APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.07.2009

BEFORE
THE HON'BLE S.K. SINGH, J.
THE HON'BLE ASHOK SRIVASTAVA, J.

Contempt Appeal No. 2 of 2009

S.M.A. Abdi and another ...Respondents/ Appellants
Versus
Private Secretaries Brotherhood and another ...Petitioner/Respondents

Counsel for the Appellants:
Sri Zafar Nayyer, Addl. Adv. General
Sri M.C. Tripathi, Addl. C.S.C.

Counsel for the Respondents:
Sri M.D. Singh Shekhar
Sri Tiwari

Contempt of Court Act-Section 19-Appeal-against interlocutory order passed by Single Judge-held-not maintainable-remedy to file intra-Court Appeal.

Held: Para 19

Thus it is clear that while dealing with the second question the Apex Court clearly said that in respect to the decision even so rendered on merits by interlocutory order a person is not remedy less and an intra-court appeal if is provided is maintainable.

Case law discussed:
(1998) 3 U.P.L.B.E.C. 2333; (2005) 7 SCC 40, (2004) 13 SCC 610, (2006) 5 SCC 399, 2007 (1) ALJ 389, (1988) 3 SCC 26, (1978) 2 SCC 370, 2008 (26) LCD 1034, 2008 (1) AWC 61

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

1. Heard Sri Zafar Nayyer, learned Additional Advocate General assisted by Sri M. C. Tripathi, learned Additional Chief Standing Counsel who appeared in support of this appeal and Sri M. D. Singh Shekhar, learned Senior Advocate assisted by Sri Tiwari who appears for the respondents.

2. This contempt appeal is directed against the order passed by the learned Single Judge dated 16.7.2009 exercising the powers under the Contempt of Courts Act by which liberty has been given to the respondents to comply with the orders passed by this Court on 29.7.1998 in writ petition no. 17585 of 1996 within ten days and to file a fresh compliance report before the Court on the date fixed. It is further provided that in case the order is complied with nobody need to appear failing which the appellants are to appear in person before the court on the date fixed i.e. 30.7.2009.

The order assailed in this appeal, for convenience, is quoted here :

"Heard Sri M. D. Singh Shekher learned Senior Counsel assisted by Sri R.D. Tiwari for the petitioner/applicant and Sri Jyotindra Mishra, learned Advocate General assisted by Sri Zaffar Nayyer, learned Additional Advocate General and Sri M. C. Chaturvedi learned Chief Standing Counsel along with M. C. Tripathi Additional Chief Standing Counsel for the respondents.

After hearing at length, I am of the considered opinion that there can be no justification to detract the view taken earlier by this Court mentioned in the order dated 6.5.2009. I am in full agreement of the aforesaid view, accordingly the same is hereby reiterated.

Respondents are permitted to comply with the order passed by this Court on 29.7.1998 in writ petition no. 17585 of

1996 within ten days from today and file a fresh compliance report before the court on the date fixed. In case the order is complied with by that time, the Principal Secretary (Finance) and the Principal Secretary (Law) will not appear in person before this Court on the date fixed. However, in case of non-compliance of the order they are directed to appear in person before this Court on the date fixed.

List/Put up on 30th July, 2009.

A copy of this order shall be provided to Sri M. C. Chaturvedi learned Chief Standing Counsel and Sri Zaffer Nayyer Additional Advocate General free of cost within 24 hours.

Sd/- Hon. Sabhajeet Yadav, J."

3. Initially when the appeal was placed, Sri Singh raised a preliminary objection about maintainability of the appeal. This Court directed the learned Stamp Reporter to examine and report, upon which the report came in which it is mentioned that the appeal is not maintainable in view of Section 19 of the Contempt of Courts Act.

4. Thus this Court is to hear the contention of either of the sides on the question of maintainability of the appeal.

5. Sri Nayyer, learned Additional Advocate General, to object the report of the learned Stamp Reporter about maintainability of the appeal and also to the submission of the Sri Singh submits that the order of learned Single Judge challenged in this appeal is not an order only for framing of charge simplicitor rather it is an order by which a mandate to do something has been given and thus even the order is at an interlocutory/intermediary stage but as it directs to do something in a particular way, the appeal as filed is maintainable under Section 19 of the Contempt of Courts Act.

6. It is further submitted that the direction given by the learned Single Judge on the facts is without jurisdiction and, therefore, the appellant cannot be left to be remediless and as the only remedy as on date available to the appellant is to file the appeal, this appeal is maintainable. Lastly it is submitted that all the directions given by this Court in the writ petition has been complied with and, therefore, the learned Single Judge has committed an error in passing the order by reiterating the order passed in the writ petition dated 6.5.2009 and in giving the impugned direction.

7. In support of the submissions about maintainability of the appeal, learned Advocate placed reliance on the decision given by the Apex Court in the case of **A. P. Verma Vs. U. P. Laboratory Technicians Association and others** reported in **(1998) 3 U.P.L.B.E.C. 2333; in the case of Modi Telefibres Ltd. and others Vs. Sujit Kumar Choudhary and others reported in (2005) 7 SCC 40,** decision given in the case of **V. M. Manohar Prasad Vs. N. Ratnam Raju and another reported in (2004) 13 SCC 610** and at the same time a recent decision given by the Apex Court in the case of **Midnapore Peoples' Coop. Bank Ltd. and others Vs. Chunilal Nanda and others reported in (2006) 5 SCC 399**.

8. In response to the aforesaid Sri Singh submits that Section 19 of the Contempt of Courts Act clearly refers for an appeal against the order of punishment by the learned Single Judge exercising the

powers under Contempt of Courts Act and thus every order passed in the exercise of that jurisdiction cannot be equated to the word "punishment" so mentioned in Section 19 of the Act and, therefore, the appeal as filed by the appellant is not maintainable.

9. Sri Singh further submits that the submission of appellants side that the order of the learned Contempt Judge is without jurisdiction is totally misconceived for the simple reason that learned Single Judge has not passed any independent order, of its own rather he has just reiterated the earlier orders passed by the court in the writ exercise and, therefore, if it is a case of incorrect interpretation according to the two sides then also it cannot be said to be an independent exercise by the Contempt Judge which is said to be without jurisdiction so as to accept the submission of the appellant side about maintainability of the appeal.

10. Lastly it is submitted that as by the order of learned Single Judge only compliance has been directed to be ensured in respect to the order passed in the writ and if the contention of the appellant side is accepted to be correct that order has been complied in its true sense then it is always open for them to put in appearance before the Court and to satisfy about the merits. The scope of an argument of the appellants about compliance or non compliance of the orders which were passed by the writ court cannot be examined in the contempt appeal at this stage.

11. In support of the submission that against this kind of order, the appeal has been rightly reported to be not maintainable, Sri Singh placed reliance on the case of **Smt. Kamal Kumari Singh Vs. State of U. P. and others reported in 2007 (1) ALJ 389** and also the decision given in the case of **Midnapore Peoples' Coop. Bank Ltd. and others (Supra),** on which reliance has been placed by the appellant side also.

12. In view of the aforesaid, this Court has to deal with the merit in the submission about maintainability of the appeal, as noted above in the light of decisions so referred and some other judgments of the Apex Court on the point.

13. To deal with the submissions about maintainability of the appeal this Court will have to refer the provisions of Section 19 of the Contempt of Court Act and thus for convenience Section can be quoted here :

"19. (1) An appeal shall lie as of right from any order or decision of the High Court in the exercise of its jurisdiction ***to punish for contempt*** *–*
(a) where the order or decision is that of a Single Judge, to a Bench of not less than two Judges of the Court;
(b) where the order or decision is that of a Bench, to the Supreme Court:"

14. On a plain reading Section 19 provides that an appeal shall lie as of right from any order or decision of the High Court in exercise of its jurisdiction to punish for contempt. In other words, if the High Court passes an order in exercise of its jurisdiction to punish any person for contempt of court, then only an appeal shall be maintainable under sub-section (1) of Section 19 of the Act. As sub-section (1) of Section 19 provides that an appeal shall lie as of right from any order,

an impression is created that an appeal has been provided under the said sub-section against any order passed by the High Court while exercising the jurisdiction of contempt proceedings. The words 'any order' have to be read with the expression 'decision' used in the said sub-section which the High Court passes in exercise of its jurisdiction to punish for contempt. 'Any order' is not independent of the expression 'decision'. They have been put in an alternative form saying 'order' or 'decision'. In either case, it must be in the nature of punishment for contempt. If the expression 'any order' is read independently of the 'decision' then an appeal shall lie under sub-section (1) of Section 19 even against any interlocutory order passed in a proceeding for contempt by the High Court which shall lead to a ridiculous result.

15. In a judgment given by the Apex Court in the case of **D.N. Taneja Vs. Bhajan Lal reported in (1988) 3 SCC 26** observation as made by the Apex Court is to be quoted here :

"The right of appeal will be available under sub-section (1) of Section 19 only against any decision or order of a High Court passed in the exercise of its jurisdiction to punish for contempt. When the High Court does not impose any punishment on the alleged contemnor, the High Court does not exercise its jurisdiction or power to punish for contempt. The jurisdiction of the High Court is to punish. When no punishment is imposed by the High Court, it is difficult to say that the High Court has exercised its jurisdiction or power as conferred on it by Article 215 of the Constitution."

16. We may refer to the observation made by the Apex Court in another decision on the point in the case of **Purshotam Dass Goel Vs. Justice B. S. Dhillon reported in (1978) 2 SCC 370** :

"The (contempt) proceeding is initiated under Section 17 by issuance of a notice. Thereafter, there may be many interlocutory orders passed in the said proceeding by the High Court. It could not be the intention of the legislature to provide for an appeal to this Court as a matter of right from each and every such order made by the High Court. The order or the decision must be such that it decides some bone of contention raised before the High Court affecting the right of the party aggrieved. Mere initiation of a proceeding for contempt by the issuance of the notice on the prima facie view that the case is a fit one for drawing up the proceeding, does not decision any question. .....It is neither possible, nor advisable, to make an exhaustive list of the type of orders which may be appealable to this Court under Section 19. A final order, surely will be appealable."

17. On a consideration of the views expressed in series of decisions referred above, the Apex Court in the recent decision of **Midnapore Peoples' Coop. Bank Ltd. and others (Supra)** posed various questions for consideration and they were accordingly answered. The Apex Court after quoting provision of Section 19 of Contempt of Courts Act framed questions for consideration as are contained in para 9 of the judgment which are being quoted here:

"(i) Where the High Court, in a contempt proceeding, renders a decision on the

merits of a dispute between the parties, either by an interlocutory order or final judgment, whether it is appealable under Section 19 of the Contempt of Courts Act, 1971 ? If not, what is the remedy of the person aggrieved ?

(ii) Where such a decision on merits is rendered by an interlocutory order of a learned Single Judge, whether an intra-court appeal is available under clause 15 of the Letters Patent ?

(iii) In a contempt proceeding initiated by a delinquent employee (against the enquiry officer as also the Chairman and Secretary in charge of the employer Bank), complaining of disobedience of an order directing completion of the enquiry in a time-bound schedule, whether the court can direct (a) that the employer shall reinstate the employee forthwith; (b) that the employee shall not be prevented from discharging his duties in any manner; (c) that the employee shall be paid all arrears of salary; (d) that the enquiry officer shall cease to be the enquiry officer and the employer shall appoint a fresh enquiry officer ; and (e) that the suspension shall be deemed to have been revoked?"

18. The first question so posed bas been decided in para 11 of the aforesaid judgment. The answer by the Apex Court in this respect can itself be quoted for convenience :

"I. An appeal under Section 19 is maintainable only against an order or decision of the High Court passed in exercise of its jurisdiction to punish for contempt, that is, an order imposing punishment for contempt.

II. Neither an order declining to initiate proceedings for contempt, nor an order initiating proceedings for contempt nor an order dropping the proceedings for contempt nor an order acquitting or exonerating the contemnor, is appealable under Section 19 of the CC Act. In special circumstances, they may be open to challenge under Article 136 of the Constitution.

III. In a proceeding for contempt, the High Court can decide whether any contempt of court has been committed, and if so, what should be the punishment and matters incidental thereto. In such a proceeding, it is not appropriate to adjudicate or decide any issue relating to the merits of the dispute between the parties.

IV. Any direction issued or decision made by the High Court on the merits of a dispute between the parties, will not be in the exercise of "jurisdiction to punish for contempt" and, therefore, not appealable under Section 19 of the CC Act. The only exception is where such direction or decision is incidental to or inextricably connected with the order punishing for contempt, in which event the appeal under Section 19 of the Act, can also encompass the incidental or inextricably connected directions.

V. If the High Court, for whatsoever reason, decides an issue or makes any direction, relating to the merits of the dispute between the parties, in a contempt proceedings, the aggrieved person is not without remedy. Such an order is open to challenge in an intra-court appeal (if the order was of a learned Single Judge and there is a provision for an intra-court appeal), or by seeking special leave to appeal under Article 136 of the Constitution of India (in other cases).

The first point is answered accordingly."

19. Thus it is clear that while dealing with the second question the Apex Court clearly said that in respect to the decision even so rendered on merits by interlocutory order a person is not remedy less and an intra-court appeal if is provided is maintainable.

20. Recent judgment of the Apex Court as noted above in the case of **Midnapore Peoples' Coop. Bank Ltd. and others (Supra)** was referred in the recent cases by our own court and contempt appeals were dismissed on the ground of being not maintainable. We may refer to the decision given in the case of **Prakash Vs. Arun Chand Pandey reported in 2008 (26) LCD 1034** and decision in the case of **Jai Karan Lal Verma Vs. Rajesh Kumar Pathak and others** reported in **2008 (1) AWC 61**.

21. It is thereafter in another recent judgment of this Court given in **Contempt Appeal No. 7 of 2009 Smt. Sudha Shukla Vs. Ausan and others and Contempt Appeal No. 8 of 2009 Krishna Shukla Vs. Ausan and others** decided on 26.5.2009 series of judgments of the Apex Court has been referred and on a consideration of all the aspects the question of maintainability has been decided. It has been held that unless any adverse order having immediate effect causing injury is passed, that cannot be appealed either by filing Contempt Appeal or even by filing Special Appeal if it is not so provided.

22. Observation in this respect is also contained in the decision of this Court in the case of **Smt. Kamal Kumari Singh (Supra).** Observations as made in this judgment in para 19 is to be quoted here :

"Sri Ravi Kant, learned senior counsel, further contended that part of the order, which restrain the appellant from working as officiating principal of the institution observing that the Court is satisfied that the appellant is not fit person, is appealable under Chapter VIII. Rule 5 of the Rules of the Court. In our view, even this submission cannot be accepted for the reason that an appeal under Chapter VIII, Rule 5 of the Rules of the Court lies against the "judgment". The Hon'ble Single Judge while issuing notice to the appellant has passed an interlocutory order in the nature of restraining the appellant from working as officiating principal in institution but there is nothing to show that the Hon'ble Single Judge has decided any issue or has recorded a finding of fact on any aspect of the matter against which part an appeal may lie under Chapter VIII, Rule 5 of the Rules of the Court.

23. It is not to be emphasised that right of appeal is a creature of statute and unless the law specifically provides for filing the appeal, that cannot be permitted. Any order or decision as referred in Section 19 of the Act cannot be read independently from an order of punishing for contempt.

24. So far the decision on which reliance has been placed by counsel for the appellants on the facts and details so noticed have no application to the case in hand.

25. In the decision given in the case of **V. M. Manohar Prasad (Supra)** the Apex Court said that if the order of the Contempt Judge is without jurisdiction then the appellants may approach the appellate forum. On the facts, this Court

is not to accept the submissions of the appellants that observations of the learned Single Judge in the impugned order is without jurisdiction for the simple reason that learned Single Judge has just reiterated earlier orders passed by the writ court and asked the appellants to comply them. No independent or fresh order on the merits has been passed and, therefore, the contention of the appellants side suggests to interpretation of the orders passed by the writ court in respect to their compliance as being claimed or about their non compliance as being complained which cannot be done here. Accordingly the appellants cannot take advantage of the decisions so referred.

26. In the decision given in the case of **Modi Telefibres Ltd. and others (Supra)** the Apex Court found that the learned Single Judge has recorded a finding about committing of the contempt by the appellants and the case was adjourned to accept the contemnor to purge the contempt or else for deciding the quantum of punishment. This not being the situation here, the decisions so referred may be of not much help to the appellants.

27. So far the decision in the case of **A. P. Verma (Supra)** on which reliance has been placed by the appellants, the Apex Court said that if a contention which goes to the very root of the jurisdiction is raised and the same is turned down or the order or decision is such which decides some bone of contention effecting the rights of the parties aggrieved, an appeal would be maintainable. Here is not a case where any fresh decision has been given by the learned Contempt Judge deciding some bone of contention effecting the right of the parties rather earlier orders passed in the writ were just reiterated and, therefore, neither it can be said to be a case of an order by the learned Judge which is without jurisdiction or deciding rights of the parties afresh.

28. On these facts, it cannot be said that the cases on which reliance has been placed by the learned counsel for the appellants have taken the view that every order as and when passed by Hon'ble Single Judge is appealable under Section 19 of the Act.

29. This being the situation on an analysis and in view of the decision of the Apex Court in the case of **Midnapore Peoples' Coop. Bank Ltd. and others (Supra)**, this Court has to take the view that appeal filed by the appellants is not maintainable.

30. Accordingly this contempt appeal is held to be not maintainable and thus it is dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.07.2009

BEFORE
THE HON'BLE SHRI KANT TRIPATHI, J.

Criminal Appeal No. 3852 of 2009

Chet Ram ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Ajay Tiwari

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

Code of Criminal Procedure-section-446- Recovery warrant issued without issuing show cause notice-without affording any opportunity to explain the circumstances-held-illegal Session Judge directed to give one more opportunity if the notices already issued to the applicant-consider the explanation against proposed recovery and take appropriate decision-if the applicant surrender within period stipulated by the Court-impugned order shall stand set-aside.

Held: Para 7

It is not clear as to whether the trial court had given any show cause notice to the appellant or not. It is for the Special Judge to examine the record and arrive at a conclusion on this point. If no such notice has been given to the appellant, the Special Judge shall provide an opportunity to the appellant to show cause against the proposed recovery. If the show cause notice has already been given to the appellant, the court shall provide one more opportunity to the appellant to submit his explanation against the show cause notice. If the appellant offers any cause in pursuance of the opportunity so given to him against the proposed recovery, the trial court shall consider the same and pass a reasoned order thereon as required by section 446 Cr.P.C. These procedural formalities shall be done only when the appellant surrenders before the court concerned within thirty days from the date of this order. If the appellant so surrenders and also moves an application for a fresh bail or recall of warrant/processes under section 82/83 Cr.P.C., the learned Special Judge shall give due consideration to his application and pass appropriate order thereon.

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

1. Heard Sri Ajay Tiwari, the learned counsel for the appellant and the learned AGA and perused the impugned order.

2. The appellant Chet Ram has preferred this appeal against the order dated 8.5.2009 passed by the learned Special Judge Gangster Act/A.S.J. Vth, Bareilly in Criminal Case No. 160 of 2000, whereby the learned Special Judge has issued a recovery warrant against the appellant for recovery of Rs.25,000/- being the amount of penalty on account of forfeiture of the personal bond of the appellant.

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

4. It may be mentioned that the appellant Chet Ram is an accused in the Criminal Case No.160 of 2000 (State vs. Babu and others) pending before the lower court. The case of co-accused Nizamuddin was decided on 25.5.2002 but the cases of remaining three accused namely, Babu, appellant Chet Ram and Shafiq could not be decided due to their absence. The appellant Chet Ram was not turning up and as such the learned Special Judge issued a non bailable warrant for his arrest and also issued processes under section 82/83 Cr.P.C. The properties of the appellant were attached on 11.4.2008 in pursuance of the attachment order issued under section 83 Cr.P.C. Even after that attachment the appellant did not turn up. Consequently the learned Special Judge forfeited the appellant's personal bond and directed for issue of a warrant for recovery of Rs.25,000/- as penalty from the appellant and further directed for issue of a non bailable warrant and

processes under section 82/83 Cr.P.C. against the appellant.

5. The learned counsel for the appellant submitted that the appellant was in jail in connection with some other case and as such could not appear before the learned Special Judge. It was further submitted that the learned Special Judge has not given any show cause notice under section 446 Cr.P.C. to the appellant before issuing the warrant for recovery of the penalty of Rs.25,000/-. Issue of the recovery warrant without giving a show cause notice to the appellant was invalid. The learned counsel further submitted that the appellant would appear before the Special Judge within the time allowed by this Court and to move appropriate application before the learned Special Judge for modifying the order issuing the recovery warrant. It was further submitted that the impugned order be modified accordingly.

6. In my opinion, issue of a show cause notice under section 446 Cr.P.C. to the person, whose bond has been forfeited before issuing recovery warrant, is mandatory. It is the duty of the court to give a notice to the person whose bond is or has been forfeited, calling upon him either to pay the penalty or to show cause why it should not be paid. If he pays the penalty in pursuance of the notice, the matter ends. If he does not pay the penalty and offers some explanations showing reasonable causes of non-appearance of the accused, the court has to consider the causes and pass a reasoned order thereon. If the cause shown is not sufficient the amount of the penalty should be determined by the court and if the penalty so determined remains unpaid, the court has power to make recovery of the penalty as fine. If the person to whom the show cause notice is served, offers sufficient causes, the court has power to discharge the notice and remit the penalty. The order remitting the penalty wholly or partly must be based on reasons to be recorded by the court.

7. It is not clear as to whether the trial court had given any show cause notice to the appellant or not. It is for the Special Judge to examine the record and arrive at a conclusion on this point. If no such notice has been given to the appellant, the Special Judge shall provide an opportunity to the appellant to show cause against the proposed recovery. If the show cause notice has already been given to the appellant, the court shall provide one more opportunity to the appellant to submit his explanation against the show cause notice. If the appellant offers any cause in pursuance of the opportunity so given to him against the proposed recovery, the trial court shall consider the same and pass a reasoned order thereon as required by section 446 Cr.P.C. These procedural formalities shall be done only when the appellant surrenders before the court concerned within thirty days from the date of this order. If the appellant so surrenders and also moves an application for a fresh bail or recall of warrant/processes under section 82/83 Cr.P.C., the learned Special Judge shall give due consideration to his application and pass appropriate order thereon.

8. If the appellant surrenders before the learned Special Judge within the time limit fixed by this Court, the impugned order will stand set aside, otherwise the same would remain operative.

9. The appeal stands disposed of finally in the light of the observations made here in before.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.07.2009

BEFORE
THE HON'BLE VINOD PRASAD, J.
THE HON'BLE Y.C. GUPTA, J.

Criminal Misc. Habeas Corpus Writ Petition No. 13411 of 2009

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

Counsel for the Petitioner:
Sri Viresh Misra
Sri G.S. Hajela
Sri Amit Misra

Counsel for the Respondents:
Smt. Poonam Singh
Sri J.P. Singh
Add. Solicitor General of India
Sri Sudhir Mehrotra
A.G.A.

Constitution of India, Art. 226-Detention order passed by District Magistrate U/s 3 (3) of National Security Act-challenged on the ground of delay in deciding representation-23 days delay remained unexplained-detention order not sustainable.

Held: Para 26

In view of above averments, it is crystal clear that there has been a delay of 26 days by the Union of India in considering the representation of the detenu. Explanation offered by the Union of India for this occasioned delay of 26 days is not at all satisfactory and acceptable and we, therefore, reject it. In such a view, we are left with no other option but to conclude that there has been an undue and unexplained delay on the part of the Union of India in considering detenu petitioner's representation, which nullifies continued detention of the petitioner.

Case law discussed:
1996 (33) ACC 911, 1990 SCC (Cr) 258; AIR 1990 SC 1196; 1991 SCC(1) 128,

(Delivered by Hon'ble Vinod Prasad J.)

1. Kamlesh Pathak, the petitioner/detenu, has questioned the Constitutional validity of his detention order dated 28.1.2009 (annexure no.3), under National Security Act 1980, (hereinafter referred to as the Act), passed by Detaining Authority, District Magistrate, Auraiya, respondent no.1, wielding his power, under section 3(3) of the Act.

2. Grounds for petitioner's detention, based on the dossier supplied by the police authorities, as was served to him along with annexure no.3, in compliance with section 8 of the act, are that Manoj Kumar Gupta, Executive Engineer, Auraiya was murdered by Shekhar Tiwari, MLA and his socio criminises, regarding which a State wise closer strike was organized by the Samajwadi Party on 25.12.2008. To maintain law and order during that strike, at Tahsil crossing in Auraiya city, police picket headed by in-charge inspector was posted, when at 11.30 a.m., the petitioner accompanied by his brothers Santosh Pathak and Ramu Pathak along with hundred and fifty other persons started torning off banners and posters in Homganj market. When the local police endeavored to forbade them from indulging into said lawless disorderly immoral behavior, the mob

started pelting stones and iron rods. Warning calls by the police went unheeded and the lawless conglomeration, continued it's stone pelting missile war and marched towards the office of the Circle Officer and Sub Divisional Magistrate, Auraiya. In the office of Circle Officer furnitures were broken, office records and a motor cycle of constable Vinod Kumar, parked outside, were torched with combustible inflammable petrol. Office record of the Sub Divisional Magistrate's office was also set a blaze and the furnitures were damaged. To curb such social order damaging activities, additional police force, tear gas squad, PAC, fire brigade and police from neighboring police stations were requisitioned and were pressed into action. Use of tear gas by the law enforcing agencies was protested by pelting of stones and iron pieces which caused injuries to the police personals. Shattering public order, the petitioner and the lawless mob sprinted towards national high way. However, the Petitioner along with his twenty five associates, were arrested. Because of such lawless activities, social order of district Auraiya was shattered, shutters and doors of the shops were pulled down, and people started running hither and thither, loosing their mobile phones while running, which were seized by the police force and recovery memo, thereof, (annexure 1 to the grounds of detention) was scribed by SI Pati Ram Nagar at the dictation of In-charge Inspector Auraiya. Against the petitioner and his associates FIR of crime number 487 of 2008, for offenses under sections 147/148/149/307/436/336/332/ 353 IPC and 7 Criminal Law Amendment Act and 3/6 Damage Of Public Property Act was registered at 2.35 p.m. on 25.12.2008, itself, vide GD no. 28 (annexure no. 2 to the grounds of detention).

3. Eroding social order by pelting of iron pieces and stones, the petitioner and the mob, injured 7 police personals who were got medically examined (vide annexures no. 3 to 9 to the grounds of detention) in Primary Health Centre, Auraiya. From the perusal of injury reports District Magistrate concluded that, if, the petitioner can cause injuries to the law enforcing agencies while they were discharging their lawful and legal duties of maintaining public peace, law and order, then it was established that a sense of insecurity must have pervaded in the minds of general public detrimental to the public order.

4. Further grounds were that while advancing towards Subhash crossing and reaching Khanpur crossing at the national high way, on 25.12.2008, plying vehicles were stoned by the petitioner and the mob, which was endeavored to be stopped by the law enforcing agencies, consequently they were also targeted with flying stones and iron pieces missiles injuring three police personals, (vide annexures no. 12, 13 and 14 to the grounds of detention). Road ways bus no. UP 79 B- 0727 was torched by the mob causing panic amongst driver, conductor and passengers who sprinted to take shelter to save their lives, which totally disarrayed the social and public order. The bus was totally burnt. Technical examination of the said bus, by UPSRTC Foreman, was annexed as annexure no.15. National high way was jammed and the police had to use force to arrest the petitioner and his ten associates, for which a arrest memo was also penned down. FIR of crime no. 487A/ 08 for

offenses under sections 147/148/149/307/436/336/332/353/I.P.C., 7 Criminal Law Amendment Act and 3/6 Damage Of Public Property Act was registered at the police station Auraiya at 3.30 p.m. vide GD no. 31, on the same day, which are annexures no. 10 and 11 to the grounds of detention.

5. Setting a blaze the bus and 161 Cr.P.C. statements of the witnesses in respect of the incident occurred at the office of C.O. and SDM, (Vide annexure nos. 16 to 21), indicated potentiality to disturb public order and even tempo of public life and hence those activities were other grounds of detention mentioned by the Detaining Authority. Further it was also recorded, in the grounds, that the Detaining Authority had perused general diary no. 33 dated 25.12.2008 of 4.15 p.m. and became convinced that the activities of the petitioner had aroused anger and acrimony amongst youths between 18 and 20 years of age and therefore they started torning off banners and posters and started indulging in hooligan rowdiness. Eight of those boys were arrested by the police under section 151 Cr.P.C., which further posed public order problem. All the activities of the petitioner and his associates eroded public order of Auraiya city which was recorded in the general diary vide annexure no. 22. All the above incidents were also reported with prominence in the daily news papers like Dainik Jagran, Aaj, Hindustan, under various titles, vide annexures 23 to 23N, which incident reporting affected life of the citizens in whole of the State. PAC was pressed into action to quell the activities of the petitioner vide annexure no. 24.

6. It was further mentioned, in the grounds, that respondent no.2, Detaining Authority also considered FIRs and charge sheets of various crime numbers registered against the petitioner (vide annexure nos. 25 to 30) which indicated disturbing of election process, looting of a petrol pump, snatching of a 303 bore rifle relating to Cr.No. 43/91 (vide annexure no. 31) assault and wrongful confinement, (vide annexures nos. 32 and 33), getting the accused of a murder case freed from lawful custody, (annexure nos. 34 and 35) and breaching section 144 Cr.P.C. order, (annexure nos. 36,and 37). It was further recorded that the petitioner had surrendered on 27.1.2009 in the court of Chief Judicial Magistrate, Auraiya, and had filed his bail application, annexure no. 38, which was rejected by the court and hence the petitioner had filed bail application before the Session's Judge, (annexure no. 39), which was pending and there were every likelihood of the petitioner being released on bail. District Magistrate was of the opinion that if the petitioner is released on bail then he will re-indulge into the activities detrimental to the social order. It was further mentioned in the grounds that a dossier containing above facts had been submitted by the police of police station Auraiya which had also been recommended by Additional Police Superintendent, and police Superintendent, Auraiya, (annexure no. 40) for detaining the detenu/petitioner.

7. On the above dossier, Detaining Authority became subjectively satisfied that it was necessary to detain the petitioner under the Act, for stopping him from acting in any manner prejudicial to the maintenance of public order and hence, he ordered for his detention on

28.1.2009, (annexure no. 3) which detention order is under challenge in this Habeas Corpus petition.

8. Along with the grounds, petitioner was also informed regarding his rights to send a representations to various State and Central Authorities and Advisory Board, and the manner and mode in which those representations had to be made. He was also informed regarding his rights of personal hearing, before the Advisory Board.

9. The detention order along with the grounds and all connected papers were dispatched to the State government by the Detaining Authority on the same day on which the detention order was passed, which was received to the State Government on 29.1.2009 and after carefully examining the record of the case, the State Government approved the detention order on 3.2.2009, in compliance with section 3(4) of the Act. The approval was communicated to the respondent no. 1 on 4.2.2009 and to the Detenu/petitioner on 5.2.2009. Union Government was also informed by the State Government on 5.2.2009, through speed post, under section 3(5) of the Act.

10. After being served with the detention order and the grounds thereof , the petitioner made a representation on 11.2.2009, annexure no. 5, to the writ petition. The said representation was received in the office of the District Magistrate on 12.2.2009, and the same day the Detaining Authority called for the comments from the sponsoring authorities, which was submitted to him on 13.2.2009. Thereafter para wise comments were prepared by the Detaining Authority on 14.2.2009 and, following day being a Sunday, the District Magistrate/ Detaining Authority rejected petitioner's representation on 16.2.2009, which rejection order was served to the detenu petitioner on 18.2.2009.

11. Detenu's representation along with para wise comments, dispatched by the Detaining Authority on 16.2.2009, to the State Authorities and to the Advisory Board, through special messenger, was received to the State Government on 17.2.2008 and on the same day it was dispatched to the Advisory Board, through a letter, and to the Central Government, by speed post. On the next day (18.2.2008), concerned section of the State Government prepared detailed notes on the said representation and, on that day itself, Under Secretary and Joint Secretary considered it and placed it before the higher authorities for their final decision. The representation was finally rejected by the State government on 19.2.2009, which rejection was communicated to the District Magistrate on 20.2.2009, through a radiogram, which in turn was communicated to the petitioner, through jail Superintendent, the same day.

12. State Government referred petitioner's case along with complete records including comments from the District Magistrate, petitioner's representation, to the Advisory Board on 4.2.2009. Advisory Board informed the State Government, on 19.2.2009, that it will consider petitioner's case on 25.2.2009 and therefore detenu petitioner was accordingly informed on 21.2.2009. On 25.2.2009, in the presence of the petitioner, his representation was rejected by the Advisory Board and the State government received its communication on 17.3.2009, vide a letter of the even

date. Once again the State Government examined Detenu's case a fresh and finally confirmed his detention order on 23.3.2009, under section 12 of the Act, for a period of 12 months from the date of his actual detention i.e. 28.1.2009. The same day (23.3.2009) radiogram of confirmation was sent by the State Government which was received to the Detaining Authority on the same day at 9.25 p.m. and, in turn, it was informed to the petitioner on 25.3.2009.

13. Deputy Jailor, district Jail Pilibhit, in his counter affidavit has recorded various dates mentioned above regarding the detention order, representation, communication of various orders, to the petitioner detenu, but for the sake of brevity, we do not repeat the same.

14. Respondent no.1, Detaining Authority had also communicated the detention order, the grounds thereof, detenu petitioner's representation and his comments to the Union Of India, respondent no.4, on 17.2.2009, (This date is different in the counter affidavit by Union Of India as to be 16.2.2009), which was received to the Union Of India on 19.2.2009. State Government had also informed it, vide it's letter dated 4.2.2009, (This date is different in the counter affidavit of the State Government as to be 5.2.2009), which was received on the concerned desk, in the Ministry of Home Affairs, on 11.2.2009. It was placed before under Secretary on13.3.2009, who, after carefully considering the same placed, it before Deputy Secretary (Legal) on the same day who appended his notes on 13.3.2009 itself. During that period, the concerned section had received a "large number of representations relates to the detention under NSA, especially from Uttar Pradesh. Further the concerned had proceeded on medical leave for 20 days and consequently the work concerning his desk got adversely effected and it took about two weeks to clear backlog on a chronological order". Joint Secretary considered the detenu's representation, after his return from tour, on 16.3.2009 and placed it before the Union Home Secretary, who could consider it only on 27.3.2009, due to "preoccupation with various urgent and pressing security related issues during relevant period". Examining detenu's case and the nature of his activities, the Home secretary rejected Detenu's representation, which was communicated to the Detenu through crash wireless message dated 31.3.2009 followed by a letter for the said purpose dated 2.4.2009.

15. In the back grounds of above factual scenario, that the petitioner has challenged his detention order before us.

16. On the above facts, we have heard Sri G.S. Hajela, Advocate in support of this Habeas Corpus Writ Petition, Sri Sudhir Mehrotra, learned AGA and Sri P.K. Jaiswal holding brief of Smt. Poonam Singh, learned counsel for the Union of India.

17. Learned counsel for the petitioner submitted that the detention order of the petitioner is bad in law and has been passed without any application of mind. He further contended that at the worst, the activities of the detenu petitioner can be considered to be reletable to law and order and not public order and, therefore, there was no reason for the District Magistrate to detain the petitioner. It was further submitted that

the District Magistrate had considered stale and non-existent grounds, which had affected his subjective satisfaction and, therefore, the detention order cannot be sustained and deserves to be set aside. It was further argued that the Detaining Authority had also looked into extraneous materials and, therefore, also the detention order cannot be sustained. It was next submitted that the detention order is politically motivated and was implanted malafidely because of political rivalry. It was also submitted that the detention order is based on non-consideration of material aspects, which could have affected the subjective satisfaction of the Detaining Authority. It was also argued that the Sponsoring Authority, while submitting dossier to the Detaining Authority, had not supplied relevant materials to him, which could have affected his subjective satisfaction and, therefore, also the detention order cannot be sustained. It was further argued that the bail application in respect of one of the crime was not supplied to the Detaining Authority and, therefore, also the detention order cannot be sustained. It was further submitted that the Detaining Authority has not recorded any subjective satisfaction regarding likelihood of the petitioner being released on bail in near future and, therefore, also the detention order cannot be sustained. In support of this last submission, learned counsel for the petitioner relied upon the decision of **Ajay Kumar @ Ajay Vs. State of U.P. and others 1996 (33) ACC 911**. In support of the argument that the bail application of the petitioner was not placed before the Detaining Authority, learned counsel for the petitioner relied upon the judgments of the Apex Court in **M. Ahmad Kutti Vs. Union of India: 1990 SCC (Cr) 258; D.S. Chilawat Vs. Union of India: AIR 1990 SC 1196; Kamrunnisa Vs. Union of India 1991 SCC(1) 128 and Ahmad Hussain Vs. Union of India**. It was argued that the copy of bail application relating to one of the crime (crime no. 487-A of 2008) was supplied to the petitioner along with the grounds but, in relation to crime no. 487 of 2008, it was not at all supplied and, therefore, for the reason that the complete material was not supplied to the petitioner, the detention order cannot be sustained. It was also submitted that the detention order of the petitioner, which was passed in undue waste within two days, was based on politically motivated exercise and being based on non application of mind, vague and stale grounds on extraneous consideration, deserves to be set aside. It was further submitted that there has been an undue and unexplained delay on the part of the Union of India in considering the representation filed by the detenu petitioner and, therefore, also the detention order of the petitioner cannot be sustained. Concluding the argument, it was submitted that Habeas Corpus Writ Petition be allowed and the detention order of the petitioner (annexure no. 3), dated 28.1.2009, be set aside and the petitioner be set at liberty.

18. Learned AGA as well as learned counsel for Union of India on the contrary contended that the activity of the detenu petitioner, as was contained in the dossier, supplied to the Detaining Authority clearly indicated that the activities of the detenu petitioner related with breach of public order and, therefore, the District Magistrate, Auraiya was fully justified in passing the detention order. It was submitted that blocking of public highway, entering into the office of public

servants, destroying furnitures and the public records were such activities, which definitely affected the public order and, therefore, it cannot be said that the activity of the detenu petitioner related only with law and order and not public order. It was further submitted that no extraneous material was considered by the Detaining Authority while passing the detention order and if the criminal background of the petitioner was taken into consideration by respondent no. 1, then no exception can be taken of that fact. Learned Standing Counsel for the Union of India also argued that there has been no delay on the part of the Union of India in disposing of the representation of the detenu petitioner. It is submitted that if the Home Secretary was pre-copied with certain other measures, the explanation offered by the Union of India in disposing of detenu's representation remains fully explained and, therefore, it cannot be said that Union of India was at fault at any point of time in deciding the petitioner's representation. Drawing the curtain of their arguments, it was submitted that the Habeas Corpus Writ Petition is bereft of merits and deserves to be dismissed.

19. We have considered the arguments raised by both the sides and have gone through the record of the Habeas Corpus Writ Petition along with various supplementary affidavits, counter affidavits and rejoinder affidavits. We take the arguments of learned counsel for the petitioner in seriatum.

20. First of all, it was argued by learned counsel for the petitioner that the activity of the petitioner related with law and order and not public order. The perusal of the grounds of the detention clearly indicates that the petitioner was protesting against the murder of Manoj Kumar Gupta, an engineer. The protest was for maintaining law and order and not breaching the same. Grounds clearly indicates that what was really intended by the petitioner was maintenance of law and order and not disturbance of public order. However, we could not loose site of the fact that the motive may be lawful but the manner in which the said motive was executed by the petitioner and his associates disturbed the public order. Blocking of public highway, entering into the office of public servants, destroying the furnitures and the public records were such activities, which definitely affected the public order. Even tempo of public life certainly was got affected by the activities of the petitioner and his associates and, therefore, it cannot be said that the activity of the petitioner was reletable only to law and order and not public order. In such a view, the first contention raised by counsel for the petitioner is not acceptable and we hereby hold that the detenu's activities related to the disturbance of public order and it definitely eroded even tempo of public life.

21. Coming to the another aspect of the arguments that the District Magistrate, while detaining the petitioner had considered those aspects also which were not relevant and germane to the detention order and that he had also considered extraneous materials, we find that the said argument is well founded. The grounds for detaining the petitioner emerged on 25th January, 2009, on which date, it was alleged that the petitioner started protesting against the murder of Manoj Kumar Gupta, an engineer, which had occurred on 23/24.12.2008. While

detaining the petitioner, on the said ground, before consideration of his past history and criminal cases pending against him for more than two decades ago were totally irrelevant. From the counter affidavit filed by the District Magistrate, the criminal history of the petitioner has been filed. In the said criminal history, three crime numbers are of the year 1984 and one each are of 1985, 1991 and 2004. The District Magistrate looked into those criminal histories while detaining the petitioner, which had definitely affected his subjective satisfaction, which fact is well perceptible from the perusal of the grounds of detention. The Detaining Authority had recorded in detail those criminal histories. The crimes, which were committed in 1984 could not have been repeated after 25 years and the grounds of the detention does not indicate that those crimes were repeated in future. It is very clear that three of the crime numbers 479 of 1984, 484 of 1984 and 481 of 1984 related to one and the same incident which were never repeated again during the course of the 25 years. In such a view, we are clear in our opinion that the District Magistrate had taken into consideration non existent stale materials while detaining the petitioner and this consideration makes impugned detention order vulnerable not liable to be sustained.

22. Ground that the petitioner was having a criminal history and was involved in many cases was a non existent ground. The date on which state wise protest was organized by samajwadi party i.e. 25.1.2008, all those incidents which occurred prior to one and half years had already lost their efficacy. It is recalled here that under the preventive detention law, a person can be detained only for a period of 12 months. In such a view, passing of detention order for an incident which occurred more than 12 months ago, in our opinion, is not a justifiable legal exercise. If a person cannot be detained for a period of more than 12 months it indicates that the legislature itself was of the opinion that the effect of a prejudicial activity can remain only for such a period of 12 months. Preventive detention is not punitive in nature. By detaining a person, he is neither convicted nor punished. The law of preventive detention has got a salutary purpose of forbidding recurrence of activities detrimental to the public order. If the legislature thought that the recurrence of the activity cannot take place after 12 months, passing of a detention order on such an activity which occurred prior to 12 months, is not sanctified by law. Consequently, we are also of the view that the grounds on which the petitioner was detained was based on non existent ground.

23. Further it is to be noted that since the purpose of preventive detention is not punitive , exercise of power under the Act , therefore, can not be with such ulterior motives. History sheet of a person is relevant only for determining reasonable prognosis of his future conduct as to whether detenu had the tendency to repeat the crime or not . But this does not authorise the State to count even on those incidents, where no live link between the activity and the preventive detention order existed. In the present case, gap of two decades had completely snapped the live link between the detention order and the grounds relied upon by the Detaining Authority, which grounds had definitely affected his subjective satisfaction. The purpose for which detenu was detained had no nexus with the disturbance of

elections way back in the year 1984. Stale and non existent grounds relied upon to detain the petitioner, are by itself sufficient to nullify the detention order. A balance has to be struck between personal liberty of a citizen on the one had and preservation of social order with safety and security of the country on the other. Tilting the said balance in favor of State, with out valid and legally sustainable reasons, against the mandate of Statue, will render detention order vulnerable which could not be justified judicially.

24. The grounds of detention further indicates that some of the relevant materials have not been considered by the Detaining Authority at the time when he had passed the detention order. In this respect, we record that while considering the criminal history of the detenu petitioner, Detaining Authority had not considered the out come of those crimes. Further, if the Detaining Authority took into consideration criminal history of the petitioner, it should have considered the defense of the petitioner as well in those offenses. Three of the crime numbers, as has been pointed out above, related with a single incident and, therefore, the Detaining Authority should have considered the fact whether there was any specific allegations against the petitioner in those crimes or not. Moreover, in crime number 43 of 1991 which related with loot and dacoity, final report had already been submitted exonerating the petitioner of the swelled charge. The factum of submission of final report was not brought to the knowledge of the Detaining Authority, which certainly would have affected his subjective satisfaction while forming an opinion against the petitioner and, therefore, such a non consideration renders the impugned detention order illegal, which is also based on stale ground for the reasons mentioned above.

25. Coming to the another argument raised by the counsel for the petitioner that there has been an inordinate unexplained delay in disposing of the detenu's representation by the Union of India, we find, from the counter affidavit filed by Union of India, that the detention order along with the grounds dispatched by the District Magistrate was received to the Union of India on 19.2.2009. State Government had also dispatched the grounds of detention along with Detaining Authority's comments and representation of the detenu petitioner, on 4.2.2009, which was received to the Union of India on 11.2.2009. From 11.2.2009 till 13.3.2009, no acceptable or cogent explanation at all has been offered by the Union of India for not considering detenu's representation. In this respect, the only relevant paragraphs of the counter affidavit by the Union of India are paragraphs 4 and 6 which we reproduced below:-

"4. That a report as envisaged under Section 3(5) of the National Security Act, 1980 about the detention of the petitioner was made by the Government of Uttar Pradesh vide their letter No. 111/2/234/2009-CX-6 dated 04.02.2009 to the Central Government in the Ministry of Home Affairs. The said report was received by the Central Government in the concerned desk in the Ministry of Home Affairs on 11.02.2009 and was put up to Under Secretary (NSA) on 13.03.2009 who carefully considered the case and submitted to Deputy Secretary (Legal) (who has been delegated powers by the Central Government to take note of such cases). Deputy Secretary (Legal)

duly examined and took note of the report in the Ministry of Home Affairs on 13.03.2009.....

6. That during the relevant period the Section had received a large number of representation relates to detention under NSA, especially from Uttar Pradesh. Further the concerned Dealing hand proceeded on medical leave for 20 days and consequently the work concerning his desk got adversely effected and it took about two weeks to clear backlog on a chronological order. The representation of the detenue was processed in the Section for consideration at various levels in the Section, Under Secretary, Deputy Secretary (Legal) and submitted to Joint Secretary (IS), on 13.3.2009. The Joint Secretary considered the case on his return from tour and forwarded the same before the Union Home Secretary on 16.03.2009. It appears that due to preoccupation with various urgent and pressing security related issues during relevant period the Home Secretary (who has been delegated powers by the Central Government to decide such cases) could consider the case of the detenue only on 27.03.2009. After consideration of the representation and the material on record show up that detenue has indulged in large scale lawlessness, attack on Police and destruction of public property has criminal history and poses threat to public order, the representation was rejected by the Union Home Secretary and the file was returned to Section through aforesaid levels. It is further humbly submitted that there has not been any deliberate delay or casualness in the matter."

26. In view of above averments, it is crystal clear that there has been a delay of 26 days by the Union of India in considering the representation of the detenu. Explanation offered by the Union of India for this occasioned delay of 26 days is not at all satisfactory and acceptable and we, therefore, reject it. In such a view, we are left with no other option but to conclude that there has been an undue and unexplained delay on the part of the Union of India in considering detenu petitioner's representation, which nullifies continued detention of the petitioner.

27. Since, we are of the opinion that the detention order (annexure no. 3) passed by the District Magistrate, Auraiya, detaining the petitioner under Section 3(3) of the National Security Act cannot be sustained for the reasons mentioned above., we do not deal with other aspects of the matter and the case laws cited before us.

28. For the reason mentioned above, we allow this Habeas Corpus Writ Petition, set aside the detention order of the petitioner, under Section 3(3) of the National Security Act 1980, passed by District Magistrate, Auraiya, on 28.1.2009, vide annexure no. 3, and direct the petitioner to be set at liberty forthwith unless he is under custody in connection with any other offense under legal orders.

There shall be no order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.7.2009

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.

Civil Misc. Writ Petition No.25322 of 1997

Anurag and others ...Petitioners
Versus
Judge Small Cause Court/Civil Judge (Senior Division), Bijnor and others ...Respondents

Counsel for the Petitioners:
Sri K.M. Garg

Counsel for the Respondents:
Sri P.N. Khare
Sri D.C. Mathur
Sri Prashant Khare
S.C.

Arbitration Act-1940-Section 14 (2)-readwith Section 34-Suit for specific performance-award given by Arbitrator on same controversy-Application to stay the proceeding-rejection on ground the plaint claiming absolute owner-incorrect-award can not be treated waste paper.

Held: Para 14

In the present case, only because the respondent No.3 is alleged to be to the owner of the property, shall not make out a case to render the award as waste paper. Once the agreement is duly signed and registered and the arbitrator renders award, then the proceedings of the regular suit ordinarily should be stayed by the court.
Case law discussed;
AIR 2008 SC page 48

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

1. Heard Sri K.M Garg, learned counsel for the petitioner and Sri P.N. Khare learned counsel for the respondents at length and perused the record.

2. The short matrix of the present controversy relates between the members of same family who are the petitioners and respondents. In the present writ petition, the respondent No. 3 had filed a suit for ejectment for arrears of rent with regard to property in question before Small Causes Court registered as Suit No. 7/94, the petitioner No. 1 and 2 including father Krishna Kumar were defendants in the said suit. During the pendency of said suit the parties including Sri Krishna Kumar entered into arbitration agreement deciding right title and shares of the members of the family on 31st July, 1994. Arbitration agreement was admittedly registered on 12.8.1994, before the Sub-Registrar, Chandpur District Bijnore. It has not been disputed that the arbitrator had given award on 24th August, 1994 and the award includes property in question. The share of Krishna Kumar was also adjudicated by the arbitrator. It is also mentioned in the award that the pending litigation before the Small Cause Court in District Bijnore, shall be withdrawn by parties on or before 21.12.1994. It is alleged that the arbitration award was given to Sri Suresh Chandra, so that he may file the award in the Court. However, it appears that the award was not filed by Sri Suresh Chandra in the Court.

3. In view of the above, on 11.5.1995 Sri Krishna Kumar had initiated the proceeding in the Court of Civil Judge Bijnore by registering a case No. 127 of 1995 to make the award the rules of Court under sub-section (2) of Section 14 of the Arbitration, 1940 (in short the Act). It has not been disputed that the delay in filing the application

under sub-section (2) of Section 14 of the Act, was condoned by the Court concerned.

4. Subject to the aforesaid back drop, late Krishna Kumar had filed an application under Section 34 of the Act in the court of Small Cause, Bijnore in SCC Suit No. 7 of 1994 for staying the proceeding. It was pleaded that in view of the provisions of Section 34 of the Act of the Court should stay the proceeding of the suit and application moved under sub-section (2) of Section 14 of the Act, should be adjudicated first.

5. The application filed by the petitioners was rejected on 19.4.1996 by the Small Cause Court, Bijnore by observing that whether the property in question is joint property or not is a subject matter which cannot be adjudicated without recording evidence. Feeling aggrieved by the order dated 19.4.1996 the petitioner preferred a revision which was registered as Revision No. 17 of 1996 in the Court of Additional District Judge, Bijnore and same was also dismissed upholding the orders passed by the trial court observing that it is not a fit case for staying proceeding under Section 34 of the Act. While passing the order dated 17.4.1997, it has been observed that whether the defendants are tenants or not, whether they are in agreement or not, are all matters of controversy which is required adjudication by recording of evidence.

6. Feeling aggrieved the petitioner approached this Court under Article 227 of the Constitution of India with the assertion that learned court below has failed to exercise the jurisdiction conferred by Section 34 of the Act. The submission of the learned counsel for the petitioners is that arbitration award should have been given primacy over the suit and proceeding should have been stayed. The Court should have firstly adjudicated the application moved under sub-section (2) of Section 14 of the Arbitration, 1940 for the enforcement of arbitration agreement. The things which were settled amicably should not be re-opened through regular suit unless arbitrator's award itself is held to be illegal or not sustainable under the law or on any other grounds.

7. While defending the impugned orders the learned counsel for the respondents invited the attention to the para 4 of the counter affidavit and submitted that the courts below has observed that the respondent No. 3 is owner of property in question, hence, the dispute between the parties should be decided by deciding the pending suit on merit. The submission of the learned counsel for the respondents in nut shell is that since respondent No. 3 is owner, right and title conferred by the arbitration agreement should not come in the way of pending regular suit. The suit should be decided to settle the controversy at rest between the parties in question.

8. The Arbitration Act 1940 was legislated to settle the disputes amicably and to avoid the multiplicity of litigation with regard to dispute of movable or immovable property. Accordingly, Arbitrators appointed in terms of agreement were given ample power to decide the controversy between the parties. Ordinarily it is expected that once the arbitration agreement is finalized and arbitrator renders award then the parties shall abide by it to settle the controversy at rest. The award should be followed in

its letter and spirit unless it suffers from substantial illegality or arbitrator acted with some malicious intent while rendering the award. In the present case, no argument has been advanced by respondents' counsel with regard to the award being biased or that they were not parties to the arbitration agreement.

9. Since the award was not enforced and was not filed in court, the application under sub-section (2) of Section 14 of the Act was moved. The provision contained in under sub-section (2) of Section 14 of the Act, is statutory and confers statutory right and once application is moved, then it is obligatory for the court concerned to record finding keeping in view the statutory provisions contained in the Act.

10. In Case during the pendency of the application under sub-section (2) of Section 14 of the Act the regular suit is permitted to continue, then it shall frustrate the Act. It is always incumbent to the courts to exercise the jurisdiction to decide the application under sub-section (2) of Section 14 of the Act expeditiously. The court has ample power to modify or cancel the award under the various provisions of the Act as reflected from Chapter 2 of the Act.

11. Section 34 of the Act gives ample powers to courts to stay the suit wherever there is an arbitration agreement between the parties. For convenience, Section 34 of the Act is reproduced as under:

"34. Power to stay legal proceedings when there is an arbitration agreement.---Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reasons why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings."

12. It is settled law that keeping in view the facts of the case the provisions contained in a Section, "may" be construed as mandatory (vide, **AIR 2008 SC page 48 Dhampur Sugar Mill Limited. Vs. State of U.P.**). Accordingly, keeping in view the facts and circumstances of the case where there is no dispute with regard to award rendered by the arbitrator, the word, 'may', used in Section 34 should be construed as mandatory.

13. A plain reading of the Section 34 of the Act indicates that if the court satisfied that the controversy has been settled in the arbitration agreement, then pending proceedings under suit should be stayed. The satisfaction of the court should be based on the genuineness of the arbitration agreement and not merely on the title of property. In case during arbitration agreement parties give up their rights and titles in each other's favour and agreement so entered, is registered, award

is given and the award so given, does not suffer from any infirmity or substantial illegality at the face of record, then ordinarily, the application moved under sub-section (2) of Section 14 of the Act should be given primacy over the pending suit and proceedings of the suit should be stayed till the court decides the application filed by a party under the Act. The satisfaction should be based on genuineness of award and not the right and title of parties with regard to property in dispute.

14. In the present case, only because the respondent No.3 is alleged to be to the owner of the property, shall not make out a case to render the award as waste paper. Once the agreement is duly signed and registered and the arbitrator renders award, then the proceedings of the regular suit ordinarily should be stayed by the court.

15. In view of the above, learned court below had incorrectly interpreted the provisions contained in Section 34 of the Act. The court below has failed to exercise the jurisdiction vested in it. The writ petition deserves to be allowed.

16. Accordingly, the writ petition is allowed. A writ in the nature of certiorari is issued quashing the impugned order dated 19.4.1996 passed by the opposite party No.1 and the judgment and order dated 17.4.1997 passed by the respondent No.2 with consequential benefits. The proceedings of JSCC Suit No.7 of 1994 shall be stayed till final adjudication of the controversy by the court in pursuance of the powers conferred by Section 14 of the Act. The court concerned is directed to decide the application moved under sub-section (2) of Section 14 of the Act in accordance with law after providing due opportunity to parties expeditiously and preferably within six months from the date of receipt of a certified copy of this judgment/order. It is clarified that while allowing the writ petition, this Court has not entered into the merit of the controversy. and the court concerned, shall decide the application moved by the petitioner independently.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.07.2009

BEFORE
THE HON'BLE VIJAY KUMAR VERMA, J.

Criminal Misc. Bail Application No. 30457 of 2008

Kanhaiya Lal Sharma ...Applicant (In jail)
Versus
State of U.P. ...Opposite party

Counsel for the Applicant:
Sri Irfan Chaudhary

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

Code of Criminal Procedure-Section 439-Bail-offence under Section 420, 409, 467, 468, 471 I.P.C.-applicant working as Assistant Post Master-allowed the agent to withdraw amount of Rs. 3 lac by case by affixing forged signature of depositor-instead of issuing the cheque-itself goes to show the conspiracy of applicant with postal agent-termed as heinous crime if released on bail-people would be reluctant in deposit of money with post office-parity claimed-held-can not be accepted.

Held: Para 25 & 26

In view of the observations made in aforesaid decisions, I am of the

considered opinion that merely on the basis of the principle of parity, the applicant cannot be released on bail in present case of heinous nature.

If the persons like Kanhaiya Lal Sharma (applicant) are allowed to be released on bail in such crimes, then the people would be reluctant to deposit their money in Post Offices, which would cause great damage to the institution. Therefore, having regard to all these facts, but without expressing any opinion on merit of the case, in this heinous crime, the applicant does not deserve bail.

Case law discussed:

1983 Cr. L.J. 736, 1993 Cr L J 938, 1997 (34) ACC 311, (1998 U.P. Cr.R. 263), AIR 1995 SC 705, Special Leave Petition No. 4059 of 2000, 2003 ALL. L. J. 625, 2005(52) ACC 205, 1996 A. Cr. R.867, 2009 (3) JT 385, 1901 AC 495; (1987) 1 SCC 213; (2003) 2 SCC 111; (AIR 2004 SC 4778), AIR 2008 SC 946; AIR 2008 SC 863, 2008 (63) ACC 115.

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

The applicant Kanhaiya Lal Sharma, who was posted as Assistant Postmaster in Head Post office Saharanpur at the relevant time, has sought his release on bail by means of this application under section 439 of the Code of Criminal Procedure (in short 'the Cr.P.C.'), in case crime No. 386-C/2006, under sections 420, 409, 467, 468, 471 & 120-B Indian Penal Code (in short 'the IPC.'), P.S. Sadar Bazar, Saharanpur.

2. Shorn of unnecessary details, the allegations made in the FIR lodged on 27.08.2006 at Sadar Bazar, Saharanpur by the complainant Subodh Chandra Mathur, in brief, are that on retirement from U.P. State Sugar Corporation Ltd. in the year 2003, payment of Rs. 9,00,000/- (Rupees Nine Lac) was made to the complainant towards Provident Fund and gratuity, which he invested in monthly income Scheme in Head Post Office Saharanpur, through authorized agent Prashant Tyagi, his wife Smt. Kavita Tyagi, brother Sushant Tyagi and father Pooran Chandra Tyagi. The complainant had deposited the said amount in his name as well as in the names of his sons Mudit and Shobhit and his wife Smt. Neelu Mathur. Rs.3,00,000/- each were deposited in A/c No. 1016784 and 1016785 on 28.08.2003 in the name of complainant and his son Mudit. Thereafter, Rs.3,00,000/- were deposited by the complainant in account No. 1020020 on 28.05.2004 in the name of his son Shobhit Mathur and wife Neelu Mathur. Interest on monthly basis on these deposits was paid to the complainant up to June 2006, but pass-books of aforesaid accounts were not given by the agent to the complainant. When no person came to make payment of interest in the month of July 2006, the complainant made inquiry from Head Post Office Saharanpur, then he came to know that entire amount of account No. 1016784 and 1016785 has been withdrawn on 03.03.2005 by Prashant Tyagi by making forged signatures of Account Holders on withdrawal form (SB-7), showing his brother Sushant Tyagi as witness and in the same manner, entire amount of account No. 1020020 was also withdrawn on 16.11.2005 by the said agent through some Jaspal Singh showing him partner. It is further alleged in the FIR that entire amount of the aforesaid accounts has been withdrawn due to collusion and conspiracy of Assistant Postmaster Kanhiya Lal Sharma and officials Amar Singh and Lokesh Kumar of Head Post Office Saharanpur.

3. I have heard argument of Sri Irfan Chaudhary Advocate appearing for the applicant and AGA for the State.

4. The main submission made by learned counsel for the applicant was that with similar allegations some other First Information Reports were also lodged against the applicant in District Saharanpur and in the cases pertaining pertaining to those FIR, the applicant has been granted bail by another Benches of this Court in case crime Nos. 386-B.M./2006, 386-A.E./2006, 386-A.Y./2006, 386-AT/2006, 386-AO/2006, 386-5B/2007, 386-CB/2006, 386-BF/2006 and 386-CE/2006 and hence the applicant deserves bail in present case also on the basis of the principle of parity. For this submission, my attention was drawn towards certain bail orders which have been filed as Annexure-2 (Paper Nos. 22 to 25).

5. On merit, it was submitted by learned counsel for the applicant that entire amount from the accounts mentioned in the FIR was withdrawn by the authorized agent and since no amount has been withdrawn by the applicant, hence on this ground also, he deserves bail. It was also submitted by the learned counsel in this context that there is no material in the case diary to show that there was any conspiracy or collusion between the applicant and authorized agents, who have withdrawn the money from the accounts of the complainant and his family members.

6. Next submission made by learned counsel for the applicant was that if the authorized agent after withdrawing the money from the accounts in question did not pay the said money to the Account Holders, then applicant and other employees of post office are not responsible for this act and only the agents can be held liable for the offences alleged to have been committed. It was also submitted in this context by the learned counsel that no money was entrusted to the applicant by the complainant or Account Holders and hence the offence punishable under section 406 IPC is not made out against the applicant.

7. It was also submitted by learned counsel that the applicant is languishing in jail since 16.03.2007 and hence on the basis of the long detention period in jail, the applicant is entitled to be released on bail, because due to delay in trial fundamental right of speedy trial envisaged in Article 21 of the Constitution is being violated.

8. The bail application was vehemently opposed by learned AGA contending that the entire money from the accounts of complainant and his family members has been withdrawn due to collusion and conspiracy of the applicant and other officials of Head Post Office Saharanpur and hence in this heinous crime, the applicant should not be released on bail, because due to the collusion and conspiracy of the applicant and other employees of Saharanpur Head Post Office, the complainant has been ruined due to withdrawal of entire money, which was invested by him in monthly Income Scheme.

9. It was also submitted by learned AGA that as per rule of the Post Offices, payment of the money exceeding Rs. 20,000/- in monthly income scheme or other schemes can be made by cheque

only in the name of Account Holder, but in present case, ignoring this mandatory provision, the applicant had permitted the authorized agent to withdraw about Rs. 9,00,000/- (Rupees Nine Lac) in cash, which in itself shows that the applicant was in collusion with the agent, who had withdrawn the money by making forged signatures of Account Holders on withdrawal form (SB-7). It was also submitted by learned AGA that without active cooperation and conspiracy of the applicant and other employees of post office, the money from the account of complainant could not be withdrawn in the manner in which it was withdrawn by the agents.

10. On the matter of granting bail on the basis of the principle of parity, it was submitted by learned AGA that parity cannot be the sole ground for bail in heinous crimes.

11. Having given my thoughtful consideration to the rival submissions made by the parties counsel and after going through the entire case diary of crime No. 386-C of 2006 and other material available on record, I find force in the contention of learned AGA that in this heinous crime, the applicant does not deserve bail.

12. It is true that some other Benches of this Court have granted bail to the applicant in the cases of similar nature and some such bail orders have been filed as Annexure -2, but I entirely agree with the submission of learned AGA that parity cannot be the sole ground for bail.

13. The matter of granting bail on the ground of parity has been considered in several decisions of this Court and Hon'ble Apex Court. The Full Bench of this Court in ***Sunder Lal Vs. State 1983 Cr. L.J. 736*** did not accept this proposition, which will be evident from the following observations in para 15 of the report:-

"The learned Single Judge since has referred the while case for decision by the Full Bench, we called upon the learned Counsel for the applicant to argue the case on merits. The learned Counsel only pointed out that by reasons of fact that other co-accused has been admitted to bail the applicant should also be granted bail. This argument alone would not be sufficient for admitting the applicant to bail who is involved in a triple murder case...."

14. This question was again examined by the Division Bench of this Court in ***Nanha Vs. State 1993 Cr L J 938,*** where after consideration of several earlier decisions on the point including Sunder Lal (supra), the Hon'ble Judges constituting the Bench gave separate opinions. Hon'ble G.D. Dubey, J. held as follows in para 24 of the reports;

"..... My answer to the points referred to us is that parity cannot be the sole ground for granting bail even at the stage of second or third or subsequent bail applications when the bail application of the co-accused whose bail had been earlier rejected are allowed and co-accused is released on bail. Even then the Court has to satisfy itself that, on consideration of more material placed, further developments in the investigations or otherwise and other different considerations, there are sufficient grounds for releasing the applicant on bail. If on examination of a given case, it

transpires that the case of the applicant before the Court is identically similar to the accused on facts and circumstances who has been bailed out, then the desirability of consistency will require that such an accused should be also released on bail."

Hon'ble Virendra Saran, J. held as follows in para 61 of the reports:

"My answer to the points referred to is that if on examination of a given case it transpires that the case of the applicant before Court is identical, similar to the accused, on facts and circumstances, who has been bailed out, then the desirability of consistency will require that such an accused should also be released on bail (Exceptional cases as discussed above apart)....."

This shows that there was no unanimity between the two Judges constituting the Bench and according to Hon'ble G.D. Dube, J. parity cannot be the sole ground for granting bail to a co-accused."

15. The Hon'ble M. Katju, J., as His Lordship then was, declined to grant bail on the ground of parity and referred the matter to larger Bench in ***Chander @ Chandra Vs. State of U.P. 1997 (34) ACC 311***. The matter came up for consideration before a Division Bench. While deciding the said reference in Chander @ Chandra Vs. State of U.P. (1998 U.P. Cr.R. 263) the Division Bench held that:-

" a Judge is not bound to grant bail to an accused on the ground of parity even where the order granting bail to an identically placed co-accused contains reasons, if the same has been passed in flagrant violation of well settled principle and ignores to take into consideration the relevant facts essential for granting bail."

16. It is further held by the Division Bench in ***Chander @ Chandra Vs. State of U.P. (1998 U.P. Cr.R. 263)*** that if bail has been granted in flagrant violation of well settled principles, the order granting bail would not be in accordance with law. Such order can never form the basis for a claim founded on parity. The following observations made by the Bench in Para 17 of the report are also worth mentioning:-

"The grant of bail is not a mechanical act and principle of consistency cannot be extended to repeating a wrong order. If the order granting bail to an identically placed co-accused has been passed in flagrant violation of well settled principle, it will be open to the Judge to reject the bail application of the applicant before him as no Judge is obliged to pass orders against his conscience merely to maintain consistency."

17. In this connection it will be useful to notice the observations made by the Hon'ble Apex Court, where the claim was made on the ground that a similar order had been passed by a statutory authority in favour of another person. In ***Chandigarh Administration Vs. Jagjit Singh AIR 1995 SC 705***, it was held as follows in para-8 of the reports:

"..... if the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal and unwarranted order cannot be made the basis of issuing a writ

compelling the respondent-authority to repeat the illegality or to pass another unwarranted order."

"..... The illegal/unwarranted action must be corrected, if it can be done according to law-indeed, wherever it is possible, the Court should direct the appropriate authority to correct such wrong orders in accordance with law-but even if it cannot be corrected, it is difficult to see how it can be made a basis for its repetition.

"..... Giving effect to such pleas would be prejudicial to the interests of law and will do incalculable mischief to public interest. It will be a negation of law and the rule of law."

18. Again in ***Secretary Jaipur Development Authority V. Daulatmal Jain, 1997(1) SCC 35***, it was observed as follows in para-24 of the reports:

"Article 14 proceeds on the premises that a citizen had legal and valid right enforceable at law and persons having similar right and persons similarly circumstanced, cannot denied of the benefit thereof. Such persons cannot be discriminated to deny the same benefit. The rational relationship and legal back up are the foundations to invoke the doctrine of equality in case of persons similarly situated. If some persons derived benefit by illegality and had escaped from the clutches of law, similar persons cannot plead nor the Court can countenance that benefit had from infraction of law and must be allowed to be retained. Can one illegality be compounded by permitting similar illegal or illegitimate or ultra vires acts? Answer is obviously, no."

19. In Special Leave Petition No. 4059 of 2000: ***Rakesh Kumar Pandey Vs. Munni Singh @ Mata Bux Singh and another***, decided on 12.3.2001, the Hon'ble Apex Court strongly denounced the order of the High Court granting bail to the co-accused on the ground of parity in a heinous offence and while cancelling the bail granted by the High Court it observed that:-

"The High Court on being moved, has considered the application for bail and without bearing in mind the relevant materials on record as well as the gravity of offence released the accused-respondents on bail, since the co-accused, who had been ascribed similar role, had been granted bail earlier."

20. The Apex Court in the aforesaid law report has further observed:-

"Suffice it to say that for a serious charge where three murders have been committed in broad day light, the High Court has not applied its mind to the relevant materials, and merely because some of the co-accused, whom similar role has been ascribed, have been released on bail earlier, have granted bail to the present accused respondents. It is true that State normally should have moved this Court against the order in question, but at the same time the power of this Court cannot be fettered merely because the State has not moved, particularly in a case like this, where our conscience is totally shocked to see the manner in which the High Court has exercised its power for release on bail of the accused respondents. We are not expressing any opinion on the merits of the matter as it may prejudice the accused in trial. But we have no doubt in our mind that the

impugned order passed by the High Court suffers from gross illegality and is an order on total non-application of mind and the judgement of this Court referred to earlier analysing the provisions of sub-section (2) of section 439 cannot be of any use as we are not exercising power under sub-section (2) of section 439 Cr.P.C."

21. In the case of ***Salim Vs. State of U.P. 2003 ALL. L. J. 625,*** this Court has held that parity can not be the sole ground for bail.

22. Again in the case of ***Zubair Vs. State of U.P. 2005(52) ACC 205,*** this Court observed that there is no absolute hidebound rule that bail must necessarily be granted to the co-accused, where another co-accused has been granted bail.

23. The matter of granting bail on the principle of parity was considered by this Court in ***Satyendra Singh Vs. State of U.P. 1996 A. Cr. R.867*** also. The following observations made in para 16 of the report at page 871 are worth mentioning:-

"The orders granting, refusing or cancelling bail are orders of interlocutory nature. It is true that discretion in passing interim orders should be exercised judicially but rule of parity is not applicable in all the cases, where one or more accused have been granted bail or similar role has been assigned inasmuch as bail is granted on the totality of facts and circumstances of a case. Parity can not be a sole ground and is one of the grounds for consideration of the question of bail. Some of the circumstances have been enumerated in the Supreme Court Decision in Gur Charan Singh Vs. State (Delhi Administration), AIR 1978 SC 179.

24. Although the Hon'ble Apex Court has granted bail recently on the ground of parity in ***Izrahul lHaq Abdul Hamid Shaikh and Anr. Vs. State of Gujarat 2009 (3) JT 385,*** but this case can not be said to be the authority to hold that parity is a sole ground for granting bail. It is nowhere held as a binding precedent in this case that if bail has been granted by a Bench to any accused, then another Bench is also bound to grant bail to other similarly placed accused. Otherwise also a judgement of the Court is only an authority for what it actually decides and not what logically follows from it and judgement of the Court is not to be read mechanically as a Euclid's Theorem nor as if it was a statute. See (1) ***Quinn vs. Leathern, 1901 AC 495; (2) Ambica Quarry Works vs. State of Gujarat & others (1987) 1 SCC 213; (3) Bhavnagar University vs. Palittana Sugar Mills Pvt. Ltd. (2003) 2 SCC 111; (4) Bharat Petrolieum Corporation Ltd. & another vs. N. R. Vairamani & another (AIR 2004 SC 4778) (5) Sarva Shramik Sanghatana (K.V.), Mumbai vs. State of Maharashtra & Ors. AIR 2008 SC 946; (6) Government of Karnataka & Ors. Vs. Gowramma & Ors. AIR 2008 SC 863.***

25. In view of the observations made in aforesaid decisions, I am of the considered opinion that merely on the basis of the principle of parity, the applicant cannot be released on bail in present case of heinous nature.

26. Coming to the merit of the case, it is not disputed that the applicant Kanhaiya Lal Sharma was posted as

Assistant Postmaster in Head Post Office Saharanpur on the dates, on which the money from the accounts in question was withdrawn by the agents. From the statements of the complainant and other witnesses recorded by the investigating officer during investigation, this fact is prima facie established that withdrawal form (SB-7) through which the amounts in question were drawn do not bear the signature of Account Holders and by making forged signatures on withdrawal forms, the money was withdrawn in cash by the agent Prashant Tyagi. It is not the case of applicant in the bail application that the withdrawal forms (SB-7), through which the amounts in question were withdrawn, bear the signatures of Account Holders. Those withdrawal forms (SB-7) were passed and approved by the applicant in the capacity of Assistant Postmaster. The payment of entire money was made to the agent on the basis of the endorsement of approval made to the applicant on withdrawal forms. It is not disputed that about Rs.9,00,000/- were paid in cash. Letter No. 5-20/UP06/2000-INV dated 29.8.2001, issued by the Director General Post Offices, provides that payment from Monthly Income Scheme (MIS) account either byway of premature or final closure or of monthly interest if it is Rs. 20,000/- or more should be paid by cheque only by the post offices as provided in section 269-T of the Income Tax Act. In present case, the direction issued by the Director General Post Offices was totally ignored by the applicant, as payment of about nine lac rupees was permitted to be made by him in cash to the agent. Granting permission to withdraw rupees more than 20,000/- in cash by the applicant is prima facie proof of his involvement in the collusion and conspiracy with the agents to withdraw the money from the accounts of the complainant and his family members. Had the payment of money from the accounts of the complainant and his family members was made through cheques, as provided in aforesaid letter issued by Director General Post Offices, then the complainant would have been saved from being ruined. Payment of entire money from account No. 1020020, which was in the name of Smt. Neelu Mathur and Sobhit, was permitted to be made to one Jaspal Singh without summoning the Account Holders to verify whether Jaspal Singh is their partner or not. No consent of Account Holders was taken by the applicant to pay the money to Jaspal Singh, a third person not connected with account No. 1020020. It is very unfortunate that the applicant Kanhaiya Lal Sharma, who was holding responsible post of Assistant Postmaster in the Head Post Office Saharanpur and who is supposed to know the relevant rules about withdrawal of money from Monthly Income Scheme or other Scheme of post offices, permitted the agent Prashant Tyagi to withdraw about Rs.9,00,000/- in cash in utter disregard of the directions issued by Director General of Post Offices as mentioned herein-above. The applicant has not only caused irreparable loss to the complainant, but he has caused great damage to the institution in which he was working. People deposit their money in Banks and Post Offices in the hope to increase their capital and for security purpose also. It appears that the applicant with the help of other employees of Head Post Office Saharanpur was operating a racket, as some other first information reports also have been lodged in such matters against the applicant. Innocent investors have been deprived of their whole life earning by the accused persons.

If the persons like Kanhaiya Lal Sharma (applicant) are allowed to be released on bail in such crimes, then the people would be reluctant to deposit their money in Post Offices, which would cause great damage to the institution. Therefore, having regard to all these facts, but without expressing any opinion on merit of the case, in this heinous crime, the applicant does not deserve bail.

27. In my considered opinion, on the basis of the long incarceration in jail also, the applicant can not be admitted to bail in this heinous crime. In this context, reference may be made to the case of ***Pramod Kumar Saxena vs. Union of India and others 2008 (63) ACC 115***, in which the Hon'ble Apex Court has held that mere long period of incarceration in jail would not be per-se illegal. If the accused has committed offence, he has to remain behind bars. Such detention in jail even as an under trial prisoner would not be violative of Article 21 of the Constitution.

28. Consequently, the bail application of the applicant Kanhaiya Lal Sharma is hereby rejected.

29. The trial court concerned is directed to conclude the trial of the applicant and other accused persons within six months making sincere efforts and avoiding unnecessary adjournments.

30. SSP Saharanpur also is directed to depute special messenger to procure the attendance of the witnesses after obtaining their summons from the court concerned.

31. Before parting with this order, I would like to point out that whatever observations have been made herein-above by me are for the purpose of disposal of this bail application only. The trial court would be at liberty to take its own view on all the matters and will not be guided by the observations made by me in this order.

32. The office is directed to send a copy of this order within a week to the trial court and SSP concerned for necessary action.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.07.2009

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

Civil Misc. Writ Petition No.33791 of 2009

Kotak Mahindra Bank Ltd. ...Petitioner
Versus
Debts Recovery Appellate Tribunal, Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri Anil Tiwari
Sri O.P. Misra
Sri Apoorva Tewari

Counsel for the Respondents:
Sri Zafar Naiyer, Addl. Adv. General
Sri Sachin Upadhyay
Sri Ashok Mehta
Sri P.N. Tripathi
Sri Jayant Banerji
Sri P.J. Nagar
S.C.

Debt Recovery Tribunal Act 1994-Section 20, 21 and 22-in defective appeal-against the order passed by Debt recovery Tribunal-without pre-deposit, without considering the question of time barred-appellate Tribunal passed interim order-held-tribunal being creation of

statute can not travel beyond mandatory provisions-order set-aside with direction to decide the appeal in accordance with laws without unnecessary adjournment.

Held: Para 8

This is a fall out of the principle that once a procedure has been prescribed then the procedure therein is binding on the parties and the same can be waived only in terms of the provisions made under the Statute. From a perusal of the Statutory provisions, it is evident that the Tribunal was obliged to pass an order on the application moved by the State for waiving the condition of pre-deposit and also to consider the issue of limitation before proceeding to entertain the appeal on merits or the application for interim protection. The grant of interim order was, therefore, in the opinion of the Court, patently without jurisdiction without there being a competent appeal in terms of the Statute. The Tribunal, being a creation under the Statute, therefore, could not have traveled beyond the provisions aforesaid.

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

1. Supplementary-Affidavit filed today, is taken on record.

2. Heard Sri Anil Tiwari, Senior Advocate, assisted by Sri Apoorva Tewari and Sri O.P. Misra, learned counsel for the petitioner and Sri Zafar Naiyer, learned Addl. Advocate General for the State, assisted by Sri Sachin Upadhyay, Advocate.

3. Notice has been served on Sri Ashok Mehta, learned counsel for the U.P. State Cement Corporation Ltd. through the official liquidator, notice has been accepted by Sri J. Nagar for respondent No. 6, notice on behalf of respondent No. 7 has been accepted by Sri P.N. Tripathi and notice on behalf of respondent No. 8 has been accepted by Sri Jayant Banerji.

4. Having heard learned counsel for the parties, it is not necessary to issue notice to the other respondents as the learned counsels for the parties, after the submissions were advanced, have consented to the final disposal of the writ petition for being remanded back to the Tribunal for passing of the orders in the terms as provided hereinafter. In view of the aforesaid facts, the matter is being disposed of finally under the Rules of the Court without awaiting for any further Affidavits.

5. Under the judgment of the Debt Recovery Tribunal dated 6.12.2006 certain amount was sought to be recovered from the respondents therein. This decree was further modified on an application vide order dated 7.7.2008. The State moved an application for recall of the judgment dated 6.12.2006 which had been allegedly amended by the order dated 7.7.2008. This application has been undisputedly rejected. The State of U.P. has now preferred an Appeal against the said orders in which a Caveat was instituted by the petitioner, which has given rise to the present proceedings. An objection was filed on behalf of the petitioner to the effect that the Appeal was incompetent in view of the provisions of Section 20,21 and 22 read with the Rules prescribed under 1994 Rules and heavily time barred, as such, there was no occasion for the Tribunal to have granted an interim relief to the respondent-State of U.P. on an incompetent appeal.

6. Sri Anil Tiwari has invited the attention of the Court to the various provisions which provide for the presentation of an Appeal, the manner in which the pre-deposit has to be made and the scrutiny of any Appeal before it is entertained for orders having passed thereon. Sri Tiwari has urged that neither any proper court fee has been paid, which is evident from a perusal of the impugned order itself nor had the pre-deposit been made as per the provisions of Section 21 of the Act. He further contends that the matter was taken up hastily and the orders were passed as an interim measure without there being any competent appeal in the eyes of law. He contends that the procedure prescribed under the Act and the Rules have to be construed strictly as they relate to recovery proceedings and, therefore, there cannot be any presumption or deemed compliance of provisions. He contends that an application for waiving the conditions of pre-deposit had been moved by the State of U.P. but without any order having been passed thereon, the Tribunal has erred in proceeding to straightaway grant an interim order. This is also evident from a perusal of the order impugned wherein dates have been fixed inviting objections on the application moved on behalf of the petitioner for dismissing the appeal. Sri Tiwarin further contended that the question of limitation is also involved and, therefore, the pre-requisite for entertaining the appeal was the question of jurisdiction to be assumed by the Tribunal on the issue of limitation as well as on the issue of pre-deposit as contained under Section 21. He contends that the Tribunal has committed a patent error and not a latest error which could be cured later on.

7. Sri Zafar Naiyer for the State, on the other hand, contends that as a matter of fact, there is no decree which could be executed against the State nor any amount was due and, therefore, the Tribunal was fully justified on the facts of the case to have granted interim relief. On the other issues, Sri Zafar Naiyer has urged that in view of the facts of this case, the Tribunal was fully justified in extending the benefit of interim relief to the State as in his humble opinion, there was no liability on the State at all.

8. Having heard learned counsel for the parties and having considered their submissions, it is more than evident that the statute prescribes a particular procedure to be adopted for preferring an appeal against an order. Undisputedly, the State has under a presumption, that the decree is likely to affect the interest of the State, filed an appeal. The Statute does not draw any distinction on the issue of liability or no liability arising out of a decree for the purposes of following the procedure prescribed for presenting an appeal. The appeal has to be presented in the manner in which it has been provided for, under the Statute. It is settled right from Taylor Vs. Taylor, (1876) 1 Ch.D. 426 and others upto Prof. Ramesh Chandra V. State of U.P. and others, 2007 (4) ESC 2338 (All)(DB) (para 27) that when a procedure has been prescribed in law then the Authority has to proceed to adjudicate such a claim in that manner alone and no other. This is a fall out of the principle that once a procedure has been prescribed then the procedure therein is binding on the parties and the same can be waived only in terms of the provisions made under the Statute. From a perusal of the Statutory provisions, it is evident that the Tribunal was obliged to pass an order

on the application moved by the State for waiving the condition of pre-deposit and also to consider the issue of limitation before proceeding to entertain the appeal on merits or the application for interim protection. The grant of interim order was, therefore, in the opinion of the Court, patently without jurisdiction without there being a competent appeal in terms of the Statute. The Tribunal, being a creation under the Statute, therefore, could not have traveled beyond the provisions aforesaid.

9. Sri Zafar Naiyer, at this juncture, urged, that the matter be remanded back without keeping it pending so that these issues may be decided at the earliest by the Tribunal where a very short date has already been fixed.

10. Having drawn the aforesaid conclusions, there is no point in keeping this writ petition pending and, therefore, the orders impugned dated 11.6.2009 and 1.7.2009 are set aside with a direction to the Tribunal to proceed to pass orders in accordance with the provisions of the Statute as observed herein above and in accordance with law.

11. It shall be open to the petitioner to press all the applications that have been filed relating to the maintainability of the appeal and the objections thereon on behalf of the Statute and the Tribunal shall be obliged to decide the same, accordingly.

12. The Tribunal shall proceed to decide the matter without granting any unnecessary adjournments.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.07.2009

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.

Civil Misc. Writ Petition No.39253 of 2008

Managing Committee and another
...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Shri Ashok Khare, Senior Counsel
Sri Ismamul Rahman Khan

Counsel for the Respondents:
CSC,
Sri Mahtab Alam

Societies Registration Act 1860-Section 25 (1)-Amendment of bylaws-extending the term of society-accepted by Assistant Registrar-held-illegal-before expiry of the admitted term only way to get fresh election-held-extending the term from 3 years to 5 years-undemocratic-illegal-District Magistrate to appoint authorized controller till fresh election-held.

Held: Para 21

In the present case, keeping in view the observation made hereinabove, it shall be appropriate that a fresh election should be held of the Committee of Management in pursuance to the provisions contained in Sub Section (2) of Section 25 of the Act on the basis of membership list as was available in the year 2004 to run the society in question.

Case law discussed:
[2006(24) LCD 1373], 2004(5)SCC 795, AIR (39) 1952 SC 6, AIR 1978 SC 851, 1994 Allahabad CJ 162, (2001)8 SCC 509, 1991 Suppl. 2 SCC 36, 1991(2) SCC 412, 2002 Vol. 1 AWC 771, 2003 Vol. 3 AWC 1802.

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

1. Heard learned counsel for the parties. Precisely, the substantial question of law involved in the present writ petition is whether the tenure of the Committee of Management may be extended by resolution of the General Body instead of electing the office bearers in accordance with the procedure provided in the bye-laws of the Society ?

2. Aljamiya Tul Islamia Lil Banaat Educational Society, Dhaura, Tanda, District Bareilly, in short, Society is a society, registered under the Societies Registration Act. The Society runs a Madarsa with the name and title of Aljamiya Tul Islamia Lil Banaat, in short Madarsa. By the impugned order, the Assistant Registrar, Firms, Societies & Chits, Bareilly has allowed an amendment done in the bye-laws of the society vide alleged resolution of the general body dated 25.3.2007.

3. Sri Ashok Khare, learned Senior counsel, assisted by sri Ismamul Rahman Khan submits that the Assistant registrar while passing the impugned order has exceeded its jurisdiction and the matter could have been referred to the prescribed authority under sub Section (1) of Section 25 of the Societies Registration Act. He submits that the order has been passed without providing reasonable opportunity of hearing to the petitioners and the affected parties.

4. However, while defending the impugned order, it has been submitted by Sri Mahtab Alam that the Assistant Registrar has got juridiction to pass the impugned order and it has been passed with due opportunity of hearing to the parties. It has been submitted that only election dispute may be referred to the prescribed authority and not a controversy with regard to amendment in the bye-laws of the society by which the total members of the general body have been increased from 11 to 34. Admittedly, the election of the Committee of Management was held in March 1999.

5. Before the term expired, a general body meeting of the society was called on 4.3.2004. Out of 11, 9 members had appeared and by resolution passed in the said meeting, the term of the Committee of Management was extended for five years. The copy of the resolution has been filed as Annexure-3 to the writ petition. It has been stated that the resolution dated 4.3.2004 was confirmed in the subsequent meeting of the general body dated 3.4.2004. The petitioners filed an application before the Assistant Registrar for the renewal of registration certificate for the period of five years from 10.3.1999. In the mean time, one Sri Abdul Jaleel moved an application dated 8.4.2004 before the Assistant registrar claiming himself to be new general secretary. The Assistant Registrar has issued a notice dated 29.4.2004 calling upon the petitioners to submit reply. It was stated before the Assistant Registrar by the petitioners that since Abdul Jaleel could not get elected, he had set up a false case with regard to the office of General Secretary. Along with reply/objection dated 12.5.2004 (annexure-7), the petitioners have also filed an affidavit of seven members of the general body to establish that Sri Abdul Jaleel was not general secretary; rather the term of earlier office bearers was extended for five years. However, Sri Abdul Jaleel has also staked his claim and later on moved

an application stating that the general body meeting was convened on 25.3.2007 wherein out of 45 members, 32 appeared. By amendment, it was provided that the maximum number of members of the Management Committee would be 25 and minimum would be 11. Sri Abdul Jaleel filed an affidavit also to establish his claim. In response to it, the petitioners stated that no meeting of the general body was held to carry out the amendment and 34 names have been added by interpolation and on objections filed by the petitioners the notice was also issued to Sri Abdul Jaleel.

6. The Assistant Registrar at his end, by the impugned order dated 9th May, 2008 decided to register the amendment keeping in view the papers submitted by Sri Abdul Jaleel and the objections filed by the petitioners were rejected. A copy of the impugned order dated 9th May 2008 has been filed to Annexure-15 to the writ petition.

7. While assailing the impugned order, it has been stated that the Assistant registrar has fixed only one date, i.e. 13.2.2008, on which date the petitioner no. 2 was present but Sri Abdul Jaleel was not present. It is stated that no hearing took place and the case was adjourned in absence of Sri Abdul Jaleel keeping in view the application moved on his behalf. After 13th August, 2008, no date was fixed by the Assistant Registrar; rather the impugned order was passed straight way in utter disregard of principles of natural justice.

8. Though the averments contained in para 36 and 37 of the writ petition have been denied in the counter affidavit (para 18) and it has been stated that various dates were fixed but no date has been mentioned. Thus, it appears that a vague reply has been given by the respondents to the averments contained in paras 36 and 37 of the writ petition.

9. While considering the arguments, advanced by the learned counsel for the parties, one other question seems to be cropped up, i.e.:- whether the Committee of Management was empowered to extend its period for a further five years keeping in view the resolution of the General Body dated 4.3.2004 ?

10. From perusal of the bye-laws of the Society, a copy of which has been filed as Annexure No.2 to the writ petition, it is evident that the Committee of Management shall be selected by the General Body under the guidelines given in the bye-laws. Virtually, the word, 'selection' used by the draftee seems to mean 'election'. Meaning thereby that all the members of the General Body shall elect the post holders of the Committee of Management (office bearers) who shall continue to discharge their obligation under bye-laws for five years. For convenience, relevant portion from the bye-laws of the Society in question is reproduced as under :

"A. FRAMING : There shall be a Management committee to conduct, and to manage the society which shall be selected by theGeneral Body under the following guidelines.

Above all the members the general body shall select the following Post holders of the Management Committee."

"B. MEETINGS : Meeting of the Management Committee there will be 3

general meeting in a year and special meeting can be called at any time by the president. In which the subject should the mentioned as a reason of the meeting."

"C. INFORMATION : Duration of Information - For the General Meeting of the Management Committee information should be given to each members, prior 3 days of the Meeting date and in case of special meeting 24 hours before meeting date, the information shall be given to the members personally or through special messenger."

"D. QUORRUM : 2/3 part of the total members of the Committee is sufficient to fulfil the quorum the meeting."

"E. VACANCIES. Vacancies can be fulfilled by the approval of the President and the majority of the members or the General Body by the 2/3 part of the total member.

"F. RIGHTS AND DUTIES OF MANAGEMENT COMMITTEE : To make the arrangement and to define the stable and unstable property of the society.

To amend the objects in accordance with the beneficial arrangement and conductivity of the society.

To make arrangement of the funds for carrying the expenditures of the institution governed by the society.

To put the proposal about the annual income and expenditures before the General Body and future budget also.

To make the final decision and appointments for the institutions governed by the society.

Other beneficiaries steps for the institutions.

"G. DURATION : Management committee, working period not less than five years.

11. Thus, a combined reading of relevant portion of the bye-laws of the Society indicates that though the General Body has got right to amend the bye-laws but so far as the term of office bearers is concerned, it shall expire after the period for which they had been elected. The bye-laws of the Society does not empower the General Body to extend the period of the Committee of Management by resolution.

12. The Scheme of Societies Registration Act, 1860, in short Act, is democratic in nature. The purpose is that the office bearers of the society must be elected for the period provided in the bye-laws or rules of the society and any member of the General Body has right to contest such election. Ordinarily, the resolutions are passed unanimously or by majority. In case in absence of any specific procedure, the societies are permitted to extend the term of the Committee of Management by resolution of the General Body, it shall frustrate the very object of the Act. Moreover, in the present case, the resolution of 4.3.2004 is by majority and is not unanimous. Even, absence of one member makes a difference. Every member of a Society has got right to express his views. Accordingly, so far as the present case is concerned, the extension of term by the resolution of General Body seems to be

an act in derogation to bye-laws of the Society.

13. A Division Bench of this Court in a case reported in **[2006(24) LCD 1373] Umesh Chandra and another versus Mahila Vidyalaya society Aminabad, Lucknow and others** (delivered by me) held that the committee of Management and its member cannot act in violation of bye-laws or the rules of the society.

14. The aforesaid proposition may also be inferred from the Scheme of the Act. Under Section 1, the Society is registered in pursuance to the Memorandum of Association formed by the founding members of the Society. Under Section 2, it shall be obligatory for the members to indicate various features in the Memorandum of Association like name of the society, its object etc. Under Section 3-A read with Sections 4 and 4-A of the Act, the renewal of certificate of registration and annual list of managing body is to be filed. Section 4 provides that once in every year, on or before the fourteenth day succeeding the day on which, according to the rules of the Society, the annual general meeting of the society is held, or, if the rules do not provide for an annual general meeting, in the month of January, a list shall be filed with the Registrar containing names, addresses and occupations of the governors, council, directors, committee, or other governing body. The provision of Section 4 provides that if the managing body is elected after the last submission of the list, the counter signature of the old member, shall, as far as possible, be obtained on the list. Section 4-A of the Act relates to the amendment in the rules. For convenience, Sections 4 and 4-A of the Act are reproduced as under :

"4. Annual list of, managing body to be filed.- Once in every year, on or before the fourteenth day succeeding the day on which, according to the rules of the Society, the annual general meeting of the society is held, or, if the rules do not provide for an annual general meeting, in the month of January, a list shall be filed with the Registrar of Joint-Stock Companies, of the names, addresses and occupations of the governors, council, directors, committee, or other governing body then entrusted with the management of the affairs of the society.

Provided that if the managing body is elected after the last submission of the list, the counter signature of the old member, shall, as far as possible, be obtained on the list. If the old office-bearers do not counter-sign the list, the Registrar may, in his discretion, issue a public notice or notice to such persons as he thinks fit inviting objections within a specified period and shal decide all objections received within the said period."

"4A. Changes etc. in rules to be intimated to Registrar.- A copy of every change made in rules of the society and intimation of every change of address of the society, certified by not less than three of the members of the governing body shall be sent to the Registrar within thirty days of the change."

15. A combined reading of Sections 4 and 4-A of the Act shows that the Managing Committee or the Committee of Management of a society must be an elected body. While framing bye-laws of

the Society, the provisions contained in Section 4 should be kept in mind. No society can frame bye-laws contrary to letter and spirit of the Section 4 of the Act which speaks for the elected representative. Once the term of the office bearers of the Committee of Management expire, then it shall always be incumbent on the society to call the General Body meeting and hold a fresh election.

16. In the case of Umesh Chandra (supra), various pronouncements of Hon'ble Supreme Court this Court considered and observed that every word, every line and section of an statute should be considered which ascertaining the intent of legislature. Legislature to their wisdom has used word "elected" in the provision of section 4, which cannot be ignored.

17. Undoubtedly, in case the dispute arises with regard to election of the office bearers of the Committee of Management, then such dispute may be referred to the prescribed authority in pursuance to power conferred by Sub Section (1) to Section 25 of the Act. The prescribed authority has got power under sub-section(1) to decide any doubt or dispute in respect of election or continuance in office of an office bearer of such society, and may pass such order in respect thereof as it deems fit. Relevant portion from Section 25 of the Act is reproduced as under :

"25. Dispute regarding election of office-bearers.-(1) The prescribed authority may, on a reference made to it by the Registrar or by at least one-fourth of the members of a society registered in Uttar Pradesh, hear and decide in a summary manner any doubt or dispute in respect of the election or continuance in office of an office-bearers of such society, and may pass such orders in respect thereof as it deems fit.....

"(2) Where by an order made under sub-section(1), an election is set aside or an office-bearer is held no longer entitled to continue in office or where the Registrar is satisfied that any election of office-bearers of a society has not been held within the time specified in the rules of that society, he may call a meeting of the general body of such society for electing such office-bearer or office-bearers, and such meeting shall be presided over and be conducted by the Registrar or by any officer authorised by him in this behalf, and the provisions in the rules of the society relating to meetings and elections shall apply to such meeting and election with necessary modifications."

18. A Division Bench of this Court in a case reported in **2004(5)SCC 795 New Friends Cooperative House Building Society Limited versus Rajesh Chawla and others** held that an order of any person or authority limiting the right to vote of election can be challenged before the appropriate competent authority. A defective electoral roll can also be challenged before the competent authority or by filing a regular suit.

Hon'ble Supreme Court in a case reported in **AIR (39) 1952 SC 6 N.P. Ponnuswami versus The Returning Officer, Namakkal Constituency, Namakkal, Salem, Distt. and others** held that where a remedy has been provided under an Act or statute to challenge the outcome of the election, then that alternative remedy should be availed and writ petition under Art. 226 of

the Constitution shall not be maintainable. N.P. Ponnuswami (supra) has been reaffirmed by the Hon'ble Supreme Court in a case reported in **AIR 1978 SC 851 Mohinder Singh Gill and another versus The Chief Election Commissioner, New Delhi and others**.

A Division Bench of this court in a case reported in **1994 Allahabad CJ 162 Basant Prasad Srivastava, Manager, Gandhi Smakarak Uchchtar Madhyamic Vidyalaya, Azamgarh versus State of U.P. and others** held that the election of the Committee of Management of an institution may be raised before the Civil Court. It has been further held that in appropriate case, it shall always be open to the parties to approach the prescribed authority in accordance with the provisions contained in Sub Section (1) of Section 25 of the Societies Registration Act.

In (2001)8 SCC 509 Shri Sant Sadguru Janardan Swami Sahkari Dugdha Utpadak Sanstha and another versus State of Maharashtra and others, their Lordships of Hon'ble Supreme Court held that the breach or non-compliance of the mandatory provisions or rules during election process can be challenged in an election petition.

19. In a case reported in **1991 Suppl. 2 SCC 36 Nagri Pracharini Sabha versus Vth Additional District Judge, Varanasi and others**, Hon'ble Supreme Court held that once the tenure of the election of the office bearer was over by passage of time, the Court should decide the controversy keeping in view the latter development.

In **1991(2) SCC 412 K. Murugan versus Sencing Association of India, Jabalpur and another**, when the tenure of the office bearer of Indian Olympic Association was over, Hon'ble Supreme Court appointed a retired Judge of Hon'ble Supreme Court as receiver to conduct the election in accordance with rules of the society.

In **2002 Vol. 1 AWC 771 Seva Samiti Allahabad and another versus Assistant Registrar, Firms, Societies & Chits and another** where the term of the Committee of Management had expired, the Deputy Registrar was directed to hold election in pursuance to power conferred by Sub Section (2) of Section 25 of the Act and a District Magistrate was appointed to look after the routine affairs of the Society.

20. In a case reported in **2003 Vol. 3 AWC 1802 Committee of Management versus Assistant Registrar, Firms, Societies**, a Division Bench of this Court held that after expiry of tenure of Committee of Management, the erstwhile members of the Committee of Management cannot hold election. Only option is to proceed under Sub Section (2) of Section 25 of the Societies Registration Act by the Deputy Registrar.

21. In the present case, keeping in view the observation made hereinabove, it shall be appropriate that a fresh election should be held of the Committee of Management in pursuance to the provisions contained in Sub Section (2) of Section 25 of the Act on the basis of membership list as was available in the year 2004 to run the society in question.

22. In view of above, the writ petition is allowed. A writ in the nature of certiorari is issued quashing the impugned order dated 9.5.2008 (Annexure-15) with consequential benefits. A writ in the nature of mandamus is issued directing the Registrar to hold the fresh election of the Society in question in pursuance to power conferred by Sub Section (2) of Section 25 of the Societies Registration Act, 1860 expeditiously and preferably within a period of four months from the date of receipt of a certified copy of this order. For the interim period, the District Magistrate, Bareilly shall appoint a receiver who shall be an officer of the district to do routine work of the society in question till new elected committee resumes office.

23. The writ petition is allowed accordingly with no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.07.2009

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

Civil Misc. Intervener Application No. 87478 of 2009

In

Special Appeal No. 517 of 2009

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

Versus

Committee of Management, Anjuman Madarsa Noorul Islam Dehra Kalan, Ghazipur and another ...Petitioners/ Respondents

Counsel for the Intervener:
Sri V.K.S. Chaudhary
Sri Boopendra Nath Singh

Counsel for the Respondents:
Sri Ch. N.A. Khan
S.C.

High Court Rules-Chapter XII Rule 5A read with Code of Civil Procedure-Order I Rule 8-A-Intervener Application-in pending Special Appeal-at proposed applicant neither supporting case of either the Appellant or Respondents-application with allegation of collusion between State Government as well as management of Madarsa run by Muslim community-question whether muslim belongs to minority community or not-required investigation of facts-neither question of law nor mixed question of law-held-intervener application not maintainable-rejected.

Held: Para 22

It is thus evident that the applicant intervenor neither proposes to support any of the parties in the writ petition nor the issues raised by the parties. We, therefore, do not find that this application as an intervenor can be allowed and the applicant can be permitted to advance submissions opposing all the parties in the writ petition. In fact, the remedy lies elsewhere. The intervenor-applicant, if so advised, may avail such remedy as admissible in law before the appropriate forum with appropriate pleadings, grounds, reliefs, etc.

Case law discussed:
AIR 1985 SC 1622, 1999 (3) SCC 141, AIR 2000 SC 1296, AIR 2001 SC 1861, 2003 (5) SCC 480, 2006 (5) SCC 62, 1999 (4) SCC 630, JT 2007 (12) SC 86.

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

1. We have heard Sri V.K.S. Chaudhary, learned Senior Advocate assisted by Sri B.N. Singh, Advocate on Intervener Application filed on behalf of Adhivakta Samanvay Samiti U.P. through

its Secretary Sri R.K. Ojha, Advocate, Office at 198 Lukerganj, Allahabad, learned Standing Counsel for the appellant (in Special Appeal No. 517 of 2007) and Ch. N.A. Khan and other learned counsels appearing for the parties in all the connected matters.

2. The applicant has approached this Court with the prayer that it should be allowed to be heard in the above mentioned appeal alongwith other connected matters so that the applicant may support the judgment of Hon'ble Single Judge impugned in this appeal holding that Muslims are not entitled to be recognized as religious minority in the State of U.P. and accordingly, Madarassas run by Muslim communities are not entitled for grant in aid since they cannot be treated as minority religious institutions.

3. At the outset this Court enquired from the learned counsel for the applicant as to how this application is maintainable, inasmuch as, whether the applicant is supporting the petitioner or the respondents of the writ petition.

4. Learned counsel for the applicant submitted that he is supporting the judgment since it has decided an issue of national importance. Further, in respect to one prayer in the writ petition he is supporting the petitioner and in respect to the other prayer in the writ petition he is supporting the respondents though the grounds of support are absolutely different. He further submitted that since he is supporting the judgment on certain issues decided by Hon'ble Single Judge, therefore, the applicant is entitled to be heard in these appeal and the intervention deserved to be allowed.

5. In order to show the maintainability of the application reliance is placed on Chapter XXII Rule 5-A of the Allahabad High Court Rules, 1952 (*hereinafter referred to as the "High Court Rules")* and Order I Rule 8-A of the Code of Civil Procedure (*hereinafter referred to as the "CPC"*). It is contended that though Order I Rule 8-A CPC provides that the Court may hear a person but the word 'may' in the facts and circumstances and the purpose for which the rule is made, is liable to be construed as 'shall'. In support of the above submission reliance is placed on a passage from "Interpretation of Statutes" by Jagdish Swaroop and "Principles of Interpretation of Statutes" by G.P. Singh. Besides, Sri Chaudhar cited authority of the Apex Court in **The Collector (District Magistrate) Allahabad and another Vs. Raja Ram Jaiswal, AIR 1985 SC 1622** (Para 19); **Saraswati Industrial Syndicate Ltd. Vs. CIT, 1999 (3) SCC 141** (para 12); **State of Bihar and another Vs. Bal Mukund Sah and others, AIR 2000 SC 1296** (para 14); and **Municipal Council Hansi, District Hissar Vs. Maniraj and others, AIR 2001 SC 1861** (para 6). He further argued that Section 107 CPC confers power upon the appellate Court which is possessed by the trial court and, therefore, the provision of Order 1 Rule 8A C.P.C. would have application in Special Appeal also. Sri Chaudhary further argued that the applicant is trying to protect the public fund from being squandered by the State authorities for purposes other than public and national interest and it is his fundamental duty under Article 51-A of the Constitution of India to protect the same. Besides, such grant-in-aid to the institutions in question is also violative of Article 27 of the Constitution of India,

therefore, the applicant is entitled to be heard in the matter and to advance his submissions.

6. On the contrary, all the parties in the appeals whether representing appellants or the respondents opposed the intervention application and contended that the applicant has not interest in the matter in issue in writ petition but certain issues which were not involved directly or otherwise in the writ petition but have been decided by Hon'ble Single Judge on his own and now to support those issues only the present application has been filed, though the applicant is neither supporting the petitioner nor the respondents in the writ petition but a different case altogether so as to destroy the case of both the sides. Sri J.K. Tiwari, learned Standing Counsel placed reliance on the Apex Court's decision in **Rajasthan Public Service Commission and another Vs. Harish Kumar Purohit and others, 2003 (5) SCC 480** and **Ravi Rao Gaikwad and others Vs. Rajaji Nagar Youth Social Welfare Assn. and others, 2006 (5) SCC 62**. The other learned counsel adopted the arguments of Sri Tiwari and said that the application sould be rejected.

7. For permitting a person to intervene in a pending matter, no specific provision has been made either in the CPC or in the High Court Rules. The two provisions on which reliance has been placed on behalf of the applicant are Chapter XXII Rule 5-A of the High Court Rules and Order 1 Rule 8-A of CPC. Therefore, first of all we propose to consider the above two provisions.

8. Chapter XXII Rule 5-A of the High Court Rules reads as under:

*"**5-A Hearing of persons not served with notice.-** At the hearing of the application, any person who desires to be heard in opposition to the application and appears to the Court to be a proper person to be heard, may be heard notwithstanding that he has not been served with notice under Rule 2."*

9. A bare perusal of Rule 5-A shows that where a person in the writ Court appears and requests to be heard in opposite on the petition and and it appears to the Court that he is a proper person only then he may be heard even though no notice has been served upon him since he was not a party impleaded in the writ petition. To attract Rule 5-A of the High Court Rules, two things are necessary; (1) a person desired to be heard in opposition to the application and (2) he appears to be a proper person to the Court that he should be permitted to be heard. Here the present application is not one seeking intervention for opposing the writ petition. Secondly, in the dispute involved in the writ petition, the learned counsel for the applicant could not show as to how he is a proper person to be heard. Therefore, in our view, the reference made and reliance placed on Rule 5-A is misconceived and does not apply to the present application. We have no manner of doubt that wherever and whenever the Court finds that a person is a proper party to be heard in a matter he should be allowed opportunity to be heard but simply because someone has come and requested to be heard, he cannot be allowed as a matter of course and that too, which all the parties in the writ petition are opposing.

10. Then we come to Order I Rule 8-A CPC which reads as under:-

"8-A Power of Court to permit a person or body of persons to present opinion or to take part in the proceedings.-*While trying a suit, the Court may, if satisfied that a person or body of persons is interested in any question of law which is directly and substantially in issue in the suit and that it is necessary in the public interest to allow that person or body of persons to present his or its opinion on that questions of law, permit that person or body of persons to present such opinion and to take such part in the proceedings of the suit as the Court may specify.*

11. To attract Rule 8-A three things are required: (1) While trying the suit the Court should be satisfied that a person or body of persons is interest in any question of law; (2) such question of law must have directly and substantially in issue in the suit and (3) it is necessary in the public interest to allow such person or body of person to present his or its opinion on the question of law.

12. Besides, the power of the Court to permit such person or body of persons to present his or its opinion is discretionary, inasmuch as, the Rule says that the Court may permit such person or body of persons. Sri Chaudhary vehemently submitted that the word 'may' has to be read as 'shall'. In "Principles of Statutory Interpretation" by Sri G.P. Singh, at page 447 while commenting upon the proposition as to when a provision would be read as mandatory or directory, the following observations of Lord Cairns have been quoted:

"There may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so."

"Where a power is deposited with a public officer for the purpose of being used for the benefit of person specifically pointed out with regard to whom a definition is supplied by the Legislature of the condition upon which they are entitled to call for its exercise, that power ought to be exercised and the court will require it to be exercised."

13. The above proposition in our view, is not at all necessary to be gone in this matter. In our view, Rule 8-A by itself has no application in the present case. Therefore, it would not be necessary for us to go into the academic question as to whether the word 'may' in Rule 8-A should be read as 'shall' or not. The very first condition to attract Rule 8-A is that there is a question of law. Sri Chaudhary has submitted before us that according to him the following questions are involved in this matter which are pure questions of law and, therefore, the applicant as intervenor is entitled to be heard:

1. Whether Muslims can be termed as a minority in Uttar Pradesh?
2. Is the Madarsa, where religious teaching is imparted, is entitled to grant-in-aid from the State Government?

3. Is the Anjuman Madarsa Noorum Islam Dehra Kalan Ghazipur a 'Minority Institution' which the meaning

of Articles 29 (1) and 30 of the Constitution?

14. Sri B.N. Singh, Advocate has filed written arguments also today in the Court and in para 4 thereof also the above questions have been mentioned. A bare reading of the above questions, in our view, shows that the above questions cannot be said to be pure questions of law. On the contrary, they are questions involving investigation into facts and, at the best, some of them may be said to be mixed questions of facts and law. The first question formulated by the applicant, as to whether Muslims can be termed as a minority in U.P. cannot be decided by construing only some statutory provisions but needs a detailed investigation into several factual information needs collection of evidence and scrutiny threadbare of such facts. Similar is the position with respect to question no. 2 and 3. If a question would have been raised "what minority is", the same may be said to be a pure question of law needs to be decided in the light of constitutional provisions contained in Articles 29 and 30 of Constitution of India but when the question is as to who is a minority and whether a particular community can be said to be minority etc., such questions cannot be said to be a pure question of law. As said above, these questions involve collection of evidence, relevant facts and figures and, therefore, are questions of fact or at the best mixed questions of facts and law. The three issues/questions which have been formulated by the applicant on which it intends to address the Court, since in our view, cannot be said to be the questions of law, therefore, Rule 8-A as such has no application in the case in hand and cannot help the applicant for maintaining the application in question.

15. Then comes the basic questions as to who intervenor is and when intervention application can be allowed.

16. In **Saraswati Industrial Syndicate (supra)** the Apex Court categorically held that purpose of granting an intervention application is to entitle the intervenor to address argument in support of one or the other side. Therein the persons who filed the intervention application supported the case of the assessee and opposed the view taken by the Income Tax Department. Therefore, the Apex Court allowed the intervention application and heard intervenor in that case. This view was reiterated in **State of Tamil Nadu Vs. Board of Trustees of the Port of Madras, 1999 (4) SCC 630**.

17. Again it came to be considered in **Ravi Rao Gaikwad (supra)** where an order of the High Court permitting the intervenors to participate in the case before Hon'ble Single Judge was under challenge. The Apex Court considered as to what was the issue involved in the writ petition before the Hon'ble Single Judge and thereafter observed that the persons making impleadment application cannot throw any light on those matters and relying on **Saraswati Industrial Syndicate (supra)** set aside the order of the High Court whereby the intervenors were allowed to participate in the matter. This has been followed in **Ram Nandan Singh and others Vs. A.G. Office Employees Co-op. House Construction Society Ltd., Ranchi and others, JT 2007 (12) SC 86.**

18. Coming to the judgements relied upon by the applicant we find that in **Bal Mukund Sah (supra)** the intervenor supported general category candidates who had filed the writ petition before the High Court. In **Maniraj (supra)** the property of a person seeking intervention was sought to be taken away without either impleading him or hearing him. Therefore, the Court held that he was a necessary and proper party though he had filed the application titled as 'Intervenor'. This fact is evident from the following in para 6 of the judgment:

"In the circumstances, the application made by the appellant ought to have been allowed when the direction adversely and seriously affected the valuable rights of the appellant over the immovable property in dispute."

19. Similarly, in **Raja Ram Jaiswal (supra)** serious allegations were made against Hindi Sahitya Sammelan and its impleadment application was rejected by the High Court. The Apex Court found that the allegations of *mala fide* and ulterior motive leveled against Hindi Sahitya Sammelan cannot be heard in its absence and observed that the High Court wrongly rejected the application for impleadment. It also found that Sammelan was a proper party to be heard and this was not disputed by Sri Nariman, learned counsel appearing for the appellant in that case.

20. Therefore, in all the three cases, we find that the intervention was allowed either when the person was supporting one of the party or that he was found to be a necessary and proper party to the dispute before the Court. Here the Madarsas were allowed grant-in-aid by the State Government by issuing a Government Order in the year 1996. Some of the Madarasas, whose list was given, were allowed the said benefit. Some more Madarsas (to be precise 67 Madarsas) were sought to be extended the said benefit by means of an order dated 17.5.2004, which did not include the institution of the petitioner-respondent in this appeal, i.e., Anjuman Madarsa Nooral Islam Dehra Kalan, Ghazipur. Therefore, the said institution challenged the said order on the ground that that non inclusion of the petitioner-respondent's name in the said list was illegal. There is no challenge to the Government Order of 1996 which is a matter of policy to provide grant-in-aid to the Madarsa. What the applicant intervenor intends to submit is that no grant-in-aid whatsoever could be allowed to any Madarsa at all and, therefore, the order dated 17.5.2004 challenged in the writ petition deserves to be quashed and to this extent the intervenor is supporting petitioner respondent no. 1 in the writ petition but it is opposing their further prayer to provide grant-in-aid to this institution for the reason that according to the intervenor-applicant such grant to Madarasas is illegal. *Exfacie,* the intervenor's case is absolutely different. In absence of any challenge to the Government Order of 1996, neither any such plea can be allowed to be raised nor can be heard by this Court in a matter where such an order is not at all in dispute. On the contrary, the parties in the writ petition have placed reliance on the said Government Order for taking its benefit. *Ex facie,* therefore, it is evident that the intervenor's application is not supporting either of the party in the writ petition but intend to make out a new case of its own.

21. Moreover, the appeals before us have been filed alleging that the issues decided by Hon'ble Single Judge never arose in the matter and the respondents before us also agree so far as this aspect is concerned. The intervenor has categorically said in the application in para 5 that all the parties are colluding for the said purpose. Para 5 of the application is reproduced as under:

"5. That it appears that both State of U.P. and the Committee of Management and Anjuman Madarsa Noorul Islam Dehra Kalan, have filed appeals, from the grounds of appeal and the contents of appeals it appears that the both State of U.P. and the committee of Management Anjuman Madarsa are colluding with each other on main question decided. This is a question of national importance and is likely to affect the whole country. In such State of affairs is necessary and the intervener who has filed the application on the very date the special appeal No. 322 of 2007 was listed for admission. The intervener must be heard, it appears that no order has been passed on the intervener application it appears no application came before the court and it not listed for orders."

22. It is thus evident that the applicant intervenor neither proposes to support any of the parties in the writ petition nor the issues raised by the parties. We, therefore, do not find that this application as an intervenor can be allowed and the applicant can be permitted to advance submissions opposing all the parties in the writ petition. In fact, the remedy lies elsewhere. The intervenor-applicant, if so advised, may avail such remedy as admissible in law before the appropriate forum with appropriate pleadings, grounds, reliefs, etc.

23. In view of the above discussion, we are clearly of the view that this application is not maintainable.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.07.2009

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

Civil Misc. Contempt Application No. 4969 of 2006

Islamuddin ...Applicant
Versus
Sri Umesh Chandrara Tiwari and another ...Respondents

Counsel for the Applicant:
Sri Arvind Srivastava
Sri Zuber Ahmad Siddique

Counsel for the Respondents:
A.G.A.

Contempt of Courts Act 1971-read with Section 5 of Limitation Act-contempt proceeding initiated after one year-reference made before the Division Bench-whether the provisions of limitation Act applicable in proceeding of contempt Act? Held-"No" except Section 17 of no other provision of limitation Act applicable.

Held: Para 76

We, therefore, answer both the questions referred by the Hon'ble Single Judge in negative and hold that for the purpose of Section 20 of Act 1971, the Act 1963 and its provisions (except-Section 17) have no application whatsoever. The law laid down by the Apex Court in Pallav Sheth (supra) does

not make Section 5 of Act 1963 applicable and would not confer power upon the Court to condone or waive delay where proceedings of contempt are sought to be initiated under Act 1971 after one year from the date when the contempt is alleged to have been committed.

Case law discussed:

2001 (7) SCC 549, (1996) 5 SCC 342, (1976) 1 SCC 392, 1991 Supp (2) SCC 631, 1995 Supp(4) SCC 578, (1995) 5 SCC 5, (2002) 3 SCC 130, (2006) 6 SCC 239, AIR 1922 Bom. 52, 17 C.W.N. 1285; AIR 1914 Cal. 69, AIR 1935 Nag. 46, AIR 1972 SC 858, AIR 1931 Cal. 257 Rankin, C.J., AIR 1974 SC 2255, JT 2008 (6) SC 177, JT 2007 (12) SC 27, 2000 (4) SCC 400, 2005 8 SCC 423; 2004 (1) SCC 360; 1998 (1) SCC 349, 1988 (3) SCC 26, (1976) 2 SCC 174, (1974) 2 SCC, JT 2004 (9) SC 265, AIR 2000 SC 1136, 1995 Cri LJ 3830 (FB), AIR 2007 Kerala 153, 2004 (17) AIC 684, AIR 1968 SC 647, 1996 (6) SC 44, JT 2005 (10) SC 64), 2000 Cri. L.J. 3619.

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

1. This matter has come come up before us pursuant to the reference made by Hon'ble Single judge vide order dated 18.12.2006, formulating the following two questions to be answered by a larger Bench:

(i). Whether the decision in Pallav Sheth case, (2001) 7 SCC 549, can be construed so as to apply all the principles enshrined in the provisions of the Indian Limitation Act (except Section 17 thereof) and as to whether the same can be made applicable to proceedings to be initiated under Section 12 of the Contempt of Courts Act, 1971.

(ii). Whether the High Court in exercise of its powers for initiating contempt of its Court or the contempt of its subordinate court or Tribunal, as the case may be, has the power to condone and waive the delay in initiation of contempt proceedings under Section 12 of the Courts Act.

2. The two questions appear to have been formulated following the arguments advanced by the learned counsel for the applicant based on certain observations of the Apex Court in **Pallav Sheth Vs. Custodian and others 2001 (7) SCC 549** relying whereof the learned counsel for the applicant has sought to apply Section 5 of the Limitation Act, 1963 (hereinafter referred to as the Act, 1963) to the limitation prescribed under Section 20 of the Contempt of Courts Act, 1971 (hereinafter referred to as Act, 1971) so that if the contempt proceedings are sought to be initiated after one year's delay, the same may be condoned by the Court and proceedings may be initiated even after the above prescribed period.

3. Sri Arvind Srivastava, learned counsel for the applicant submitted that in **State of West Bengal Vs. Kartik Chandra Das and others (1996) 5 SCC 342** the Apex Court held that Section 5 of Act, 1963 would be applicable to the appeals filed under Section 19 of Act, 1971 beyond the period prescribed therein, empowering the Court to condone the delay. Based thereon he submitted that it cannot be said that Act, 1971 is a complete code in all respect, inasmuch as, if for the purpose of appeal under Section 19 power to condone delay under Section 5 of Act, 1963 can be validly applied, there is no reason to exclude the same for the purpose of condoning delay if contempt proceedings are initiated after the period of limitation prescribed under Section 20 of Act, 1971. Further relying on Section 29 of Act, 1963 he submitted that unless the application of Act, 1963 is expressly excluded, it will apply to all the

Courts which includes the High Court also. In support of the above submission, reliance is placed on **Mangu Ram Vs. Municipal Corporation of Delhi (1976) 1 SCC 392, Competent Authority, Tarana District, Ujjain (M.P) Vs. Vijay Gupta and others 1991 Supp (2) SCC 631, Shantilal M. Bhayani Vs. Shanti Bai 1995 Supp(4) SCC 578, Mukri Gopalan Vs. Cheppilat Puthanpurayil Aboobacker (1995) 5 SCC 5, Shaik Saidulu @ Saida Vs. Chukka Yesu Ratnam and others (2002) 3 SCC 130, State of Goa Vs. Western Builders (2006) 6 SCC 239**.

4. Learned counsel for the applicant has also filed written submissions in support of his contention that Section 5 of Act, 1963 ipso facto would be applicable to Act, 1971 enabling this Court to entertain a contempt application filed beyond the period of limitation prescribed under Section 20 provided the applicant satisfy the Court about the reasons beyond his control in the occurrence of delay.

5. Having heard the above submissions and perusing the reference order of the learned single judge, the provisions of the statute and the relevant authorities on the subject applicable on the aforesaid questions, we find that though the questions are simple but has far reaching consequences and therefore need to be answered after careful consideration of the entire law on the subject.

6. The genesis of the argument advanced by learned counsel for the applicant is the judgment of the Apex Court in **Pallav Sheth (Supra)** and therefore before coming to other aspects of the matter it would be appropriate to have a perusal of the above judgment as to the dispute raised therein and the exposition of law laid down therein.

7. One M/s Fair Growth Finances Services Ltd. was notified on 2nd July, 1992 under the provisions of Special Courts (Trial of Offences Relating to Transaction Insecurities) Act 1992, (hereinafter preferred to as the "Special Courts Act"). All properties belonging to it stood automatically attached by operation of law due to above notification. The custodian appointed under the Special Courts Act filed Misc. Application No. 193 of 1993 and sought a decree for Rs. Fifty Crores on behalf of the notified party against Pallav Sheth. On 24.02.1994, Sri Pallav Sheth submitted a consent decree for Rs. 51.49 crores which was to be paid in instalments. Shri Sheth paid Rs. Two Crores but thereafter committed default in payment of further instalments. The Custodian then moved an Execution Application No. 343 of 1994 and the Special Court thereupon required the appellant Sri Sheth to disclose all his assets and at the same time by an interim order dated 03.08.1994 restrained him from alienating, encumbering and selling off or parting with possession or transferring in any manner whatsoever any of his assets, movable or immovable, including bank accounts. The Special Court on 24.08.1994, after receiving an affidavit from Pallav Seth wherein he disclosed his assets, passed further interim order of attachment of some of the assets mentioned therein.

8. On 11th November, 1997 the Income Tax Department conducted raids on Pallav Sheth and taken note of the News Paper reports containing the details

of the assets detected by the Income Tax Department, the Special Court directed the custodian to ascertain from the Income Tax Department complete details of all the assets of Sri Sheth. The Income Tax Department in reply to the query made by the custodian, vide letter dated 5th May, 1998 informed that during search operations, Pallav Sheth was detected being de-facto owner of five companies, namely Anzug Plastics (P) Ltd., Magan Hotels (P) Ltd, Klar Chemicals (P) Ltd., Malika Foods (P) Ltd. and Jainam Securities (P) Ltd.. He had further reported to admit in the statements before the Income Tax Authorities that several cash deposits amounting to Rs. 2.81 crores made in the bank accounts of the aforesaid five companies were his undisclosed income. Thus according to the Income Tax Authorities the assets of the above 5 companies belong to Pallav Sheth and these companies were also to receive substantial amount from other companies/individuals. Besides, the Income Tax Department also informed about some further assets of Pallav Sheth. The custodian on 18th June 1998 filed Misc. Application no. 276 of 1998 before the Special Court with the prayer that the appellant should be punished for committing contempt of the Special Court's order dated 24th August, 1994, whereupon the Special Court issued notices on 9th April 1999 to Pallav Sheth to show cause for contempt. The allegations of defiance of the order of Special Court were denied by Pallav Sheth in his reply. The Special Court on 29th October, 1999 allowed amendment of Misc. Application No. 276 of 1998 permitting substitution of reference to the order dated 24th August, 1994 with order dated 3rd August, 1994. By order dated 31st January, 2001, the Special Court held Pallav Sheth guilty of contempt of Court and sentenced him to one month imprisonment and imposed a fine of Rs. 2,000/-. By a separate order dated 7th February, 2001 the Special Court dealt with the contention with respect to limitation and held that the contempt application was not barred by limitation prescribed under Section 20 of Act, 1971 on the ground that it was a case of continuing wrong.

9. In appeal before the Apex Court, the arguments on behalf of Pallav Sheth were restricted only to the issue of limitation under Section 20 of Act, 1971. The appellant before the Apex Court chose not to advance any submission on the merits of the issue. In the circumstances, the question formulated by the Apex Court, which it required to decide in that case was as under, as mentioned in para 8 of the judgment:

"The only question which survives for consideration in this appeal is whether in view of the provisions of Section 20 of the Contempt of Courts Act, 1971, the Special Court was prohibited from taking any action as, according to Mr. Venugopal, the Court had initiated proceedings of contempt after the expiry of a period of one year from the date on which the contempt was alleged to have been committed".

10. The Apex Court initially examined the provisions of Special Courts Act and with reference to Section 11(A) thereof, found that the Special Court was constituted under Section 5 of the said Act, consisting of one or more sitting judges of the High Court and has the same power as the High Court in respect of contempt of itself. This power could be

exercised in addition to the exercise of power under the provisions of the Act, 1971. In the circumstances it was noticed by the Apex Court that just as the High Court, being the Court of record, has the power under Article 215 of the Constitution of India to punish for contempt of Court itself, similarly, the Special Court consisting of a Judge of the High Court can also exercise that power available under Article 215.

11. Shri Venugopal, counsel for Pallav Sheth, appellant before Apex Court, for the purpose of attracting Section 20 relied on the date of the order which was said to be violated that is 3rd August, 1994 and 22nd August, 1994 and and the date on which show cause notice was issued by the Special Court for contempt that is 9th April, 1999 and submitted that the limitation having expired long back, the contempt proceedings were barred by Section 20. He also contended that the provision of Section 20 will be attracted for determining the period of one year on the date when the Court applied its mind and not on the date on which the application was filed and since the limitation had expired long back, the entire proceedings were barred by limitation. To answer the above question, the Apex Court firstly considered as to what would be the date on which the Court can be said to have initiated proceedings, i.e, the date when notice is issued by the Court or from the date when an application is filed by the informant bringing to the notice of the Court the wilful disobedience or violation of order by the alleged contemnor and secondly as to when the period would commence i.e. from the date of the order of the Court or the date when the violation thereof takes place or when it comes to the knowledge of the informant.

12. Answering the first part about the date of initiation of proceedings , it was held that Section 20 has to be construed in a manner which would avoid an anomaly and hardship to both the litigants so as not to suffer for inaction on the part of the Court to punish for its contempt in taking up the application and apply its mind as to whether the notice is to be issued or not and also the harmonious construction of the various provisions of the statute so that a mischievous person may not take undue advantage of any avoidable lacuna in the language of the statute. The Court held that for the purpose of taking cognizance of a criminal contempt under Section 15, beginning of the action would be the date when the proceedings were initiated for contempt that is when the application is filed before the Advocate General or this Court. Similarly for civil contempt, filing of an application drawing the attention of the Court for further steps to be taken under Act, 1971 would be the date of commencement of the period prescribed in Section 20 and not when the Court issued notice. Therefore 18.06.1998 was held to be the date on which the Apex Court held that the proceedings for contempt were initiated under Section 20 for the purpose of considering the period of limitation or the period for taking cognizance. If an application is moved within one year thereafter it would be well within the time and cannot be said to be barred by Section 20. The Apex Court in para 44 of the judgment held as under:

44. *"Action for contempt is divisible into two categories, namely, that initiated suo motu by the Court and that instituted*

otherwise than on the Court's own motion. The mode of initiation in each case would necessarily be different, while in the case of suo motu proceedings, it is the Court itself which must initiate by issuing a notice, in the other cases initiation can only be by a party filing an application. In our opinion, ***therefore, the proper construction to be placed on Section 20 must be that action must be initiated, either by filing of an application or by the Court issuing notice suo motu, within a period of one year from the date on which the contempt is alleged to have been committed****". (emphasis added)*

13. The Apex Court also took into consideration that where the alleged contemnor had been successfully hiding the facts by practising fraud etc., the delay caused thereof would not render the proceedings barred by limitation but in such case, date on which such facts came to the notice of the informant would be the date of commencement of violation of Court's order. The Court considered the submissions of the appellant that application itself having been filed after almost four years when the order was passed, it was barred by time & repelling the same, in para 46 and 48 of the judgement observed as under:

"The record disclosed that the Custodian received information of the appellant having committed contempt by taking over benami concerns, transferring funds to these concerns and operating their accounts clandestinely only from a letter dated 05.05.1998 from the Income Tac Authorities. It is soon thereafter that on 18.06.1998, a petition was filed for initiating action in contempt and notice issued by the Special Court on 09.04.1999...."(para 46.)

"The fraud perpetuated by the appellant was unearthed only on the Custodian receiving information from the Income Tax Department, vide their letter dated 05.05.1998. On becoming aware of the fraud, application for initiating contempt proceedings was filed on 18.06.1998, well within the period of limitation prescribed by Section 20. It is on this application that the Special Court by its order of 09.04.1999 directed the application to be treated as a show-cause notice to the appellant to punish him for contempt. In view of the above stated facts and in the light of the discussion regarding the correct interpretation of Section 20 of the Contempt of Courts Act, it follows that the action taken by the special Court to punish the appellant for contempt was valid..." (para 48)**.**

14. Since the Apex Court in **Pallav Sheth (supra)** held that the application was filed within time, it did not consider the further aspect of the matter as to whether there was a continuing wrong or not.

15. If we consider the question in the facts and circumstances of the case in which it cropped up before the Apex Court, we find that though the Interim Orders were passed by the Special Court on 3rd August, 1994 and 24th August, 1994 but their defiance came to the notice to the Custodian only when he received a letter dated 5th May, 1998 from the Income Tax Department and within one and a half month thereof he filed an application, i.e., on 18th June 1998 for contempt before the Special Court requesting for initiating contempt proceedings against **Pallav Sheth**

(Supra). For determining the period of one year, the Apex Court found that the defiance having commenced on 5th May, 1998 the application was well within time.

16. We do not find that the Apex Court has relied on either Section 29 of Act 1963 or has held that Section 5 would be applicable for enabling the Court to initiate the contempt proceedings even after expiry of period of one year provided under Section 20 of 1971 Act.

17. Sri Srivastava learned counsel for the appellant, however, placing reliance on later part of para 46 and 47 of the judgement in ***Pallav Sheth (supra)*** vehemently contended that there from the applicability of Section 5 of 1963 Act is very clear and is evident. The aforesaid extract of the judgement which has been heavily relied by Sri Srivastava, would be useful to be referred as under:

"Section 29(2) of the Limitation Act, 1963 provides that where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Section 4 and 24 (inclusive) shall apply insofar as, and to the extent to which, they are not expressly excluded by such special or local law. This Court in the case of Kartick Chandrara Das has held that by virtue of Section 29(2) read with Section 3 of the Limitation Act, limitation stands prescribed as a special law under Section 19 of the Contempt of Courts Act, 1971 and in consequence thereof the provisions of Sections 4 and 24 of the Limitation Act stand attracted".(para 46)

"Section 17 of the Limitation Act, inter alia, provides that where, in the case of any suit or application for which a period of limitation is prescribed by the Act, the knowledge of the right or title on which a suit or application is founded is concealed by the fraud of the defendant or his agent Section 17(1)(b) or where any document necessary to establish the right of the plaintiff or the applicant has been fraudulently concealed form his Section 17(1)(d), the period of limitation shall not begin to run until the plaintiff or the applicant has discovered the fraud or the mistake or could, with reasonable diligence, have discovered it; or in the case of a concealed document, until the plaintiff or the applicant first had the means of producing the concealed document or compelling its production. These provisions embody fundamental principles of justice and equity Viz. That a party should not be penalized for failing to adopt legal proceedings when the facts or material necessary for him to do so have been willfully concealed from him ans also that a party who has acted fraudulently should not gain the benefit of limitation running in his favour by virtue of such fraud". (para-47)

18. Having given our considerable thoughts, we find that this submission is also plainly misconceived. The Hon'ble Single Judge himself has noticed the judgment of Apex Court in **Pallav Sheth (supra)** at length and also various authorities cited before him, and has observed that Section 20 leaves no room for doubt that the words used therein are almost prohibitory in nature to the effect

that no Court shall initiate any proceedings after expiry of one year from the date on which the contempt is alleged to have been committed. He has further observed that Section 20 takes away jurisdiction of the Court for initiation of contempt proceedings and as such the Court shall not punish such person if initiation has not taken place within a period of one year. The Hon'ble Single Judge is also of the view that application of Section 5 of Act 1963 would make Section 20 and the prohibition therein nugatory which cannot be the intention of the legislature. By judicial process of interpretation the Court's cannot find such a course. But, then, referring to some further observations of the Apex Court, his Lordship with a view to have a clear authority on the subject, as to whether Section 5 would be applicable to contempt proceedings under Section 12 of Act, 1971, particularly in view of the fact that the Apex Court in **Pallav Sheth (supra)** has taken note of Section 17 of the 1963, Act; has formulated the above two questions and referred the matter to the larger Bench though the judgment itself contain reply to the above questions on page 9 and 10.

19. Now we proceed to reply the above two questions in the light of the various authorities cited at the bar as also the submission that Section 17 has been taken note by the Apex Court in **Pallav Sheth (supra)** would also make all other provisions applicable including Sec 5 of 1963 Act.

20. The law in respect to contempt of Court has been considered time and again in the last more than a century. We do not propose to deal in the matter at length, but it would be useful to have a brief reference of the relevant aspect of the matter. During pre-independence era the High Courts of Judicature were established by Letters Patent and were made superior Courts of record. As such they had power to attach and commit for acts amounting to contempt of their own proceedings as Contempt of Court without reference to whether the acts alleged constituted an offence under the Indian Penal Code. However, there appears to be conflict between High Courts as to the jurisdiction of the High Court to punish for contempt of subordinate courts. The Madras High Court in the case of **Venkata Rao, 12 I.C. 293** and the Hon'ble Bombay High Court in the case of **King Emperor Vs. P.G. Kurkarni, AIR 1922 Bom. 52** held that they possess power to protect their subordinate courts against such contempt. The Calcutta High Court in **King Emperor Vs. Girindra Mohan Das and others, 17 C.W.N. 1285**; and **Legal Remembrancer Vs. Matilal Ghose and others, AIR 1914 Cal. 69** took a contrary view. Further it was also not clear as to whether the Court of Judicial Commissioners of the Central Provinces, Oudh and Sind have these general powers either in regard to contempt of their own proceedings or of the proceedings of Courts subordinate to them. It is in these circumstances that the Contempt of Courts Act (XII of 1926) (hereinafter referred to as the "Act, 1926") was enacted. Though the statement of objects and reasons included that the Act is being enacted considering that the Court of Judicial Commissioner whether would have power of contempt or not but the Act, 1926 as enacted, in fact, did not provide anything in respect to Judicial Commissioner. This was pointed out by Nagpur Judicial Commissioner's Court in

the case of **Mst. Hira Bai Vs. Mangal Chand, AIR 1935 Nag. 46**. It was a short Act containing only three sections.

21. After independence in the Constitution specific provisions were made with respect to powers of Contempt of Supreme Court and High Courts under Articles 129 and 215 of the Constitution of India. Article 215 of the Constitution makes every High Court, a Court of record having power to punish for its contempt. It reads as under :

"215. High Courts to be Courts of record.- *Every High Court shall be a Court of record and shall have all the powers of such a Court including the power to punish for contempt of itself."*

22. Courts of record are not defined either in the Constitution or in General Clauses Act. However, the Courts of record are those, whose acts and judicial proceedings are enrolled for a perpetual memorial testimony. Their proceedings are kept on record and are conclusive evidence of that which is recorded therein. Whether a Court is Court of record or not would depend on the fact as to whether it has jurisdiction to punish for contempt of itself or or other substantial offences. In respect to the statutory enactments, Article 246 (1) of the Constitution provides that the Parliament has exclusive power to make laws in respect to such matters as are enumerated in List I in Seventh Schedule. Article 246 (3) empowers the Legislature of the State to make law with respect to the subjects mentioned in List II in the Seventh Schedule subject to Article 246 (1) and (2). Article 246 (2) provides that notwithstanding anything in Clause 3 Parliament and subject to Clause 1 the legislature of any State shall have power to make laws with respect to any of the matters enumerated in List III Seventh Schedule of the Constitution. In respect to Courts, Entry 77 List-I VII Schedule provides as under :

"77. Constitution, organisation, jurisdiction and powers of the Supreme Court (including contempt of such Court), and the fees taken therein; persons entitled to practice before the Supreme Court."

23. Similarly, in respect to Contempt of Courts other than that of Supreme Court, entry 14 List III Schedule Seventh provides as under :

"14. *Contempt of Court, but not including contempt of the Supreme Court."*

24. Therefore, the Constitution clearly provides for a law to be made by the Parliament or State legislature to the extent mentioned in Entry 77, List I and Entry 14 List III. The Parliament stepped in by enacting "Contempt of Court Act, 1952" (Act 33 of 1952) (hereinafter referred to as "Act, 1952") after the commencement of Constitution and replaced the Act, 1926. The aforesaid Act was a short one and basically provided the extent of punishment which could be imposed by the High Courts in the matter of contempt. The Act, 1952 vide Section 6 thereof repealed not only Act, 1926 but some other provincial enactments enforced in pre-independent States which were mentioned in the schedule. The said enactments were as under:

"(a) The Contempt of Courts Act, IV of 1855, as in force in the State of Hyderabad. The whole
(b) The Indore Contempt of Courts Act, No. V of 1930, as in force in the State of Madhya Bharat. The whole
(c) The Contempt of Courts Act, Gwalior State, Samwat 2001, as in force in the State of Madhya Bharat. The whole
(d) The Contempt of Courts Act, 1930 (XI of 1930), as in force in the State of Mysore. The whole
(e) The Contempt of Courts Act, S. 1991 (V of S. 1991), as in force in the Patiala and East Punjab States Union.
The whole
(f) The Patiala and East Punjab States Unior Judicature Ordinate, S. 2005 (X of S. 2005) Section 33
(g) The Contempt of Courts Act, 1926 (XII of 1926) as in force in the State of Rajasthan before the commencement of the Act. The whole
(h) The Contempt of Courts Act, 1926 (XII of 1926) as in force in the State of Saurashtra before the commencement of this Act. The whole
(i) The High Court of Judicature Saurashtra State Ordinate, 1948 (Saurashtra Ordinance II of 1948) Section 31
(j) the Cochin Contempt of Courts Act (XXXII of 111), as in force in the State of Travancore-Cochin. The whole"

25. The aforesaid Act was substituted by the Act, 1971 which is a detailed enactment covering various aspects of the matter pertaining to contempt. The Act, 1971 came into force on 24.12.1971. A question in respect to earlier enactment of 1952 relating to contempt of High Court came to be considered before Apex Court. Fine was imposed on 25.2.1964 but was not paid and an amount of Rs.500/- earlier deposited as security for appearance remained unattached till 1971. One R.L. Kapur filed application for refund of the security amount while the State filed another application for attachment of the said amount towards the unpaid fine. Sri Kapur contended that under Section 17 of Indian Penal Code, six years having elapsed since imposition of fine, the application of the State was barred by time. The Apex Court in **R. L. Kapur Vs. State of T.N. AIR 1972 SC 858** held that the power to punish for contempt of the High Court as a Court of record is a substantial one. Whether it was inherent or conferred by Article 215 of the Constitution, but certainly was not derived from Act, 1971, and, therefore, not within the purview of the Indian Penal Code or the Code of Criminal Procedure. However, the jurisdiction of contempt is of a special nature and should be used sparingly. In **Ananta Lal Vs. A.H. Watson AIR 1931 Cal. 257 Rankin, C.J**. observed that

"The Court's jurisdiction in contempt is not to be invoked unless there is real prejudice which can be regarded as a substantial interference with the due course of justice. It is not every theoretical tendency that will attract the action of the Court in its very special jurisdiction. The purpose of the Court's action is a practical purpose and it is reasonably clear on the authorities that this Court will not exercise its jurisdiction upon a mere question of propriety."

26. **Oswald, in its book 'Contempt of Court' 3rd Edn. Page 17** said that it is an offence purely sui generis and that its punishment involves in most cases an exceptional interference with the liberty of the subject, and that too by a method or

process which would in no other case be permissible or even tolerated. It is highly necessary therefore in all questions of that nature where the functions of the Court have to be exercised in a summery manner that the Judge in dealing with the alleged offence should not proceed otherwise than with greater caution and deliberation and only in cases where the administration of justice would be hampered by the delay in proceeding in the ordinary course of law; and that when any antecedent process has to be put in motion, every prescribed step and rule, however technical should be carefully taken, observed and insisted upon.

27. In **Baradakanta Mishra Vs. Mr. Justice Gatikrushna Mishra AIR 1974 SC 2255**, the Apex Court observed "*Even if the Court is prima facie satisfied that a contempt has been committed, the Court may choose to ignore it and decline to take action. There is no right in any one to compel the Court to initiate a proceeding for contempt even where a prima facie case appears to have been made out. The same position obtains even after a proceeding for contempt is initiated by the Court on a motion made to it for the purpose."* We do not propose to burden this judgment by a catena of other decision on this aspect but suffice is to mention at this stage that these are the general principles in the light whereof, we have to consider whether vigour of Section 20 of Act, 1971 can be whittled down by applying Section 5 of Act, 1963.

28. The period of limitation prior to Act, 1971 was not prescribed in the Act of 1952 or 1926. For the first time it was introduced in Act, 1971.

29. The vires of Section 20 was challenged time and again before various High Courts and the matter also went to the Apex Court. While upholding the same, it has been said that the power of contempt conferred by the Constitution cannot be abrogated by an ordinary law but can be regulated by making a procedural enactment. It was therefore held that the procedural restrictions regarding quantum of punishment or the period within which proceedings are to be initiated cannot be said to be ultra vires of Article 215 of the Constitution.

30. At this stage, we find it appropriate to quote Section 20 of Act 1971 to find out as to what has been said therein:

*"No Court shall initiate any proceedings of contempt**, either on its own motion or otherwise**, after the expiry of a period of one year from the date on which the contempt is alleged to have been committed." (emphasis added)*

31. A perusal of the above provision shows that it restrain the Court from initiating any proceedings for contempt either on its own motion or otherwise after the expiry of a period of one year from the date on which the contempt is alleged to have been committed. The mandate is that the Court would have no jurisdiction whatsoever to initiate proceedings under Act 1971 if the period as prescribed therein has expired. The period of one year would commence on the date when the contempt that is defiance or disobedience of the Court's order alleged to have been committed. Therefore, the date of commencement is the deliberate disobedience or defiance of the Court's order by the alleged

contemnor. This complaint that the alleged contemnor has disobeyed or defied deliberately order of the Court can be brought to the notice of the Court either by the informant or the Court can take cognizance on its own motion when such fact comes to its notice suo-motu or otherwise. If the defiance or disobedience remains hidden for a longer time, in our view that would not make the period under Section 20 to commence since defiance or disobedience is directly connected with the knowledge of such defiance to the informant or the Court as the case may be and therefore, we have to apply Section 20 in a manner that it may be functional and workable in a reasonable and appropriate manner meaning thereby it is not the mere date of defiance or disobedience but the date on which such defiance or disobedience comes to the notice of the informant or the Court as the case may be. If the application therefore is filed within one year from the date when such defiance or disobedience come to the notice of the informant or the cognizance is taken by the Court on its own motion within one year from the date this fact is brought to its notice that the alleged contemnor has defied or disobeyed deliberately an order of the Court, the proceedings would not be barred by Section 20 of Act 1971.

32. Section 20 of the Act is mandatory in the sense that if the proceedings are sought to be initiated after expiry of one year form the date the alleged contempt has been committed, it would be beyond the jurisdiction of the Court to initiate such proceedings, but the said proposition has to be considered in a reasonable manner, in the light of the purpose and objective for which the above provision has been made. It applied to both the situations where the Court proceeds on its own motion suo motu or on the application made by a person aggrieved. This provision appears to have been enacted pursuant to the Sanyal Committee Report. The Act, 1971 lays down a different Scheme with regard to contempt of Courts than prevalent before. The preamble to the Act says, "an Act to define and limit the powers of certain Court in punishing for contempt of Courts and to regulate their procedure in relation thereto". This is an exhaustive Act providing for the procedure in relation to the contempt of Courts.

33. With reference to the application of Section 5 of Act 1963, it appears that entire emphasis has been placed on the observation of the Apex Court in **Pallav Sheth (supra)** whereby in paras 46,47 and 48 of the judgment, it has referred to Section 29(2) of Act 1963 and thereby has observed that Section 17 of the Act 1963 would be applicable in the case in hand and therefore the fraud perpetuated by the appellant Pallav Sheth would not give him any benefit to claim the benefit of limitation running in his favour by virtue of such fraud. We have to consider whether the effect of the above observation is that Section 5 of Act 1963 can be said to be applicable so as to take away the effect and mandate of Section 20 of Act 1971. Since the Court has referred in this regard **Kartik Chandrara Das (supra),** its earlier judgment, in order to appreciate **Kartik Chandra Das** and other judgments of the Apex Court cited at the bar, delivered prior to **Pallav Sheth (supra)** it would be necessary to look into those authorities and thereafter it would be proper to consider the consequences and to see how these statutes can be read in harmony.

34. In **Kartik Chandrara Das (supra),** contempt proceedings, were initiated by Kartik Chandra Das. The State of West Bengal, against notice of contempt issued by Single Judge, filed a Letters Patent appeal which the Division Bench dismissed observing that the delay in filing letters patent appeal is non condonable as Section 5 of Act 1963 does not apply. In appeal before the Apex Court, it was admitted that an appeal under Section 19 of Act, 1971 would lie to the Division Bench and limitation of 30 days from the date of the order has been prescribed subject to the exclusion of the time taken for obtaining the certified copy thereof. The Appellate Side Rules of the Calcutta High Court were also placed before the Apex Court showing that the application of the Limitation Act was not excluded therein. Considering Rule 3 Chapter VIII of the Appellate Side Rules under the Letters Patent , the Apex Court held that the Division Bench was, therefore, right in holding that the Limitation Act was not extended for an appeal filed under Clause 15 of the Letters Patent against the order passed by the Learned Single Judge under the provisions of the Contempt of Courts Act. However, the Calcutta High Court had also framed rules under the Contempt of Courts Act and Rule 35 thereof provided as under:

"In respect of appeals from the orders of any Judge or Bench of the original side the rules of the original side relating to appeals and in respect of appeals from the order of any Judge or Bench of the appellate side, the rules of the Appellate Side shall apply mutatis mutandis".

35. In view of Rule 35, the Apex Court found that the procedure prescribed on the appellate side would be applicable and has to be followed in respect of an appeal filed under Section 19 of Act 1971. Thereafter the Court referred to Section 29 of Act 1963 and relying on sub-Section (2) thereof held that for the limitation prescribed under section 19 of Act 1971, which is a special law, Sections 4 to 24 of Act 1963 would be attracted by virtue of Section 29 (2) read with Section 3 of 1963 to the extent they are not expressly excluded by such special or local law. It further held that the rules made on the Appellate Side for entertaining Letters Patent appeal under Clause 5 or appeals under Section 19 of Act 1971 had not expressly excluded Section 5 of Act 1963, it would apply to the appeals filed against the order of the Learned Single Judge for the enforcement by a way of contempt and the High Court was not right in holding that Section 5 of Act 1963 would have no application.

36. Section 29, sub-section (2), of Act 1963 clearly provides where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Section 4 to 24 (inclusive) shall apply insofar as, and to the extent to which they are not expressly excluded by such special or local law. A perusal of Section 29 read with Section 3 of Act 1963 would show that the bar of limitation therein is in

respect of suit, appeal or application. Though, the term 'suit' has not been defined but Section 3 (2) specify that for the purpose of Act 1963 when a suit would be treated to have been instituted and it reads as under:

"3 (2)For the purposes of this Act,--
(a) a suit is instituted,--
i. in an ordinary case, when the plaint is presented to the proper officer;
ii. In the case of a pauper, when his application for leave to sue as a pauper is made; and
iii. in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator;
(b) any claim by way of a set-off or a counter-claim, shall be treated as a separate suit and shall be deemed to have been instituted,--

i. in the case of a set-off, on the same date as the suit in which the set-off is pleaded;
ii. in the case of a counter-claim, on the date on which the counter claim is made in Court."

37. The term application has been defined in Section 2 (b) of Act 1963 which reads as under :

"application" includes a petition."

38. This takes us to consider is whether the Limitation prescribed under Section 20 of Act 1971 can be said to be one in respect to be a 'suit' instituted, or an appeal preferred or an application made so as to attract the provisions of Sec. 4 to 24 of Act 1963 by virtue of Section 29 (2) of the Act.

39. Neither it has been argued nor learned counsel for the applicant did suggest that an application brought before the Court for initiating proceedings for contempt due to alleged disobedience or defiance of its order can be said to be a "suit instituted" or "appeal preferred". However, he strongly relied on the word 'application made' and submitted that in respect of an application made the above provisions would be applicable and such an application if made after expiry of one year from the date the contempt is alleged to have been committed, and if it is barred by Section 20 of Act 1971, it would attract Section 5 of Act 1963 by virtue of Section 29 (2) read with Section 3 of Act,1963.

40. We, however, find ourselves unable to agree with the above submissions. The prohibition contained in Section 20 is in respect of taking cognizance i.e. for initiating contempt proceeding by the Court either on its own motion or otherwise. For attracting the provisions of the Act 1971, an application by informant is not a condition precedent. The concept of initiation of contempt proceeding is not dependent on an application to be submitted by a person but the nature of application is in fact like reporting or giving information to the Court about the alleged defiance or disobedience of its order. The purpose is to bring to the notice of the Court that some one is guilty of deliberate disobedience and defiance of its order and he should be punished for contempt. That is the only purpose of an application If it is made by an individual who in effect may be said to be an informant. But even otherwise the Court on its own motion can also take cognizance of such defiance or disobedience if this fact had come to its

notice from any other source and thereupon also it can initiate proceedings for contempt.

41. In the matter of contempt of Subordinate Court it is the report of a subordinate Court which forms the basis for initiation of contempt proceedings by the Court. By no stretch of imagination, the report of the Subordinate Court can not be treated to be an application under Section 3 read with Section 2 (b) of the Act 1963 so as to attract Section 5 of Act, 1963. Similarly if the proceedings are initiated by the Court suo motu, it cannot be said that the same are preceded by any application.

42. Besides, in exercise of powers under Section 27 of the Act, 1971 this Court also has framed Rules to govern the procedural aspects for punishing a person for contempt of the Court. Chapter 35-E of the Allahabad High Court Rules 1952 (hereinafter referred to as "1952 Rules") provides that every application, reference or motion for taking proceedings under the Contempt of Court's Act, 1971 shall mention, whether it relates to commission of civil contempt or criminal contempt, and where the allegations constitute both, separate applications shall be moved. Rule 3 refers to motion or Reference u/s 15 of the Act, 1963 dealing with the criminal contempt and provides the manner in which the statement stating forth the facts constituting the contempt, of which the person charged is alleged to be guilty, have been taken. Once the Court takes cognizance on such an application, motion or reference or suo-motu, Rule V provides for framing of charge and thereafter, the matter becomes an action relating to the Court and the contemnor,. The person's application loses any significance.

43. Rule 10 Chapter 35 E makes it very clear and reads as under:

"After writing information about the commission of contempt of Court by any person or persons, the informants shall not have any right to appear or plead or argue before the Court unless he is called upon by the Court specify to do so."

44. The Apex Court has also stated, time and again that contempt is a matter between the Court and the contemnor and the person who brings to the notice of the Court about the factum of defiance or disobedience of a Court's order by a person is virtually out of picture. He can be said to be an informant but not personally interested in the matter and has no right for his own to proceed with the matter.

45. In **Mahalaxmi Sugar Mills Co. Ltd and another Vs. Union of India and others JT 2008 (6) SC 177**, the Apex Court in para 71 of the judgment said :-

"Contempt is a matter between the Court and the Contemnor."

46. In **M/s. Maruti Udyog Ltd., Vs. Mahendra C. Mehta and others JT 2007 (12) SC 27** the Apex Court quoted and followed its earlier decision in **R. N. Dey and others Vs. Bhagyabati Pramanik & ors 2000 (4) SCC 400** to the following effect:

"We may reiterate that the weapon of contempt is not to be used in abundance or misused. Normally it cannot be used for execution of the decree or

implementation of an order for which alternative remedy in law is provided for. Discretion given to the Court is to be exercised for maintenance of the Court's dignity and majesty of law. Further, an aggrieved party has no right to insist that the Court should exercise such jurisdiction as contempt is between a contemnor and the Court....."

47. The same view has been reiterated in **Jaipur Municipal Corporation Vs. C.L. Mishra 2005 8 SCC 423 ; Bank of Baroda Vs. Sadruddin Hasandaya and another 2004 (1) SCC 360 ; Commissioner, Agra and others Vs. Rohtas Singh and others 1998 (1) SCC 349 and D.N. Taneja Vs. Bhajan Lal 1988 (3) SCC 26**.

48. The nature of an application and the position of the person who moved an application before the Court for initiating contempt proceedings also came to be considered before the Apex Court in D.N. Taneja (Supra) and it was held :

"A contempt is a matter between the Court and the alleged contemnor. Any person who moves the machinery of the Court for contempt only brings to the notice of the Court certain facts constituting contempt of Court. After furnishing such information he will assist the Court, but it must always be borne in mind that in contempt proceedings, there are only two parties namely the Court and the Contemnor".

49. It was also held by the Apex Court in **D.N. Taneja (Supra)** that the person who has lodged the complaint is not entitled to a right of appeal because he was not a necessary party in contempt proceedings. The above observations of the Apex Court in **D.N. Taneja (Supra)** have been followed in **Commissioner, Agra Vs. Rohtas Singh (Supra).**

50. The term 'application' under section 3 of Act, 1963 though has not been defined except of what has been said in Section 2(b) of Act, 1963 that the application includes petition but there can be no doubt that application contemplated under Act, 1963 must be one in respect where to an applicant not only has a substantive right to move being a necessary party in the proceedings but also in case of any adverse order, he may take up the matter to the higher forum i.e. appeal etc. This is further clarified from the definition of the applicant, which is, though inclusive, but throws some light on the point and it would be useful to reproduce Section 2(a) of Act, 1963 as under:

"2(a) "applicant " includes –
(i) a petitioner ;
(ii) any person from or through whom an applicant derives his right to apply ;
(iii) any person whose estate is represented by the applicant as executor, administrator or other representative ;"

51. It would be useful to refer to the Apex Court decision in **Sheikh Saidulin (Supra)** where the Apex Court observed that the meaning of the word "applicant" could be understood in a generic sense i.e. a prayer made to an authority for some relief to set aside an order of another authority. To the same effect is the law laid down in **P. Philip Vs. The Director of Enforcement, New Delhi (1976) 2 SCC 174** where also the Court has observed that an 'application' would be a document containing certain material

facts with a prayer to the Court or the authority to grant relief or remedy based on those facts.

52. We do not find any reason to have a different view in respect to the term "application" and therefore, an application preferred by a person requesting the Court to initiate contempt proceedings against someone who has violated deliberately Court's order cannot be said to be an 'application' referred to in Section 3 read with Section 2(b) of Act, 1963.

53. In **Shaik Saidulu @ Saida (supra)** the matter pertains to Sections 71 and 671 of Hyderabad Municipal Corporation Act, 1955(2) and the question was whether an election petition can be treated to be an application under Section 671(2) of the said Act. Holding that the term "application" is not defined in the said Act, the Court refers to dictionary meaning of the word "application" which is "(1) a formal request to an authority (2) the action of putting something into operation, practical use or relevance , (3) the action of applying something to a surface, (4) sustained effort, (5) computing a program or piece of software designed to fulfil a particular purpose." The Court held the word 'application' could be understood in a generic sense as a prayer made to an authority for some relief to set aside an order of another authority. Relying to its earlier judgment in ***Prem Raj Vs. Ram Charan, (1974) 2 SCC***, the Apex Court observed that the plaint which makes a request to the Court is an application. However written statement was held not to be an application because it does not include any request to the Court. It also relied on **P. Philip (supra)** where it was held that term "application" is synonymous with the term "petition" which means a written statement of material facts, requesting the Court to grant the relief or remedy based on those facts. It is a peculiar mode of seeking redress recognized by law. The Court therefore, held that an election petition would be covered by the word "application" used in Section 671 of the aforesaid act and any other view would amount to adopting a hyper technical approach which would defeat the very purpose of the Act and the provisions made therein for disputing the authenticity and the conduct of the election. Thereafter the Apex Court also referred to Act 1963 and observed that a term "application" having been defined therein which includes a petition, therefore it would be just and proper to include election petition in the word "application", and in these circumstances, the Court held that Section 71 would stand attracted with regard to limitation for filing election petition and would also attract Section 5 of Act 1963, since there was no express exclusion of the provisions of Limitation Act 1963.

54. That being the position, the question would be whether in such cases, Section 5 of Act 1963 by virtue of Section 29(2) read with Section 3 would have any application to Section 20 of Act 1971. The answer is clearly no. The period prescribed under Section 20 is not in respect to an application, suit or appeal but it restrain the Court from initiating contempt proceedings after expiry of one year from the date of the alleged contempt. It is not a restraint in respect to any suit, appeal or application. Prohibition under Section 20 of Act 1971 is applicable in such matters also where the proceedings are initiated by the Court

suo moto. To limit the prohibition under Section 20 and to attract Act, 1963 only in such cases where the proceeding for contempt are initiated on an application given by a person, by including the said application in the definition of "application" under Section 2 (b) of Act 1963 and not in other case where the proceedings have been initiated on its own motion, would neither be conducive to the harmonious construction of the provision of Act 1971 and Act 1971, nor permissible. As we have already said, an application for initiating proceedings under Section 20 of Act 1971 and Act is in the nature of an information to the Court about the disobedience or defiance of the Courts' order by the alleged contemnor. Thereafter the matter is between the Court and the contemnor. This by itself shows that it is not an application to which Sections 3 and 5 of Act 1963 are applicable. Therefore, even if it is to be held that Section 29 (2) of Act 1963 makes applicable the provisions of the said Act to the appeals under Section 19 of the Act 1971, the same cannot be extended to the provisions of Section 20 of Act 1971 since the Limitation prescribed therein is not in respect to any application made or suit filed or appeal preferred but the period prescribed therein is in respect to the initiation of proceeding for contempt by the Court either on its own motion or otherwise. In view of the above, Section 5 of Act 1963 would have no application at all. Section 5 of Act 1963 empowers the Court to condone delay to an "appeal" or "application" other than an application under any provision of the order 21 C.P.C. if filed after the prescribed period. Since, we have held that Section 20 of Act 1971 does not talk of any "appeal" or "application", ex-facie we have no manner of doubt that in the matter of Section 20 of Act 1971, neither Section 3 nor Section 5 of Act 1963 would have any application.

55. So far as Section 17 of Act, 1963 it has been applied by the Apex Court in **Pallav Sheth (Supra).** From a careful reading of the judgment, it would be evident that the Court has no where said that the provisions of Act, 1963 ipso facto would apply to all the proceedings under Act, 1971. It has referred to **Kartik Chandra Das (Supra)** observing that for the purpose of appeal under Section 19 of the Act, 1971, in absence of any exclusionary provision, by virtue of Section 29 (2) read with Section 3 of Act, 1963, the provisions of Section 5 can be extended giving power to the Court to condone delay in filing appeal, but the same as such would have no application so far as Section 20 of 1971 is concerned. The reference to Section 17 has been made to stress the proposition that if a fraud would not benefit a person for any purpose whatsoever. It is well settled that a judgment is not to be read as a statute. Each and every "word" of the judgment are not to be construed like the provisions of a legislation which has to be given effect.

56. It is repeatedly held by the Apex Court that the precedent binding on the Courts is the exposition of law laid down by the Apex Court and binding precedent would be when an issue is raised, argued and decided. A difference in a fact or circumstance makes a world's difference. In **Escorts Ltd Vs. Commissioner of Central Excise , Delhi-II JT 2004 (9) SC 265** it was held :

"Circumstantial flexibility, one additional or different fact may make a

world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper."

57. In **Pallav Sheth (Supra)** the issue raised before the Apex Court was as to when the period of one year under section 20 of Act, 1971 would commence so as to attract the prohibition of initiation of proceedings after one year provided therein, and also, when it would be said that the Court has initiated proceedings for contempt. The Court held that the Act of disobedience or defiance would be said to have taken place when the said fact comes to the knowledge of the informant and as soon as an application is moved before the Court by the individual or in a matter of criminal contempt, on the application moved before the Advocate General or in the matter of contempt of subordinate Court when the reference is made by the sub-ordinate Court and in the matter of suo-motto action taken when the notice is issued by the Court, it would be said that the contempt proceedings have been initiated by the Court. The question as to whether Section 5 of Act, 1963 would be applicable when an application is filed for initiating contempt after expiry of one year as contained a Section 20 of Act, 1971 was not at all an issue raised in the above case.

58. At this stage, we may also notice that in **Om Prakash Jaiswal Vs. D.K. Mittal & another AIR 2000 SC 1136** in para 15 of the judgment, the Apex Court considered the applicability of Section 5 of Act, 1963 to Section 20 of Act, 1971 and held "The heading of Section 20 is 'limitation for actions for contempt'. Strictly speaking this section does not provide limitation in the sense in which the term is understood in the Limitation Act. Section 5 of the Limitation Act also does not, therefore, apply. Section 20 strikes at the jurisdiction of the Court to initiate any proceeding for contempt."

59. This judgment also held that mere filing of application or petition for initiating proceeding for contempt or a mere receipt of reference by the Court does not amount to initiation of the proceedings. However, this part of the finding in **Om Prakash Jaiswal (supra)** has been overruled by the Apex Court in **Pallav Sheth (supra)** as is evident from para 42 and 44 of the judgment which are reproduced as under :

"42. *The decision in Om Prakash Jaiswal's case (2000 AIR SCW 722: AIR 2000 SC 1136 : 2000 Cri LJ 1700 (supra), to the effect that initiation of proceedings under Section 20 can only be said to have occurred when the Court formed the prima facie opinion that contempt has been committed and issued notice to the contemner to show-cause why it should not be punished, is taking too narrow a view of Section 20 which does not seem to be warranted and is not only going to cause hardship but would perpetrate injustice. A provision like Section 20 has to be interpreted having regard to the realities of the situation. For instance, in a case where a contempt of a subordinate court is committed a report is prepared whether on an application to Court or otherwise, and reference made by the subordinate court to the High Court. It is only thereafter that a High Court can take further action under Section 15. In the process, more often than not, a period of one year elapses. If the interpretation of Section 20 put in Om Prakash Jaiswal's case (supra) is correct,*

it would mean that notwithstanding both the subordinate court and the High Court being prima facie satisfied that contempt has been committed the High Court would become powerless to take any action. On the other hand, if the filing of an application before the subordinate court or the High Court making of a reference by a subordinate court on its own motion or the filing an application before an Advocate-General for permission to initiate contempt proceedings is regarded as initiation by the Court for the purposes of Section 20, then such an interpretation would not impinge on or stultify the power of the High Court to punish for contempt which power, dehors the Contempt of Courts Act 1971 is enshrined in Article 215 of the Constitution. Such an interpretation of Section 20 would harmonise that section with the powers of the Courts to punish for contempt which is recognised by the Constitution."

*"**44.** Action for contempt is divisible into two categories, namely, that initiated suo motu by the Court and that instituted otherwise than on the Court's own motion. The mode of initiation in each case would necessarily be different. While in the case of suo motu proceedings, it is the Court itself which must initiate by issuing a notice. In other cases initiation can only be by a party filing an application. In our opinion, therefore, the proper construction to be placed on Section 20 must be that action must be initiated, either by filing of an application or by the Court issuing notice suo motu, within a period of one year from the date on which the contempt is alleged to have been committed."*

60. With reference to finding of the Apex Court in **Om Prakash Jaiswal (supra)** in respect to application of Section 5 of the Act, 1963, we do not find that the Apex Court in **Pallav Sheth (supra)** noticed any disagreement to the same. Further, while interpreting Section 20 of Act, 1971 in the light of Article 215 and/or 129 of the Constitution, it was observed that the procedure prescribed by Act, 1971 had to be followed even in exercise of the jurisdiction under Article 215 of the Constitution. It is, therefore, Section 20 is to be so interpreted that it does not stultify the power under Article 129 or 215. Like other provisions of Act, 1971 relating to the extent of punishment which can be imposed, a reasonable period of limitation can also be provided. The underlying principle in respect to prescription of limitation under Section 20 is that a litigant must act diligently and not sleeps over its right. If a party has acted with utmost diligence, it would cause great hardship if for the inaction on the part of the Court, a contemner escaped despite of having committed gross contempt. The Apex Court observed that what sought to be argued by learned counsel for the appellant in **Pallav Sheth (supra)** if accepted would mean that Court would be rendered powerless to punish even though it may be fully convinced for the blatant nature of a contempt having been committed and the same having been brought to the notice of the Court soon after the committal of the contempt and within the period of one year thereof. In these circumstances, the Apex Court read Section 20 consistence with Article 129 and 215 and said in para 41 of the judgment as under :

*"**41**. .....Section 20, therefore, has to be construed in a manner which would avoid such an anomaly and hardship both as regards the litigant as also by placing a pointless fetter on the*

part of the Court to punish for its contempt. An interpretation of Section 20, like the one canvassed by the Appellant, which would render the constitutional power of the Courts nugatory in taking action for contempt even in cases of gross contempt, successfully hidden for a period of one year by practising fraud by the contemner would render Section 20 as liable to be regarded as being in conflict with Art. 129 and/or Art. 215. Such a rigid interpretation must therefore be avoided."

61. In this regard, we may also notice that there was a Full Bench decision of Hon'ble Kerala High Court in **Mayilswami Vs. State of Kerala 1995 Cri LJ 3830 (FB)** holding that limitation prescribed under Section 20 of Act, 1971 is not applicable when the action is taken under Article 129 or 215 of the Constitution but in view of the subsequent law laid down by the Apex Court, recently another Full Bench in **P. Damodaran Vs. Cherkalam Abdulla and others AIR 2007 Kerala 153** has observed that the earlier decision is no more good law in view of the Apex Court decision in Om Prakash Jaiswal (supra) and Pallav Sheth (supra) as is evident from the following :

"It is true that contrary view expressed by the Full Bench of this Court in Mayilswami v. State of Kerala (1995 (2) KLT 178) : (1995 Cri LJ 3830 (FB) that limitation prescribed under Section 20 of the Contempt of Courts Act is not applicable when action is taken under Article 129 or 215 of the Constitution of India is no more good law in view of the judgment of the Apex Court in Om Prakash Jaiswal v. D.K. Mittal (2000) 2 SCC 171 : (AIR 2001 SC 1136). The above dicta with regard to the application of Section 20 was affirmed by the three member bench decision of the Apex Court in Pallav Sheth v. Custodian. (2001) 7 SCC 549 : (AIR 2001 SC 2763) even though three member Bench had differed with the view in Om Prakash Jaiswal's case (supra), with regard to the question of starting point of limitation and the meaning of the word 'initiate' appearing in Section 20 of the Act."

62. The applicability of Section 5 of Act, 1963 with respect to Section 20 of Act, 1971 also came to be considered before a Division Bench of Hon'ble Orissa High Court in **Khemchand Agarwal Vs. Commissioner, Irrigation & another 2004 (17) AIC 684** wherein it was held that Section 5 has no application as is evident from the following :

"Section 5 of the Limitation Act has no manner of application to a proceeding under the Contempt of Courts Act."

63. It has been repeatedly held by the Apex Court that a decision is an authority of what it actually decides and not what logically follows. (See **State of Orissa Vs. Sudhanshu Shekhar Misra and others AIR 1968 SC 647, Union of India Vs. Dhan Devi 1996 (6) SC 44** and **State of Orissa Vs. Md. Illiyas JT 2005 (10) SC 64).** A careful reading of judgment in Pallav Sheth (Supra) also makes it clear that the Apex Court has taken recourse to Section 17 of Act, 1963 in furtherance of the well accepted principal of law in the matter of fraud and fraudulent activities that fraud vitiates everything and therefore, if a person has been successful in concealing or hiding some fact by playing fraud, he cannot be allowed to take advantage of such

fraudulent act on his part. Section 17 of Act, 1963 recognizes the said principle and this has been taken note of by the Apex Court to stress that the benefit of fraudulent activities cannot be availed by the person who is guilty of such fraud. It would be extending or enlarging the said proposition to an extent neither permissible nor warranted otherwise if we construe the said observations to hold that it has the affect as if the Apex Court has held that wherever any limitation is prescribed under Act, 1971 including Section 20, the provisions of Act, 1963 from Section 4 to 24 (inclusive) shall be applicable to such proceedings.

64. Section 17 of Act 1963, which has been made applicable by the Court in **Pallav Sheth(supra)** is not in the sense as if the provisions of Act 1963 have been held in entirety to to Section 20 of Act 1971. It would have to be understood in the context that the Court held that a party cannot benefit itself if a fraud has been played by it . It has referred to Section 17 of Act 1963 observing that this provision embodies fundamental principles of justice and equity, viz. that a party should not be penalised for failing to adopt the legal proceeding if material necessary for him to do so has been wilfully concealed from him and a party who has played fraud should not be allowed to gain benefit on account of his fraud. The Apex Court while referring to Section 29 (2) and Section 17 of Act has neither any occasion to consider as to whether delay in initiation of proceedings under Section 20 can be condoned by taking recourse to Section 5 of Act 1963 nor the said question was up for consideration before the Court. The reference to Section 29(2), 3 and 17 is in the context of the question as to whether the delay occurred due to fraud played by one of the party can be allowed to benefit such party who is guilty of playing such fraud.

65. In **Khemchand Agarwal (supra)** referring to **Pallav Sheth (supra),** the Hon'ble Orissa High Court also said that as per the Apex Court decision, Section 17 of the Limitation Act will apply to a contempt proceeding in case of fraud and not otherwise. Thereafter, observing that since no case of fraud was pleaded before the Court in Khemchand Agarwal (supra), it held that there was no question of applying the provisions of Limitation Act therein. For the purpose of holding that Section 5 of Act, 1963 has no application, the Hon'ble Orissa High Court also referred to the Apex Court decision in Om Prakash Jaiswal (supra) as is evident from para 7 of the judgment, which reads as under :

"7. In another judgment of the Supreme Court in Om Prakash Jaiswal v. D.K. Mittal and another, it has clearly been laid down that section 20 of the Act is applicable to a proceeding for Contempt of Court. It has further been held that section 20 does not provide limitation in the sense in which the term is understood in the Limitation Act and therefore, section 5 of the Limitation Act does not apply to section 20 of the Contempt of Courts Act. In fact, the Supreme Court held in this judgment that section 20 of the Act strikes at the jurisdiction of the Court to initiate any proceedings for contempt and section 5 of the Limitation Act has no manner of application thereto."

66. There is another reason for taking the above view. Section 29(2) of Act, 1963 provides that Sections 4 to 24

(inclusive) shall apply only in so far as and to the extent to which they are not expressly excluded by such special or local law. From the very reading of Section 20 of Act 1971, we are of the view that it expressly excludes the power of the Court to condone delay in giving to itself jurisdiction to initiate proceedings for contempt after expiry of one year from the date the contempt is alleged to have been committed. Applicability of Section 5 of Act, 1963 to the bar contained in section 20 of Act, 1971 would make the mandate contained therein illusory for all purposes. Where the language of the statute is clear, it is not for the Court to interpret the provision of statute in a manner which would completely destroy the express provision of the statute. Reading Section 20 of Act 1971 in consonance with Section 29 (2) and 17 of Act 1963, it can be said that it excludes the period taken beyond one year by a person in moving application, due to lack of information on account of the fraud played by the alleged contemnor and the benefit of Section 17 may be stretched to what extent as there is nothing contrary in Section 20 to exclude section 17 from its application but it does not mean that Section 5 can also be placed on the same pedestal since the purpose and object of Section 5 is totally different.

67. A Single Judge of Hon'ble Rajasthan High Court (Dr. B.S. Chauhan, J.- as his Lordship then was) in **Devi Kishan Vs. Madan Lal Verma 2000 Cri. L.J. 3619** has also considered the question of applicability of Section of Limitation Act to Section 20 of the Act, 1971 and his Lordship has said that the same has no application at all.

68. Now in the light of the above discussion, we proceed to consider the various other authorities cited at the Bar. In **Mangu Ram(supra)** Section 5 of Act 1963 was made applicable in respect of the "application" for special leave against acquittal under Section 417 Cr.P.C. 1898 and the Court applied the provisions of the Act 1963 observing as under:

"It is true that the language of sub-section (4) of Section 417 is mandatory and compulsive, in that it provides in no uncertain terms that no application for grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of sixty days from the date of that order of acquittal. But that would be the language of every provision prescribing a period of limitation. It is because a bar against entertainment of an application beyond the period of limitation is created by a special or local law that it becomes necessary to invoke the aid of Section 5 in order that the application may be entertained despite such bar. Mere provision of a period of limitation in howsoever peremptory or imperative language is not sufficient to displace the applicability of Section 5. The conclusion is, therefore, irresistible that in a case where an application for special leave to appeal from an order of acquittal is filed after the coming into force of the Limitation Act, 1963, Section 5 would be available to the applicant."

The above observations are self explanatory.

69. In **Vijay Gupta (supra)** the objection filed before the Competent Authority under M.P. Ceiling on Agricultural Holdings Act, 1960 was held

to be a 'petition' that is an 'application' and therefore the Court held that Section 5 of the Act, 1963 by virtue of Section 29 (2) would be applicable as there is no express exclusion of the provisions of Act 1963.

70. In **Mukari Gopalan (supra)** again it was an 'appeal' under Kerala Buildings (Lease and Rent Control) Act, 1965. It was held by the Court that in view of lack of any express exclusion of the provisions of Act 1963, Section 5 of Act 1963 would apply to such an appeal.

71. In **Shanti Lal M. Bhayani (supra)**, the application of Section 5 of Act 1963 was considered in respect to an 'appeal' preferred under Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 and noticing that there was no express exclusion in the said act, the provisions of Act 1963 by virtue of Section 29(2) would bring in Section 5 of the said Act also.

72. This also makes it clear as to why in **KartiK Chandra Das (supra)** the Apex Court with reference Section 29 (2) read with Section 3 of Limitation Act of 1963 made applicable Section 5 of Act 1963 to an appeal preferred under Section 19 of Act 1971.

73. In **Western Builders (supra),** the question was about the applicability of Section 14 of Act 1963 to the proceedings under arbitration and conciliation Act, 1996. The Apex Court held in para 19 as under:

"There is no provision in the whole of the Act which prohibits discretion of the Court. Under Section 14 of the Limitation Act if the party has been bona fidely prosecuting his remedy before the Court which has no jurisdiction whether the period spent in that proceedings shall be excluded or not. Learned counsel for the respondent has taken us to the provisions of the Act of 1996: like Section 5, Section 8(1), Section 9, Section 11, sub-sections (4),(6),(9) and sub-Section(3) of Section 14, Section 27, Sections 34, 36, 37, 39(2) and (4), Section41, sub-section(2), Sections 42 and 43 and tried to emphasise with reference to the aforesaid Sections that wherever the legislature wanted to give power to the Court that has been incorporated in the provisions, therefore, no further power should lie in the hands of the Court so as to enable to exclude the period spent in prosecuting the remedy before other forum. It is true but at the same time there is no prohibition incorporated in the statute for curtailing the power of the Court under Section 14 of the Limitation Act. Mush depends upon the words used in the statute and not general principles applicable. By virtue of Section 43 of the Act of 1996, the Limitation Act applies to the proceedings under the Act of 1996 and the provisions of the Limitation Act can only stand excluded to the extent wherever different period has been prescribed under the Act, 1996. Since there is no prohibition provided under Section 34, there is no reason why Section 14 of the Limitation Act (sic not) be read in the Act of 1996, which will advance the cause of justice. If the statute is silent and there is no specific prohibition then the statute should be interpreted which advances the cause of justice".

74. The above authority also therefore has no application in this case, since therein. It is not is dispute that the matter relates to an applications(petition)

filed before the civil court for setting aside the award.

75. Thus, the judgment in **Pallav Sheth (supra),** in our view, cannot be said to be an authority on the question as to whether the provisions of Section 5 of Act 1963 would have application where the contempt proceedings are initiated after expiry of the period of one year from the date of alleged contempt that is Section 20 of Act 1971. The above judgment is an authority for the proposition that contempt proceedings would be deemed to have been initiated by the Court when (1) an application is filed before the Court by an individual for bringing to its notice the disobedience or defiance of its order and requesting for punishing the contemner for committing contempt of the Court; (2) in a matter of criminal contempt when an application is moved before the Advocate General or when the Court permits to move before it directly; (3) in the matter of contempt of subordinate court when reference is made by the subordinate court; and (4) in the matter of suo motu action, when the notice is issued by the Court. The Apex Court said that if the above actions are taken within one year from the date, contempt is alleged to have been committed, the application would be deemed to be within the time prescribed under Section 20 of Act, 1971. It also says where the defiance or disobedience could not come to the knowledge of the applicant or the Court due to fraud played by the contemnor, the date of knowledge shall be treated to be the date when contempt is alleged to have been committed.

76. We, therefore, answer both the questions referred by the Hon'ble Single Judge in negative and hold that for the purpose of Section 20 of Act 1971, the Act 1963 and its provisions (except-Section 17) have no application whatsoever. The law laid down by the Apex Court in **Pallav Sheth (supra)** does not make Section 5 of Act 1963 applicable and would not confer power upon the Court to condone or waive delay where proceedings of contempt are sought to be initiated under Act 1971 after one year from the date when the contempt is alleged to have been committed.

77. Let the record of this matter be placed before the Hon'ble Single Judge for proceedings with the matter further in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.07.2009

BEFORE
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No. 8175 of 1993

Abodh Narain ...Petitioner
Versus
The Deputy Director of Consolidation, Farrukhabad at Fatehgarh and others ...Respondents

Counsel for the Petitioner:
Sri S.C. Verma

Counsel for the Respondents:
Sri Sanjeev Trivedi
Sri Brijesh Sahai
Sri Arvind Kumar Srivastava
S.C

U.P. consolidation of Holdings Act-Section 21 (3) read with Consolidation Rules-Rule 24 (d)-Spot Inspection-Chak allotment-plot No.88 area 0.38 acre situated adjacent to road-pacca

construction surrounded with boundary wall out of 0.38 Acre only 0.06 acre allotted ignoring the claim of petitioner-application for spot inspection also rejected by the consolidation authority without discussion of hardship of petitioner-and the reasons for not allotting major position of plot no. 88-held-order not sustainable-direction to decide as fresh in the light of observation within period of 3 months.

Held: Para 6 & 7

After hearing learned counsel for parties and after perusal of record, it is clear that original holding of petitioner was Ghata No. 88 and from perusal of Form 23, it is clear that total areas was 0.38 acre. Admittedly that Ghata number is on the main road and therefore, if there was a demand by petitioner, to that effect to allot major portion of that original holding that should have been considered by the consolidation authorities. Though the settlement officer (consolidation) in the appeal has observed such and has given a finding but in spite of the aforesaid fact, has given only 0.06 acres on the Ghata No. 88. The Deputy Director of Consolidation in spit of application submitted by petitioner for spot inspection regarding verification has rejected the claim of petitioner and has not made any spot inspection.

In view of aforesaid fact and on the basis of judgment cited by learned counsel for petitioner, I am of opinion that orders passed by respondents are not sustainable in law and is hereby quashed.

Case law discussed:

2006 (101) R.D. 671, 1996 (Supplement) R.D. 559.

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

1. Heard learned counsel for petitioner, learned counsel for respondents and learned Standing Counsel.

2. This writ petition has been filed for quashing the order dated 1.12.1991 (Annexure 9 to writ petition) passed by respondent No. 1. Further, order dated 5.8.1987 (Annexure 4 to writ petition) passed by respondent No. 2 and order dated 20.10.1986 (Annexure 1 to writ petition) passed by respondent No.3.

3. It appears that petitioner is a sole tenant of original Plot No. 88 area 0.38 acre situated on G.T. Road and in adjoining to U.P. Tourist Bunglow. The plot is surrounded by pucca boundary wall. During consolidation operation, petitioner was assured that he will be given the said plot. An objection to that effect was filed by petitioner under Section 20 of the Act but the said objection was rejected vide its order dated 20.10.1986 by a non-speaking and non-reasoned order. Then petitioner filed an appeal. Appellate Court though has held that original holding of petitioner is plot No. 88, therefore, that particular plot be allotted according to Form 23 but at the time of amendment, only 0.06 acre was allotted in Plot No. 88 and similar area has been allotted to respondents though it does not belong to respondents. Petitioner has also submitted an application for spot inspection but that was not done. Aggrieved by aforesaid order, petitioner filed a revision. Revisional Court in spite of fact that petitioner has made an application for spot inspection and this fact has been mentioned by revisional court, has held that there is no necessity to increase the area according to valuation and the area allotted during consolidation operation, is correct. Though, nothing has been recorded by Deputy Director of

Consolidation that from Ghatta Section 88 some area has been reduced and petitioner has been adjusted in his original holding at Ghata No. 94. In such situation, there is no necessity to any amendment.

4. Learned counsel for petitioner submits that consolidation authorities are bound to record reason, if they refuses, demand made by a person to allot land of his original holding, which stood by the road side. A reasoned order to that effect be passed by not accepting the request and demand made by the effected person. In the present case also, petitioner has made an application for spot inspection before the appellate court as well as before the Revisional court but without making spot inspection, claim of petitioner has been rejected. Reliance has been placed upon a judgment of this Court in ***Raja Ram (Dead) through Lrs. Vs. Deputy Director of Consolidation, Mirzapur and others*** reported in 2006 (101) R.D. 671. Placing reliance upon the aforesaid judgement learned counsel for petitioner has relied upon para 6 of the said judgement. The same is quoted below:-

"6. Reliance has been placed on various decisions of this Court, Chhedi Lal v. Deputy Director, Consolidation and others. This Court had ruled that the guidelines contained in the Government Order dated 26.5.1981 are to be strictly adhered to as it has been enacted in 26.5.1981 are to be strictly adhered to as it has been enacted in confirmation and to give effect to the intention of the Act and the provisions of section 19. I have perused the said Government Order and on a close examination of the orders of the consolidation authorities, impugned in the writ petition, I am satisfied that the orders have not been passed in accordance with law and without considering the specific objection. This Court had set aside the order of the consolidation authorities on the ground that no reasons were recorded for declining to allot the area demanded by the petitioner of his original holding, which stood by the road side. In absence or any valid reason to decline the request of the petitioner, the order was held to be unsustainable in law and consequently was set aside. In another writ petition, Nathunee and others v. Deputy Director of Consolidation Ghazipur and another, the Court had quashed the order of the Consolidation authority as the impugned orders in the said writ petition were without application of mind and without assigning any appropriate reason and considerint the comparative hardship, which was to be faced by the parties. The authorities having failed to take into consideration this aspect, the order stood vitiated in law. Similar view has been expressed in the case of Rajendra Singh and others Vs. Deputy Director of Consolidation and others. For a ready reference, paragraph 8 of the said judgment is quoted below:-

"A perusal of the impugned order of the Deputy Director of Consolidation goes to show that no reason has been recorded by the Deputy Director of Consolidation. The only reason recorded for allowing the revision is hat claim made by the revisionists (respondents herein) is genuine. Apart from that there is no discussion by the Deputy Director of Consolidation about the claim of the parties nor any other reason has been given. The specific objection of the petitioners that order of settlement Officer, Consolidation is based on the basis of compromise between the parties, though has been noted by the Deputy

Director of Consolidation but no finding has been returned on the said issue. It was incumbent upon him to have considered the fact whether the order of the Settlement Officer, Consolidation was based on compromise between the parties or not. He was also reluired considering the case of the petitioners before reaching to any conclusion. A perusal of the judgement also indicates that no spot inspection was done by the Deputy Director of Consolidation. The allegation of the contesting respondents that they have been allotted a multi-cornered chak could have been easily verified by the Deputy Director of consolidation by making a spot inspection which he failed to do so."

5. Further decision has been relied upon by learned counsel for petitioner in ***Rajendra Prasad Shukla Vs. Deputy Director of Consolidation reported in 1996 (Supplement) R.D. 559.*** It has been held that in case an application for spot inspection is made, it is incumbent on the part of the consolidation authority to make an spot inspection. If that has not been done, the order is liable to be quashed. Placing reliance upon the aforesaid judgement learned counsel for petitioner submits that spot inspection by consolidation authorities is must in case application has been filed. If the spot inspection has not been made that is breach of universal principles and in violation of Section 21 (3) and Rule 24 (d) of the Act. In such situation, learned counsel for petitioner submits that orders passed by respondents is liable to be quashed.

6. After hearing learned counsel for parties and after perusal of record, it is clear that original holding of petitioner was Ghata No. 88 and from perusal of Form 23, it is clear that total areas was 0.38 acre. Admittedly that Ghata number is on the main road and therefore, if there was a demand by petitioner, to that effect to allot major portion of that original holding that should have been considered by the consolidation authorities. Though the settlement officer (consolidation) in the appeal has observed such and has given a finding but in spite of the aforesaid fact, has given only 0.06 acres on the Ghata No. 88. The Deputy Director of Consolidation in spit of application submitted by petitioner for spot inspection regarding verification has rejected the claim of petitioner and has not made any spot inspection.

7. In view of aforesaid fact and on the basis of judgment cited by learned counsel for petitioner, I am of opinion that orders passed by respondents are not sustainable in law and is hereby quashed.

8. The writ petition is allowed. Order dated 1.12.1991 (Annexure 9 to writ petition) passed by respondent No. 1, order dated 5.8.1987 (Annexure 4 to writ petition) passed by respondent No. 2 and order dated 20.10.1986 (Annexure 1 to writ petition) passed by respondent No.3 are hereby quashed and matter is remanded back to the consolidation officer for decision as a fresh in accordance with law after giving opportunity to petitioner.

9. As the matter is very old, it should be decided within three months from the date of production of certified copy of this order.

No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.07.2009

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

Civil Misc. Writ Petition No. 20282 of 1990

Amber Kumar Jain ...Petitioner
Versus
The State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri G.N. Verma
Sri A.N. Verma

Counsel for the Respondents:
S.C.

U.P. Imposition of Ceiling Act 1960 Section 38-B-Bar of subsequent proceeding-principle of resjudicata-scope and ambit explained-once the order passed by appellate authority-become final-can not be subjected to fresh notice for determination of surplus land-held-proceeding on same ground not maintainable.
Case law discussed:
2002 (93) R.D. 663, AIR 1999 SC 2264, AIR 2004 SC 2186.

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

Heard learned counsel for the parties.

Proceedings for determination and declaration of surplus land with the petitioner under U.P. Imposition of Ceiling of Land Holding Act, 1960 were initiated. Prescribed Authority, Jansath, District Muzzafarnagar through order dated 20.05.1976 held that petitioner possessed about 23 *bighas* land as surplus land. Against the said order, petitioner filed appeal being Ceiling Appeal No. 780 of 1976. One more appeal was also filed against the same judgment number of which appears to be 81 of 1976 . III Additional District Judge, Muzzafarnagar allowed both the appeals through judgment and order dated 27.09.1976 and held that petitioner did not possess any surplus land. It appears that no writ petition was filed against the judgment and order dated 27.09.1976.

However thereafter fresh proceedings were initiated against the petitioner. At the second stage, Prescribed Authority through order dated 29.04.1988 declared 22 *bighas* land as surplus almost on the same grounds on which earlier order was passed by the Prescribed Authority, which had been set aside in appeal. Against the order dated 29.04.1988, an appeal was again filed being Appeal No. 11 of 1987-88, which was allowed on 27.07.1988 and matter was remanded to the Prescribed Authority. After remand, Prescribed Authority passed order on 18.04.1990 declaring about 21 *bighas* of land as surplus land. Said order was passed in Case No. 1 of 1988-89. Against order dated 18.04.1990, petitioner filed appeal being Appeal No. 2 of 1989, which was allowed in part through judgment and order dated 25.07.1990. The said orders have been challenged through this writ petition. Appellate Court instead of 21 *bighas* 9 *biswas* 10 *biswancies* land, which had been declared as the surplus land by the Prescribed Authority, declared 12 *bighas* and odd land as surplus. Appellate Court held that from the statement of Lekhpal, it was clear the Jai Prakash son of Sukhdarshan Lal was not doing agriculture and was not having any agricultural tools or material and was not residing in the village and that land was being used by the petitioner. Petitioner

had sold property to Jai Prakash on 22.06.1972 and sale deed had been found to be quite valid and genuine through earlier judgment and order dated 27.09.1976. Accordingly, the said land could not be treated to belong to the petitioner through subsequent judgment. Subsequent judgment was completely barred by the principle of *res judicata.* In this regard, learned counsel for the petitioner has also cited an authority of this court reported in **Lady Parassan Kaur Charitable Educational Trust Society, Gorakhput Vs. State of U.P. and others, 2002 (93) R.D. 663.**

A three judges authority of the Supreme Court reported in **Devendra Nath Singh Vs. Civil Judge and others, AIR 1999 SC 2264** has held that Section 38-B of Ceiling Act, which deals with bar against *res judicata* is not applicable to the decision taken in ceiling proceedings itself and the only scope of Section 38-B of the Ceiling Act is that any finding recorded in ancillary proceedings will not operate as *res judicata in proceedings* under Ceiling Act. Para 3 of the said authority is quoted below:-

"*3. Having examined the provisions of Section 13-A and Section 38-B of the Act, we are of the considered opinion that under Section 13-A the Prescribed Authority has the power to reopen the matter within two years from the date of the notification under sub-section (4) of Section 14 to rectify any apparent mistake which was there on the face of the record. That power will certainly not include the power to entertain fresh evidence and re-examine the question as to whether the two sons, namely, Hamendra and Shailendra were major or not. The power under Section 38-B merely indicates that if any finding or decision was there by any ancillary forum prior to the commencement of the said Section in respect of a matter which is governed by the Ceiling Act then such findings will not operate as res judicata in a proceeding under the Act. That would not cover the case where findings have already reached its finality in the very case under the Act. In this view of the matter we have no hesitation to come to the conclusion that the Prescribed Authority had no jurisdiction to reopen the question of majority of the two sons in purported exercise of the power under Section 13-A. If the Authority had no jurisdiction, question of waiver of jurisdiction does not arise, as contended by learned counsel for the respondent."*

Unfortunately, without noticing the above authority Supreme Court in **AIR 2004 SC 2186 "Escorts Farms Ltd. v. Commr., Kumanon Division, Nainital",** which is a two judges authority, held otherwise. However, in the authority of Escort Farms a particular point had been assumed without determination in earlier ceiling proceedings. In that background Supreme Court held that earlier proceedings will not operate as *res judicata*. In the instant case, there was no assumption in the earlier proceedings. It was a clear cut decision on merit after discussion of evidence and the arguments of both the parties.

There is one more aspect of the matter which requires consideration. Apart from the doctrine of *res judicata,* the doctrine of binding nature of judgments of higher courts is also applicable. The judgment dated 27.09.1976 was passed by the appellate authority. Accordingly, Prescribed

Authority under the Ceiling Act could not go against the said judgment, hence fresh proceedings on the same point were not maintainable.

Accordingly, writ petition is allowed. Impugned orders are set aside.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.07.2009

BEFORE
THE HON'BLE RAKESH SHARMA, J.

Civil Misc. Writ Petition No. 27963 of 2007.

Smt. Raj Bala Sharma ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ram Shiromani Mishra

Counsel for the Respondents:
Sri V.K. Nagaich
S.C.

U.P. Government Servant Conduct Rules 1956-Rule 29 (3) (1) and (2)-Dismissal from Service-petitioner being widow working as S.I. (M) on compassionate ground-got married with one Mr. Ajeet Singh (Constable)-marriage slenderized before Court-during enquiry was found that Ajeet Singh already married having his first wife alive-never disclosed this fact-no misconduct pointed out in any manner-petitioner having one daughter of marriageable age and burden to settle two sons-except minor no major punishment could be inflicted-performance of petitioner found through and expellant-punishment of dismissal-held-harsh-direction for reinstatement with full salary issued.

Held: Para 19

This Court has also taken note of two decisions of this Court in which similar controversy has been set at rest. In 1997 All.L.J 1714 (Supra), this Court has held that no major penalty could be awarded to a government servant on contravention of provisions contained in rule 29 of the U.P. Govt. Servant Conduct Rules, 1956. Only a minor penalty as indicated in the rules could have been imposed. The punishment of dismissal in the present case is not proportionate to the charges levelled against the petitioner. The misconduct which has been imputed to the petitioner is not in any manner affecting the discharge of her official duty. No such finding has been recorded by the competent authority in this regard. The punishment of dismissal from service awarded to the petitioner appears to be harsh and it does not commensurate to the gravity of charge proved against her. The petitioner's case is squarely covered by the above said decision of this Court as well as in the light of the decision rendered by Hon'ble Apex Court in the case of Ranjit Thakur Vs. Union of India (AIR 1987 SC 2386) and other cases cited in the aforementioned judgment of this Court.

Case law discussed:
1977 ALJ 1714, AIR 1987 SC 2386.

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

1. Heard Sri Ram Siromani Misra, learned counsel for the petitioner and learned Standing Counsel representing the State.

2. The petitioner, an erstwhile Assistant Sub Inspector (Ministerial) working in 41st battalion P.A.C., Ghaziabad has assailed the order of removal dated 13.1.2006 passed by the D.I.G., P.A.C., Meerut Range, Meerut and subsequent orders passed by the appellate and revisional authorities. It was a case of a lady police official who was a widow

unknowingly, remarried to her Junior colleague one constable (M) Ajeet Singh who was alleged to be already married to someone. In place of awarding a minor penalty as provided under rule 29 of the U.P. Govt. Servant Conduct Rules, 1956, the petitioner has been dismissed from service. The punishment was too harsh and it did not commensurate to the charges levelled against her. Sub rule(3) of rule 29 of the above said rule itself provides for awarding a minor penalty of withholding of an increment for three years if the government servant violates the provisions contained in sub rules (1) and (2). The widow with two minor children could not get herself resettled in life , rather lost her job which was provided to her on compassionate ground after death of her first husband , a police personnel.

3. It emerges from the record that the petitioner's husband had died while in government service and she was provided with compassionate appointment in the police department on a ministerial post. She was appointed on the post of constable (m) on 21.11.1992 as her husband had died in harness on 10.2.92. Considering her satisfactory services, she was promoted to the post of Assistant Sub Inspector of Police(m). While the petitioner was posted as Asstt. Sub Inspector of Police (M) in the office of SSP, Bulandshahr in the year 2003, she met Sri Ajeet Singh who was also posted there as constable (m). The petitioner being a widow was being provided emotional and other kind of support by Sri Ajeet Singh and intimate relationship developed between the two. As per learned counsel for the petitioner she did not know about the fact that Sri Ajeet Singh was already married or her wife was a serious patient of Tuberculosis. Both of the them agreed to go for a court marriage and accordingly the said union was registered by the Registrar (Hindu Marriage) on 11.3.2003. No formal marriage as per Hindu rites Satpadi etc. was performed. The petitioner already had two minor children, one daughter and a son at the time of her marriage. In fact she was in urgent need of emotional and other support to run and manage her family and the colleague Sri Ajeet Singh had always extended cooperation to her in sustaining herself in life and society. He was always available to her with a helping hand. Much emphasis has been laid by the counsel for the petitioner that she did not know that Sri Ajeet Singh was already married and had a wife living in the village. Both of them started living together and she was transferred to 41st Battalian, PAC, Ghaziabad in the year 2004.

4. On some complaints, the Commandant, P.A.C. ordered a preliminary enquiry against the petitioner for violating the provisions contained in section 29 of the U.P. Govt. Servant Conduct Rules, 1956. A preliminary enquiry was conducted initially by one Dharam Singh, Assistant Commandant and subsequently Smt. Abha Singh, Deputy Commandant started a departmental enquiry by issuing a charge sheet on 9.2.2005. The petitioner submitted a detailed reply to the charge sheet dated 9.2.2005 and pleaded herself innocence of the charges. While the first departmental enquiry was still pending, a second preliminary enquiry was also ordered against the petitioner to be conducted by one Sri Santosh Kumar, an Assistant Commandant in 41st Bn, P.A.C. who submitted his report on 30.5.2005.

This time Sri Ashok Kumar, Deputy Commandant had issued another charge memo on 6.8.05. Both the charges dated 9.2.2005 and 6.8.2005 contained the same charges. The petitioner again submitted a reply to this charge sheet on 17.8.2005 pleading innocence.

5. The Enquiry Officer completed the enquiry and submitted the report on 15.9.05 holding the petitioner guilty of the charges. The Enquiry Officer had recommended dismissal of the petitioner from the service. These findings were approved and a show cause notice was issued on 25.11.2005. The petitioner filed a writ petition No.76193 of 2005 in this Hon'ble Court seeking quashing of the proceedings and show cause notice. This Court had ordered for completing the enquiry within a stipulated period. The reply to the show cause notice was submitted on 22.12.2005. Several decisions of Hon'ble Apex Court and this Court were cited before the concerned officer. These cases supported the case of the petitioner. Without considering the reply submitted by the petitioner, D.I.G. of Police, Meerut had passed the final order of penalty on 13.1.2006 dismissing the petitioner from service.

6. As per learned counsel for the petitioner, the petitioner's case was not covered by rule 29 of the U.P. Govt. Servant Conduct Rules, 1956 as the charge sheet did not indicate that the petitioner did not obtain the permission of the State Government before undergoing remarriage. A widow could remarry under law though offence of remarriage is punishable under section 494 IPC. This is not applicable in the petitioner's case as she was a widow at the time of her marriage. The petitioner had not violated any of the provisions contained in the said section. If Sri Ajeet Singh was already married, the petitioner's marriage which was registered in the office of Registrar of Marriage on 11.3.2003 shall be treated to be null and void. The court marriage solemnised on 11.3.2003 by issuing certificate by Registrar of Marriage has become null and void if Sri Ajeet Singh was treated to be already married. The marriage being null and void , no action should have been taken against the petitioner under rule 29 of the U.P. Govt. Servant Conduct Rules, 1956.

7. Sri Ram Shiromani Mishra has laid much emphasis that Sri Ajeet Singh had given in writing that he had not informed the petitioner Raj Bala Sharma regarding her earlier marriage. The petitioner being a widow and that too with two little children agreed to get married with Ajit Ajeet Singh to resettle herself in life. The petitioner's alleged marriage with Sri Ajeet Singh did not in any manner interfere or obstruct her with her official duty which she had been performing with sincerity and dedication. The punishment awarded against the petitioner was quite harsh and disproportionate to the charges levelled against her. Even as per provisions contained in this rule, no major penalty can be awarded against the petitioner. Rule 29 is quoted below:

29(1): No Govt. Servant who has a wife living shall contract another marriage without fresh obtaining the permission of the Govt. notwithstanding that such subsequent marriage is permissible under the personal law for the time being applicable to him.
(2) No female Govt. Servant shall marry any person who has a wife living without first obtaining permission of the Govt.

(3) **A minor punishment to be imposed in contravention of Sub Rule(1) or Sub Rule (2) shall be withholding of increments for three years.**

8. The petitioner has placed reliance on a judgment rendered by this Court reported in **1977 ALJ 1714**- Paras Nath Pandey Vs. Asstt. Director (Admn), Directorate of Training and Employment, U.P., Lucknow and others. In this case this Court has clearly laid down that in such case only minor penalty could be awarded against a government servant in violation of rule 29 of the U.P. Govt. Servant Conduct Rules, 1956. Another judgment rendered on 20.12.2004 in W.P.No.19034 of 1997- Gaya Deen Vs. Inspector General of Police(Railways), Allahabad & others has also been produced before the Court.

9. The petitioner's appeal and revision were rejected without application of mind. The petitioner has been thrown out of employment which was provided to her by the government on compassionate ground after the death of her husband late Sri Santosh, a police personnel on 21.11.1992. She would suffer irreparable loss and injury. She has no other means of livelihood and has to maintain her two children and settle them in life.

10. Learned Standing Counsel has opposed the writ petition and submitted that the petitioner knowingly had remarried Sri Ajeet Singh who had a wife living at his native village. A statement has been made by Sub Registrar/Registration Officer, Hindu Marriage, Ghaziabad that the marriage was registered on 11.3.2003 under section 8 of the Hindu Marriage Act, 1955 and a formal certificate under rule 7(2) of the U.P. Hindu Marriage Niyamawali, 1973 was issued to the couple. Since the marriage was solemnised and registered on 11.3.2003, there was clear violation of rule 29 of the U.P. Govt. Servant Conduct Rules, 1956. Learned Standing Counsel has also submitted that the petitioner has stopped taking family pension after this marriage and she has returned Rs.7,239/- the amount of family pension to the Govt. Treasury. Thus, the factum of marriage was established. As far as the petitioner's submission that she had no knowledge of earlier marriage of Ajeet Singh, it cannot be believed. She was senior to Sri Ajeet Singh and she must have made an enquiry before marrying Sri Ajeet Singh. As far as the departmental enquiry is concerned, the same was held in accordance with the relevant service rules. A preliminary enquiry was conducted and it was followed by a formal regular enquiry. A detailed charge sheet was issued against the petitioner. After obtaining and considering her reply a show cause notice was issued against her. Considering the gravity of the charges, the petitioner was rightly dismissed from the service. There was no illegality or infirmity in the decision making process in holding departmental enquiry. Adequate punishment has been awarded against the petitioner who had remarried constable Ajeet Singh. The competent authority had followed the provisions contained in rule 29 of U.P. Govt. Servant Conduct Rules, 1956.

11. I have heard learned counsel for the parties at length and perused the record.

12. Here is a case of a widow of a police personnel who was given compassionate appointment on the death

of her husband in harness on 10.2.92. At the time of the death of her husband, the petitioner had two minor children to maintain. She was given compassionate appointment on 21.11.92 on the post of constable (m). It is evident from record that the petitioner was subsequently promoted on the higher post of Assistant Sub Inspector of Police (m). This shows that her work, conduct and performance in the services had remained satisfactory. It was natural for a young widow like the petitioner to get attracted to a colleague working in the same department. Both were in the ministerial establishment working in the same office. The love is blind. It also appears from the record that Sri Ajeet Singh was supporting his senior colleague Smt. Raj Bali Sharma and her children in the time of need. It is borne out from the record that Sri Ajeet Singh was providing mental and other support to the petitioner and her children to carry on in life at a small city, i.e.,Bulandshahr. In peculiar circumstance in which the widowpolice personnel was living, it was natural for her to be attracted to a supportive man. Like in garden a creeper **(Lata, vallarre)** needs a strong support to climb up and sustain itself, a woman also may need a support who could stand with her facing the life garden in hard times. Even a small stream needs support of its banks, strong hills rocks to proceed further in the process to transform itself into a big mighty river.

13. As far as petitioner's statement is concerned , she has demonstrated that she had no knowledge about the first marriage of Sri Ajeet Singh. As far as the offence of remarriage (as per section 494 IPC) is concerned, in the present case the petitioner Smt. Raj Bala Sharma had married after the death of her first husband. Section 494 I.P.C. deals with a person who had a husband or wife living. This charge cannot be fastened on Smt. Raj Bala Sharma, petitioner. There is substance in the submission of the learned counsel for the petitioner that according to section 17 of Hindu Marriage Act, no marriage between two Hindus could be solemnised if one of them has a husband or wife living. If such marriage is solemnised after the commencement of this Act it would be null and void. The provisions of section 494 and 495 IPC shall apply in such cases. Applying this law, the marriage of the petitioner with Sri Ajeet Singh was null and void under law and no punishment could be awarded against her under section 29 of the U.P. Govt. Servant Conduct Rules, 1956. As per section 11 read with section 5 of the Hindu Marriage Act, 1955, the marriage may be held as void. The petitioner's case cannot be dealt with under under rule 29 of the U.P. Govt. Servant Conduct Rules, 1956. Sri Ajeet Singh had given in writing to the Enquiry Officer that he had not informed the petitioner regarding her earlier marriage. The petitioner appears to be innocent in the present case.

14. In Rule 29 of the U.P. Govt. Servant Conduct Rules, 1956, the main thrust has been given on the term " without obtaining prior permission of the government". In this case the petitioner has not been charged for this misconduct. She has been charged only for remarriage and not for charge of not obtaining the permission of the government. Neither there was such accusation against the petitioner nor it was found proved.

15. This Court has read the provisions contained in rule 29 of the U.P. Govt. Servant Conduct Rules, 1956. It has

been provided in these rules that whoever contravenes the provisions contained in rule 29(1)&(2) shall be awarded with a minor penalty. In the present case, the awarding of punishment of dismissal is certainly against the letter and spirit of rule 29 itself. The major penalty ought not to have been awarded against the petitioner applying the rule 29(1)(2)(3) of the U.P. Govt. Servant Conduct Rules, 1956.

16. This Court has also taken note of the fact that the work, conduct and performance of the petitioner has remained satisfactory. The petitioner's alleged marriage with Sri Ajeet Singh did not in any manner interfere with or obstruct her official duties. She was promoted from the post of constable to S.I. (M) and was posted at Bulandshahar. There is nothing on the record to show that her work, conduct and performance was not up to the mark. Even otherwise her living with Sri Ajeet Singh or having intimate relation could not be branded as an offence committed by her as it has come on record that she was not aware of earlier marriage of Sri Ajeet Singh and she being widow could have performed remarriage with a colleague or a man of her choice.

17. Learned counsel for the petitioner has also submitted that the petitioner as well as Sri Ajeet Singh both have been dismissed from service and none of them have any other means to sustain their families . Both of them are immensely suffering due to issuance of dismissal order. The education and upbringing of the children is also suffering.

18. This Court has also noted that as a result of dismissal from service, the petitioner, a widow has immensely suffered, as submitted by the learned counsel for the petitioner. It may be hard for her to sustain herself and her two children in life. Her daughter is of marriageable age and both the children have to be settled in life. Considering the subject matter of accusation, misconduct committed by the widow, it was not appropriate to throw her out of employment, dismiss her from services rendering her unfit for future employment.

19. This Court has also taken note of two decisions of this Court in which similar controversy has been set at rest. In 1997 All.L.J 1714 (Supra), this Court has held that no major penalty could be awarded to a government servant on contravention of provisions contained in rule 29 of the U.P. Govt. Servant Conduct Rules, 1956. Only a minor penalty as indicated in the rules could have been imposed. The punishment of dismissal in the present case is not proportionate to the charges levelled against the petitioner. The misconduct which has been imputed to the petitioner is not in any manner affecting the discharge of her official duty. No such finding has been recorded by the competent authority in this regard. The punishment of dismissal from service awarded to the petitioner appears to be harsh and it does not commensurate to the gravity of charge proved against her. The petitioner's case is squarely covered by the above said decision of this Court as well as in the light of the decision rendered by Hon'ble Apex Court in the case of Ranjit Thakur Vs. Union of India (**AIR 1987 SC 2386**) and other cases

cited in the aforementioned judgment of this Court.

20. In view of the above discussion, the petition succeeds and is allowed. The order of impugned dismissal of the petitioner dated 13.1.2006 and the orders passed in the appeal and revision dated 19.3.2006 and 12.4.2007 respectively are quashed. Since the order of dismissal has been quashed by this Court, the petitioner is entitled for reinstatement. The respondents are directed to reinstate the petitioner in service within one month from the date of filing of a copy of this order by the petitioner before the authority concerned. It is further observed that it shall be open to the appropriate authority to award only other minor penalty against the petitioner as provided in sub rule (3) of rule 29 of the U.P. Govt. Servant Conduct Rules, 1956 if the charges are proved. All the consequences shall follow. The petitioner shall be treated to have remained in service with all the consequential benefits of such service.

No order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.07.2009

BEFORE
THE HON'BLE D.P. SINGH, J.

Civil Misc. Writ Petition No. 33148 of 2009
Connected with
Civil Misc. Writ Petition No. 33389 of 2009
And
Civil Misc. Writ Petition No. 33431 of 2009
And
Civil Misc. Writ Petition No. 33494 of 2009
And
Civil Misc. Writ Petition No. 33614 of 2009
And
Civil Misc. Writ Petition No. 34075 of 2009
And
Civil Misc. Writ Petition No. 34170 of 2009
And
Civil Misc. Writ Petition No. 34177 of 2009
And
Civil Misc. Writ Petition No. 34328 of 2009
And
Civil Misc. Writ Petition No. 29283 of 2009
And
Civil Misc. Writ Petition No. 35766 of 2009
And
Civil Misc. Writ Petition No. 34897 of 2009
And
Civil Misc. Writ Petition No. 34483 of 2009

Dinesh Kumar Singh & others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Bhupendra Kumar Tripathi

Counsel for the Respondents:
S.C.

U.P. Pharmasists Service Rules, 1980 Rule 15 (2)-Selection of Pharmasists-preperation of merit list-instead of yearwise or batchwise inter se-seniority-combined merit list prepared-out of 900 only 300 candidate questioned the action of authorities-appellate court-confining the relief only within those 300 candidates-directed for preparation of their merit list-following inter se seniority with batch/yearwise-now petitioners being encouraged with Division Bench division-after considerable time seeking same treatment-held-No relief can be granted.

Held: Para 15,16 & 17

Apart from the aforesaid, as already observed above, any tinkering with the order would amount to either modification or as sitting in appeal over

the said judgment. Both are against judicial discipline.

Several judgments have been placed before the Court to canvass that the benefit of the judgment rendered in similarly situated cases can be extended to the petitioners also but, as already mentioned, these aspects have to be examined by that very Division Bench or the appellate court.

For the foregoing reasons, no relief can be granted to the petitioners and accordingly writ petitions are dismissed, subject to the observations made hereinabove.

Case law discussed:
(1969 (1) SCC 185), (1989 (2) SCC 356), (JT 1991 (4) SC 160), (2006 (11) SCC 464).

(Delivered by Hon'ble D.P. Singh, J.)

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

All the petitioners in this bunch of writ petitions claim that they have passed their diploma course in pharmacy in different years from various recognised institutions and they have registered themselves with the U.P. Pharmacy Council in different years. They have preferred these petitions for quashing of an advertisement dated 12.11.2007 for recruitment as Pharmacist and for a mandate that selection be made yearwise.

2. Earlier, the selections were being made under U.P. Pharmacists Service Rules, 1980 (hereinafter referred as the 1980 Rules) and in view of Rule 15(2), the selection committee was obliged to prepare a list in order of merit according to the marks obtained by them in the diploma examinations. However, by misinterpretation of the provision, selections were being made yearwise and batchwise and not strictly in accordance to the merit, as envisaged in the said rule.

3. An advertisement dated 12.11.2007 was issued inviting applications for recruitment of 766 posts of Pharmacist and it was stipulated therein that the recruitments would be made under the U.P. Procedure for Direct Recruitment of Group 'C' Post (Outside the Purview of Public Service Commission) Rules, 2002 as amended in 2003 (hereinafter referred to as the 2002 Rules).

4. It appears that about 800 diploma holders who had applied, filed several writ petitions before the Lucknow Bench of this Court claiming that the recruitments should be held under the 1980 Rules. A learned Single Judge in the case of **Sunil Kumar Rai & others vs. State of U.P. & others** (Writ Petition no.7699 (SS) of 2007) treating it as the leading petition, alongwith several other petitions, vide its judgment dated 23.5.2008, held that the appointments could not be made under the 2002 Rules unless they were amended and, therefore, had to held under the 1980 Rules in the following words :

"Consequently, inevitable conclusion is that unless and until sub-rule (3) of rule 5 of Uttar Pradesh Procedure for Direct Recruitment of Group "c" Posts (Outside the Purview of Public Service Commission) Rules, 2002 and the Uttar Pradesh Procedure for Direct Recruitment of Group "C" Posts (Outside the Purview of Public Service Commission) (First Amendment) Rules, 2003 is amended same cannot be pressed into serice in reference to clause (a) of sub-rule (3) of

rule 5 vis-a-vis the post of Pharmacist under 1980 Rules."

5. His Lordship was then confronted with a situation, that despite Rule 15(2) of the 1980 Rules, the selection was being made batch or yearwise i.e. incumbents of an earlier batch or year would be selected according to their interse seniority, even though they had obtained lesser marks than a candidate of subsequent year or batch inspite of having secured higher marks in the qualifying diploma examination. Considering several earlier judgments on the issue which had interpreted Rule 15(2) of the 1980 Rules, went on to hold :

"Consequently, in the facts and circumstances of the present case, all the writ petitions are disposed of with the direction that Director General, Medical and Health U.P. Lucknow is competent to issue advertisement and constitute Selection Committee in terms of rule 6 of the Uttar Pradesh Procedure for Direct Recruitment of Group "C" Posts (Outside the Purview of Public Service Commission) Rules, 2002 and the Uttar Pradesh Procedure for Direct Recruitment of Grup "C" Posts (Outside the Purview of Public Service Commission((First Amendment) Rules, 2003, but until and unless amendment is made in clause (a) of sub-rule (3) of rule 5 thereof, selection cannot be undertaken by computing the marks as per procedure prescribed therein rather selection has to take place as per provisions as contained under Rule 15(2) of the U.P. Pharmacists Service Rules, 1980 on the basis of the marks obtained in Pharmacy Diploma Examination, ***irrespective of the year in which candidate has appeared in Diploma Examination."*** *(highlighting supplied)*

6. Out of those 800 petitioners, only about 300 of the petitioners preferred different special appeals against the said judgment and a Division Bench of this Court clubbed all of them together with the leading petition being Special Appeal No. 377 of 2008 (Prem Chandra & others vs. State of U.P. & others), and upheld the interpretation of Rule 15(2) made by the learned Single in the following worlds :

"We have considered the arguments from both the sides with respect to interpretation of Rules 14 and 15 and in particular Rule 15(2) and we find that the interpretation given by the learned Single Judge cannot be faulted on the ground that these Rules require continuation of process of selection for all subsequent years from amongst the batches of Pharmacists, who have secured diploma in the provious years and also in the subsequent years."

7. However, when confronted with the past practice adopted with regard to batch and yearwise preparation of merit list, though it found that :

"The appellants though, under the rules were entitled to be appointed on the basis of their merit, even in the presence of diploma holders of prior batch of lower merit, but were denied consideration for appointment because of the procedure adopted by the State Government in making the appointments, with the result, persons of comparatively lower merit were appointed and are in service, whereas the appellants stand ousted even from the zone of consideration."

Considering various factors, including the fact that only 300 diploma holders were before it and 766 were to be filled up, it observed as under :

"We are informed that about 300 diploma holders falling in the same category are before this Court who have been fighting for their cause and, therefore, we feel that the directives issued in these appeals be confined only to those persons who are vigilant and have approached this Court and those who have succumbed to their ouster, would not get the benefit of this order.

We may also clarify that as per the statistics given by the appellants' counsel, there were about 800 writ petitioners but after the decision of the learned Single Judge, only about 300 persons are before this Court and rest of them left themselves to their fate. Such persons cannot be entitled to the benefit of this order."

and went on to hold :

"We also take notice of the fact that under the present advertisement, 766 vacancies have been notified, therefore, the present appellants, who are much less in number, can also be considered for appointment, leaving sizeable vacancies for the rest of the candidates.

We, therefore, dispose of these special appeals with the direction that the appellants' cases shall be considered in accordance with the pre-existing practice by considering their appointment on the basis of their merit taking their batches into consideration as was being done earlier but this process would be available only for the appellants and they would be accommodated if they are otherwise found eligible and the remaining vacancies would be filled in by following Rule 15(2) strictly as directed by the learned Single Judge."

8. It is apparent from the aforesaid judgment that it was clearly stipulated that the benefit of batch and yearwise preparation of merit list would be confined to only those about 300 persons who had preferred special appeals and all others were left out to face selections on merit irrespective of the year in which they had cleared their Diploma examination.

9. The petitioners in this bunch of writ petitions are those diploma holders who did not even challenge the advertisement of 2007 within a reasonable time nor they preferred any special appeal, but after rendering of the judgment in the special appeal on 4.5.2009, they have preferred the present writ petitions claiming that they should also be extended the benefit which was extended to those 300 appellants.

10. The question is, whether, in the teeth of such directions by the Division Bench, the present petitioners can be extended the benefit ?

11. They have relied upon several orders of the Court including by this Court where writ petitions were disposed off extending the benefit of the Division Bench judgment, on the concession by the Standing Counsel that they were identical matters. No decision needs to be cited for the proposition that an order passed on concession cannot be treated as a precedent. They have also relied upon an order of another Division Bench in Special Appeal No.1139 of 2008 (Ashok Rai & others vs. State of U.P. & others) decided on 9.6.2009. The said Division

Bench disposed off the appeal only in terms of the judgment dated 4.5.2009. Neither the said Division Bench nor any other Single Judge examined this aspect that the benefit of year and batchwise preparation of merit list had been confined only to the appellants of Prem Chandra's case.

12. Once the directions are clear and explicit, any deviation with the order of the learned Single Judge as affirmed by a reasoned order of the Division Bench can only be done either through a modification or clarification application but by the same Division Bench under the High Court Rules, or, in appeal by the appellate court.

13. However, it is urged that by restricting the benefit to only the appellants in Prem Chandra's case (supra), the petitioners have been discriminated. It has to be borne in mind that Rule 15(2) of 1980 Rules provides merit as the criteria across the board for selection to the post of Pharmacist and which interpretation of the learned Single Judge has been upheld by the Division Bench. However, in view of the prevailing past practice adopted by the Government by adopting batch or yearwise seniority, the Court granted concession to only those appellants who had challenged the judgment of the learned Single Judge. This methodology of applying the principles of laches and acquiescence for depriving the concession or benefit of a decision is not new and has been applied right from 1969, if not earlier. In the case of **Durga Prasad vs. Chief Controller of Imports and Exports** (1969 (1) SCC 185) and followed up by the Apex Court in **Rup Diamonds vs. Union of India** (1989 (2) SCC 356) the Apex Court denied the benefit of the decision to "fence sitters " who had not raised any challenge at earliest point of time. Even in Service Jurisprudence, the principle has been employed extensively. In **Ashok alias Somanna Gowda & another vs. State of Karnataka & others** (JT 1991 (4) SC 160) with regard to selection of Assistant Engineers, the Supreme Court held that allotment of 33% of total marks for interview was illegal, and though it extended the benefit of the ratio to the candidates before it but it denied the benefit to other candidates who had not approached the Court within time in the following words :

"Learned counsel appearing on behalf of the State of Karnataka pointed out that there are many other candidates who had secured much higher marks than the appellants in case the above criteria is applied for selection. In view of the fact that appointments under the impugned Rules were made as back as in 1987 and only the present appellants had approached the Tribunal for relief, the case of other candidates cannot be considered as they never approached for redress within reasonable time. We are thus inclined to grant relief only to the present appellants who were vigilant in making grievance and approaching the Tribunal in time."

14. Recently, the Apex Court, summarising the statement of law of various decisions, in the case of **U.P.Jal Nigam & another vs. Jaswant Singh & another** (2006 (11) SCC 464) refused to extend the benefit of its earlier decision increasing the retirement age of the employees of Jal Nigam, in the following words:-

"In view of the statement of law as summarised above, the respondents are guilty since the respondents have acquiesced in accepting the retirement and did not challenge the same in time. If they would have been vigilant enough, they could have filed writ petitions as others did in the matter. Therefore, whenever it appears that the claimants lost time or whiled it away such cases, the court should be very slow in granting the relief to the incumbent. Secondly, it has also to be taken into consideration the question of acquiescence or waiver on the part of the incumbent whether other parties are going to be prejudiced if the relief is granted..."

15. Apart from the aforesaid, as already observed above, any tinkering with the order would amount to either modification or as sitting in appeal over the said judgment. Both are against judicial discipline.

16. Several judgments have been placed before the Court to canvass that the benefit of the judgment rendered in similarly situated cases can be extended to the petitioners also but, as already mentioned, these aspects have to be examined by that very Division Bench or the appellate court.

17. For the foregoing reasons, no relief can be granted to the petitioners and accordingly writ petitions are dismissed, subject to the observations made hereinabove.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.07.2009

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

Civil Misc. Writ Petition No.33837 of 2000

Raja Ram and others ...Petitioners
Versus
Smt. Son Kali and others ...Respondents

Counsel for the Petitioners:
Sri Kamlesh Mishra
Sri S.C. Verma
Sri Murtaza Ali

Counsel for the Respondents:
Sri V.K. Singh
Sri K.K. Singh
Sri Nisaruddin
Sri B. Pant
Sri N.K. Srivastava
Sri V.K. Mishra
Sri S.K. Kulshrestha
Sri N.K. Sharma
S.C.

U.P. Zamindari Abolition Act 184 (4)-Cancellation of Patta-without publication in News Paper, allotment made in disregard of order of preference-held illegal-direction issued to all the District Magistrate-ensure the advertisement of Patta in two news papers prior two week of allotment following the order of preference-also to follow the procedure of Section 27 (3) of ceiling Act.

Held: Para 14

Accordingly, it is directed that henceforth no allotment of gaon sabha land under U.P.Z.A.&L.R. Act and the Rules framed thereunder shall be made unless date of allotment is advertised in some such daily newspaper which has got wide circulation in the area in question (e.g. Dainik Jagran and Amar

Ujala) atleast two weeks in advance. Through advertisement applications from deserving persons with sufficient details shall be invited and the available land shall be allotted to all the deserving applicants. The applications shall be entered in a register specifically maintained for the said purpose. The receipt of applications must be issued to the applicant and applications shall be preserved at least for seven years. This procedure shall be followed for making allotment of ceiling land also as under Section 27 (3) of U.P. Imposition of Ceiling on Land Holding Act allotment is to be made in accordance with the order of preference and subject to the limits specified in Section 198 of U.P.Z.A.L.R. Act.

Case law discussed:

AIR 1984 SUPREME COURT 363, AIR 2006 SUPREME COURT 1165, AIR 2006 SUPREME COURT 1806, 2002 (1) A.R.C. 327, 1994 (1) UPLBEC 461, (1994) 3 UPLBEC 1551, 2005 (99) RD 823 (F.B.), A.I.R. 2008 S.C. 2854, AIR 1979 SUPREME COURT 1628.

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

1. Heard learned counsel for the parties.

2. This writ petition arises out of proceedings for cancellation of patta under Section 198(4) of U.P.Z.A.&L.R. Act. Gaon Sabha/Land Management Committee through resolution dated 11.12.1992 allotted patta of different portions of land vested in it to 36 persons including Smt. Son Kali - respondent no.1. Petitioner's father late Shri Radhey Shyam challenged the said order through application under Section 198 (4) of U.P.Z.A.& L.R. Act on the ground that he was in possession since before Zamindari Abolition over the land in dispute hence it was not vacant and patent grounds that there was no agenda, no munadi and provisions of Rule 173 to 176 of U.P.Z.A.&L.R. Rules were violated were also taken. Smt. Son Kali was allotted an area of 1 bigha 10 biswas out of gaon sabha plot no.2119/2. In para-5 of the writ petition it has been stated that the said plot was in actual cultivatory possession of late Radhey Shyam - father of the petitioner since before the abolition of Zamindari. This allegation is patently false as at no point of time land in dispute was entered in the revenue record in the name of Late Radhey Shyam. Since Zamindari abolition it was entered as gaon sabha land. Even if it is assumed that Radhey Shyam was in possession, his possession was absolutely unauthorised and such a person is not entitled to challenge the allotment proceedings.

3. The case initiated by Radhey Shaym was registered as case no.9/96-97 Radhey Shyam vs. Son Kali. Collector, Kanpur Dehat decided the matter on 26.8.1998 and held the allotment in favour of respondent no.1 - Son Kali to be valid. Cancellation application was accordingly dismissed. Respondent no.1 had also contended that she had undergone tubec-tomy operation. The Collector also found that respondent no.1 was otherwise also entitled for allotment. The Collector found that agenda was properly circulated and munadi was also done and that she was also delivered possession through dakhalnama. Against the said order petitioner filed revision being revision no.46/159 of 1998-99 which was dismissed on 13.7.2000 by Additional Commissioner (Administration) hence this writ petition.

4. Courts below also held that consolidation had taken place in the village in question and petitioner did not file any objection regarding his right over

the land in dispute. Lower Revisional court further held that petitioner possessed sufficient land and petitioner did not belong to scheduled caste and that apart from petitioner no other person challenged the allotment which was made in favour of 36 persons including respondent no.1. Before the courts below no such argument was raised that respondent no.1 or her husband already possessed sufficient land.

5. The finding recorded by the courts below are basically findings of fact requiring no interference in exercise of writ jurisdiction. Petitioner's father's claim of possession or any sort of right was also barred by Section 49 of U.P.C.H. Act.

6. However, there is one general aspect of the matter regarding allotment of gaon sabha land which requires consideration. Generally complaints are filed that proceedings of allotment are done surreptitiously and in-fact residents of the village in question do not get information of allotment. The procedure of munadi through beating of drum as provided under Rules 173 of U.P.Z.A.&L.R. Rules has become obsolete. It is extremely difficult if not impossible to prove as to whether munadi was done through beating of drum or not. In every village in Uttar Pradesh several persons read newspapers. Accordingly, it is essential that information regarding allotment shall be published in some such Hindi newspaper which has got wide circulation in the area like 'Dainik Jagran' or 'Amar Ujala' atleast two weeks in advance so that all those persons who belong to the eligible category and who are desirous of getting allotment of gaon sabha land may apply for the same. In this manner procedure of allotment will be completely aboveboard and transparent.

7. In the following authorities even though in the relevant rules or regulations publication in the newspaper was not provided still the courts held that advertisement/ publication shall be made in the newspapers.

1(a). AIR 1984 SUPREME COURT 363 "B. S. Minhas v. Indian Statistical Institute"

1(b). AIR 2006 SUPREME COURT 1165 "Union Public Service Commission v. Girish Jayanti Lal Vaghela"

1(c). AIR 2006 SUPREME COURT 1806 (para30 (Constitutional Bench "Secretary, State of Karnataka v. Umadevi"

8. In these cases it has been held that for appointment to any post under the government or governmental instrumentality advertisement must be made in the newspaper.

2. Jagdish vs. D.J. 2002 (1) A.R.C. 327

9. In this case it has been held that vacancy of a building under Section 14 of U.P.Urban Building Regulation of letting rent and Eviction Act 1972 shall be advertised in the newspaper before making allotment.

3(a) K.N. Dwivedi Vs. D.I.O.S., 1994 (1) UPLBEC 461

3.(b) Radha Raizada vs. Committee of Management, (1994) 3 UPLBEC 1551

10. In these cases provision of notifying a short term vacancy in a college on the notice board of the college as provided by IInd Removal of difficulties order under U.P. Secondary Education Service Selection Board Act 1982 was held to be illegal and violative of Article 14 and 16 of the Constitution of India and it was directed that even for making appointment against short term vacancy post shall be advertised in the newspaper as provided under Ist Removal of difficulties Order 1981 framed under the said Act for appointment against the substantive vacancies.

4. **Ram Kumar vs. State 2005 (99) RD 823 (F.B.)**

In this authority it has been held that fisheries lease in respect of ponds vested in Gaon sabha under Section 117 of U.P.Z.A.&L.R Act shall be settled after due advertisement in the newspapers.

5. **A.I.R. 2008 S.C. 2854 State of U.P. vs. M/s Swadeshi Polytex Ltd**

In this case it has been held that for auctioning the property for realisation of dues under the provisions of State Financial Corporation Act or U.P.Z.A.&L.R. Act/Rules date and venue of auction and details of the property shall be published in the newspapers.

11. We are in right to information age. Villagers are being taught the use of computer and internet. Accordingly beat of drum belongs to an age which has gone by.

12. Supreme Court in **AIR 1979 SUPREME COURT 1628 "Ramana Dayaram Shetty v. International Airport Authority of India"** has held that Government or Governmental agency/instrumentality while extending largess must act in a reasonable manner and not arbitrarily providing full opportunity to all to make a claim for the same.

13. Under Section 198(3) it is permissible to allot gaon sabha land to a deserving person to a maximum extent of 1.26 hectares or 3.125 acres of land. However, this is maximum area which may be allotted . With the increase of population it is not at all necessary to allot so much area to one person. Smaller areas allotted to larger number of people will serve the public purpose in a better way.

14. Accordingly, it is directed that henceforth no allotment of gaon sabha land under U.P.Z.A.&L.R. Act and the Rules framed thereunder shall be made unless date of allotment is advertised in some such daily newspaper which has got wide circulation in the area in question (e.g. Dainik Jagran and Amar Ujala) atleast two weeks in advance. Through advertisement applications from deserving persons with sufficient details shall be invited and the available land shall be allotted to all the deserving applicants. The applications shall be entered in a register specifically maintained for the said purpose. The receipt of applications must be issued to the applicant and applications shall be preserved at least for seven years. This procedure shall be followed for making allotment of ceiling land also as under Section 27 (3) of U.P. Imposition of Ceiling on Land Holding Act allotment is to be made in accordance with the order of preference and subject to the limits specified in Section 198 of U.P.Z.A.L.R. Act.

15. With the above observations, writ petition is disposed of.

16. Office is directed to supply a copy of this judgemnt free of cost to learned Chief Standing Counsel for being circulated to the Secretary concerned and all the Collectors who shall in turn circulate the same to all the Sub Divisional Officers and Pradhans of Gaon sabhas in their districts.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.07.2009

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No.65847 of 2008

Ajay Kumar Mishra & others...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Ashok Khare
Sri V.D. Shukla

Counsel for the Respondents:
Sri s.P. Kesarwani, Addl. C.S.C.

Constitution of India, Art. 226- Cancellation of entire selection list- Selection of Safai Karmi-large number of irregularities, favoritism and corrupt practices adopted in interview-being satisfied with the report entire selection cancelled-challenge made on ground petitioner belong to general candidate-while bungling done under reserve category-select list not yet published-government is not bound to appoint such candidate-overall responsibility, accountability to maintain fairness upon the Government-cancellation-held proper.

Held: Para 14

The select list was not published and thus the petitioners have not acquired any rights to be selected. In State of M.P. Vs. Sanjay Kumar Pathak, (2008) 1 SCC 456, the Supreme Court held that even though selection process was completed no appointment can be made in the absence of select list and that the State Government is not bound to appoint and select candidates. The judgment in Inder Preet Singh Vs. State of Punjab, (2006) 11 SCC 356, cited by the petitioners is also not applicable to the facts of the case. Here the corrupt practices adopted by the selection committees were so mixed up that it is not possible to separate the tainted from those, who may be honest and good candidates. It will thus be in the interest of all concerned that the selections are held afresh.

Case law discussed:
(2008) 1 SCC 456, (2006) 11 SCC 356.

(Delivered by Hon'ble Sunil Ambwani, J.)

1. Heard Shri Ashok Khare, Sr. Advocate assisted by Shri V.D. Shukla for the petitioner. Learned Standing Counsel appears for the respondents.

2. The petitioners applied for selections as 'Safai Karmis' in 'general category', in response to the advertisement dated 16.6.2008. They were subjected to cycle test/ safai test and interviews on different dates and were called to appear in a test on 4.10.2008 at Vibhuti Narain Government Inter College, Gyanpur. The selection process concluded on 4.10.2008. A final select list was prepared by the district authorities. On 5.11.2008 the State Government passed an order, on the recommendation of the District Magistrate, cancelling the entire selections on the complaints made against the selection process. The State Government directed fresh selection to be

held, excluding the officers, included in the earlier selection committees. By this writ petition the petitioners have questioned the validity of the order dated 5.11.2008 of the State Government cancelling the entire selections and the notification dated 3.11.2008 issued by the District Panchayat Raj Adhikari, Sant Ravi Das Nagar readvertising 1264 posts of 'Safai Karmis' to be selected in accordance with the procedure provided in the Group-D Employees Service Rules, 1985 (the Rules), as amended from time to time.

3. Shri Ashok Khare, learned counsel for the petitioner submits that the State Government did not have authority under the Rules to cancel the selections held in accordance with the statutory Rules. The order has been passed without application of mind on the report of the District Magistrate, which was wholly motivated and based on surmises and conjectures. The committees constituted by the District Magistrate had maintained transparency and impartiality in selections. The material on the basis of which selection were cancelled was not sufficient to arrive at the conclusion to cancel the selection process.

4. In the counter affidavit of Shri K.P. Singh, District Panchayat Raj Officer, Sant Ravi Das Nagar, Bhadohi it is stated in the beginning, in para 3 (b) that the impugned advertisement is dated 3rd December, 2008, and not 3rd November, 2008. An advertisement was issued on 16.6.2008 inviting application for recruitment of 1264 posts of Safai Karmis in Distt. Sant Ravi Das Nagar, Bhadohi, followed by a corrigendum dated 09.7.2008. The posts were created by Government Orders dated 1.3.2008, 11.4.2008 and 6.6.2008, to be filled up in accordance with Group-'D' Employees Service Rules, 1985, for sanitation and to maintain cleanliness for the health of general public in villages from amongst persons, who had knowledge and experience in cleaning of roads and drains etc., one of the basic eligibility for appointment.

5. The District Magistrate constituted two selection committees, consisting of three members each including Shri R.D. Ram, Distt. Employment Officer, Shri N.K. Singh, Distt. Panchayat Raj Officer as Chairmen of these selection committees. It is stated in para 3 (e) to (h):-

"(e) That on 29.9.2008 the District Magistrate made a surprise inspection. At the time of inspection the Chairman as well as the members of Board No.2 (selection committee No.2) were present and the number sheets were in process of being sealed. During the course of inspection 10 slips and two note books containing roll numbers of candidates with description of certain amounts were recovered from the pocket of the Chairman of Board No.2 i.e. Shri N.K. Singh, District Panchayat Raj Officer. Similarly a list was recovered from the member of the Board Shri P.C. Prasad which also contained various roll numbers. Statement of Shri N.K. Singh was recorded in presence of officers who admitted the slips etc., to be in his handwriting and also that the same have been recovered from his pocket. Consequently the District Magistrate appointed the District Development Officer as Enquiry Officer to enquire into the matter and to submit his report. The enquiry was conducted by the Enquiry

Officer who submitted his report dated 3.10.2008 annexing therewith various documentary evidences which clearly revealed commission of serious illegalities at large scale in selection process and taking of money from selection etc. The Enquiry Officer also came to the conclusion that the entire selection process/ interview was neither transparent nor impartial. He also noted the fact based on documentary evidences that marks awarded initially were changed by increasing the marks substantially so as to select particular candidates. After receipt of the aforesaid Enquiry Report dated 3.10.2008 the District Magistrate considered the same and referred the matter to the State Government alongwith Enquiry Report vide D.O. Letter dated 7.10.2008. True copy of the statement on oath of Shri N.K. Singh, District Panchayat Raj Officer dated 29.9.2008 bearing acknowledgment/ signature of certain other officers/ members of the selection committee, true copy of the Enquiry Report dated 3.10.2008 along with its annexures and true copy of the letter of District magistrate dated 7.10.2008 referring the matter to the State Government are annexed herewith and are marked as Annexure No.CA-3, CA-4 and CA-5 respectively to this Counter Affidavit.

(f) That in view of the facts found as aforementioned, the District Magistrate changed the constitution of the selection committee vide orders dated 30.9.2008, 1.10.2008, 3.10.2008 and 4.10.2008 (collectively marked as Annexure No.9 to the writ petition).

(g) That since serious illegalities and irregularities at large scale in the selection process were evidence on record and as such the number sheets prepared by selection committees upto 4.10.2008 were sealed and kept in the double lock of treasury. The final list/ merit list was neither prepared nor has been prepared so far as and as such the allegation of the petitioners that their names appear in the select list is wholly baseless.

(h) That considering the serious illegalities and irregularities committed in the selection process of Safai Karmis, the State Government cancelled the entire selection process and directed the District Magistrate vide letter dated 5.11.2008 (Annexure No.12 to the writ petition) to constitute fresh selection committee for selection in accordance with law. The State Government further directed that none of the officers who were either the Chairman or member of the selection committee should be kept in the new selection committee/ Selection Board. Pursuant to the aforesaid direction the impugned Advertisement dated 3.12.2008 (Annexure No.13 to the writ petition) has been issu3ed which has been wrongly alleged to be the Advertisement dated 3.11.2008. It is further relevant to mention that the intimation of cancellation of selection process was pasted on the Notice Board of Collectorate and Vikas Bhawan."

6. Learned Standing Counsel submits that the District Magistrate had in her inspection, noticed gross irregularities in selections. The Chairman of Board No.2 Shri N.K. Singh and the member Shri P.C. Prasad were found to have a number of slips in their hand writing and money in their possession. The report of the Committee constituted by the District Magistrate clearly established that the Chairman and the members were accepting money and recommendations for selections. The details of these slips

have been annexed to the counter affidavit and the report of Shri R.P. Misra, Distt. Panchayat Raj Officer is enclosed. The enquiry report refers to 10 slips and two note books bearing 236 roll numbers with some mobile phone numbers and 3 doubtful numbers, written twice over. About 70 roll numbers were written twice. The Enquiry Officer examined 169 roll numbers out of which 6 were in SC and 47 in OBC category. Out of these 146 roll numbers written on slips and notebook did not mention any category. The Enquiry Officer examined all the roll numbers in all the categories in which they were mentioned, and examined 116 roll numbers in all categories and found that out of these 169 candidates, the marks of 109 candidates in the interviews upto 29.9.2008 were tampered and were increased. The marks of roll number 1611 was increased by three marks, but the original marks given by the Committee were not mentioned. Out of 169, 67 in SC and 65 in OBC (total 132) were given sufficient marks to get them selected and that marks of 53 OBC and 5 SC candidates were increased to such an extent that they should be selected. The enquiry officer found that in the first committee marks of 24 were changed by the first member, 17 by the second member and 33 by third member and in the second committee marks of 37 candidates were changed by first member, 13 by second member and 31 by the third member respectively in their lists. These marks were increased to ensure their selections. It was also found by the enqiry officer that the sheets of paper on which marks of interviews were recorded did not bear the signature of Chairman and the concerned member of the Committee. In most of these sheets only last pages were signed, and that all the pages did not bear the signature of the members, nor the cuttings or overwriting were signed. The validity of the list had thus become doubtful.

7. The enquiry officer also found that the names of the candidates, which were given higher marks were either ticked or underlined on the broad sheet to ensure that they were given sufficient marks to get selected. On these irregularities it was reported that large scale favouritism and corrupt practices were adopted in the interviews, on which the selections cannot be said to be transparent, impartial and just. The District Magistrate submitted a report of these irregularities and corrupt practice to the State Government on which the selections were cancelled.

8. Shri Ashok Khare, learned counsel appearing for the petitioners would submit that all the petitioners belong to general category. Out of 1264 posts of Safai Karmis 632 posts were in the general category and that against these posts there were only 315 applicants, and that 225 appeared in the selection process on 4.10.2008. There was no allegation against general category candidates nor any material was found to cancel their selections. The slips, the note book, and the tampering of the broad sheets in the marks were all related to scheduled castes and other backward class candidates. The petitioners were not at fault and were not affected by the allegations in the complaints and the material found in the enquiry. He submits that if selection process was found to be tainted, the District Magistrate was required to see the effect of the material collected and the findings of the enquiry officer in recommending to cancel the selections.

The District Magistrate was required to consider whether the material found and the report of the enquiry officer could be related to the selection of general candidates and whether the selection of the general candidates could also be cancelled on the same grounds.

9. The selections were held for 1264 posts. Out of these 50% posts were reserved and the remaining 50% were to be filled up by general category candidates. A perusal of the counter affidavit and the material recovered from the Chairman and the members of the Selection Committee and the report of the District Development Officer appointed by the District Magistrate as Enquiry Officer would show, that on 29.9.2008 in a surprise inspection made by the District Magistrate, he found 10 slips and 2 note books in the possession of the Chairman of Committee No.2, Shri N.K. Singh, Distt. Panchayat Raj Officer and a member of the Board. They admitted the slips to be in their own hand writing and its recovery from their pockets. The enquiry officer, confined the enqiry to the 239 roll numbers written on these slips and note books. Out of these 70 roll numbers were repeated on these slips and thus there were a total of 169 roll numbers. The 116 roll numbers did not indicate their categories, and thus the enquiry officer enlarged the area of his enquiry by examining the 116 roll number in all the categories and found that out of these 169 roll numbers there were 67 SC and 65 OBC, total 132 candidates, the marks were increased, so that they are selected and out of these 53 candidates belong to OBC or SC. The marks of 37 OBC and 5 SC candidates totalling 42 candidates were again increased to such an extent that they should get selected. The marks of a total number of 109 candidates were revised, the details of which is given in the enquiry report.

10. The submission that out of 632 posts in the general category, there were only 315 applicants and that 225 appeared in the selection process of 4.10.2008 is not founded upon the pleading in the writ petition. The petitioners have not stated in the writ petition, or in the rejoinder affidavit that there were only 315 applicants for 632 general category posts appeared for selections.

11. The enquiry report of the District Development Officer, Sant Ravi Das Nagar refers to 10 slips and two note books bearing 236 roll numbers. Out of 70 roll numbers were written twice over and that 146 roll numbers did not mention the category of the candidates. The enquiry officer examined 116 roll numbers in all the categories. It was found that out of 169 candidates the marks of 109 candidates in the interviews were tampered and were increased. Out of 169, 67 in SC and 65 in OBC category were given sufficient marks to get them selected and that marks of 53 OBC and 5 SC candidates were increased. The enquiry officer has not mentioned anything about the general category candidates in his report, but his report does not show that only reserved category candidates were the beneficiaries of the irregularities. The irregularities committed in the selection process, do not point only towards the reserve category candidates. The irregularities were so mixed up that the selection of general category candidates may be separated and saved.

12. The District Magistrate in her report dated 7.10.2008 to the Commissioner, Vindhyachal Region, Mirzapur forwarded the opinion of the enquiry officer, along with her recommendations that interviews were not transparent and that money was exchanged in manipulating the marks of large number of candidates. The boards assembled, half a hour before the interviews every day, after 30.9.2008. She recommended the cancellation of the entire selections.

13. The irregularities in this case were practiced on such a large scale that it cannot be said that the general category candidates did not benefit or that they can be separated from the reserved category candidates, in declaring the results. The material on record does not support the submission that the tainted candidates can be separated from the candidates, who did not influence increase of marks for ensuring their selections.

14. The select list was not published and thus the petitioners have not acquired any rights to be selected. In **State of M.P. Vs. Sanjay Kumar Pathak, (2008) 1 SCC 456**, the Supreme Court held that even though selection process was completed no appointment can be made in the absence of select list and that the State Government is not bound to appoint and select candidates. The judgment in **Inder Preet Singh Vs. State of Punjab, (2006) 11 SCC 356**, cited by the petitioners is also not applicable to the facts of the case. Here the corrupt practices adopted by the selection committees were so mixed up that it is not possible to separate the tainted from those, who may be honest and good candidates. It will thus be in the interest of all concerned that the selections are held afresh.

15. The District Magistrate is the appointing authority of 'Safai Karmis' in the Rules of 1985. The State Government as employer of all the government servants has overall responsibility and accountability to maintain transparency and fairness in the selections, and thus it cannot be said that the State Government did not have the authority to cancel the selections.

16. The writ petition is dismissed. The interim order dated 18.12.2008 is discharged.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.05.2009

BEFORE
THE HON'BLE PRAKASH KRISHNA, J

Civil Misc. Writ Petition No. 3118 of 1993

Shri Nand Kumar Agarwal and another
...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel forthe Petitioner:
Sri R.P. Goyal
Sri Manish Goyal

Counsel forthe Opposite Party:
S.C.

Stamp Act-Section 35-B of Schedule 1-B-read with Section 2(16)(c):Stamp duty-lease deed executed for 10 years-annual rent of Rs. 400/- per annum-stamp duty of Rs. 90 paid-proceeding initiated for additional amount on ground the plot situated within market area of 1500 sq. feet-held stamp duty be paid in accordance with real nature or substance

of document and not on transaction the word lease as defined under Stamp Act in Section 2(16)(c) stamp duty chargeable under Section 35(b) schedule 1-B of the Act-direction to refund Additional amount deposited during proceedings issued.

Held: Para 20 & 21

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

Viewed as above, the definition of lease as give under the Stamp Act only should be looked upon for the purposes of charge ability of stamp duty on such instrument. The said document may be treated differently under any other enactment, it is of no consequence so far as the question of payment of stamp duty is concerned.

Case law discussed:

AIR 1976 Allahabad 475, AIR 1961 Supreme Court 1047, AIR 1970 MP 74.

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

1. Challenging the legality and validity of the two orders dated 27.2.1992 passed by the Additional District Magistrate (Finance & Revenue), Firozabad and dated 12.1.1993 passed by the Chief Controlling Revenue Authority, Board of Revenue, U.P. At Allahabad in a proceeding under section 33/40 of the Indian Stamp Act, initiated against the petitioner demanding a sum of Rs. 59, 656.50 towards deficiency in stamp duty and Rs. 500/- towards the penalty, the present writ petition has been filed.

2. The facts of the case may be noted in brief:-

During audit inspection for the period of March, 1989 to December, 1989 it was found by them that a lease deed being document No. 4505 dated 10.5.1989 was executed for a period of 10 years on annual rent of Rs. 400/- on which stamp duty of Rs. 90/- was paid. Proceeding were initiated against the petitioner with regard to the4 lease deed of 15000 sq. ft. area of plot no. 187 executed by Smt. Premwati wife of Nand Kumar Agarwal. The said lease deed was executed in favour of the present petitioner who were partners in M/s. Seema Plastic Industries Mainpure Road, Shikohabad. The lessor is wife of the petitioner no. 1 and mother of the petitioner no. 2. The said lease deed was treated as a document of sale in view of Section 164 of U.P. Z.A. & L.R. Act by the Stamp Department. Since the plot so leased out is surrounded by commercial establishment, the District Magistrate opined that the stamp duty as applicable to commercial land is chargeable. The Additional District Magistrate (F& R) by the order dated 27.2.1992 held that the report submitted by the sub Registrar, Shikohabad in the light of the objections raised by the audit party that stamp duty is payable treating the said document as sale deed in view of section 164 of the U.P.Z.A. & L.R. Act is perfectly justified. The said order has been confirmed in revision no. 783 of 1991-1992 by the authority below.

3. Shri Manish Goyal, learned counsel for the petitioners, submits that the document in question is a lease deed and the authorities below were not justified in view of section 164 of U.P.Z.A. & L.R. Act in treating the said document as a sale deed. The submission is that the lease as defined under the Stamp Act should be taken into account for the purposes of determining the stamp duty on the instrument in question. He further submits that in view of various provisions contained in the U.P.Z.A. & L.R. Act, lease of an agricultural land unless made by a disable person is void and there is no transfer of right, interest or title in pursuance of the said document and therefore no stamp duty is payable. The learned standing counsel, on the other hand, supports the impugned order.

4. Considered the submission of learned counsel for the parties and perused the record.

5. It may be noted that lease of immovable property has been defined in section 105 of the Transfer of Property Act which means transfer of right to enjoy such property, made for certain time, express or implied, or in perpetuity, is consideration of a price paid or promised, r of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions, to the transferor by the transferee, who accepts the transfer on such terms.

"Lease as defined under Section 2 (16) of the Indian Stamp Act, is as follows:-

"Lease means a lease of immovable property and included also-

(a) a patta;

(b) a kabuliyat or other undertaking in writing, not being a counter part of a lease, to cultivate, occupy, or pay or deliver rent for immovable property;

(c) any instrument by which tolls or any description are let;

(d) any writing on an application for lease intended to signify that the application is granted;

(e) any instrument by which mining lease is granted in respect of minor minerals as defined in Clause (e) of Section 3 of the Mines and Minerals (Regulation and Development) Act, 1957."

6. A conjoint reading of the definitions of lease as given under the Transfer of Property Act as also given under the Stamp Act would show that under the Stamp Act, lease has been widely defined.

7. In ***Banney Khan Vs. The Chief Inspector of Stamp , U.P. AIR 1976 Allahabad 475*** it has been observed that the Stamp Act has been framed to consolidation and amend the law relating to stamps. It has been held that its provisions should be treated as complete in themselves and in order to determine the nature of a document for the purposes of an Act , reliance should be placed on the provisions of the Act and not on any other enactment.

8. The authorities below proceeded to hold that the document is insufficiently stamped on the ground that such a lease of agricultural land is not permissible under

the provisions of U.P.Z.A. & L.R. Act. If a lease deed is executed in violation of the provisions of U.P.Z.A. & L.R. Act, the lessor will become bhumidhar with non transferable right if the total area of land held by him together with land held by his family including the land let out to him does not exceed 12-1/2 acres and where the total area exceeds 12-1/2 acres the provisions of Section 154 and 163 of U.P.Z.A. & L.R. Act will apply.

9. Section 154 of the U.P.Z.A. & L.R. Act provides that no bhumidhar shall have the right to transfer by sale or gift any land other than tea gardens to any person where the transferee shall , as a result of such sale or gift, becomes entitled to land which together with land if any, held by his family will, in the aggregate, exceed 12.50 acres in Uttar Pradesh.

10. It has been found that in the present case the lessor has executed the lease deed in violation of the provisions of Section 156 of U.P.Z.A. & L.R. Act, the consequence as provided under sections 156 and 157 of the U.P.Z.A. & L.R. Act will ensue. It has been found that the said lease deed in view of the various provisions of U.P.Z.A. & L.R. Act, already referred to above, will amount to a sale deed and, therefore, the stamp duty shall be payable on the market value of the subject matter of the instrument, as applicable to a deed of conveyance.

11. Challenging the aforesaid orders, the learned Counsel submits that the provisions of U.P.Z.A. & L.R. Act cannot be taken into consideration while deciding a dispute under the Stamp Act. Reliance has been placed on a Special Bench decision of this Court in **Banney Khan vs. The Chief Inspector of Stamp, U.P., AIR 1976 Allahabad 475.** In this case the question was with regard to the applicability of the correct Article in respect of toll auction. The case of the auction purchaser was that such a transaction does not amount to lease as defined under Transfer of Property Act while on the other hand, the case of the stamp department was that it amounts a 'lease' as defined under Section 2 (16) of the Indian Stamp Act and the duty was chargeable under Article 35(b) of Schedule 1- B of U.P. Stamp (Amendment) Act, 1962. The court posed the question whether the document is a lease deed falling under Section 2 (16) of the Indian Stamp Act or is a licence and also a bond under Section 2 (5) of the Stamp Act and is chargeable with duty as a bond under Article 15 Schedule 1-B of the Act. In the above context, the following observations, which were relied upon by the learned Counsel here, were made:-

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

12. Ultimately, it was held that in view of definition of 'lease' given in Section 2 (16) (C) of the Stamp Act duty is chargeable under Article 35(b) of Schedule 1-B of the Stamp Act as amended in U.P.

13. It is an acknowledged legal position that there are two guiding

principles for applicability of the Stamp Act in respect of a particular document. They are :-

(i) The Court is not bound by the apparent tenor of an instrument, it shall decide according to the real nature or substance of the document; and

(ii) The duty is on the instrument and not on the transaction.

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

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

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

16. In interpreting a taxing statute, it has been said time and again, that equity has not role to play. Equitable consideration are entirely out of place. Nor can taxing statutes be interpreted on any presumption or assumption. The court must look squarely at the words of the statute and interpret them. It must interpret a taxing statute in the light of what is clearly expressed; it cannot imply anything which is not expressed; it cannot import provisions in the statutes so as to supply any assumed deficiency. (See ***Commissioner of Sales Tax, U.P. Vs. Modi Sugar Mills Ltd. , AIR 1961 Supreme Court 1047***).

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

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

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

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

(ii) *The second rule is that the Court is not (Sic) by the apparent tenor of the instrument, it is the real nature of the transaction which will determine the stamp duty.*

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

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

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

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

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

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

21. Viewed as above, the definition of lease as give under the Stamp Act only should be looked upon for the purposes of charge ability of stamp duty on such instrument. The said document may be treated differently under any other enactment, it is of no consequence so far as the question of payment of stamp duty is concerned.

22. In the result, the writ petition succeeds and is allowed with costs. The impugned orders are hereby set aside. Any amount deposited in pursuance of the impugned orders or in pursuance of the interim order passed by this Court shall be refunded to the petitioners within a period of one month from the date of production of certified copy of this order by the authority concerned. In case of default, the authority concerned shall also be liable to pay interest @ 6% per annum from the date of deposit to the date of actual refund.

The writ petition is allowed with costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.05.2009

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 7149 of 2009

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

Counsel for the Petitioner:
Sri K.B. Srivastava

Counsel for the Respondents:
Sri Pankaj Rai
S.C.

U.P. Cooperative Collection Funds and Amin and Others Employees Service Rules 2002-Rule 29- Revision- petitioner continuously worked as Cooperative Kurk Amin for 16 years 17 days on substantive post -thereafter worked as junior clerk (collection) at Tehsil level retired on 31.10.06 after completing 31 years 87 days service. Denial of pension on ground of working as junior clerk- which is not a post of Amin of other employee of concerned category-held illegal petitioner worked throughout on substantive post as government employee -entitled to club -entire service period for purpose of retirement dues and pension.

Held: Para 10:

The issue, as to whether a Cooperative Kurk Amin is a government servant holding a civil post, is thus no longer resintegra. This court and Apex Court have held that the cooperative Kurk Amins are government servants. The petitioner, appointed as Cooperative Kurk Amin of the collectorate on the regular pay scale on 28.7.1975; working continuously thereafter in the capacities of the Sahkari Kurk Amins, and Junior Clerk, continued to serve as a government servant throughout on regular basis from the date of his initial appointment on 28.7.1975 to the date he attained superannuation and retired at the age of 60 years as a member of service of whose service conditions are regulated by the rules of 2002. He is thus entitled to club his entire services together for the purposes of retirement dues and pension.

Case law discussed:
7326 (S/S) of 2004, (2001) 4 SCC 78, (1983) 2 SCC 33, 047, AIR 1970 MP 74.

(Delivered by Hon'ble Sunil Ambwani , J.)

1. Heard Shri K.B. Srivastava, learned counsel for the petitioner. Learned standing counsel appears for the respondents. With the consent of parties the writ petition was finally heard on 2.4.2009

2. The petitioner was appointed as Sahkari Cooperative Kurk Amin on 28.7.1975 in the play scale of Rs.200-320 for realization of outstanding dues of cooperative societies. On 28.2.1984 the District Assistant Registrar, Cooperative Societies U.P. Muzaffarnagar appointed him on the post of Sahkari Kurk Amin at Tehsil level in the office of Additional District Cooperative Officer, Sadar, Muzaffarnagar in the pay scale of Rs. 354-550. Subsequently by an order dated 29.11.1990 issued by the Additional Registrar (Banking) Cooperative Societies. U.P. Lucknow, the Deputy Registrar, Merrut was directed to appoint the petitioner as Junior Clerk from the post of Kosthak Lipik/Sahkari Kurk Amin and accordingly the Deputy Registrar, Cooperative Societies, U.P. Merrut Region, Merrut directed the District Assistant Registrar, Cooperative Societies, U.P. Haridwar to appoint the

petitioner on the post of Junior Clerk in the newly created district Haridwar in the pay scale of Rs. 950-1500.

3. The petitioner continued to work on substantive post of Cooperative Kurk Amin without any break for 16 years and 17 days and thereafter as Junior Clerk (Collections) at Tehsil level w.e.f. 21.8.1991 and superannuated on 31.10.2006 at the age of 60 years after completing 31 years and 87 days of service in regular pay scale. The petitioner however has not been held entitled to payment of pension inspite of the fact that the District Assistant Registrar, Cooperative Societies, U.P. Muzaffarnagar has made a recommendation for grant of pension on the ground that the facilities of pension are provided to the Cooperative Kurk Amin under the U.P. Cooperative Collections Fund and Amin and other Employees Service Rules 2002 (in short the Rules of 2002) and that in similar cases the Cooperative Kurk Amin have been provided with the right to receive pension.

4. Learned Standing counsel has sought instructions in the matter and informs the Court that the District Magistrate had sought opinion of D.G.C. (Civil), Muzaffarnagar and was advised that since the petitioner was appointed by the District Magistrate as a salaried Amin and thereafter as Cooperative KurkAmin at Tehsil level and was serving as a Junior Clerk at the time of retirement, the period of his service as Cooperative Kurk Amins should be added for the purposes of award of pension. The Treasury Officer, Muzaffarnagar has opined on 31.7.2007 that under Rule 29 of Rules of 2002, pension, gratuity and other retiral dues are provided to be paid to amins and his other companions and the employees of the concerned categories. It would be appropriate to treat the petitioner eligible for pension under Rule 29 of the Rules of 2002. The matter is still pending consideration in the State Government.

5. In the counter affidavit of Shri Mohd. Kaleem, Additional District Cooperative Officer, Muzaffarnagar, it is stated that the petitioner retired on 31.10.2006 as Junior Clerk of which the appointing authority is the District Assistant Registrar. His service were not regulated by the Rules of 2002, as he was not an Amin or Associate Amin under Rule 29 of the Rules of 2002 and is thus not entitled to pension.

6. In **Chandra Prakash Pandey and others vs. State of UP and others, Writ Petition No. 7326 (S/S) of 2004** this Court had held in its judgment dated 25.11.2008, that the Kurk Amins are to be treated as government servants and were entitled to all the benefits which are applicable to Government servants including pension. Earlier Shri Chandra Prakash Pandey and others filed a Writ Petition No. 199 of 1991 claiming declaration that they were government servants. The Court held in its judgment dated 26.4.1993, that the Kurk Amins are entitled to be treated as government servants. They were also entitled to regular pay scale and other allowance. The Special Appeals No. 15 (S/B) of 1994 and 39 (S/B) of 1994 were filed by the State of UP as well as petitioners. All those appeals were heard and by a judgment dated 5.5.1995 the Special Appeals filed by the State of U. P. was dismissed and the Special Appeals filed by the petitioners were allowed directing

concerned authorities to decide the case of the petitioners in the light of observations made I the judgment and to pass appropriate orders on the representations and to take steps for implement the decision. In paragraph-23 of the judgment it was held that the petitioners working as Kurk Amins were holding civil posts and were government servant and therefore their pay should be regulated by the existing pay scale . It was however held that it is not for the Court to decide as to what pay scale should be made applicable to the petitioners and therefore for that purpose the Court held that the proper authority will decide about the pay scales, arrears and other things related to the petitioner's claims. Pursuant to the judgment the District Magistrate, Faizabad had appointed petitioners in that writ petition as government servants on 23.10.2001 and that under the Rules of 2002 the petitioners were granted pay scale of Rs. 3050-3950. The judgments were confirmed by the Apex Court holding that the petitioners are government servants.

7. In this case the petitioner was appointed as Cooperative Kurk Amin on regular salary basis in the in the pay scale of Rs.200-320 on 28.7.1975. He was thereafter appointed as Cooperative Kurk Amin on salary basis at Tehsil level on 28.2.1984, and thereafter as Collection Clerk on 29.11.1990. The petitioner was thereafter appointed as Junior Clerk in the regular pay scale of Rs.950-1500 by the District Assistant Registrar, Cooperative Societies, U.P. Haridwar on 5.12.1990 in pursuance on the letters of the Registrar, Cooperative Societies, U.P. dated December 5, 1990 and the Deputy Registrar, Cooperative Societies U.P. Merrut Region, Merrut dated August 3, 1991.

8. The Cooperative Kurk Amins are engaged for realization of government dues. They discharges same functions and duties as regularly appointed collection Amins in the revenue department of state.

9. In **State of U.P. & Ors vs. Chandra Prakash Pandey & Ors. (2001) 4 SCC 78,** arising out of the Division Bench judgment of this Court referred to above, the Supreme Court held that the Kurk Amins Appointed on commission basis for recovery of outstanding dues of the Cooperative Societies were members of service and government servant on the ground that Cooperative Kurk Amins were appointed by the Collectors and were being paid out of the cost recovered according to the provisions for the recovery of land revenue, and were also given the revised pay scale. They were performing the same duties and responsibilities as Kurk Amins of other department on salary basis. They enjoy and exercise the power to arrest a person, who is a defaulter, can attach his property, which he can put to auction, like his counter part on regular basis. A Kurk Amin on commission basis and on regular basis similarly follows the provisions of U.P. Zamindari Abolition and Land Reforms Act, 1951 and U.P. Land revenue act, 1901 in so far as the recovery of land revenue is concerned. Once the District Magistrate issues a recovery citation, both the sets of Kurk Amins in order to execute the recovery follow the same procedure and exercise the powers and they are under the control of one and same authority. Both work in the same capacity under control of the State Government and their appointments

and duties fully comply with the tests laid down by the Supreme Court in the decision of **State of Gugarat vs. Raman Lal Keshav Lal Soni (1983) SCC 33** in which a Constitution Bench held that the panchayat service constituted under Section 203 of the Gujarat Panchayats Acts, 1962 was a civil service of the State and the members of the service were government servants. It was found that the right of appointment; the right to terminate the employment; the right to take other disciplinary action; the right to prescribe conditions of service; the nature of duties performed by the employees; the right to control the employees; manner and method of work; for issuing directions and the right to determine the source from which wages or salary are paid and a host of such circumstances, have to be considered to determine the exigency of the relationship of master and servant.

10. The issue, as to whether a Cooperative Kurk Amin is a government servant holding a civil post, is thus no longer res-integra. This court and Apex Court have held that the Cooperative Kurk Amins are government servants. The petitioner, appointed as Copperative Kurk Amin of the collectorate on the regular pay scale on 28.7.1975; working continuously thereafter in the capacities of the Sahkari Kurk Amins, and Junior Clerk , continued to serve as a government servant throughout on regular basis from the date of his initial appointment on 28.7.1975 to the date he attained superannuation and retired at the age of 60 years as a member of service of whose service conditions are regulated by the Rules of 2002. He is thus entitled to club his entire services together for the purposes of retirement dues and pension.

11. The writ petition is **allowed** with directions to respondents to allow the petitioner to complete the pension papers and thereafter to sanction the pension, gratuity, leave encashment, group insurance and all over service retiral benefits which are due to a government servant. The petitioner has retired has retired on 31.10.2006. The delay in award of pension cannot be attributed to him at all.

12. The petitioner as such is also entitled and shall be paid 8 % interest per annum on the delayed payment of the retiral dues and the arrears of pension. If the petitioner completes and submits all the documents within one month, the respondents shall settle and sanction the pension papers both for payment of pension and retiral dues within next three months.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.05.2009

BEFORE
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition No. 16767 of 2001

Shiv Mangal Singh ...Petitioner
Versus
Deputy Director of Consolidation, Banda and others ...Respondents

Counsel for the Petitioner:
Sri Faujdar Rai,
Sri Ram Swaroop Singh
Sri C.K. Rai

Counsel for the Respondents:
Sri Siya Ram Sahu
Sri V.K. Singh
S.C.

U.P. Consolidation of Holdings Acts-Section-19-A(2)-Allotment of Chak-land reserved for Cattle purpose-unless such declarations made by A.C.O.-Gaon Sabha land can not be allotted to individuals.

Held: Para 10:

There is no dispute that the land of Gaon Sabha or the State Government can be allotted in the consolidation proceeding, but it is possible only on a declaration being made by the Assistant Consolidation Officer in writing to the effect that it is proposed to transfer the rights of the petitioner in or over that land to any other land specified in the declaration and earmarked for that purpose in the provisional Consolidation Scheme. It is not the case of the petitioner that any such declaration as required under the proviso has been made in respect of Gata No. 6362. In this view of the matter, I am of the view that the Settlement Officer, Consolidation was not justified in allotting plot which was reserved for Rahoni (cattle purposes) to the petitioner. The decision cited by the learned counsel for the petitioner in the case of Ram Kumar and another Vs. Zila Adhikari/D.D.C., Muzaffarnagar and another (supra) does not say that in the absence of any declaration under the proviso to Section 19 A (2) of the Act, the land of the Gaon Sabha or State Government can be allotted. Therefore, the decision cited by the learned counsel for the petitioner is not applicable to the facts of the present case.

Case law discussed:
2002 (93) R.D. 403.

(Delivered by Hon'ble Rajes Kumar J.)

1. By means of present petition, the petitioner is challenging the order of the Deputy Director of consolidation, Banda dated 21.3.2001 by which the revision no. 17 filed by the Gaon Sabha has been allowed.

2. The brief facts giving rise to the present petition are that gata no. 6362 was reserved or Rahoni (cattle purposes). In the consolidation proceeding, objection filed by the petitioner has been rejected by the Consolidation Officer, Banda. It appears that the petitioner was claiming allotment of gata no. 6362 in his favour which has been rejected. Against the order of the Consolidation Officer, petitioner filed appeal before the Settlement Officer Consolidation, Banda. In appeal, the petitioner contended that in gata no. 6362, the petitioner was in possession before the Zamindari Abolition Act and the same was the property of his ancestral. The Settlement Officer Consolidation has accepted the plea of the petitioner that said gata no. 6362 was in possession of the petitioner and was continuing in his name and for some period due to mistake of Patwari, the name of the petitioner was not recorded in Khatuni and in case if the same land would be reserved for Rahoni purposes, the petitioner will suffer irreparable loss. The Settlement Officer Consolidation accordingly directed to allot gata no. 6362 of the value of Rs.8.52 paisa and the area of the same value of gata nos. 6414 and 6425 be reserved for Rahoni purposes.

3. Being aggrieved by the order, Gaon Sabha filed revision before the Deputy Director of Consolidation. The Deputy Director of Consolidation allowed the revision and set aside the order of the Settlement Officer Consolidation. The revisional authority held that gata no. 6362 is reserved for Rahoni purposes if is for public use and there is no reason to allot the said gata no. 6362 to the petitioner. A necessary direction has been issued in this regard. Being aggrieved by

the revisional order, the present writ petition has been filed.

4. Heard Sri Faujdar Rai, assisted by Sri R.S. Singh, learned counsel for the petitioner and learned Standing Counsel appearing on behalf of respondent nos. 1 to 3. No one appears on behalf of Gaon Sabha.

5. Learned counsel for the petitioner submitted that under Section 19-A (2) of the U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as the Act) the land of the State and the Gaon Sabha can also be allotted and in case if the Settlement Officer Consolidation has allotted the land of the Gaon Sabha it cannot be said to be illegal. In support of the contention he relied upon the decision in the case of **Ram Kumar and another Vs. Zila Adhikari/ D.D.C., Muzaffarnagar and another, reported in [2002(93) R.D. 403).**

6. Learned Standing Counsel submitted that under Section 19-A(2) of the Act the land of Gaon Sabha and State can be allotted only on the condition mentioned therein. He submitted that the proviso to Section 19-A(2) of the Act provides that such land can be allotted only after the Assistant Consolidation Officer has declared in writing that it is proposed to transfer the rights of the public as well as of all individuals in or over that land to any other land specified in the declaration and earmarked for that purpose in the provisional Scheme. He submitted that in the present case, no such declaration has been made and, therefore, Settlement Officer Consolidation was not justified in allotting the land of the Gaon Sabha to the petitioner.

7. Having heard learned counsel for the parties, I have perused the impugned order and the material on record.

8. Learned counsel for the petitioner has not disputed that plot no. 6362 belong to Gaon Sabha and is reserved for Rahoni.

9. Section 3(2) of the Act defines "consolidation" which means rearrangement of holdings in a unit amongst several tenure holders in such a way as to make their respective holdings more compact. The Explanation of sub-section (2) of the Act says that for the purpose of this clause, holding shall not include the land mentioned in Section 132 of the U.P. Zamindari Abolition & Land Reforms Act, 1950 (hereinafter referred to as the "Act"). Therefore, the land which is reserved for the public purpose is out side the purview of th consolidation. Section 19-A (2) of the Act reads as follows:-

"**(2) Notwithstanding anything contained in this Act, the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, or any other law for the time being in force, it shall be lawful for the Assistant Consolidation Officer, where in his opinion it is necessary or expedient so to do, to allot to a tenure-holder, after determining its valuation any land vested in the Gaon Sabha, or any other local authority, as a result of notification issued under Section 117 or 117-A of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950.**

Provided that where any such land is used for a public purposes, it shall be allotted only after the Assistant Consolidation Officer has declared in writing that it is proposed to transfer the rights of the public as well as of all

individuals in or over that land to any other land specified in the declaration and earmarked for that purposes in the provisional Consolidation Scheme."

10. There is no dispute that the land of Gaon Sabha or the State Government can be allotted in the consolidation proceeding, but it is possible only on a declaration being made by the Assistant Consolidation Officer in writing to the effect that it is proposed to transfer the rights of the petitioner in or over that land to any other land specified in the declaration and earmarked for that purpose in the provisional Consolidation Scheme. It is not the case of the petitioner that any such declaration as required under the proviso has been made in respect of Gata No. 6362. In this view of the matter, I am of the view that the Settlement Officer, Consolidation was not justified in allotting plot which was reserved for Rahoni (cattle purposes) to the petitioner. The decision cited by the learned counsel for the petitioner in the case of Ram Kumar and another Vs. Zila Adhikari / D.D.C., Muzaffarnagar and another (supra) does not say that in the absence of any declaration under the proviso to Section 19 A (2) of the Act, the land of the Gaon Sabha or State Government can be allotted. Therefore, the decision cited by the learned counsel for the petitioner is not applicable to the facts of the present case.

11. In the result, writ petition fails and is, accordingly dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.07.2009

BEFORE
THE HON'BLE SURENDRA SINGH, J.

Criminal Misc. Application No. 24498 of 2007

Smt. Maya Devi and others ...Applicants
Versus
State of U.P. & another ...Opposite Parties

Counsel for the Applicants:
Sri V. Singh
Sri D. Tiwari

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

Code of Criminal Procedure-Section 482-Quashing of charge sheet-offence under Section 323-challenged on ground-being non-cognizable offence- Police lacks of jurisdiction-held-charge sheet be treated as complaint in accordance with procedure laid down under chapter XV of the Code-offence being trivial in nature-applicant be permitted to appear through counsel under section 205 of the code.

Held: Para 8:

With the reasons mentioned above, the charge sheet submitted by the police in the present case under Section 323 I.P.C. Shall be treated as complaint and it is to be decided as a complaint in accordance with procedure laid down under Chapter XV of the Code of Criminal Procedure. Learned Magistrate fell in legal error by taking cognizance in the said case. In view of the above discussion, the order of the Magistrate is only required to be modified and not to be quashed as a whole.

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

1. The applicants by filling this application have sought to quash the orders dated 7.6.2007 and 27.7.2007 passed by Additional Chief Judicial Magistrate, Aligarh in Criminal Case No. 810 of 2007 (State Versus Maya Devi and others), under Section 323 I.P.C. Police Station Shasni Gate, District Aligarh, pending in the Court of Additional Chief Judicial Magistrate, Court No. 1, Aligarh.

Briefly put, the facts of the case may be summarized as follows;

2. An F.I.R. Was lodged by the respondent No. 2- Har Charan Sharma against the applicant under Section 147, 323 and 380 I.P.C. Vide Case Crime No. 40 of 2007 at Police Station Sasni, District Aligarh on 7.2.2007 at 7.35 P.M. Regarding the incident alleged to have taken place on 12.1.2007 at 7.00 P.M. The police after investigation of the case submitted charge sheet against the accused applicant under Section 323 I.P.C. and on that charge sheet Magistrate took cognizance and summoned the applicant. Aggrieved with that order, the present application has been filed.

3. Heard learned counsel for the applicants and learned A.G.A. and perused the material placed on record.

4. The contention of the learned counsel for the applicant is that the offence under Section 323 I.P.C. Being non-cognizable, the police lacks jurisdiction to file charge sheet and, therefore, the charge sheet so laid being nonest in the eye of law should be quashed.

5. Learned A.G.A. Opposed the argument of the learned counsel for the applicant and stated that it has not been alleged in the order whether the charge sheet filed was treated as a complaint case or police challany case. He has further submitted that no prejudice has been caused to the applicant by the impugned order.

6. Coming to the merit of the contention made by the learned counsel for the applicant, undisputedly the aforesaid case cannot continue as on arising out of police report because said report can be filed when the offence is cognizable. Therefore, the question arises whether entire criminal proceedings should be brought to a halt and charge sheet laid is liable to be quashed ? Reference may be made to Exception 2 (d) of the Code of Criminal Procedure.

Explanation to Clause (d) to Section 2 of the Code provides:

"Explanation-A report made by a police officer in a case which disclose, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant."

7. Section 2 (d) of the Code encompasses a police report also as a deemed complaint if the matter is investigated by a Police Officer regarding the case involving commissions of a non-cognizable offence. The police officer (Investigating Officer) who has submitted the charge sheet and he being a public servant, statements under Section 200 and 202 Cr. P.C. Are not required to be recorded in view of the proviso (2) to Section 200 Cr.P.C. No doubt, Annexure-

2 has been termed as a charge sheet but the same should be treated as a report and proceeding should continue as complaint in view of exception 2 to Section 2(d) of Code of Criminal Procedure as has been extracted above.

8. With the reasons mentioned above, the charge sheet submitted by the police in the present case under Section 323 I.P.C. Shall be treated as complaint and it is to be decided as a complaint in accordance with procedure laid down under Chapter XV of the Code of Criminal Procedure. Learned Magistrate fell in legal error by taking cognizance in the said case. In view of the above discussion, the order of the Magistrate is only required to be modified and not to be quashed as a whole.

9. The application under Section 482 Cr.P.C., therefore, is allowed partly treating the charge sheet as a complaint. However, the offence being trivial in nature, the applicants shall be permitted by the court below to appear through their counsel under Section 205 of the Code of Criminal Procedure, after bail is granted to them subject to the terms and conditions imposed by the court below under the facts and circumstances of the case.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.07.2009

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 29780 of 1992

Brahma Singh ...Petitioner
Versus
D.I.O.S. and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare
Sri K.S. Mishra

Counsel for the Respondent:
S.C.

Constitution of India-Article 226- Claim of Salary-petitioner being senior most L.T. Grade teacher-discharging duty of lecture (geography)-since July 1991-in absence of substantive appointment/promotion order-mere discharge of duties of higher post-can not be basis to claim salary-petition dismissed.

Held: Para 9

The submission is thoroughly misconceived inasmuch assuming that the petitioner was required to discharge duties of lectured, but the fact remains that there was nothing on record to show that he was never appointed or promoted to the post of Lecturer in 1991. A person claiming salary on a post must have to be appointed on the said post. Mere discharge of duties on a post or looking after the duties of a post is not equivalent or at par or can be a substitute of promotion or appointment on that post. This aspect has been considered by a Division Bench of this Court in Smt. Vijay Rani Vs. Regional Inspectress of Girls Schools, Region-I, Merrut & others 2007(2) ESC 987 and it has been held that a person merely looking after the duties is not entitled to claim salary of the higher post. In the circumstances, no relief can be granted even on this aspect also.

Case law discussed:
1990 (1) UPLBEC 160, 1996 (3) ESC 155, 2007(2) ESC 987.

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

1. Heard Sri K.S. Mishra, learned counsel for the petitioner at great length and learned Standing Counsel

representing respondents no. 1 and 2. Despite notice having been served upon respondent no. 3 neither he has filed any counter affidavit nor anyone has put in appearance on his behalf.

2. The short question up for consideration is whether the petitioner was eligible for promotion to the post of Lecturer against a vacancy occurred on 30.06.1991 in Hindu Anglo Vaidic Inter College, Saharanpur (hereinafter referred to as 'College'). The petitioner was appointed as Assistant Teacher (CT Grade) in the College on 17.02.1981. Sri Mishra stated that in 1986, the cadre of C T Grade was declared a dying cadre and, therefore, he became Assistant Teacher in L.T. Grade and continued as such. On account of one Sri Shyam Dayal Srivastava, Lecturer (Geography) on 30.06.1991 a substantive vacancy on the post of Lecturer fell vacant and he, being senior most L.T. Grade Teacher, was entitled to be considered for promotion on that post, but the Management of the College informed the vacancy to the U.P. Secondary Education Service Selection Board (hereinafter referred to as 'Commission') so at to be filled in by direct recruitment and it is against this process of recruitment and the consequential advertisement made by the Commission for filling in the said vacancy, the present writ petition has been filed challenging the advertisement and the writ of prohibition restraining the respondents from making and ad hoc appointment in the College by direct recruitment and instead consider him for promotion and pay salary for the said post.

3. The learned Standing counsel, however, contended that the petitioner, being not eligible for promotion to the post of Lecturer, the process of direct recruitment has validly been initiated by the respondents.

4. Having heard learned Counsel for the parties, it appears that it is the admitted case of the petitioner that he started functioning in L.T. Grade from February 1991. Para 2 of the writ petition states as under:

"2. *That the petitioner was appointed as a permanent Assistant Teacher in C.T. Grade in the college on 17.02.1991. Thereafter the petitioner has been granted L.T. Grade of pay scale on account of declaration of C.T. Grade to a dying cadre. The petitioner is functioning in the L.T. Grade of pay scale from Feb. 1991."*

5. Besides, Annexure-2 to the writ petition is representation sent by the petitioner himself wherein he has clearly stated that he was appointed as Assistant Teacher (C.T. Grade) on 17.02.1981. from 17.02.1991 he is working as permanently in L.T. Grade prior to 17.2.1991. Annexure-6 to the writ petition which is a certificate issued by the Principal of the College also shows that the Principal has certified that the petitioner is working in L.T. Grade from 17.2.1991. There is nothing on record to show that the petitioner was ever appointed or promoted as Assistant Teacher (L.T. Grade) prior to 17.2.1991. The contention of learned counsel for petitioner, therefore, that he was promoted or appointed in L.T. Grade in 1986 is not supported by any material or record and the same being question of fact, cannot be decided in favour of the petitioner unless a appointment/promotion letter is placed on record or there is any

other material to show that he was promoted on the post of Assistant Teacher (L.T. Grade) on a date earlier then 17.2.1991. Besides, along with the supplementary affidavit, the petitioner has also filed a resolution of committee of management and on page 3 thereof, the committee of management has also said that the petitioner was working in L.T. Grade from 17.2.1991. The vacancy of Lecturer having arisen on 30.6.1991, i.e., almost after three and half months from the date the petitioner was appointed in L.T. Grade, ex facie he was ineligible for promotion to the post of Lecturer (Geography).

6. He was placed reliance on Division bench Judgement of this Court in **Charu Chandra Tiwari Vs. D.I.O.S. Deoria & others 1991(1)UPLBEC 160.** Another is a Single Judge Judgement of this Court **Ram Swaroop Vs. State of U.P. & others 1996(3)ESC 155.** However, I do not find the said judgments supporting the petitioner in any manner. In **Charu Chandra Tiwari (supra)**, this court considered the effect of Section 18 of U.P. Secondary Education Service Selection Board Act, 1982 and the manner in which an ad hoc appointment awaiting regular selection from Commission could be made and for the period and duration for which such such appointment could be made. In **Ram Swaroop (supra)** this Court considered Rule-9 of the U.P. Secondary Education Service Commission and Selection Board Act. 1982 qua Regulation 6 Chapter 2 of the Regulations framed under Intermediate Education Act, 1921 (hereinafter referred to as '1921 Act') Regulation 6 provided eligibility for promotion to the post of L.T. Grade and Lecturer and it says that the incumbent must have minimum five years "continuous substantive service". On the contrary, Rule 9 of the Rules provides eligibility as "five years continuous service". The word "substantive" was not therein and in these circumstances, the Hon'ble Single Judge held that in order to consider eligibility of a Teacher for promotion, it is not the "substantive service", but five years "continuous service" which has to be considered as is evident from Para 13 of the judgment where the Hon'ble Single Judge says as under:

"*A period of the aforesaid Regulation-6 would shows that five years continuous substantive service is the necessary condition for giving promotion form C.T. Grade to L.T. Grade or in the Lecturer's Grade, whereas continuous substantive service has not be made a condition for promotion under Rules 9 and 9-B. The requirement of continuous substantive service having not been incorporated in Rule-9 as is was therein Regulation-6 clearly indicates that the intention of the framer was not to retain five years continuous substantive service as a necessary condition for giving promotion to a teacher in the higher grade. Rule-9 only proscribes five years continuous service as a teacher on the date of occurrence of vacancy.*"

7. Thus, under Rule 9 it cannot be doubted that at least five years continuous service in the feeder cadre is necessary. I am not concerned in the case in hand whether the petitioner possess experience as substantive teacher or not but the question is whether he has worked Assistant Teacher (L.T. Grade) for at least five years. As discussed above, the petitioner has not at worked for five years

in L.T Grade, therefore, he was not eligible for promotion to the post of Lecturer (Geography)

8. Learned counsel for the petitioner further says that after the vacancy occurred, he was required to look after the duties as Lecturer and, therefore, from 1.7.1991, he is discharging the duties as Lecturer and hence entitled for promotion on regular basis and salary to the said post.

9. The submission is thoroughly misconceived inasmuch assuming that the petitioner was required to discharge duties of lectured, but the fact remains that there was nothing on record to show that he was never appointed or promoted to the post of Lecturer in 1991. A person claiming salary on a post must have to be appointed on the said post. Mere discharge of duties on a post or looking after the duties of a post is not equivalent or at par or can be a substitute of promotion or appointment on that post. This aspect has been considered by a Division Bench of this Court in **Smt. Vijay Rani Vs. Regional Inspectress of Girls Schools, Region-I, Merrut & others 2007(2) ESC 987** and it has been held that a person merely looking after the duties is not entitled to claim salary of the higher post. In the circumstances, no relief can be granted even on this aspect also.

10. In view of above, the writ petition lacks merit and is, accordingly dismissed.
