners for eviction on the ground of default and for recovery of arrears of rent. Tenants pleaded that entire rent had been deposited under Section 30 of U.P. Urban Buildings (Regulation of Letting, Rent & Eviction) Act, 1972 hence they were not defaulter. The trial Court held that deposit of rent under Section 30 of the Act was not valid and decreed the suit for eviction through judgment and decree dated 17.08.1994. Against the said judgment and decree S.C.C. Revision no.52 of 1994 was fled which was dismissed by Ist A.D.J., Rampur on 28.11.1995 hence this writ petition.

4. Initially Sibtey-Nabi was the landlord who died before filing of the suit leaving behind respondent nos.1 to 9 as his heirs. Similarly original tenant was Mohd.Yaqub Khan who died during pendency of the suit and was substituted by the petitioners. Landlords respondents sent a notice to original tenants on 02.07.1990 terminating the tenancy and demanding the rent from 01.11.1976 to 30.06.1990 (total Rs.4920/-). The tenants replied the notice stating therein that rent had been deposited under Section 30 of U.P. Urban Buildings (Regulation of Letting, Rent & Eviction) Act, 1972 in case no.9 of 1977. Original landlord had died on 03.09.1988. However, even after his death no application for substitution of respondent nos. 1 to 9 was filed in the case under Section 30 of the Act (Misc. case no.9 of 1972). Same thing was pleaded by the defendants in the written statement filed in the suit. It was further pleaded that subsequently rent till 31.10.1992 had also been deposited in the case under Section 30 of the Act (Misc. Case no.9 of 1977). Tenants contended that firstly when notice was received by original tenants, they were not defaulter for four months and secondly tenants had deposited the entire rent and they were entitled to the benefit of Section 20(4) of the Act.

5. Landlords contended that deposit of rent under Section 30 of the Act was not valid as no notice of any deposit was given to the landlord and that provisions of Rule 21(5) of the Rules framed under the Act were not complied with. It was further contended that after the death of original landlord Sibtey-Nabi on 03.09.1988 deposit in his name was not valid.

6. In para no. 8 of the writ petition it has been stated that in the eviction suit giving rise to the instant writ petition tenants deposited Rs.735/- on 06.09.1993 which included Rs.300/- towards rent from 01.11.1992 to 31.08.1993 and cost of the suit including counsel fee. Written statement was filed on 27.09.1993.

7. In my opinion even if all the pleas taken by the tenants petitioners are accepted still deposit under Section 30 will not be valid after the date of death of original landlord as tenants did not seek substitution of the heirs of original landlord in the case under Section 30 of the Act. Rent deposited under Section 30 (1) of the Act can be withdrawn only by the person in whose name it is deposited. The heirs of original landlord after the

death of original landlord could not withdraw the said rent. In this regard reference may also be made to Section 30(4) of the Act which is quoted below:-

"On any deposit being made under sub-section (1), the Court shall cause a notice of the deposit to be served on the alleged landlord, and the amount of deposit may be withdrawn by that person on application made by him to the Court in that behalf."

8. For the aforesaid reasons I do not find any error in the impugned judgments. Continuance of deposit of rent in the case under Section 30 of the Act after the death of original landlord/opposite party in the said case on 03.09.1988 was utterly invalid and heirs of original landlord could not withdraw the said amount.

9. Writ petition is accordingly dismissed.

10. Tenants-petitioners are granted six months time to vacate provided that:-

1. Within one month from today tenants files an undertaking before the J.S.C.C. to the effect that on or before the expiry of aforesaid period of six months he will willingly vacate and handover possession of the property in dispute to the landlords-respondents.

2. For this period of six months, which has been granted to the tenants-petitioners to vacate, they are required to pay Rs.1800/-(at the rate of Rs.300/- per month) as rent/damages for use and occupation. This amount shall also be deposited within one month before the J.S.C.C. and shall immediately be paid to the landlord-respondent.

3. Within one month from today tenants shall deposit entire decreetal amount due till date (after adjusting any amount already deposited) before the J.S.C.C. for immediate payment to landlords respondents.

In case of default in compliance of any of these conditions tenants-petitioners shall be evicted through process of Court after one month and tenants-petitioners shall be liable to pay damages at the rate of Rs.600/- per month since after one month till the date of actual vacation.

11. Similarly, if after filing the aforesaid undertaking and depositing decreetal amount and Rs.1800/- the accommodation in dispute is not vacated on the expiry of six months then damages for use and occupation shall be payable at the rate of Rs.600/- per month since after six months till actual vacation. It is needless to add that this direction is in addition to the right of the landlords-respondents to file contempt petition for violation of undertaking and execution application.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.12.2008

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

First Appeal From Order No. 182 of 1994

Smt. Krishna Kumari and another
...Claimants/Appellants
Versus
Brijesh Kumar Gupta and others
...Respondents/Opposite parties

Counsel for the Appellants:
Sri Rajesh Kumar Yadav
Sri Ajay Kumar Goel

Counsel for the Respondents:
Sri Arvind Kumar Mishra
Sri Amaresh Sinha

Code of Civil Procedure-Order VIII Rule 4 (2)-engagement of new counsel without withdrawal of power of earlier counsel-after decision recall application by subsequent counsel on ground name not shown in cause list-held-not maintainable-once party engage more than one counsel-name of any one counsel shown-unless satisfactory explanation forward for non appearance-order can not be recalled on request of subsequent new counsel.

Held: Para 6

Now when the party to the proceedings have chosen to engage two counsel without terminating the authority of the earlier counsel and the name of any of them is duly printed and no one attends the Court, it is obligatory for the party to give sufficient explanation for the absence of the both. The non printing of the name of the subsequent counsel itself would not be a sufficient ground to recall the judgment and order passed on merits.

Case law discussed:
2000 (39) A.L.R., A.I.R. 1982 Alld. 183, 2007 (3) ALJ 116

(Delivered by Hon'ble Pankaj Mithal, J.)

1. Heard learned counsel for the parties.

2. This first appeal from order was decided on merits on 13.9.2007. The counsel for the respondent no. 3 had not appeared even in the revised list though the name of Sri A.K. Mishra was shown. Now another counsel appearing for the respondent no. 3 has moved this application for the recall of the judgment and order dated 13.9.2007 on the ground that his name was not printed.

3. It is not disputed that for the same respondent Shri A.K. Mishra was also appearing and his name was duly printed in the cause list. His Vakalatnama was not withdrawn and therefore it can not be said he ceased to have instructions. No leave was granted to the new counsel to appear replacing the earlier counsel. The Division Bench of this Court in ***2000 (39) A.L.R. Balram Tiwari and others Vs. Regional Transport Authority Varanasi Region, Varanasi and another*** had deprecated the practice of engaging a new counsel without terminating the instructions of the previous counsel.

4. Order III, Rule 4 (2) C.P.C. specifically provides that every appointment of the counsel by party shall be deemed to be in force until determined with the leave of the Court. A Division Bench of this Court in ***A.I.R. 1982 Alld. 183 Bijli Cotton Mills (p) Ltd. Vs. M/s Chhagenmal Bestimal and others*** while considering the above provision laid down that the authority of the counsel once engaged can be terminated by the client but this cannot be done orally and must be done in writing with the permission of the Court in the manner laid down by Rule 4 (2) of Order III C.P.C.

5. In the instant case it is not the case of the applicant/respondent no. 3 that instructions were withdrawn from the earlier counsel and his power stood terminated in writing with the leave of the Court. Thus, there was no termination of the authority of the earlier counsel.

6. Now when the party to the proceedings have chosen to engage two

counsel without terminating the authority of the earlier counsel and the name of any of them is duly printed and no one attends the Court, it is obligatory for the party to give sufficient explanation for the absence of the both. The non printing of the name of the subsequent counsel itself would not be a sufficient ground to recall the judgment and order passed on merits.

7. A similar view has also been expressed by another Division Bench of this Court recently in ***2007 (3) ALJ 116 Smt. Veena Agarwal Vs. M/s Unjha Ayurvedic Pharmacy & others.***

8. Therefore, I am of the view that non printing of the name of the subsequent counsel is not a valid ground for recall of the order.

9. Application rejected.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.12.2008

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

Special Appeal No. 308 of 2008

The Chief Managing Director (C.M.D.) and others ...Appellants
Versus
Masan Ali and others ...Respondents

Counsel for the Appellants:
Sri Subodh Kumar

Counsel for the Respondents:
Sri Manoj Pathak

Constitution of India-Art. 226-Recall of regularization order-petitioner/respondents working as casual labour on class 4th post-corporation framed scheme to convert those casual labours as full time worker-thereafter under the said scheme regularized service book prepared given all benefits available to regular employees-after 4 years revocation consequent to regularization-order-reverting as casual labour and recovery of excess payment consequent to regularisation in the garb of Uma Devi Case-held-neither in Uma Devi nor in subsequent decisions-authorities have been empowered to revoke the regularization order in utter violation of principle of natural justice-nor the workers found guilty if concealment of material facts or playing fraud in getting regularization-held-rightly quashed by learned Single Judge-concerned authority to take decision as fresh after giving full opportunity to those petitioner-fill final decision status quo shall be maintained.

Held: Para 10

Be that as it may, so far as these appeals are concerned we are prima facie of the view that the petitioners were regularised by the competent authority giving the benefit of scheme of regularisation which was neither challenged in any Court of Law nor was struck down. So long as the scheme is continuing and its benefit has been extended to similarly placed other employees by issuing formal orders of regularisation on or before 10.04.2006, we do not find any reason as to why mere delay in issuing the formal orders of regularisation to the petitioners would deprive the same benefit to them who are also covered by the said scheme which has been formulated by the appellants themselves and has not been discontinued. Moreover, once the benefit of regularisation has been conferred upon a person, before its revocation it is incumbent upon the employer to afford adequate opportunity of defence. The alleged show cause notice issued by the appellants in the case in hand only

shows that since the Apex Court's decision in Uma Devi (supra) has been delivered on 10.04.2006 and the regularisation order were issued thereafter hence the appellants decided to revoke the same and it did not give such facts as has been argued before the Court that the regularisation has been obtained by the petitioner on accounts of fraud or misrepresentation etc. and they are not covered by the scheme.

Case law discussed:

2006(4) SCC 1, 2007(1) SCC 373, JT 2007(12) SC 179, JT 2008(11) SC 467, AIR 1994 SC 2480

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

1. All these three intra-Court appeals arise out of a common judgement dated 16.11.2007 of Hon'ble Single Judge allowing the writ petitions of petitioner-respondents (*hereinafter referred to as the "petitioners'*) quashing the orders impugned in the writ petition whereby the respondent-appellants (*hereinafter referred to as the "appellants*") have cancelled the orders of regularisation of petitioners and reverted them to their original position of full time sweeper/casual labour and also directing for recovery of the amount paid in excess to the petitioners.

2. The appellants it appears formulated a scheme for conversion of part time casual labours into full time casual labours w.e.f. 25.08.2000 and thereafter on 23.01.2006 took a further decision that all those part time casual labours who have been converted into a full time casual labours be considered for regularisation against group 'D' vacancies. Appropriate direction in this regard was issued by General Manager, East Circle, Bharat Sanchar Nigam Limited, Lucknow (*hereinafter referred to as the "General Manager, BSNL"*) on 23.01.2006 appending a list of such labours who it sanctioned for regularisation in group 'D' cadre. The aforesaid list included all the petitioners. The General Manager, BSNL thereafter issued orders of regularisation on 20/31.07.2006 and corresponding order for pay fixation was issued on 03.08.2006. Service books of petitioners were prepared and pay slips were also issued. On 02.01.2007 the impugned order was issued reverting the petitioners to their original position as casual labours w.e.f. December, 2006 and orders were issued for payment of wages on daily wage basis. Another order was issued on 15.01.2007 directing the Accounts Officer concerned that the amount already paid to the petitioners, over and above the wages found payable on daily wage basis, be recovered from them. It is these two orders which were challenged in the writ petitions by the petitioners on the ground that having regularised they could not have been reverted to their original position as casual labour and secondly that the impugned orders have been issued in utter violation of principle of natural justice.

3. The case of the appellants before the Hon'ble Single Judge was that, besides other, the petitioners could not have been regularised in view of the Constitution Bench judgement in **Secretary, State of Karnataka Vs. Uma Devi 2006(4) SCC 1** decided on 10.04.2006 since in the case in hand the order of regularisation was issued after the aforesaid judgment and it is for this reason that the respondents passed the impugned orders reverting the petitioners to their original position as casual labour. The appellants in their counter affidavit pleaded that before passing the impugned orders, show cause

notice was issued by the Assistant General Manager on 28.10.2006 stating that in view of the Apex Court's decision the orders of regularisation deserved to be cancelled and the petitioners shall be paid salary as per the old system and thereafter only the order dated 31.07.2006 of cancellation of regularisation was passed. In the supplementary counter affidavit it was also pointed out that after the decision of Apex Court in **Uma Devi (supra),** a circular letter was issued by the Assistant Director General (Personal-IV), Bharat Sanchar Nigam Limited, New Delhi on 17.05.2006 stating that the Apex Court has held that any appointment made bypassing the scheme envisaged in the Constitution for public employment is illegal and the judgment of Apex Court be brought to the notice of all concerned. It is said that thereafter it was not within the authority of subordinate officials to issue any regularisation order to the petitioners. Since the aforesaid circular order came to the notice of the authorities subsequently, the regularisation orders were recalled. By another supplementary counter affidavit it was said that the petitioners were never engaged by advertisement of vacancies, inviting applications, undergoing selection procedure etc. and, therefore, their engagement being illegal they could not have been regularised in view of the Constitution Bench decision in **Uma Devi (supra)** followed in **Municipal Corporation of Jabalpur Vs. Om Prakash Dudey, 2007(1) SCC 373**.

4. The Hon'ble Single Judge has held, taking recourse to another decision of the Apex Court in **U.P. State Electricity Board Vs. Pooran Chandra Pandey and others, JT 2007(12) SC 179** that the judgment of Apex Court in **Uma Devi (supra)** would not apply mechanically without looking to the facts of the particular case and thereafter has examined the facts of these cases in particular, and held, that there was an agreement between the parties that casual labours working on part time basis would be made full time casual labours and thereafter would be absorbed as a one time scheme and the said agreement was binding between the parties. His Lordship has also held that mere lack of requisition sent to the employment exchange under the Employment Exchange (Compulsory Notification of Vacancies) Act, 1959 would not vitiate the exercise of regularisation and hence they could not have been denied the benefit of regularisation only on the ground of the decision of the Apex Court **Uma Devi's** case and that too without any opportunity or show cause notice.

5. Learned counsel for the appellants vehemently contended before this Court that the Hon'ble Single Judge has failed to consider that the alleged regularisation of petitioners was the result of fraud or misrepresentation on their part inasmuch as there are certain persons who is said to have been engaged as part time casual labours at the age of 7 or 8 years when they were minor and without looking to these facts, in a collusive manner, the field authorities appears to have issued regularisation orders of the petitioners and, therefore, they were rightly deregularised and the orders for realization of excess amount paid under the regularisation orders were issued. He drew our attention to the supplementary counter affidavit, para 4 and 5 thereof, showing that Smt. Asha Devi has shown date of engagement as 10.02.1985 and her date of birth is 05.04.1977 which means that as per her own claim she was

engaged as casual part time labour when she was below 8 years of age. He, therefore, submitted that in case of fraud or misrepresentation it was always open to the employer to recall its order and the Hon'ble Single Judge has erred in law in observing that the case of fraud or misrepresentation has not been pleaded by the appellants. He contended that the words "fraud or misrepresentation" in so many words though have not been mentioned in the pleading but the aforesaid facts were placed on record to show the ex facie fraudulent activities in the regularisation of petitioners and, therefore, the regularisation orders have been recalled rightly.

6. Sri R.C. Pathak, learned counsel for the petitioners, however, disputing the aforesaid facts contended that at no point of time the case of fraud or misrepresentation was ever pleaded or argued by the appellants and, therefore here is not a case which warrants interference in the appeal particularly when the orders of regularisation in favour of petitioners have been cancelled without affording any opportunity to petitioners by mechanical application of the Apex Court decision in **Uma Devi (supra)** though the said decision in the facts and circumstances of the case have no application.

7. Having considered the submission and going through the record we find that the appellants have not disputed this fact that as a one time measure, relaxing all other conditions of recruitment etc., they formulated a policy of regularisation of such part time casual labours who were working since long before the creation of Bharat Sanchar Nigam Limited by firstly converting part time casual labour in full time casual labour and thereby regularizing them in group 'D' service. The said scheme was not revoked or rescinded by the respondents. It is not their case that the benefit of the said scheme has not been accorded/extended to other similarly placed employees. The only reason for not extending the benefit of the said scheme to the petitioners is that by the time actual order of regularisation could be issued/or was issued in favour of the petitioners the Apex Court decision in **Uma Devi (supra)** had come which provided that the engagement/ appointment made contrary to the rules cannot be regularised. The law laid down by the Apex Court in **Uma Devi (supra)** is the law of land and it has to be observed and complied with by all the authorities. We have no manner of doubt in this proposition. However, the Apex Court in **Uma Devi (supra)** has neither set aside the existing scheme or provision in a department which provide for benefit of regularisation to its employees and it has also not touched upon the orders of regularisation already issued in various cases according to the existing scheme or the statutory provision as the case may be.

8. In the case of petitioners the decision to convert part time casual labours into full time casual labours was taken in 2002 and for regularisation thereof in January, 2006. If the appellants took some more time or delayed the matter for issuance of actual order of regularisation, the petitioners for the same could not have been blamed. Moreover, the Chief General Manager, BSNL, Lucknow issued order on 23.01.2006 itself according its approval for regularisation of the petitioners and while conveying its sanction, it only directed the

concerned authority to verify that the persons sought to be regularised were working on the date of regularisation and fulfill all other conditions requisite for the same as provided in the scheme of regularisation and that they shall be regularised against the post created in group 'D' and not against new posts to be sanctioned for this purpose only. That being so, the mere incident of issuance of formal regularisation orders after the decision of Apex Court in **Uma Devi (supra)** cannot vitiate the otherwise valid regularisation of the petitioners inasmuch as the fate of petitioners in respect to regularisation cannot depend upon the exigency or incident of mere issuance of formal orders of regularisation by the concerned authority though all other formalities were completed much earlier in point of time. Neither that is the intent of law laid down by the Apex Court in **Uma Devi (supra)** nor it has said so. Despite of our repeated query from the learned counsel for the appellants he could not show anything contained in **Uma Devi (supra)** which empower an employer to recall an order of regularisation either already issued or if the other procedure was completed but formal order was issued thereafter in accordance with the existing scheme or rules for regularisation. Even in the subsequent decisions the Apex Court has nowhere says that where a person is covered by a regularisation scheme formulated by the employer, in the absence of such scheme being challenged in a Court of Law and declared illegal, the benefit of such scheme cannot be extended to such employees.

9. It is no doubt also true that so far as the decision of Apex Court in **Pooran Chandra Pandey (supra)** is concerned it would be useful to refer a three Judge judgment of Apex Court in **Official Liquidator Vs. Dayanand and others, JT 2008(11) SC 467.** The Apex Court held that some part of the judgment in **Pooran Chandra Pandey (supra)** in so far as it has commented and made observations in respect to **Uma Devi (supra)** would neither be treated as binding by the High Courts, Tribunals and other judicial forums nor they should be relied upon or made basis for bypassing the principle laid down by the Constitution Bench. However, this would not turn the table otherwise since the present cases can be decided even otherwise.

10. Be that as it may, so far as these appeals are concerned we are prima facie of the view that the petitioners were regularised by the competent authority giving the benefit of scheme of regularisation which was neither challenged in any Court of Law nor was struck down. So long as the scheme is continuing and its benefit has been extended to similarly placed other employees by issuing formal orders of regularisation on or before 10.04.2006, we do not find any reason as to why mere delay in issuing the formal orders of regularisation to the petitioners would deprive the same benefit to them who are also covered by the said scheme which has been formulated by the appellants themselves and has not been discontinued. Moreover, once the benefit of regularisation has been conferred upon a person, before its revocation it is incumbent upon the employer to afford adequate opportunity of defence. The alleged show cause notice issued by the appellants in the case in hand only shows that since the Apex Court's decision in

Uma Devi (supra) has been delivered on 10.04.2006 and the regularisation order were issued thereafter hence the appellants decided to revoke the same and it did not give such facts as has been argued before the Court that the regularisation has been obtained by the petitioner on accounts of fraud or misrepresentation etc. and they are not covered by the scheme.

11. Further, before directing for recovery of the amount already paid, again it was incumbent upon the appellants to afford opportunity to the petitioners. The alleged show cause notice filed as Annexure-1 to the counter affidavit nowhere says that such fact was mentioned and the petitioners were directed to show cause against any proposed recovery. In **Bhagwan Shukla v. Union of India, AIR 1994 SC 2480** the Apex Court clearly held that such orders could not have been passed without affording opportunity of show cause to the concerned employee.

12. In the circumstances while confirming the judgment of Hon'ble Single Judge to the extent it has set aside the orders impugned in the writ petitions we make it clear that the other observations of Hon'ble Single Judge may not come in the way of the appellants for passing fresh orders in respect of the petitioners in accordance with law which they may pass after issuing an appropriate show cause notice to the petitioners henceforth giving them opportunity to submit their reply effectively. This exercise shall be completed by the appellants within three months from today.

13. We are informed that during the pendency of this appeal the petitioners were working and discharging their duties with the appellants which fact has not been disputed by learned counsel for the appellants. That being so, till fresh orders, as directed above, are passed by the appellants status quo in respect to the continuance of petitioners in service, status and salary shall be maintained.

14. With the aforesaid directions/observations and modifications, all the appeals are disposed of. There shall be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.12.2008

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

Special Appeal No. 1670 of 2008

Ram Chandra Dixit ...Appellant
Versus
Union of India ...Respondent

Counsel for the Appellant:
Sri Bhoopendra Nath Singh

Counsel for the Respondent:
Addl. Solicitor General of India

<u>Industrial Dispute Act, 1947-Section 10</u>-Oral termination-after 13 years-workman approached before central Government to refer the dispute-refusal by Govt. on ground of inordinate delay-held-proper-case law Ajab Singh relied by the workman-held-no application.

Held: Para 6

In the facts of the present case, the Central Government for the reasons

recorded in the order namely that the appellant was a casual worker and has raised the dispute qua his oral termination/disengagement after more than 13 years has rightly refused to make reference. Such an action of the Central Government cannot be said to be illegal, which may warrant interference under Article 226 of the Constitution of India.

Case law discussed:
1999 SCC (L & S) 1054

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

1. This intra Court appeal has been filed against the judgment and order of Hon'ble Single Judge dated 15th October, 2008 whereby the writ petition filed by the present appellant being Writ Petition No.43719 of 2008 has been dismissed.

2. Facts relevant for deciding the present special appeal are; The present appellant claims to have been employed as casual labour in Railways. His engagement as such was put to an end on 9th July, 1987. Such disengagement is stated to have been effected in violation of the provisions of the Industrial Disputes Act, 1947. The appellant made an application for re-engagement before the Management after 12 years, i.e., in the year 1999, which was not considered. He thereafter made an application for conciliation under Section 10 of the Industrial Disputes Act, 1947. The conciliation between the appellant and the employer failed. The Conciliation Officer forwarded the papers to the Central Government for appropriate reference if any. The Central Government by means of the order dated 28th July, 2000 refused to make the reference after recording as follows:-

"*The dispute has been raised after 13 years without any valid reasons and the workman has also failed to prove that he worked for more than 240 days in the Railway.*"

3. This order of the Ministry of Labour, Government of India was subjected to challenge by means of the aforesaid writ petition. The writ Court has dismissed the writ petition after being satisfied that in facts of the case the refusal to make reference cannot be said to be illegal in any manner. The order of the Hon'ble Single Judge has been subjected to challenge by means of this appeal.

4. Sri B.N. Singh, learned counsel for the appellant with reference to the judgment of the Hon'ble Supreme Court in the case of ***Ajaib Singh vs. Sirhind Cooperative Marketing-Cum-Processing Service Society Limited and another*** reported in 1999 SCC (L & S) 1054 contends that no limitation is prescribed under the Industrial Disputes Act, 1947 for making a reference and, therefore, it is not within the competence of the Central Government to refuse to make the reference. He further submits that the power to refuse to examine a dispute on the ground of delay is only with the Labour Court and that too when the employer is able to satisfy that some prejudice has been caused to him due to inordinate delay in raising of the dispute. Since in the present case the dispute was never referred, there was no occasion of any such plea being raised before the Labour Court.

5. We have heard learned counsel for the parties and gone through the record.

6. At the very outset, we may record that the competence of the Central Government to make the reference flows from Section 10 of the Industrial Disputes

Act, 1947. A bare reading of the said section would demonstrate that Central Government has to consider as to whether any dispute exists or is apprehended before making reference. If the Central Government is of the opinion that no dispute exists or is apprehended, it has every right to refuse to make the reference. A dispute may die because of raising of same with inordinate delay as well as for other reasons. It is doubt true that no limitation is provided for raising a dispute, however, from the language of Section 10 of the Industrial Disputes Act, 1947, it is apparently clear that only if an industrial dispute exists or is apprehended, that reference is to be made. Therefore, existence of a dispute or apprehension thereof is a condition precedent for any reference being made. In the facts of the present case, the Central Government for the reasons recorded in the order namely that the appellant was a casual worker and has raised the dispute qua his oral termination/disengagement after more than 13 years has rightly refused to make reference. Such an action of the Central Government cannot be said to be illegal, which may warrant interference under Article 226 of the Constitution of India.

7. The Hon'ble Supreme Court in the case of ***Ajaib Singh*** (Supra), relied upon by the learned counsel for the appellant was considering a case where the High Court while exercising its jurisdiction under Article 226 of the Constitution of India upset an award of the Labour Court on the ground that there was inordinate delay in making of the reference qua the dispute. It is in this background that the Hon'ble Supreme Court has held that since no limitation is provided for making a reference and, in facts of the case reference was made, it is only for the Labour Court to mould the relief if there was any delay in raising of the dispute. It has been held that the High Court ought not to have interfered with the award made by the Labour Court on the ground of delay in reference. We are, therefore, of the opinion that the judgment relied upon by the learned counsel for the appellant has no application to the facts of the present case.

8. In view of the above, we find no reason to interfere with the judgment and order of the Hon'ble Single Judge.

The Special appeal is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.12.2008

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

First Appeal From Order No.3775 of 2008

The Oriental Insurance Company Limited ...Appellant
Versus
Kanchan Pandey & others ...Respondents

Counsel for the Appellant:
Sri Ashok K. Jaiswal

Counsel for the Respondents:

Motor Vehicle Act 1988-Section 170 and 173-Appeal against order-rejecting application to contest the case passed under section 170 can be challenged only under supervisory jurisdiction under Act 227-not under section 173-in absence of award.

Held: Para 10 & 21

From the aforesaid decisions it is clear that 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. But if the application is rejected, the appeal can be filed only on the grounds available under section 149(2) of the Act, as no appeal is provided against the order rejecting the application under section 170. An appeal under section 173(1) of the Act lies only against the award of the tribunal and the order under section 170 not being an award, no appeal would be maintainable against such an order. A Division Bench of this Court, however, has held in Oriental Insurance Co. Ltd. vs. Smt. Manju and others 2007 (3) T.A.C. 456 (All) that the order rejecting the application under section 170 of the Act can be challenged by the insurance company under the supervisory jurisdiction of this Court under Article 227 of the Constitution of India. We respectfully agree with the above view.

The argument of the learned counsel that the appellant could challenge the order passed by the tribunal in these appeals, is liable to be rejected. We have examined the relief claimed in these appeal but we do not find that orders dated 17.4.2007 or 19.9.2007 have been challenged by the appellant. After the application under Section 170 was rejected it was open to the appellant to challenge the orders 17.4.2007 or 19.9.2007 under the supervisory jurisdiction of this Court under Article 227 of the Constitution of India. But the order dated 17.4.2007 or 19.9.2007 cannot be challenged in these appeals, as an appeal under Section 173(1) of the Act lies only against the award of the Motor Accident Claims Tribunal and the orders under Section 170 not being an award, no appeal would be maintainable against such an order.

Case law discussed:

AIR 2002 SC 456, AIR 2006 SC 577, AIR 2006 SC 1255, 2007 (3) T.A.C. 456 (All),

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

1. These two appeals directed against the award of the Motor Accident Claims Tribunal (in brief the tribunal) give rise to an interesting questions of law, whether the statutory order under section 170 of the Motor Vehicles Act, 1988 (in brief the Act) can be deemed to have been passed; whether the order passed by the tribunal rejecting an application under section 170 can be challenged in an appeal under section 173(1); whether the order passed by the tribunal permitting the insurance company to cross-examine the claimant's witness in absence of the owner satisfies the requirements of law as provided in section 170 of the Act?

2. The brief facts are that on 24.1.2005 Shiv Shankar Mishra along with Dilip Kumar Pandey was going to his residence, driving Motor Cycle No.UP-65/V-6821. The bus no.UP-42/T-2889 collided with motor cycle. Due to injuries received in the accident Shiv Shanker Mishra died on the spot. The pillion rider Dilip Kumar Pandey was also seriously injured and he died at the hospital. The bus belonged to U.P. State Road Transport Corporation. It was insured by the appellant.

3. The legal representatives of Dilip Kumar Pandey filed M.A.C.P. No.44 of 2005 claiming Rs.20 lacs as compensation under section 166 of the Act. The appellant filed an application under section 170 of the Act which was rejected on 7.4.2007 by the tribunal. The claim petition was allowed by the tribunal and compensation of Rs.2,11,000/- was awarded to the claimants. The award of the tribunal dated 27.9.2008 has been challenged by the appellant in F.A.F.O. no.3775 of 2005.

4. The legal representatives of Shiv Shankar Mishra filed M.A.C.P. No.45 of 2005 claiming Rs.25 lacs as compensation under section 166 of the Act. The appellant filed an application under section 170 of the Act on which an order was passed on 19.9.2007 permitting the appellant to cross-examine the witness produced by the claimants PW-1, as the owner was not present. The claim petition was allowed by the tribunal and compensation of Rs.2,23,000/- was awarded to the claimants. The award of the tribunal dated 17.10.2008 has been challenged by the appellant in F.A.F.O. no.3776 of 2005.

5. In both the claim petitions identical evidence was led and almost identical findings were recorded. The tribunal held that motor cyclist was not negligent and the accident took place due to rash and negligent driving of the driver of the bus. The driving licence of its bus driver Jagarnath was valid. The claim petition was not bad for non-joinder of necessary parties. The bus was not being driven in breach of insurance policy, and the claimants were entitled to compensation from the appellants.

6. Both the claim petitions have been allowed, with regard to the same accident, by the same tribunal, although on different dates. However, both the appeals, with the consent of the counsel for the appellant, are heard together.

7. We have heard the learned counsel for the appellant. In F.A.F.O. No.3775 challenging the award of the tribunal in M.A.C.P. No.44 of 2005, the learned counsel has urged that the order passed on application under section 170 by the tribunal rejecting the application can be challenged in an appeal under section 173(1) of the Act, because the appellant wants to challenge the quantum of compensation etc., in absence of availability of any grounds of breach of insurance policy mentioned in section 149(2) of the Act.

8. In F.A.F.O. No.3776, challenging the award of the tribunal in M.A.C.P. No.45 of 2005 the learned counsel has urged that the order passed on application under section 170 by the tribunal permitting insurance company to cross-examine the witness of the claimant, in absence of the owner, amounts to allowing the application under section 170. He urged that if any order is passed by the tribunal on an application under section 170, except an order of rejection, in law, it would be deemed that the application under section 170 has been allowed. He vehemently urged that passing of the order of rejection would only prevent the insurance company to contest the claim on merits on all the points arising in the award.

9. The peculiar feature of these appeals is that although they arose out of the same incident, in which the owner was common, yet the tribunal has passed two inconsistent orders on the applications filed by the insurer for granting permission under section 170 of the Act. What is the effect of such inconsistent order, we propose to examine latter but before it we may extract Section 170 of the Act,

"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."

This section has come up for consideration before the Apex Court on number of occasions. It is well settled by the Hon'ble 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 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....."

In **National Insurance Co. Ltd., v. Mastan and another AIR 2006 SC 577** the Apex Court held as under:-

"It is beyond any doubt or dispute that in a proceeding where the right of the insurer to raise a defence is limited in terms of sub-section (2) of Section 149, an appeal preferred by it against an award of the Motor Accident Claims Tribunal must only be confined or limit to some extent. But once a leave has been granted to the insurer to contest the claim on any ground as envisaged in Section 170 of the 1988 Act, an appeal shall also be maintainable as a matter of right, wherein the High Court can go into all contentions."

The Apex Court in **Bijoy Kumar Dugar v. Bidyadhar Dutta and others AIR 2006 SC 1255** has held as under:-

".....The appeal being a product of the statute it is not open to an insurer to take any plea other than those provided under section 149(2) of the Act. However, in a situation where there is collusion between the claimant and the insurer or the insured does not contest the claim and further, if the MACT does not implead the Insurance Company to contest the claim, in such a situation it is open to the insurer to seek permission of the MACT to contest the claim on the ground available to the insured or to a person against whom the claim has been made. If permission is granted and the insurer is allowed to contest the claim on merit, in that case it is open to the insurer to file an appeal against the Award of the MACT on merits.

Thus, in such a situation the insurer can question the quantum of compensation awarded by the MACT."

10. From the aforesaid decisions it is clear that 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. But if the application is rejected, the appeal can be filed only on the grounds available under section 149(2) of the Act, as no appeal is provided against the order rejecting the application under section 170. An appeal under section 173(1) of the Act lies only against the award of the tribunal and the order under section 170 not being an award, no appeal would be maintainable against such an order. A Division Bench of this Court, however, has held in **Oriental Insurance Co. Ltd. vs. Smt. Manju and others 2007 (3) T.A.C. 456 (All)** that the order rejecting the application under section 170 of the Act can be challenged by the insurance company under the supervisory jurisdiction of this Court under Article 227 of the Constitution of India. We respectfully agree with the above view.

11. The next question is whether the order of the tribunal permitting the insurance company to cross-examine the witness produced by the claimant amounts to allowing the application under section 170 of the Act? In **Jyotsnaben Sudhirbhai Patel's** case the apex court in paragraph 14 held as under:-

"In the instant case, the Insurance Company was impleaded as third respondent. The driver and owner of the vehicle, though appeared before the Tribunal, did not contest the proceedings. They did not file the written statement nor did they choose to give evidence before the Tribunal. Admittedly, the appellant filed an application under S.170 of the Act seeking permission of the Tribunal to contest the proceedings giving the necessary details. The award passed by the Tribunal also evidently shows that pursuant to this permission, the counsel for the appellant Insurance Company cross examined the witnesses produced by the claimant to prove the negligence of the offending vehicle. Unfortunately, however, the Tribunal, while passing its orders on the petition filed under S.170 of the Act only stated that the prayer was granted, though the mandate of S.170 (b) of the Motor Vehicles Act states that the Tribunal while passing an order shall record its reasons."

12. The import of the decision in Jyotsnaben Sudhirbhai Patel's case is that the tribunals are required to assign reasons while allowing or rejecting an application under section 170 of the Act. The tribunal cannot ignore an application under section 170. It is mandatory for the tribunal to pass an order under section 170 either in the affirmative or in the negative. The reason for it is that the right to contest of the insurer depends on the order of the tribunal. We may point out that an application may be allowed or the tribunal sometimes stops short and may direct, "prayer is granted" or it may say, "heard", the insurer to examine the witnesses or cross-examine the witness as in this case. Or it may reject the application. In Jyotsnaben Sudhirbhai Patel's case it was categorically held that since the insurance company's right to contest gets enlarged, the recording of reasons and passing of the order was necessary.

13. We may now examine whether the order of the tribunal in M.A.C.P. No.45 of 2005 permitting the insurance company to cross-examine the witness in absence of the owner can be said to be allowing or deemed allowing of the application under section 170 of the Act. The insurer and the insured stand on the same footing. But the insurer is impleaded only where the insured is in collusion with the insurer, to safeguard the interest of the insurance company, and to contest the claim on merits. The only other circumstance where the insurance company is allowed to contest the claim is when the owner is not contesting. If the contest by the owner is real then the insurance company cannot be permitted to cross-examine the witnesses only because owner was absent on a date. The order of prayer granted on the application or heard and permitted to cross-examine the witness may amount to allowing the application.

14. Let us examine the orders of the tribunal. From the awards of both the claim petitions it is clear that the owner of the Bus no.UP-42/T-2889 U.P. State Road Transport Corporation was contesting both the claim petitions. It had filed written statements, produced and examined driver of the bus Jagarnath as DW-1, filed copy of driving licence of Jagarnath driver 29 Ga-4, registration book of the bus, permit, insurance policy 27 Ga-2, 29 Ga-2 and 29 Ga-3, naksha nazri (site plan), and technical report of inspection of bus and motor cycle. The insurance company had not led any evidence to establish that driving licence was invalid or the bus was being driven in breach of insurance policy.

15. In M.A.C.P. No.44 of 2005, the application under section 170 of the Act filed by the insurance company was rejected on 7.4.2007 by the tribunal by the following order:-

"Heard. Owner is contesting hence rejected."

16. The application of the insurance company had been rejected on 7.4.2007, therefore, the appellant could assail the award of the tribunal only on the grounds mentioned in section 149(2) of the Act and neither on negligence or contributory negligence nor on quantum of compensation.

17. In M.A.C.P. No.45 of 2005, an application under section 170 of the Act was also filed by the insurance company. It appears on 19.9.2007 the owner was not present. The tribunal passed an order on 19.9.2007 permitting the appellant insurance company to cross examine the witness of the claimant PW-1 as the owner of the bus was absent. It is necessary to reproduce the order of the tribunal as below:-

"Heard. Insurance Co. is permitted to cross examine the witness of petitioner as owner is not present to cross examine P.W.I."

18. On the principle laid down by the Apex Court in Jyotsnaben Sudhirbhai Patel's case the word "heard" has to be construed as permitting the insurance company to contest. But the incident being same, the owner being common, the tribunal could not have passed two contradictory orders.

19. In both the appeals the appellant had challenged the award of the tribunal on the questions of negligence or contributory negligence and quantum of compensation.

In appeal no.3775 of 2008 arising out of M.A.C.P. No.44 of 2005 the application under section 170 had been rejected on 7.4.2007 by the tribunal. The tribunal had recorded a finding that no evidence had been led by the insurance company on the point of breach of insurance policy. No argument before us, has been raised by the learned counsel for the appellant on the grounds mentioned in under section 149(2) of the Act. The appellant cannot be permitted to raise the points of negligence or contributory negligence and quantum of compensation. The appeal lacks merit and deserves to be dismissed.

20. So far as appeal no.3776 of 2008 arising out of M.A.C.P. No.45 of 2005 is concerned the tribunal had recorded a finding that no evidence had been led by the insurance company on the point of breach of insurance policy. No argument before us, has been raised by the learned counsel for the appellant on the grounds mentioned in under section 149(2) of the Act. The appellant cannot be permitted to raise the points of negligence or contributory negligence and quantum of compensation. This appeal also has no merit and deserves to be dismissed.

21. The argument of the learned counsel that the appellant could challenge the order passed by the tribunal in these appeals, is liable to be rejected. We have examined the relief claimed in these appeal but we do not find that orders dated 17.4.2007 or 19.9.2007 have been challenged by the appellant. After the application under Section 170 was rejected it was open to the appellant to challenge the orders 17.4.2007 or 19.9.2007 under the supervisory jurisdiction of this Court under Article 227 of the Constitution of India. But the order dated 17.4.2007 or 19.9.2007 cannot be challenged in these appeals, as an appeal under Section 173(1) of the Act lies only against the award of the Motor Accident Claims Tribunal and the orders under Section 170 not being an award, no appeal would be maintainable against such an order.

22. For the aforesaid reasons, we do not find any merit in both the appeals. The appeals fail and are accordingly dismissed.

23. The amount of Rs.25,000/- deposited by the appellant in this court under section 173 of the Motor Vehicles Act, 1988 in both the appeals shall be remitted by the Registry to the Motor Accident Claims Tribunal within one month and shall be included in the amount to be paid by the appellant to the claimants.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.11.2008

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No. 17015 of 2001

Kalika Prasad and others ...Petitioners
Versus
Board of Revenue & others ...Respondents

Counsel for the Petitioners:
Sri V.C. Srivastava

Counsel for the Respondents:
Sri V.K. Singh
Sri Gulab Chandra
Sri Ajay Kumar Sharma
Sri Shamimul Hasnain

U.P. Zamindari Absolution Act 1950-Section 195 and 197-readwith Z.A. rule 115-P-allotment of land-Trees planted by petitioner standing-land not within

the definition of vacant land-during enquiry the trees found planted by petitioner-without notice or opportunity petitioner can not be said-not aggrieved person-impugned order passed by collector as well as Board of Revenue-set a side-matter remanded to collector for fresh decision.

Held: Para 24 & 32

Not only in this case but in number of cases it has been held that when impugned order leads civil consequences adversely affecting the right of others then before passing such order principal of natural justice has to be observed. In the present case the revenue courts have found the petitioner in occupation of land therefore before allotting the land to other person or even thereafter they ought to have given an opportunity for removal of tree if the allotment was of land in dispute was otherwise valid.

From the perusal of meaning of the word "aggrieved" and the view taken by the Courts it is apparent that the person concerned i.e.,the petitioner is very well aggrieved as he is in occupation of the land and his trees are standing thereon, and if the orders impugned in the writ petition are carried on/implemented it is none except petitioner who will put to loss. Hence the view taken by the Collector that the petitioner is not aggrieved person is unsustainable.

Case law discussed:

AIR 1921 PC 240 P.242, (2003) 6 SCC 516, 1993, SCC 259, 7 Ind. Cas. 765 (766), 2003 All.C.J. 771

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

1. This writ petition has been filed for issuing a writ of certiorari quashing the judgment and order dated 15.02.2001 and 30.07.1996 passed by Board of Revenue in Reference No. 96 of 1996-97 and Additional Collector (Administration) Kanpur Dehat (hereinafter referred to as respondent no.2) in case no.140/95-96 under Rule 115-P of U.P.Z.A & L.R. Rules. Vide order dated 30.07.1996 the respondent no.2 has rejected the application of the petitioner dated 01.12.1993 for cancelling the allotment of abadi site over an area measuring about 10 biswansi situated in plot no. 267 which old number happened to be 322 and by subsequent order dated 15.02.2001 the Member Board of Revenue has rejected the reference made by Additional Commissioner, Kanpur Division Kanpur while exercising his Revisional power under Section 333 of U.P. Zaminadari Abolition & Land Reforms Act,1950 (in short U.P.Z.A. & L.R. Act) in Revision No. 40/96-97 Kalika Prasad & others v. Brijendra Kumar & others. The Revision was filed against the judgment and order dated 30.07.1996.

2. The facts giving rise to this case are that an area of 10 biswansi situated in plot no. 267 was allotted to the respondent no.5 for abadi site by the respondent no.4 i.e., Land Management Committee. The petitioners have filed an application for cancellation of the said allotment under Section 122-C (6) of U.P.Z.A. & L.R. Act read with Rule 115-P of U.P.Z.A. & L.R. Rules on the ground that the allotted area was given by the Zamindar to the petitioners since before the abolition of Zamindari for plantation of the trees and over the disputed land more than 50 years old trees belonging to the petitioners are standing and the land was not vacant, therefore, no allotment could be made. It has also been stated that the allotment was irregular as the respondent no.5 do not fall under the eligibility criteria and the procedure prescribed under the rules for allotment has also not been followed. The said application was rejected by the

Collector by the impugned order dated 30.07.1996 on the ground that the land is recorded as ***banjer*** in the revenue record and the possession of the petitioners over the disputed land, prima facie appears to be unauthorised. It has also been held that the petitioners have no right over the land in dispute. Since the allotment in favour of respondent no.5 was made in accordance with law, therefore, that cannot be cancelled in this proceeding.

3. Aggrieved from the order dated 30.07.1996 the petitioner has filed a Revision No. 40/96-97 under Section 333 of U.P.Z.A. & L.R. Act before the Additional Commissioner, Kanpur Division, Kanpur. The Additional Commissioner has found that the Zamindar has given permission on 22nd May,1949 for plantation of trees. Therefore, the petitioner's right over the planted trees is established. But so far as the title is concerned the Divisional Commissioner has held that the land shall belong to the Gaon Sabha, however, the possession of the petitioner cannot be said to be illegal, or unauthorised as he has entered into the possession only after the permission of Zamindar since before the commencement of U.P.Z.A.& L.R. Act. Hence he made a reference to the Board of Revenue for allowing the application dated 01.12.1993 filed by the petitioners for cancellation of the allotment over the plot no. 267.

4. The Member Board of Revenue has rejected the reference made by the Additional Commissioner (Administration) Kanpur Division Kanpur vide order dated 15.02.2001 and maintained the order passed by the Collector the respondent no.2 dated 30.07.1996. In doing so, learned Member has observed that in case the permission was granted by the Zamindar for plantation of the trees since prior to the Zamindari abolition then why the petitioner has not taken any steps to get recorded his name on the basis of that permission. The Member Board of Revenue has taken the view that the petitioner has no locus standi to challenge the aforesaid allotment in favour of the opposite parties.

5. Sri V.C. Srivastava, learned counsel for the petitioner while assailing the aforesaid orders have made following submissions:

(i) Admittedly the land was not vacant at the time of allotment, therefore, no allotment could be made in view of the provisions contained under Sections 195,197 and 122-C of U.P.Z.A.& L.R. Act and Rules framed thereunder.
(ii) The allotment has been made ignoring the mandatory provisions as contained in Rule 115- N of the U.P.Z.A.L.R. Rules as no munadi and beating of drums as required under the Rule has been made before the allotment, therefore allotment deserved to be cancelled.
(iii) In his submissions assuming there was proposal for allotment of land by the Land Management Committee, the respondent did not fall under the eligibility criteria as contained under Section 122-C (3) of the U.P.Z.A.L.R. Act as the person in whose favour allotment is made is not a landless person.
(iv) The father of the respondent happened to be the Member of the Land Management Committee,

therefore, the allotment could not have been made.

(v) The report of the Tehsildar with regard to the irregular allotment has also not been considered either by the Collector while passing the order dated 30.7.1996 on the application of the petitioner for cancellation of the lease or by the member Board of Revenue in the reference proceeding.

6. He has also submitted that the permission/izazatnama given by the Zamindar in the year 1949 was a valid one and the petitioners have planted trees over the said land, therefore, a valuable right has accrued in favour of the petitioners and the Collector as well as Member Board of Revenue have erred in law in not examining the facts of the case in the legal perspective. In his submissions the reason recorded by the leaned Additional Commissioner Kanpur Division, Kanpur while sending the reference to the Board of Revenue is quite logical and legal one and learned Member Board of Revenue has erred in law in not accepting the reference and rejecting the same.

7. Refuting the submissions of the learned counsel for the petitioner, learned Standing Counsel as well as counsel for the Gaon Sabha have submitted that the provisions of Sections 195 & 197 of the U.P.Z.A. & L.R. Act, are not attracted in the case of the petitioners. In their submission the land in dispute is recorded as ***banjer*** in the revenue record, therefore, allotment has been made under Section 122-C of U.P.Z.A. & L.R. Act by the competent authority on the resolution of the Gaon Sabha. They have also submitted that had there been any permission given by the Zamindar in favour of the petitioner for plantation of the trees over the disputed land they ought to have taken recourse of law for recording their name in Revenue Record. Now after the expiry of so many years such kind of plea is unsustainable in the eyes of law. In their submission the orders passed by the respondents no.1 & 2 are perfectly valid and in accordance with law and it do not require any interference under Article 226 of the Constitution of India.

8. I have heard Sri V.C.Srivastava, learned counsel for the petitioner and learned Standing Counsel as well as counsel for the Gaon Sabha, for the respondent. No body has appeared for the respondent no.5.

9. In view of the submissions made by learned counsel for the petitioner, the requirement of law for the allotment of land under Sections 195 & 197 of U.P.Z.A. & L.R. Act, are required to be looked into. These sections are quoted below:-

195. Admission to Land- (1) The [Land Management Committee] with the previous approval of the [Assistant Collector in charge of the Sub-Division] shall have the right to admit any person as [bhumidhar with non-transferable rights] to any land (other than land falling in any of the classes mentioned in Section 132) where:-

(a) the land is vacant;
(b) the land is vested in the [Gaon Sabha] under Section 117; or
(c) the land has come into the possession of [Land Management Committee] under Section 194 or under any other provision of this Act.

197. Admission to land mentioned in Section 132- (1) The [Land Management Committee] [with the previous approval of the
[Assistant Collector in charge of the Sub-Division] shall have the right to admit any person as asami to any land falling in any of the classes mentioned in Section 132 where-

(a) the land is vacant land,
(b) the land is vested in the [Land Management Committee], or
(c) the land has come into the possession of the [Land Management Committee] under Section 194 or under any other provision of this Act.

[(2) Notwithstanding anything contained in any other provisions of this Act, the right to admit any person as asami of any tank, pond or other land, covered by water shall be regulated by the rules made under this Act.]

10. From the perusal of above sections it is apparent that the first requirement of law for the allotment of land under Sections 195 (a) and 197 (a) is that the land must be vacant.

11. The word 'Vacant' has been defined in Chamber's Dictionary as empty; unoccupied; not assigned to any activity; free; blankly incurious.

Almost the same meaning has been given in the Webster's Dictionary.

12. The word 'Vacant' means empty; not filled (of a post or seat etc,); unoccupied; untenanted, not vacant grin, unused or unoccupied (having no claimant).

13. From the perusal of the meaning of word 'vacant' it is clear that the word vacant means-unoccupied, having no claimants. Here it is admitted that the petitioners are in possession over the leased land, therefore, the land was not vacant at the time of allotment.

14. Now further question would arise that if the land was not vacant whether it was open to the Revenue Authorities to let out the land without getting it vacated from the possession of the petitioners.

15. It is not in dispute that the rule of law is prevailing and nobody can be permitted either it is governmental authorities or a private person to take law in their hands. If a person is in unauthorised occupation of the land, the U.P.Z.A. & L.R. Act, 1950 takes care of and has made provision for eviction of such unauthorised occupant. Section 122 (B) of the U.P.Z.A.& L.R. Act which deals with the power of Land Management Committee and the Collector for eviction of unauthorised persons. There is also provision for payment of compensation and damages for unauthorised use and occupation but that can not be resorted unless a show cause notice/an opportunity of hearing is given to the person concerned who has been found in wrongful occupation.

16. Not only in the U.P.Z.A. & L.R. Act but under Section 4 & 5 of U.P. Public Premises (Eviction of Unauthorised Occupant) Act, 1971 there is a provision to evict such persons who are unauthorised occupant over the State property. Section 27 of the U.P. Urban Planning and Development Act, 1973 also talks about the same and in all these Acts

there is a provision for issuing notice before the eviction of unauthorised occupants/and construction over the such land.

17. It is also noticeable that certain kind of unauthorised occupants (landless labourers, village artisans etc.) have got legal status under Section 123 of U.P.Z.A.& L.R. Act. It reflects that unauthorised occupation is not a new thing, therefore, it can be safely inferred that even if, somebody is found in the unauthorised occupation of Gaon Sabha land, should not be thrown in this manner without taking recourse of law particularly in a case where unauthorised duration is of long standing.

18. Now the question would arise whether the requirement of vacant nature of land for allotment of the land vested in the Gaon Sabha as required under Sections 195 & 197 is also applicable in the case of the allotment of housing site under Section 122-C of the U.P.Z.A.& L.R. Act, which is quoted below:-

122-C Allotment of land for housing site for members of Scheduled Caste, agricultural labourers etc.- (1) The Assistant Collector in charge of the sub-division of his own motion or on the resolution of the Land Management Committee, may earmark any of the following causes of the land for the provision of abadi sites for the members of the Scheduled Castes and [The Schedule Tribes and the other backward classes and the persons of general category living below poverty line] and agricultural labourers and village artisans-

(a) lands referred to in Clause (i) of Sub-Section (1) of Section 117 and vested in the Gaon Sabha under the section;

(b) lands coming into possession of the Land Management Committee under Section 194 or under any other provisions of this Act.

(c) any other land which is deemed to be or becomes vacant under Section 13, Section 14, Section 163, Section 186 or Section 211;

(d) Where the land earmarked for the extension of abadi and reserved as abadi site for Harijans under the U.P. Consolidation of Holding Act, 1953, is considered by him to be insufficient, and land earmarked for other public purposes under that Act is available, then any part of the land so available.

(2) Notwithstanding anything in Section 122-A, 195,196,197 and 198 of this Act, in Section 4,15,16,19,28-B and 34 of the United Provinces Panchayat Raj Act, 1947, the Land Management Committee may with the previous approval of the Assistant Collector in charge of the Sub-division allot for purposes of building of houses, to persons referred to in Sub section (3);

(a) any land earmarked under Sub-section(1);

(b) any land earmarked for the extension of abadi sites for Harijans under the provisions of the U.P. Consolidation of Holdings Act, 1953;

(c) any abadi site referred to in Clause (vi) of Sub Section (1) of Section 117 and vested in the Gaon Sabha;

(d) any land acquired for the said purposes under the Land Acquisition Act, 1994,

(3) The following order of preference shall be observed in making allotment under Sub-section (2);

(i) an agricultural labourer of village artisan residing in the village and belonging to a Scheduled Caste or [Scheduled Tribes or other backward classes or a person of general category living below poverty line];
(ii) any other agricultural labourer or village artisan residing in the village;
(iii) any other person residing in the village and belonging to a Schedule Caste or;
(iv) a person with disability residing in the village.

19. From the bare perusal of the above section, it appears that the requirement of vacant nature of the land as contained in Sections 195 and 197 of the U.P.Z.A.& L.R. Act is not there. However, learned counsel for the petitioner submitted before the Court that same analogy may be applied here also in the case of allotment of the housing site. After careful examination of Sections 195,197 and 122 -C it transpires that the word 'vacant' mentioned in Sections 195 & 197 do not find mention under Section 122-C of the U.P.Z.A.& L.R. Act. It is well established principle of rules of interpretation that the statute should be read as it is. In the case of **Corporation of the City of Victoria v. Bishop of Vancouver Island, AIR 1921 PC 240 P.242.** It has been observed by Lord Atkinson:-

"In the construction of statutes, their words must be interpreted in their ordinary grammatical sense unless there be something in the context or in the object of the statute in which they occur or in the circumstances in which they are used, to show that they were used in a special sense different from their ordinary grammatical sense."

20. If the words used in the section 122-C are to be read as it stand and if it is read so then the requirement of vacant nature of land is not necessary. The only requirement under that Section is that the land must be vested in the Gaon Sabha under Sub section 1 of Section 117 of the U.P.Z.A. & L.R. Act, and the land coming into the possession under Section 194 or any land which is deemed to be vacant under Sections 13,14,163,186 or Section 211 or where the land year marked was for extention of abadi and reserved as abadi site for harijan under the U.P. Consolidation of Holdings Act. Had there been any intention of the legislature to make condition precedent the vacant nature of land for allotment of abadi site under this section then that word must have been mentioned in this section also.

21. It is noticeable that the Courts are not supposed to fill the gaps. The court can utmost press the wrinkles and can not make a bridge. The Court's function is to interpret the law, keeping in mind the object of the Act and the Rules framed thereunder.

22. The Apex Court in the case of **Karnata State vs Union of India AIR 1978 SC 68, Union of India vs Ranjit Kumar reported in (2003) 6 SCC 516** has observed:

"in this connection it is pertinent to remember that although a court cannot supply a real casus omissus it is equally clear that it should not so interpret a statute as to create a casus omissus when there is really none"

23. However, one question will remain that even if it is presumed that the land vested in the Gaon Sabha can be

allotted even if it is not vacant, even then the requirement of principles of natural justice is required to be observed particularly in a case where the order impugned leads civil consequences. The Apex Court in the case of ***D.K. Yadav Vs. J.M.A. Industrial Ltd. Reported in 1993, SCC 259*** has made the following observations:

The cardinal point that has to be borne in mind, in every case, is whether the person concerned should have a reasonable opportunity of presenting his case and the authority should act fairly, justly, reasonably and impartially. It is not so much to act judicially but is to act fairly, namely, the procedure adopted must be just, fair and reasonable in the particular circumstances of the case. In other words application of the principles of natural justice that no man should be condemned unheard intends to prevent the authority from acting arbitrarily effecting the rights of the concerned person.

It is fundamental rule of law that no decision must be taken which will affect the right of any person without first being informed of the case and giving him/her an opportunity of putting forward his/her case. An order involving civil consequences must be made consistently with the rules of natural justice. In Mohinder Singh Gill Vs. Chief Election Commissioner the Constitution Bench held that 'Civil consequences' covers infraction of not merely property or personal right but of civil liberties, material deprivation and non-pecuniary damages. In its comprehensive connotation every thing that affects a citizen in his civil life inflicts a civil consequence. Black's Law Dictionary, 4th edn., page 1487 defined civil rights are such as belong to every citizen of the State or country... they include... rights capable of being enforced or redressed in civil action... In State of Orissa V. (Miss) Birapani Dei this Court held that even an administrative order which involves civil consequences must be made consistently with the rules of natural justice. The person concerned must be informed of the case, the evidence in support thereof supplied and must be given a fair opportunity to meet the case before an adverse decision is taken. Since no such opportunity was given it was held that superannuation was in violation of principles of natural justice.

In State of W.B. V Anwar Ali Sarkar per majority, a seven-judge Bench held that the rule of procedure laid down by law comes as much within the purview of Article 14 of the Constitution as any rule of substantive law. In Maneka Gahndi Vs. Unioin of India another Bench of seven Judges held that the substantive and procedural laws and action taken under them will have to pass the test under article 14. The test of reasons and justice cannot be abstract. They cannot be divorced from the needs of the nation.
The tests have to be pragmatic otherwise they would cease to be reasonable. The procedure prescribed must be just, fair and reasonable even though there is no specific provision in a statute or rules made thereunder for showing cause against action proposed to be taken against an individual, which affects the right of that individual. The duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the power to take punitive or damaging action. Otherwise also although it has been held that the requirement of vacant nature of land as

contained under Section 195 and 197 of U.P.Z.A.& L.R. Act is not there under Section 122 C but the provisions of Section 122-B are still there and the same is not applicable only with regard to the particular type of unauthorised occupant, therefore, authorities must have taken care of statutory provisions before allotting the land in dispute.

24. Not only in this case but in number of cases it has been held that when impugned order leads civil consequences adversely affecting the right of others then before passing such order principal of natural justice has to be observed. In the present case the revenue courts have found the petitioner in occupation of land therefore before allotting the land to other person or even thereafter they ought to have given an opportunity for removal of tree if the allotment was of land in dispute was otherwise valid.

25. So far as the procedural lapses with regard to the allotment of land is concerned it was obligatory on the part of the authorities to consider the same in view of the provisions contained under Rule 115-N of U.P.Z.A. L.R. Rules, which runs as follows:

115-N. C-General.- (1) Whenever the Land Management Committee proceeds to allot housing sites under rule 115-L or 115-M, it shall announce by beat of drum in the village the exact location of the sites to be allotted, the time, the date and venue of allotment.
(2) All allotment shall be made by the Land Management Committee in a meeting held for the purpose on the date announced under sub-rule (1). Where more than one person belonging to the same order of preference express their desire to be allotted a particular site, the said Committee shall draw lots to determine the person to whom the site should be allotted:

Provided that the prior approval of the Assistant Collector-in- charge of the sub-division shall be obtained for every allotment under Rule 115-L or 115-M.
(3) The allottee of the housing site shall be given a receipt for the premium, if any, paid by him to the Land Management Committee and a certificate of allotment. The certificate shall be in Z.A. Form 49-F which shall be prepared in two parts, the main certificate being given to the allottee and its counterpart remaining with the Land Management Committee for record.

26. From the perusal of sub rule (1) of Rule 115 N it is apparent that the Land Management Committee was under legal obligation to advertise the resolution for allotment of abadi site. Whereas in this particular case from the perusal of report of Tehsildar copy of which has been brought on record as Annexure-2 to the writ petition, it transpires that the procedure contained in the rule were not followed and the allotment was made in contravention of the rules but the authorities (Collector & Board of Revenue) have omitted to take note of the report of the Tehsildar in this regard and failed to exercise their duties vested in them under the relevant statute.

27. In this regard it is to be noted that the Collector while passing the order dated 30.7.1996 has also observed that the petitioner is not aggrieved person as he has occupied the Gaon Sabha land, therefore, also an application on his instance for cancellation of lease is not maintainable.

28. The word 'aggrieved' has been defined in the **Webser's Dictionary** as having the grievance; offended, slighted, injured in one's legal rights.

29. In the **Law Laxicon Dictionary** the word Aggrieved has been defined as under:

'aggrieved' means a term of very ancient origin, appearing on the Statute Role of 1363; For purposes of ascertaining rights of appeal, any person who is in any sense a party to a legal proceeding is **"aggrieved"** by a wrong decision with regard to the proceeding. Under statutes granting the right of appeal to the party aggrieved by an order or judgment, the party aggrieved is one whose pecuniary interest is directly affected by the adjudication; one whose right of property may be established or divested thereby. (Black).

30. In the case of *Lalji Sahay Singh v. Abdul Gani, 7 Ind. Cas. 765 (766)* it has been observed that an aggrieved person is a person whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something.

31. In the case of *Ebrahim Aboodbakar v. Custodian General of Evacue Property, AIR 1952 SC 319* the Apex Court has observed that when a person is given a right to raise a contest in a certain matter and his contention is negatived, he is a person aggrieved.

32. From the perusal of meaning of the word "aggrieved" and the view taken by the Courts it is apparent that the person concerned i.e., the petitioner is very well aggrieved as he is in occupation of the land and his trees are standing thereon, and if the orders impugned in the writ petition are carried on/implemented it is none except petitioner who will put to loss. Hence the view taken by the Collector that the petitioner is not aggrieved person is unsustainable.

33. The matter can be examined from another angle:

Rule 115-P talks about the power of the Collector with regard to the cancellation of allotment of land made under 115-L and 115-M of the U.P. Zamindari Abolition & Land Reforms Rules, 1952. Rule 115-P is reproduced belows:-

115-P. (1) The Collector may, of his own motion or on the application of any person aggrieved by any order of allotment of land under rule 115-L or 115- M, proceed to make an inquiry in the manner given hereunder.
(2) The allottee and Land management Committee shall be necessary parties to all such cases.
(3) The Collector on the application of any party or otherwise may pass suitable interim orders at any time before the final disposal of the case.
(4) The Collector shall call upon all persons interested in the order of allotment to appear and present their case before him. It shall not be necessary to record evidence but the memo of the day to day inquiry shall be kept on record by the Collector. On making inquiries, if he is satisfied that the allotment is irregular he may cancel the allotment and thereupon the right, title and interest of the allottee and of every other persons

claiming through him in the land shall cease.
(5) The order of the Collector under the preceding sub-rule shall be final.

34. From the perusal of Sub Rule (3) and (4) of Rule 115-P it transpires that the Collector may, on his own or on the application of any person aggrieved may proceed to make an inquiry and pass interim order or call other interested person in this regard. These sub rules provide that how the Collector shall proceed while holding an inquiry.

35. Almost the same word "otherwise' as used in Sub Rule 3 of Rule 115-P of the U.P.Z.A.L.R. Rules has been used in Rule 4 (1) of the U.P. Panchayat Raj (Removal of Pradhans, UP-Pradhans and Members) Enquiry Rules 1997 and the Division Bench of this Court in the case of **Moti Lal v. District Magistrate, Lalitpur and another reported in (2003 All.C.J.. 771)** has interpreted the said word as under:

"The words " or otherwise" occurring in sub-rule 1 of Rule 4 are of wide import. Even if no complaint is filed as envisaged by Rule 3, the State Government does not lack of power to direct holding of preliminary enquiry. There may be cases in which the District Magistrate or other officials charged with looking the affairs of Gram Panchayat may receive information or may personally finds fact requiring holding of preliminary enquiry. For example, the Sub Divisional Officer who is incharge of a sub division if finds a Pradhan abusing his position and committing serious financial irregularities can report the matter to the District Magistrate who is authority competent to order of preliminary enquiry. The report of Sub-Divisional officer may form basis for directing a preliminary enquiry. The District Magistrate may after personally coming to know some serious lapse on the part of the Pradhan may direct preliminary enquiry without there being any complaint or report. In the present case the complaint submitted by the Up-Pradhan was valid material for directing preliminary enquiry, hence the submission of counsel for the appellant has no substance."

36. The determination before the Division Bench was that whether a preliminary inquiry against the Pradhan can be initiated on a complaint/information as prescribed under Rule 3 of Rules 1997 or the State (Collector) can pass an order for holding a preliminary enquiry on the basis of information otherwise received.

37. In the present case although this Court has held that the petitioner was very well aggrieved person and District Magistrate has erred in holding that an application for cancellation of lease on the instance of the petitioner is very well maintainable, but assuming for the sake of argument the petitioner was not an aggrieved person as pointed out by the Collector concerned even then the Collector was under a legal obligation in furtherance of his duty to examine the procedural lapse in granting of lease under the provisions of U.P.Z.A.& L.R. Act and Rules.

38. In view of above discussions, I am of the view that the Collector was under a legal obligation to hold an enquiry with regard to the procedural lapse in respect to the allotment of the abadi site as he was otherwise having knowledge of the irregular allotment of

the abadi site (the report of Tehsildar Annexure-2 to the writ petition), needless to say that the same mistake has been committed by the Member Board of Revenue while rejecting the reference made by the Additional Commissioner.

39. In the result the writ petition succeeds and is allowed. The impugned orders dated 30.7.1996 and 15.2.2001 (Annexures no.3 & 6 to the writ petition) are hereby quashed.

40. The matter is remanded back to the Collector to pass appropriate order in accordance with law after holding an enquiry as required under the relevant statues. Petition allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.12.2008

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 34592 of 2003

Lal Pratap Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri H.N. Singh
Sri B. Narayan Singh

Counsel for the Respondents:
S.C.

Constitution of India Art. 226-Benefit of notional promotion-petitioner's claim seeking parity-of pay scale as per employee working in Head quarter alongwith consequential benefits, pay scale, seniority etc. allowed by High Court-consequently the petitioner held entitled to get promotion as excise Inspector w.e.f. 13.6.96. But due to pendancy of SLP before the Apex Court-could not be acted upon-petitioner retired on 28.3.98-for purpose of fixation of pension-petitioner entitled for fixation on basis of last pay drawn in pay scale of Inspector and not as senior clerk-respondents can not be allowed to take benefit of their own wrong.

Held: Para 21

Even otherwise, it would result in grave injustice as it would amount to granting benefit to the respondents for their own fault since denial of promotion to the petitioner, when it was due, was not on account of any fault of the petitioner, but that of respondents. In view of the aforesaid facts and circumstances, this Court is clearly of the view that the impugned orders of the respondents denying pension to the petitioner taking in to account his notional promotion on the post of Senior Clerk, Senior Assistant and Excise Inspector retrospectively is wholly illegal and arbitrary and liable to be set aside.

Case law discussed:
2000 (85) FLR 714

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

1. Heard Sri H.N. Singh, learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. The petitioner is aggrieved by order dated 13.9.2002 of the Joint Secretary, U.P. Government, Lucknow and consequential order dated 29.5.2003 of the Excise Commissioner, U.P., Allahabad whereby he has been denied revised pension as a result of his notional promotion on higher posts from back date in higher pay scales.

3. The facts giving rise to the present dispute, in brief, are as under.

4. The petitioner was initially appointed as Junior Clerk in the Excise Department of State of U.P. on 26.10.1971 and confirmed on the said post on 1.4.1975. In the Excise Department, Junior Clerk and Senior Clerk were posted in the subordinate offices as well as in the Headquarters. The respondents were maintaining distinction in respect to pay scale and status of the said clerks posted in subordinate offices qua those posted in Head Officer though they were discharging same duties. Further vide U.P. Excise Department Ministerial Service Rules, 1980, no distinction was made in respect of seniority, promotion etc. amongst the clerks posted in subordinate offices and Headquarters. This issue thus was agitated through U.P. Excise Subordinate Officers Ministerial Association in writ petition no. 6904 of 1987. The writ petition was allowed by this Court vide judgment dated 20.11.1996 with the following directions :

"In the result the application succeeds and is allowed. Let writ of mandamus do issue commanding the respondents to pay or grant equal pay scale to the excise clerks in the subordinate offices in commensurate with those of the other counter parts in head quarters from the date of implementation of recommendation of the pay rational committee namely the date when both these groups merged into one cadre, together with the arrears as are admissible from such date and also to pay current pays on notionally fixation of the particularly scale at which they are placed in the manner indicated above. Further writ of certiorari do issue quashing seniority list prepared in being annexure S.A.3. Let a writ of mandamus do issue commanding respondents to prepare a fresh seniority list in accordance with the law observed above and fix seniority of the excise clerks accordingly within a period of six months from the date and also to fix and grant all notional benefits of promotions and other consequences of services benefits without arrear commensurate with such notional service benefits or promotion within a period of six months from the date of preparation of seniority list while, however, the petitioner shall be paid all services consequential benefit current from the date of such determination together with all consequential benefits as are admissible in law in future."

5. The State of U.P. preferred Civil Appeal No. 7340 of 1997 before the Apex Court, which was also dismissed on 14.9.2000 by a reasoned judgment affirming this Court's order. When the matter was pending before the Apex Court, the petitioner, however, attained age of superannuation on 28.2.1998 and retired from the post of Senior Clerk, though pursuant to this Court's judgment dated 20.11.1996, he was entitled to have been promoted on higher posts from much earlier date. After the decision of the Apex Court, the respondents revised seniority list on 15.3.2001 wherein the name of the petitioner was placed at sl. no. 102. Since the persons junior to the petitioner in the revised seniority list were already promoted to the post of Senior Assistant and Excise Inspector long back, the petitioner was treated to be promoted as Senior Clerk with effect from 26.6.1981, as Senior Assistant with effect from 2.12.1992 and as Excise Inspector with effect from 13.6.1996 on notional basis. The consequential benefits were not paid to the petitioner. When he made a

complaint, the Excise Commissioner vide his letter dated 15.11.2001 informed the Secretary Lokayukta Administration, Lucknow that pursuant to the aforesaid notional promotions, consequential benefits are also being made available to the petitioner as a result of his promotion on the post of Senior Clerk, Senior Assistant and Excise Inspector retrospectively. His pay fixation on notional basis with effect from 3.11.1971 till 28.2.1998 was also made by the respondents and a sum of Rs. 14,344/- towards arrears was also paid on 23.3.2003. However, since, the petitioner had retired on 28.2.1998, as a matter of fact, while working on the post of Senior Clerk for the reason that the appeal of the State Government was pending before the Apex Court and during the pendency of the said appeal, the judgment of this Court was not given effect by the respondents, therefore, his pay was fixed according to the last pay actually drawn on 28.2.1998 on the post of Senior Clerk from which he actually retired. Even after his notional promotion on the higher posts with retrospective effect, though some amount of arrears was paid for the period prior to the date of retirement, but no revision of pension was made by the respondents and when he agitated, the respondents no. 1 vide letter dated 13.9.2002 informed the Excise Commissioner that the benefit of notional promotion on higher posts would not count for the purpose of pensionary benefits and the pension would be determined on the basis of the salary which the petitioner actually drew at the time of his retirement. In pursuance to the State Government's letter dated 13.9.2002 the Excise Commissioner also passed a consequential order on 29.5.2003 rejecting petitioner's claim stating that despite of his notional promotion to the posts of Senior Assistant and Excise Inspector retrospectively, the petitioner would not get any benefit towards the amount of pension since he had not assumed charge on the higher posts as a matter of fact having retired on 28.2.1998 working as Senior Clerk. The benefit of notional promotion is not permissible for pensionary benefits.

6. These two orders of the respondents no. 1 and 2, Annexures-6 and 5 respectively to the writ petition are being assailed by the petitioner on the ground that once the petitioner has been given promotion on higher posts, though notionally, for the reason that for the fault of the respondents in not giving promotions to the petitioner when it was due, he cannot be denied benefit of the promotions made later on notionally though it is recognised for the purpose of fixation of pay. He said that pension is liable to be revised according to the pay which is admissible to the petitioner on re-fixation as a result of his notional promotions on higher posts of Senior Assistant and Excise Inspector.

7. Respondents have filed counter affidavit wherein the facts as noted above are not disputed but justifying its stand of not giving any benefit of notional promotion for the purpose of revision of pension, in para- 11 and 14, it has been stated that since the petitioner actually retired from the post of Senior Clerk and did not assume charge on the higher post, hence, he was not entitled for any benefit for the purpose of pension. The respondents have admitted that by the order dated 19.11.2001, the petitioner was allowed notional promotion on the post of Senior Clerk with effect from 26.6.1981, Senior Assistant with effect from

2.12.1992 and Excise Inspector with effect from 13.6.1996 but then it is said that benefit of the said notional promotion is not permissible for revising the pension and reliance has been placed on the Government's decision communicated to the Excise Commissioner vide letter dated 13.9.2002. It has also annexed a copy of the Excise Commissioner's letter dated 2.7.2002 and 16.8.2002 seeking advice from the State Government in the aforesaid matter stating that as per the opinion of the Finance Controller so long as a person has not assumed charge of the higher posts, the pay admissible on the said posts would not be taken into account for the purpose of pensionary benefits and, therefore, the notional promotion would not result in any benefit for pension.

8. This Court has heard learned counsel for the parties at length and perused the record.

9. Before coming to the merits of the issue, it would be useful to refer some of the relevant provisions, which would help in the adjudication of the dispute.

10. The term "pay" has been defined in Fundamental Rule (hereinafter referred to "FR") 9 (21) which reads as under:

*"**9** (21) Pay means amount drawn monthly by Government servant as-*

i. the pay, other than special pay or pay granted in view of his personal qualification, which has been sanctioned for a post held by him substantively or in an officiating capacity, or to which he is entitled by reason of his position in a cadre, and

ii. overseas pay, technical pay, special pay and personal pay, and

iii. any other emoluments which may be specially classed as pay by the Governor.

(emphasis added)

11. FR-19 and 22 deals with pay to which Government servant would be entitled when he is appointed substantively to a post in a time scale of pay and reads as under :

*"**19**. The pay of a Government servant shall not exceed the pay sanctioned by a competent authority for the post held by him. No special or personal pay shall be granted to a Government servant without the sanctioned of the Government."*

*"**22.** The initial substantive pay of a Government servant who is appointed substantively to a post on a time-scale of pay is regulated as follows :-*

(a) if he holds a lien on a permanent post other than a tenure post or would hold a line on such a post had his lien not been suspended-

(i) when appointment to the new post involved the assumption of duties or responsibilities of greater important (as interpreted for the purpose of Rule 30) than those attaching to such permanent post, he will draw as initial pay at the stage of the time-scale next above his substantive pay in respect of the old post;

(ii) (a) When the appointment to the new post does not involve such assumption of duties and responsibilities of greater importance, he shall draw as initial pay, the stage of the time-scale which is equal to his pay in respect of the old post held by him on regular basis, or, if there is no such stage, the stage next above his pay in

respect of the old post held by him on regular basis :

Provided that where the minimum pay of the time-scale of the new post is higher than his pay in respect of the post held by him regularly he shall draw that minimum as the initial pay :

Provided further that in a case where pay is fixed at the same stage, he shall continue to draw that pay until such time as he would have received an increment in the time-scale of the old post, in cases where pay is fixed at the higher stage, he shall get his next increment on completion of the period when an increments earned in the time-scale of the new post.

(b) On appointment on regular basis to such a new post, other than to an ex-cadre post on deputation, the Government servant shall have the option to be exercised within one month from the date of such appointment, for fixation of his pay in the new post with effect from the date of appointment to the new post or with effect from the date of increment in the old post.

(iii) when appointment to the new post is made on his own request under Rule 15(a) and the maximum pay in the time-scale of that post is less than his substantive pay in respect of the old post he will draw that maximum as initial pay.

(b) If the conditions prescribed in clause (a) are not fulfilled he will drawn as initial pay the minimum of the time-scale.

Provided that where a Government servant holding a post in a temporary or officiating capacity and drawing pay in a pay scale, the maximum of which (exceeds Rs.1,200 or Rs.1,720 in the scales of pay introduced with effect from August 1, 1972 or July 1, 1979) respectively, or Rs.2,050 with effect from January 1, 1984 (in respect of scale of pay introduced with effect from July 1, 1979) is appointed or promoted to another post carrying duties or responsibilities of greater importance, his initial pay in the time-scale of the higher post will be fixed at the stage next above the pay drawn in the pay scale, of the lower post. The benefit of pay so fixed is, however, restricted to the period during which the Government servant would have continued to work on the lower post but for his appointment/promotion to the higher post.

Provided further that both in cases covered by clause (a) and in cases, other than cases of re-employment after resignation or removal or dismissal from the public service, covered by clause (b),if he either-

(1) has previously held substantively or officiated in-

(i) the same post, or

(ii) a permanent post or temporary post on the same time-scale, or

(iii) a permanent post, other than a tenure post, on an identical time-scale, or a temporary post on an identical time-scale, such post being on the same time-scale as permanent post; or

(2) is appointed substantively to a tenure post on a time-scale identical with that of another tenure post which he has previously held substantively or in which he has previously officiated,

then the initial pay shall not be less then the pay, other than special pay, personal pay or emoluments classed as pay by the Governor under Rule 9(21)(iii), which he drew on the last such occasion, and he shall count the period during which he drew that pay on such last and any previous occasions for increments in the stage of the time-scale equivalent to that pay. If, however, the pay last drawn by the Government servant in a temporary post has been inflated by the grant of premature increments, the pay which he

would have drawn but for the grant of those increments shall be taken for the purposes of this proviso to be the pay which he last drew in the temporary post.

(c) when, after initial fixation of pay in the pay scales introduced with effect from July 1, 1979, appointment is made to a selection grade post in a substantive or officiating capacity, the pay will be fixed at the stage next above the pay in respect of the ordinary grade and the benefit of second proviso of F.R. 30 may be extended in such cases subject to all the conditions of that Rule being satisfied.

2. For the purpose of this Rule sterling overseas pay shall be converted into rupees as such rate of exchange as the Government may by order prescribe.

3. [Deleted].

4. A time-scale may be of recent introduction whereas the cadre or class to which it is attached may have been in existence on a graded scale before the time-scale came into force or it may be that one time-scale has taken the place of another. If a Government servant has held substantively or officiated in a post in the cadre or class prior to the introduction of a new scale and has drawn during the period salary or pay equal to a stage, or intermediate between two stages, in the new time-scale, then the initial pay in the new time-scale may be fixed at the salary or pay last drawn and the period during which it was drawn may be counted for increment in the same stage, of it the salary or pay was intermediate between two stages, in the lower stage of that time-scale.

5. The expression "if he holds a lien on a permanent post" occurring in clause (a) of Fundamental Rule 22 should be held to include the lien on a permanent post to which a Government servant is appointed in provisional substantive capacity under Fundamental Rule 14 (d), and the expression "substantive pay in respect of the old post" occurring in that Rule should be held to include his substantive pay in respect of that provisional substantive appointment. Fundamental Rule 22 (a) should therefore be held to permit the substantive pay in respect of a provisional substantive appointment being taken into account in determining his initial pay in another post of which he is appointed. When the initial pay of a Government servant in a post is thus fixed. It will not be affected even if during the tenure of his appointment to that post he reverts from his provisional appointment."

12. For the purpose of pension, the matter is governed by the provisions made in Civil Service Regulations **as applicable in U.P.** (hereinafter referred to as "CSR"). Regulation 38 thereof defines "Pay and Salary" and reads as under:

"38. "Pay and Salary"

(a) "Pay" means "monthly substantive pay". It includes also "overseas allowance" and technical allowance".

(b) For the purpose of the Leave Rules in Chapter XII, "Pay" includes also the Subsistence allowance of a member of the Indian Civil Service or a Military Officer subject to the Civil Leave Rules who has an officiating but not a substantive appointment.

(c) "Salary" means the sum of pay an acting allowance, or charge allowance, under Article 94 of Chapter VIII."

13. Rule 40 defines the "Pay of an officer" and reads as under :

"40. (a) The "pay of an officer" is.- *In the case of an officer with a substantive appointment the amount which he would receive monthly under any of the following designations, in his substantive appointment-*

Military pay and allowance and Staff Salary.

Indian Army pay and Staff Salary.

Substantive pay.

Consolidated pay.

(b) In the case of an officer without a substantive appointment, is monthly Substantive allowance (if a member of the Indian Civil Service, a Statutory Civil Servant, or a Military Officer subject to the Civil Leave Rules and his Military Pay and allowance or Indian Army Pay (if a Military Officer subject to the Military Leave Rules.).

14. Section 41 defines "Pension" and reads as under :

"41. Pension.- *Except when the term "Pension" is used in contradistinction to Gratuity, "Pension" includes Gratuity."*

15. A person retired on attaining the age of superannuation is entitled for superannuation pension vide CSR-458 which reads as under:

*"**458**. A superannuation pension is granted to an officer in superior and inferior service entitled or compelled, by Rule to retire at a particular age."*

16. Chapter-XIX Section I CSR deals with amount of pension and Regulation-468 thereof reads as under :

"468. *The amount of pension that may be granted is determined by length of service. In calculating the length of qualifying service, fractions of a half year equal to three month and above shall be treated as a completed one half year and reckoned as qualifying service."*

17. Chapter XIX Section II Regulation 474 provides for calculation of pension based on the salary/pay scale admissible to Government servant.

18. From the aforesaid provisions, it is clear that a Government Servant when he is granted promotion on a particular post on a particular date, he is entitled for pay, which is admissible on the said post and for the purpose of pension, the pay admissible to Government Servant on the post he was promoted or was appointed at the time of retirement would be relevant. No provision has been shows to this effect that it is only the actual emolument which the Government servant receives on the post which he holds at the time of his retirement though subsequently it was found that he was entitled for a higher scale, which was allowed also from the retrospective effect yet would not count for pension. The notional promotion for all purposes means appointment on a higher post with all attending benefits in law. Some times, in the facts and circumstances of a particular case, when a Court directs for notional promotion with retrospective effect, the arrears of salary may not be allowed but for all other purposes, the benefit of promotion on the higher post and fixation of pay in the pay scale admissible to such higher posts cannot be excluded at all. A Notional promotion by no means can be treated to be inferior to actual promotion. The term 'notional promotion' is normally used when a person is allowed a status which he actually could not enjoy at the time when it was due, may be for the fault of

the authorities concerned or for any other reason, and to compensate such person for such loss, promotion from an earlier date is allowed, and, in law, it has all the benefits available to such person as if he was actually promoted. In law after the petitioner was allowed notional promotion on the post of Excise Inspector with effect from 13.6.1996 and his pay was also fixed in the time scale of pay admissible to the post of Excise Inspector from the said date, if the stand of the respondents is accepted it would mean that for the purpose of retiral benefits, he continued to be a Senior Clerk, though it is not correct de facto and de jure. The petitioner has been allowed promotion on the post of Excise Inspector and has also been paid some of the arrears. The doctrine of 'having not shared responsibility of the higher post, the arrears of salary be not paid' is not applicable in such a case for the purpose of calculating pensionary benefits. Computation of pension does not require actual holding of the post and receiving salary in a particular time scale of pay at the time of retirement. The pension is admissible on the post on which the Government servant has been appointed, actually or notionally and has right to receive salary in the particular time scale meant for such post.

19. Though in slightly different context, but in **Union of India & others Vs. K.B. Rajoria 2000 (85) FLR 714** the question came up for consideration as to what "regular service" in the grade would mean and whether it would cover notional promotion or not and in that context, the Apex Court held that by giving notional promotion with retrospective effect to the concerned incumbent in that case it would mean that he was regularly appointed to the post on that date. It also held that the word "regular" does not mean actual and for the said purpose, it referred to the definition of "regular" in Concise Oxford Dictionary, Ninth Edition, which reads as under:

"(1) conforming to a rule or principle, systematic; (2) harmonious, symmetrical; habitual, constant, orderly; (4) conforming to a standard of etiquette or procedure, correct, according to convention; (5) properly constituted or qualified, not defective or amateur, pursuing an occupation as one's main pursuit."

Here also for the purpose of pension, it is only the qualifying service, which is contemplated under Regulation 468 of CSR and not the actual physical service. The interpretation given to office memorandum referred to in para-15 in **K.B. Rajoria (supra)** by the Apex Court, in my view, would apply with full vigour in the present case also though that was a case of Central Government. Here also reading the words "qualifying service" as "actual physical service" is wholly misplaced having no basis and it also overlooks the effect and concept of "notional promotion" and the benefit ensued therefrom to the concerned employee. Any other view amounts to taking a benefit given by one hand to the employee by another hand, which is neither just nor in accordance with well known principle of service jurisprudence that no person, who is otherwise entitled to a relief, should be denied the same though the denial is not substantiated by any condition of service or statutory provision applicable to such employee.

20. In case of notional promotion on the post of Excise Inspector having been

granted to the petitioner with effect from 13.6.1996, it would be deemed that on 28.2.1998, the petitioner retired from the post of Excise Inspector and was receiving salary in the time scale of pay admissible to the post of Excise Inspector. Hence he would be entitled for pensionary benefits to be computed accordingly. The decision of the respondents that since the petitioner has not joined on the post of Excise Inspector and has not worked, therefore, would not be entitled to take advantage of notional promotion for the purpose of pension is wholly arbitrary and has not been shown to be supported by any provisions contained in the service rules applicable to the petitioner.

21. Even otherwise, it would result in grave injustice as it would amount to granting benefit to the respondents for their own fault since denial of promotion to the petitioner, when it was due, was not on account of any fault of the petitioner, but that of respondents. In view of the aforesaid facts and circumstances, this Court is clearly of the view that the impugned orders of the respondents denying pension to the petitioner taking in to account his notional promotion on the post of Senior Clerk, Senior Assistant and Excise Inspector retrospectively is wholly illegal and arbitrary and liable to be set aside.

22. In the result, the writ petition is allowed. The impugned orders dated 13.9.2002 of the Joint Secretary, U.P. Government, Lucknow and consequential order dated 29.5.2003 of the Excise Commissioner, U.P., Allahabad (Annexures-6 and 5 respectively to the writ petition) are hereby quashed. The respondents are directed to re-determine the pension and other retiral benefits of the petitioner taking into account his notional promotion on the post of Senior Clerk with effect from 26.6.1981, Senior Assistant with effect from 2.12.1992 and Excise Inspector with effect from 13.6.1996 and calculate the same in accordance with rules and pay the amount of arrears of the revised pension and consequential current pension also within a period of four months from the date of production of certified copy of this order before them. The petitioner shall also be entitled to interest on the amount of arrears at the rate of 10% from the date of order, denying benefit of notional promotion in respect to pension, was passed i.e. 13.9.2002 till the aforesaid arrears are actually paid to the petitioner.

23. With the aforesaid directions, the writ petition is allowed. The petitioner shall also be entitled to cost which is quantified to Rs.5,000/-.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.09.2008

BEFORE
THE HON'BLE AMITAVA LALA, J.
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 48491 of 2008

Varun Kumar ...Petitioner
Versus
Union of India & others ...Respondents

Counsel for the Petitioners:
Sri Vinay Khare.

Counsel for the Respondents:
Sri Dr. Ashok Nigam, Addl. Solicitor General of India,
Sri Ajay Bhanot

Administrative Tribunal Act 1985-Section 19-Rejection of application in limine without considering the merit on ground as per Rule 8 (4)-No separate application supported with affidavit filed-held-not proper-Tribunal is the creation of constitution and not a statutory one-petition disposed of giving liberty to approach before Tribunal with separate application for condonation of delay-the same be decided by Tribunal on merit.

Held: Para 7

Therefore, the writ petition is disposed of without any order as to cost and with a liberty to the petitioner to make an application for condonation of delay before the tribunal positively within a fortnight from this date and if such an application is made, the tribunal will hear out such application afresh, excluding the period consumed for the purpose of making the writ petition upon obtaining the certified copy from the tribunal till the period when certified copy of the order made ready for delivery by the registry of this Court.

Case law discussed:
(1997) 3 SCC 261

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

1. The writ petition has been made challenging order dated 24th July, 2008 passed by the Central Administrative Tribunal, Allahabad (hereinafter referred to as the tribunal), not on merits but only with regard to delay, holding that in the absence of application for condonation of delay, nothing can be adhered to on merits. So far as this part is concerned, we have gone through the provisions of Sections 19, 20 and 21 of the Administrative Tribunals Act, 1985 (for short the Act). Section 21 directly deals with limitation. Sub-section (1) (a) gives time to make application before the tribunal within one year from the date on which final order has been made. Sub-section (1) (b) gives time to make such application within one year after the expiry of six months from the date of filing of appeal or representation made under clause (b) of sub-section (2) of Section 20. We quote hereunder all the relevant Sections 19, 20 and 21 of the Act for all practical purposes.

"19. Applications to Tribunals. -(1) Subject to the other provisions of this Act, a person aggrieved by any order pertaining to any matter within the jurisdiction of a Tribunal may make an application to the Tribunal for the redressal of his grievance.

Explanation. - For the purposes of this sub-section, "order" means an order made –

(a) by the Government or a local or other authority within the territory of India or under the control of the Government of India or by any corporation or society owned or controlled by the Government ; or
(b) by an officer, committee or other body or agency of the Government or a local or other authority or corporation or society referred to in clause (a).

(2) Every application under sub-section (1) shall be in such form and be accompanied by such documents or other evidence and by such fee (if any, not exceeding one hundred rupees) in respect of the filing of such application and by such other fees for the service or execution of processes, as may be prescribed by the Central Government.

(3) On receipt of an application under sub-section (1), the Tribunal shall, if satisfied after such inquiry as it may deem necessary, that the application is a fit case for adjudication or trial by it,

admit such application; but where the Tribunal is not so satisfied, it may summarily reject the application after recording its reasons.

(4) Where an application has been admitted by a Tribunal under sub-section (3), every proceeding under the relevant service rules as to redressal of grievances in relation to the subject-matter of such application pending immediately before such admission shall abate and save as otherwise directed by the Tribunal, no appeal or representation in relation to such matter shall thereafter be entertained under such rules.

20. Applications not to be admitted unless other remedies exhausted. -(1) A Tribunal shall not ordinarily admit an application unless it is satisfied that the applicant had availed of all the remedies available to him under the relevant service rules as to redressal of grievances.

(2) For the purposes of sub-section (1), a person shall be deemed to have availed of all the remedies available to him under the relevant service rules as to redressal of grievances, -

(a) if a final order has been made by the Government or other authority or officer or other person competent to pass such order under such rules, rejecting any appeal preferred or representation made by such person in connection with the grievance; or

(b) where no final order has been made by the Government or other authority or officer or other person competent to pass such order with regard to the appeal preferred or representation made by such person, if a period of six months from the date on which such appeal was preferred or representation was made has expired.

(3) For the purposes of sub-sections (1) and (2), any remedy available to an applicant by way of submission of a memorial to the President or to the Governor of a State or to any other functionary shall not be deemed to be one of the remedies which are available unless the applicant had elected to submit such memorial.

21. Limitation. - (1) A Tribunal shall not admit an application, -

(a) in a case where a final order such as is mentioned in clause (a) of sub-section (2) of section 20 has been made in connection with the grievance unless the application is made, within one year from the date on which such final order has been made;

(b) in a case where an appeal or representation such as is mentioned in clause (b) of sub-section (2) of section 20 has been made and a period of six months had expired thereafter without such final order having been made, within one year from the date of expiry of the said period of six months.

(2) Notwithstanding anything contained in sub-section (1), where –

(a) the grievance in respect of which an application is made had arisen by reason of any order made at any time during the period of three years immediately preceding the date on which the jurisdiction, powers and authority of the Tribunal becomes exercisable under this Act in respect of the matter to which such order relates ; and

(b) no proceedings for the redressal of such grievance had been commenced before the said date before any High Court,

the application shall be entertained by the Tribunal if it is made within the period referred to in clause (a), or, as the case may be, clause (b), of sub-section (1) or within a period of six months from the said date, whichever period expires later.

(3) Notwithstanding anything contained in sub-section (1) or sub-section (2), an application may be admitted after the period of one year specified in clause (a) or clause (b) of sub-section (1) or, as the case may be, the period of six months specified in sub-section(2), if the applicant satisfies the Tribunal that he had sufficient cause for not making the application within such period."

2. We have also checked up the Central Administrative Tribunal (Procedure) Rules, 1987 (hereinafter referred to as the Rule) and find that the format under Rule 4, prescribed that the applicant will declare that the application is within the period of limitation as per Section 21 of the Act. Therefore, the application is to be made coupled with a separate application for condonation of delay for the purpose of hearing by the tribunal. We also find that as per Rule 8 (4) of the Rules, the applicant who seeks condonation of delay, shall file a separate application supported by an affidavit, therefore, the Rule is very clear to that extent.

3. Mr. Vinay Khare, learned counsel appearing for the petitioner contended before us that since the selection was not made in the year 2005 but actually it has been noticed during that period within which one year's period is prescribed for appeal, there is no need of making any separate application for condonation of delay, which has been strongly opposed by Dr. Ashok Nigam, learned Addl. Solicitor General, by saying when the law as mentioned above gives scope to make it, the same is to be followed. In such way the explanation can be given.

4. During the course of hearing, one other question arose before us i.e. whether word "limitation" is the appropriate word in respect of hearing of such matters by the tribunal. Against this background, we find that the tribunal was formed as per Article 323A of the Constitution inserted by the Constitution (Forty-second Amendment) Act, 1976 w.e.f. 3rd January, 1977. It gives power to the tribunal to hear such matters as a Court of first instance. If we go through the ratio laid down by the judgement of seven-Judge Bench of apex Court, reported in **(1997) 3 SCC 261(L. Chandra Kumar vs. Union of India and others)**, we shall find the following:

"99. In view of the reasoning adopted by us, we hold that clause 2 (d) of Article 323-A and clause 3 (d) of Article 323-B, to the extent they exclude the jurisdiction of the High Courts and Supreme Court under Articles 226/227 and 32 of the Constitution are unconstitutional. Section 28 of the Act and the "exclusion of jurisdiction" clauses in all other legislations enacted under the aegis of Articles 323-A and 323-B would, to the same extent, be unconstitutional. The jurisdiction conferred upon the High Courts under Articles 226/227 and upon the Supreme Court under Article 32 of the Constitution is a part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution. The Tribunals

created under Article 323-A and Article 323-B of the Constitution are possessed of the competence to test the constitutional validity of statutory provisions and rules. All decisions of these Tribunals will, however, be subject to scrutiny before a Division Bench of the High Court within whose jurisdiction the Tribunal concerned falls. **The Tribunals will, nevertheless, continue to act like courts of first instance** in respect of the areas of law for which they have been constituted. It will not, therefore, be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned. Section 5 (6) of the Act is valid and constitutional and is to be interpreted in the manner we have indicated."

5. Therefore, the tribunal is not an usual statutory tribunal but the jurisdiction of Writ Court is curtailed and given to the tribunal. Thus, undoubtedly the tribunal hears such matters as a court of first instance i.e. like learned single Judge exercising writ jurisdiction of the High Court and its decisions are of course, subject to scrutiny by a Division Bench of the High Court, therefore, in respect of exercise of such jurisdiction for adjudicating questions of natural justice, the appropriate word, according to us, should be 'laches' in the place and instead of 'delay'. The word 'limitation', therefore, is uncalled for. Copy of such observation and/or order will be communicated to learned Addl. Solicitor General of India to inform the government in this regard. However, presently we have to go by the existing law.

6. In the instant case, we find that virtually by making this writ petition, the petitioner wants to enter into merits of the matter, bypassing the order of tribunal passed on account of delay. We cannot enter into the merits in such circuitous manner because merits cannot be adhered to by this Court directly as a court of first instance, overlapping the jurisdiction of the tribunal.

7. Therefore, the writ petition is disposed of without any order as to cost and with a liberty to the petitioner to make an application for condonation of delay before the tribunal positively within a fortnight from this date and if such an application is made, the tribunal will hear out such application afresh, excluding the period consumed for the purpose of making the writ petition upon obtaining the certified copy from the tribunal till the period when certified copy of the order made ready for delivery by the registry of this Court. Petition disposed of.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.12.2008

BEFORE
THE HON'BLE BARKAT ALI ZAIDI, J.

Criminal Misc. Bail Application No.31381 of 2008

Nirmal Tewari @ Bhoora ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri J.S. Kashyap
Stuti Singh

Counsel for the Opposite Party:
Sri S.K. Kulshrestha
A.G.A.

Code of Criminal Procedure-S-439-grant of Bail-offence under section 302-the deceased while sleeping outside his house-death caused by unknown persons-according to F.I.R. version-applicant no where in picture-during investigation police arrested the applicant-as he was in habit of teasing the daughter of deceased-held-entitled for Bail.

Held: Para 3

He is not named in the first information report and the first information report mentions that some unknown persons caused his death by a fire arm at 1.30 O' clock in the night while he was sleeping outside his house in village Bhagwandin Ka Purwa, P.S. Kakwan. During the course of investigation, the police are said to have found that the deceased was killed by the accused and the reason was that the deceased was in habit of teasing his daughter and that is what led the accused to kill the deceased.

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

1. Applicant-accused Nirmal Tewari @ Bhoora is charged, under Section 302 Indian Penal Code. He has come for bail here.

2. Heard Sri J.S. Kashyap advocate for the applicant, and Addl. Government Advocate for the State.

3. He is not named in the first information report and the first information report mentions that some unknown persons caused his death by a fire arm at 1.30 O' clock in the night while he was sleeping outside his house in village Bhagwandin Ka Purwa, P.S. Kakwan. During the course of investigation, the police are said to have found that the deceased was killed by the accused and the reason was that the deceased was in habit of teasing his daughter and that is what led the accused to kill the deceased.

4. In these circumstances, the accused may be granted bail.

5. He be released on bail on his furnishing a personal bond of Rs.25,000/- with one surety in the like amount to the satisfaction of Chief Metropolitan Magistrate, Kanpur Nagar.
