ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.06.2009

BEFORE
THE HON'BLE DILIP GUPTA, J.

Civil Misc. Writ Petition No. 59818 of 2007

Smt. Archana Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri M.M. Sahai

Counsel for the Respondents:
Sri S.K. Pandey
Sri R.C. Srivastava
Sri K.S. Kushwaha
S.C.

Constitution of India, Art. 226-Education Service-Appointment of Officiating Principal in recognized Inter College-after retirement of substantive appointee-Senior most teacher refused to accept the working as officiating Principal-petitioner being at Serial No. 6 started working as officiating principal-signature attested-Subsequent action of authorized controller and as of D.I.O.S. appointing such lecturer as officiating principal considering her seniority-ignoring refusal on two different occasion-No fresh vacancy caused-earlier vacancy of 2000 still continuing-held-illegal.

Held: Para 13

In the present case, no fresh substantive vacancy has arisen and the substantive vacancy which had occurred on account of the retirement of the regular Principal in the year 2000 is still continuing. In view of the Division Bench decision rendered by this Court in Sundershan Kumar (supra) it has to be held that Sangeeta Banerjee cannot work as Officiating Principal of the College since she had on earlier two occasions declined to do so. The order dated 20th November, 2007 passed by the Authorised Controller and the consequential order dated 6th December, 2007 passed by the DIOS, therefore, cannot be sustained.

Case law discussed:
1995 (1) AWC 122; (2008) 2 UPLBEC 1159, Special Appeal No. 959 of 2006 (Sundershan Kumar Vs. State of U.P. & Ors.), (1999) 3 UPLBEC 2088, (2004) 1 UPLBEC 600,

(Delivered by Hon'ble Dilip Gupta, J.)

1. The petitioner, a Lecturer in "Sri Agrasen Kanya Inter College, Varanasi" (hereinafter referred to as the "College'), has sought the quashing of the order dated 20th November, 2007 passed by the Authorised Controller of the College as also the consequential order dated 6th December, 2007 passed by the District Inspector of Schools, Varanasi (hereinafter referred to as the "DIOS') whereby by the former order, a direction has been given to Smt. Sangeeta Banerjee, Lecturer in the College, to discharge duties as Officiating Principal of the College and by the latter her signatures have been attested. The petitioner has also sought a direction upon the respondents not to disturb the working of the petitioner as the Officiating Principal of the College.

2. The regular Principal of the College retired in the year 2000 after attaining the age of superannuation. In the absence of regular the Principal, Prem Lata Sinha, a Lecturer in the College, was appointed as the Officiating Principal of the College but as disciplinary proceedings were initiated against her by the Committee of Management, respondent no.5 Sangeeta Banerjee was given the charge of Officiating Principal

of the College by the order dated 20th March, 2005. However, she sent a communication dated 22nd March, 2006 to the Manager of the College expressing her inability on account of domestic circumstances to take charge of the Officiating Principal of the College. Gayatri Singh was thereafter asked to take charge of the Officiating Principal of the College by the communication dated 22nd March, 2006 and though she took charge of the Officiating Principal but subsequently expressed her inability to continue as the Officiating Principal of the College by the communication dated 20th May, 2006 in view of domestic circumstances. The petitioner was, thereafter, given charge of the Officiating Principal of the College by the order dated 20th June, 2006. However, the Manager of the College again gave the charge of the Officiating Principal to Sangeet Banerjee, but she again expressed her inability to work as the Officiating Principal by the communication dated 25th June, 2006. The petitioner was thereafter asked to work as the Officiating Principal and her signatures were also attested by the DIOS by the order dated 24th July, 2006. On 20th November, 2007, however, the Authorised Controller of the College, who had since been appointed in the College, directed Sangeeta Banerjee to work as the Officiating Principal of the College in view of the application submitted by Sangeeta Banerjee and the fact that Sangeeta Banerjee was the senior most Lecturer in the College. On the basis of the said order, the DIOS by the order dated 6th December, 2007 attested the signatures of Sangeeta Banerjee as the Officiating Principal of the College. These two orders have been impugned in the present petition.

3. I have heard Sri M.M. Sahai, learned counsel for the petitioner, Sri S.K. Pandey, learned counsel appearing for Sangeeta Banerjee and the learned Standing Counsel appearing for respondent Nos. 1, 2 and 3.

4. Learned counsel for the petitioner submitted that once Sangeeta Banerjee had declined to officiate as the Principal of the College, she could not subsequently be given charge of the Officiating Principal, particularly when the same substantive vacancy is continuing and in support of this contention he has placed reliance upon the judgements of this Court in ***Satya Vir Singh Vs. District Inspector of Schools, Bulandshahr & Ors., 1995 (1) AWC 122; Ashok Kumar Jain Vs. State of U.P. & Ors***. reported in ***(2008) 2 UPLBEC 1159*** and upon the Division Bench judgment of this Court in ***Special Appeal No. 959 of 2006 (Sundershan Kumar Vs. State of U.P. & Ors.)*** decided on 15th September, 2006.

5. Learned counsel appearing for Sangeeta Banerjee and the learned Standing Counsel, however, contended that mere refusal by Sangeeta Banerjee on two occasions to work as the Officiating Principal of the College cannot be treated as refusal for all times to come and as the senior most Lecturer, she was entitled to officiate as the Principal of the College. In support of this contention, reliance has been placed upon the decisions rendered in ***Committee of Management, Jai Kisan Inter College, Lalpur Imiliadheesh, Bedipur, Basti & Ors. Vs. District Inspector of Schools, Basti & Ors., (1999) 3 UPLBEC 2088*** and ***Committee of Management, Jai Kisan Vidya Mandir College, Saharanpur & Ors. Vs. State of U.P. & Ors. (2004) 1 UPLBEC 600***.

6. I have carefully considered the submissions advanced by the learned counsel for the parties.

7. It is not in dispute that twice the Committee of Management had asked Sangeeta Banerjee, respondent no.5, to work as the Officiating Principal of the College but on each occasion, she declined to work in view of her domestic problems. It is, in such circumstances, that the petitioner was asked to officiate as the Principal of the College but subsequently when the Authorised Controller was appointed, an order was passed by him on 20th November, 2007 that Sangeeta Banerjee shall work as the Officiating Principal of the College and the DIOS subsequently attested her signatures. The question, therefore, that arises for consideration is whether the Authorised Controller was justified in passing the order that Sangeeta Banerjee shall officiate as the Principal of the College instead of the petitioner, particularly when the same substantive vacancy is continuing.

8. In Satya Vir Singh (Supra), on which reliance has been placed by the learned counsel for the petitioner, a learned Judge of this Court observed as follows:-

"Once a senior-most teacher is permitted to function as Officiating Principal of an institution but he either declines to accept the post or after accepting the post submits his resignation, he cannot claim that right to function as Officiating Principal. In Special Appeal No. 141 of 1993, Smt. Sudesh Kakkar v. Regional Inspectress of Girls Schools, Ist Region, Meerut and others, a Division Bench of this Court held that once a senior-most teacher declines offer to function as Officiating Principal she cannot claim the right subsequently to be appointed as Officiating Principal of the Institution."

9. This decision was, however, distinguished by a learned Judge of this Court in Committee of Management, Jai Kisan Inter College, Basti & Ors. (supra) and it was observed :-

"Learned counsel for the petitioner has relied on a decision of this Court in Satya Vir Singh v. D.I.O.S., Bulandshahr, 1995 (1) A.W.C. 122 and he has emphasised on paragraphs 11 and 12 of this decision in which it has been held that once the senior most teacher has declined to accept the post he cannot claim the right to function as officiating Principal. In my opinion this decision is distinguishable. In the present case the respondent No.2 had declined to accept the post of Principal in the year 1981. Satya Vir Singh's case cannot be interpreted to mean that once a person has declined to officiate as ad hoc Principal and later on the vacancy again occurs he cannot then claim to be the officiating Principal merely because he had earlier declined. In my opinion, declining of the post is only for that particular period of time when the vacancy had arisen. It cannot be treated to amount to permanently declining the post for all times to come. Whenever the vacancy may again occur in future, the senior most teacher may again be considered for the post of Principal according to law."

10. In Committee of Management, Jai Kisan Vidya Mandir College, Saharanpur (supra), a learned Judge of

this Court, after considering the decisions of this Court in Satyavir Singh (supra) and Committee of Management, Jai Kisan Inter College, Basti (supra), observed that the principles laid down in Committee of Management, Jai Kisan Inter College (supra) were applicable to the facts of the case and accordingly observed as follows:-

"Having heard the learned Counsel for the parties, I find that on earlier three occasions the officiating Principal was to be appointed in the leave vacancy. The respondent no.3 had declined to hold the post. However, after the leave vacancy had come to an end and the Principal had joined, the question of officiation cannot be said to have continued. Declining to hold the post of officiating Principal on earlier three occasions cannot be held to disentitle a person from being considered on the post of the officiating Principal when a substantive vacancy has arisen....."

11. The aforesaid decisions in the case of Committee of Management, Jai Kisan Vidya Mandir College, Saharanpur (supra) as also the Division Bench judgment of this Court in Smt. Sudesh Kakkar Vs. Regional Inspectress of Girls Schools, Ist Region, Meerut & others rendered in Special Appeal No. 141 of 1993 were considered by a **Division Bench** of this Court in **Sundershan Kumar** (supra) and it was held that if a teacher refuses to officiate as the Principal of the College then, if the same substantive vacancy continues, he cannot subsequently turn around and claim appointment as Officiating Principal. The relevant observations are as follow:-

"In the present case the facts are different. The substantive vacancy had arisen on 30.6.2003 and the same vacancy is continuing. It is not a case where leave vacancy has subsequently been converted into a substantive vacancy or a fresh substantive vacancy had arisen. Therefore, respondent no.6 having refused to officiate as the Principal on the said substantive vacancy, he is not entitled to stake claim for appointment as Officiating Principal on the same very vacancy subsequently on the retirement of Officiating Principal. Therefore, the above case law is of no help to respondent no.6 and in fact it goes against him in as much there is no fresh substantive vacancy of the post of Principal.

In our opinion, respondent no.6 in unequivocal terms had refused to officiate as Principal when the substantive vacancy of the post of Principal had occurred on 30.6.2003. The said same post continued to remain vacant as no substantive appointment on the said vacancy was made. Mere fact that an ad-hoc arrangement of Officiating Principal, which was made earlier on the said post, has come to an end, it does not mean that a fresh substantive vacancy had been created or arisen. The substantive vacancy remains the same and only Officiating arrangement has come to an end. Since respondent no.6 had declined to officiate as Principal on the said very vacancy, he cannot be permitted at this stage to turn around and to claim appointment as Officiating Principal on the same very post.

The respondent no.6 having refused to accept Officiating appointment is estopped under Law from claiming officiating appointment on the same

substantive vacancy. It would have been a different thing if a substantive vacancy which had occurred earlier, had been filled up by a regular appointment and then a fresh vacancy had been created. In that event, respondent no.6 may have become entitle for reconsideration for Officiating Principal on the fresh substantive vacancy.

The above view taken by us stands fortified by an unreported Division Bench Judgment of this Court in the case of Smt. Sudesh Kakkar Vs. The Regional Inspector of Girls Schools & Ors. passed in Special Appeal No.141 of 1993 decided on 7.4.1994, which has been relied upon in the case of Satya Vir Singh (supra)....."

12. It is in the light of the observations made in the aforesaid decision rendered in Sundershan Kumar (supra) that a learned Judge of this Court in Ashok Kumar Jain (supra) observed as follows:-

"The substantive vacancy occurred on 30.6.1998 on the retirement of Ramesh Chandra Gupta and no fresh vacancy occurred upon the retirement of Girish Chandra Jain on 30.6.1997. It was the same vacancy which continued. Consequently, the vacancy which occurred on 30.6.1998 continued and continued to exist till 30.6.2007. The same post continued to remain vacant and no substantive appointment on the said vacancy was made. The mere fact that an adhoc arrangement of officiating Principal was made earlier on the said post which came to an end would not mean that a fresh substantive vacancy had again been created. The substantive vacancy remained the same and only an officiating arrangement had come to an end. This view was also held in the aforesaid Division Bench judgment of Sundershan Kumar (supra), which is squarely applicable to the present facts and the circumstances of the case. The judgment cited by the learned counsel for the petitioner stands impliedly overruled in view of the decision of the Division Bench."

13. In the present case, no fresh substantive vacancy has arisen and the substantive vacancy which had occurred on account of the retirement of the regular Principal in the year 2000 is still continuing. In view of the Division Bench decision rendered by this Court in Sundershan Kumar (supra) it has to be held that Sangeeta Banerjee cannot work as Officiating Principal of the College since she had on earlier two occasions declined to do so. The order dated 20th November, 2007 passed by the Authorised Controller and the consequential order dated 6th December, 2007 passed by the DIOS, therefore, cannot be sustained.

14. The writ petition, therefore, succeeds and is allowed. The orders dated 20th November, 2007 and 6th December, 2007 are quashed. The petitioner shall be permitted to work as Officiating Principal of the College in terms of the earlier order passed by the Management of the College.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 29.06.2009

BEFORE
THE HON'BLE VIJAY KUMAR VERMA, J.

Criminal Misc. Bail Application 1199 of 2009

Khursheed and another ...Applicants (In Jail)
Versus
State of U.P. ...Opposite party

Counsel for the Applicants:
Sri Pankaj Sharma
Sri Rajul Bhargava
Sri S.K. Dwivedi

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

Code of Criminal Procedure Section 439-Second Bail Application-Maintainability-omission of the facts and ground available at the time of First Bail Application-Second Bail Application not maintainable except on having some additional new grounds-in Second Bail Application except period of jail no other facts pleaded-held-not maintainable.

Held: Para 12

Having given my thoughtful consideration to the submissions made by the learned AGA, I entirely agree with his contention that second bail application moved on behalf of the applicants is not legally maintainable, as no fresh ground has been shown in the 2nd bail application or at the time of arguments. I have already mentioned herein-above the submissions made by the learned counsel for the applicants. Except the ground of period of detention in jail, all other grounds, as mentioned above, were available to the applicants-accused at the time of disposal of the first bail application. Therefore, in view of the law laid down by the Division Bench of this Court in *Satya Pal Vs. State of U.P.* (supra) and keeping in view the observations made by Hon'ble Apex Court in *Kalyan Chand Sarkar Vs. Rajesh Ranjan @ Pappu Yadav* (Supra), in my opinion, second bail application on those very facts and grounds that were available to the applicants when the first bail application was moved and rejected, cannot be allowed to be advanced.

Case law discussed:
1998(37) ACC 287, 1989(26) ACC 503(SC), 1978 Cr. L. J. 651 (SC), 1987(24) ACC 425(SC), 2005(51) ACC 727 (SC), 2008 (63) ACC 115.

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

"Whether the second bail application on the grounds, which were available at the time of dismissal of first bail application is maintainable?", is the main point that falls for consideration in this case, in which second bail has been moved on behalf of the applicants named above in case crime no. 670 of 2008 under section 419, 420, 467, 468 IPC of P.S. Govardhan, District Mathura.

2. The first bail application bearing no. 30292 of 2008 was rejected on merit by another Bench of this Court vide order dated 11.11.2008.

3. Shorn of unnecessary details, the case of the prosecution, as appearing from the first information report lodged on 19.09.2008 by the complainant Gurwant Sharma s/o Bharu Lal, resident of Village Bhadbhadia, Tehsil and District Neemamb (Madhya Pradesh), is that the accused Pappu @ Khursheed (applicant no. 1 herein) and Zakir s/o Shamshuddin defrauded and cheated the complainant on 11.08.2008 and obtained Rs.10,00,000/- (Rupees ten lac) from him and gave two

bricks weighing about two kilograms saying that the bricks are of gold, whereas on examination, the bricks were found of brass or some other metal.

4. I have heard Sri Rajul Bhargava and Sri S. K. Dwivedi, Advocates appearing for the applicants and AGA for the State.

5. Before coming to the submissions made by learned counsel for the applicants and AGA, I would like to express my views on the legal question, which I have posed for consideration as stated herein-above. This question has been posed for consideration, because second or subsequent bail applications are being moved by Hon'ble members of the Bar on the same ground, which were available at the time of rejection of the first bail application. It is generally argued by Hon'ble members of the Bar that there is no legal bar to move second or subsequent bail applications even on those grounds, which were available at the time of disposal of first bail application, if arguments about those grounds were not advanced at the time of disposal of first bail application.

6. The matter of maintainability of second or subsequent bail application on the grounds, which were available at the time of rejection of first bail application, was considered by Division Bench of this Court in ***Satya Pal Vs. State of U.P. 1998(37) ACC 287***. The following question was referred by the single Judge to be decided by larger Bench:-

"Whether a fresh argument in a second bail application for an accused should be allowed to be advanced on those very facts that were available to the accused while the first bail application was moved and rejected.

7. Before the learned Single Judge reliance was placed on the decision of a learned Single Judge of this Court in the case of Gama and another v. State of U.P. 1986 (23) ACC 339. The learned Single Judge in paragraph 5 of his judgement observed as follows:-

"I am conscious that order on a bail application need not be detailed one but as the legal points were argued from both sides which require a bit detail discussion. After hearing the counsel for the parties at considerable length, the first point for determination is as to whether the arguments advanced by the learned counsel for the applicants about the statements of most of the prosecution witnesses being recorded under section 164 of the Code was considered in the first order disposing of the bail application or not. Suffice it to say that the right of bail is statutory right, rather it is a constitutional right. Even though it may be second or third bail application, but unless it is apparent from a reading of the first bail order that the point urged in the subsequent bail applications was also considered and rejected, it cannot be said that the point urged in the second or third bail application would be deemed to have been considered in the first bail application just by implication."

8. Having considered the decisions of Hon'ble Apex Court in ***State of Maharashtra Vs. Buddhikota Subha Rao 1989(26) ACC 503(SC), Babu Singh Vs. State of U.P. 1978 Cr. L. J. 651 (SC***) as well as ***Shahzad Hasan Khan V. Ishtiaq Hasan Khan 1987(24) ACC 425(SC)***, the Bench consisting of Hon'ble Girdhari

Malvia and Hon'ble K. D. Sahi, J.J. has held that second bail application for an accused can not be allowed to be advanced on those very facts that were available to the accused while the first bail application was moved and rejected. The view expressed by the Hon'ble Single Judge in ***Gama Vs. State of U.P.*** (supra), was over-ruled by the Division Judge.

9. The matter of maintainability of second and subsequent bail application was considered by the Hon'ble Apex Court in ***Kalyan Chandra Sarkar etc. Vs. Rajesh Ranjan @ Pappu Yadav and another 2005(51) ACC 727 (SC).*** On the basis of the observations made by the Hon'ble Apex Court in the decision in this case, it can very well be stated that second or subsequent bail application can be moved on some fresh grounds or change of circumstances or law. The following observations made by Hon'ble Apex Court in para 19 and 20 of the report are worth mentioning:-

"19. The principles of res judicata and such analogous principles although are not applicable in a criminal proceedings, still the Courts are bound by the doctrine of judicial discipline having regard to the hierarchical system prevailing in our country. The findings of a higher Court or a coordinate Bench must receive serious consideration at the hands of the Court entertaining a bail application at a later stage when the same had been rejected earlier. In such an event, the Courts must give due weight to the grounds which weighed with the former or higher Court in rejecting the bail application. Ordinarily, the issues which had been convassed earlier would not be permitted to be re-agitated on the same grounds, as the same would lead to a speculation and uncertainty in the administration of justice and may lead to forum hunting. (underlining is our).

20. The decisions given by a superior forum, undoubtedly, is binding on the subordinate fora on the same issue even in bail matters unless of course, there is a material change in the fact situation calling for a different view being taken. Therefore, even though there is room for filing a subsequent bail application in cases where earlier applications have been rejected, the same can be done if there is a change in the fact situation or in law which requires the earlier view being interfered with or where the earlier finding has become obsolete. This is the limited area in which an accused, who has been denied bail earlier, can move a subsequent application. Therefore, we are not in agreement with the argument of learned counsel for the accused that in view the guaranty conferred on a person under Article 21 of the Constitution of India, it is open to the aggrieved person to make successive bail applications even on a ground already rejected by Courts earlier including the Apex Court of the country."

10. Keeping in view aforecited observations made by the Hon'ble Apex Court, I now come to the submissions made by the learned counsel for the applicants in support of the second bail application. The following main arguments were advanced by the learned counsel for the applicants:-

(a) That the applicant no. 2 Majsad is not named in the FIR.

(b) That five more persons were introduced in the statements under section 161 Cr.P.C., but chargesheet has not been submitted against them. For this

submission, my attention has been drawn towards the statements of witnesses filed with supplementary affidavit dated 07.05.2009.

(c) That both the applicants were not put to identification during investigation in Test Identification Parade and hence identity of the applicants is not established. It was submitted in this context that the applicants are residents of Uttar Pradesh, whereas the complainant is resident of Madhya Pradesh and he was not knowing the applicants since before the alleged incident. The contention of learned counsel was that since the complainant and witnesses were not knowing the applicants prior to the alleged incident, hence it was obligatory for the investigating officer to put the applicants to identification during investigation in Test Identification Parade and since it was not done, hence the identity of the applicants can not be said to be established.

(d) That there was delay in lodging the FIR.

(e) That there are material contradictions in the statements of the witnesses recorded under section 161 Cr.P.C.

(f) That no recovery of any incriminating article was made from the applicants.

(g) That in the statements recorded under section 161 Cr.P.C. of the complainant, details of mobile calls have not been given.

(h) That no offence is made out against the applicants.

(i) That there is no independent witness of the alleged incident of handing over bricks by the applicants and payment of Rs.10,00,000/- by the complainant to them.

(j) That except the present case, there is no criminal antecedent of the applicants.

(k) That the applicants are in jail for more than eight months and due to delay in trial their Fundamental Right of speedy trial envisaged under Article 21 of the Constitution is being infringed.

11. AGA on the other hand contended that after thorough investigation, chargesheet has been submitted against the applicants and since all the grounds, which have been mentioned by the learned counsel for the applicants in their arguments were available at the time of disposal of first bail application, hence on those very grounds, the second bail application is not maintainable.

12. Having given my thoughtful consideration to the submissions made by the learned AGA, I entirely agree with his contention that second bail application moved on behalf of the applicants is not legally maintainable, as no fresh ground has been shown in the 2nd bail application or at the time of arguments. I have already mentioned herein-above the submissions made by the learned counsel for the applicants. Except the ground of period of detention in jail, all other grounds, as mentioned above, were available to the applicants-accused at the time of disposal of the first bail application. Therefore, in view of the law laid down by the Division Bench of this Court in ***Satya Pal Vs. State of U.P***. (supra) and keeping in view the observations made by Hon'ble Apex Court in ***Kalyan Chand Sarkar Vs. Rajesh Ranjan @ Pappu Yadav*** (Supra), in my opinion, second bail application on those very facts and grounds that were

available to the applicants when the first bail application was moved and rejected, cannot be allowed to be advanced. After passing order dated 11.11.2008 on the first bail application no. 30292 of 2008 by another Bench of this Court, the law on any point has not been changed. Merely because some other persons, whose complicity came to light during investigation, have been exonerated by the investigating officer, no benefit can be extended to the applicants. The matter of identification was considered by another Bench of this Court in the order dated 11.11.2008 passed in first bail application. Moreover, the matter of identification will be considered by the trial court. Therefore, as held by the Hon'ble Apex Court in ***Kalyan Chand Sarkar Vs. Rakesh Ranjan @ Pappu Yadav*** (supra), the grounds which have been mentioned by the learned counsel for the applicants at the time of arguments and which are mentioned above, can not be permitted to be restated as the same would lead to speculation and uncertainty in the administration of justice and may lead to forum hunting. Although, as held by Hon'ble Apex Court in ***Kalyan Chandra*** case (supra), there is room for filing of subsequent bail application in cases where earlier applications have been rejected, but the same can be done if there is change in the fact situation or in law, which requires earlier view being interfered with or where the earlier finding has become obsolete. Therefore, I am not in agreement with the argument of Sri Rajul Bhargava, learned counsel for the applicants that in view of the guarantee conferred on a person under Article 21 of the Constitution of India, it is open to the aggrieved person to make successive bail applications even on a ground already rejected by courts earlier.

13. 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.

14. For the reasons mentioned herein-above, the second bail application of the applicants Khursheed and Majsad is hereby rejected.

15. The trial court is directed to conclude the trial of the applicants within a period of six months applying the provisions of section 309 Cr.P.C. and avoiding unnecessary adjournments.

16. The S.S.P. Mathura is also directed to depute special messenger to procure the attendance of the witnesses after obtaining their summons from the trial court concerned and it must be ensured that the witnesses are produced in the trial court for evidence without causing any delay.

17. The office is directed to send a copy of this order within a week to the trial court concerned and S.S.P. Mathura for necessary action.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.05.2009

BEFORE
THE HON'BLE AMAR SARAN, J.
THE HON'BLE SHRI KANT TRIPATHI, J

Criminal Misc. Writ Petition No. 6710 of 2009

Nanhe @ Indra Kumar ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri P.C. Mishra

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

Constitution of India Article 226- Writ jurisdiction-alternative Remedy-order of externment passed under section 3 of U.P. Control of Gunda Act, 1970-appealable under section 6 of the Act-the commissioner has ample power to set aside or grant stay order-challenged on the ground the petitioner is not resident of the territorial limit of the District in question-held-no avail District Magistrate within its territorial competence of to direct any concern Gunda to desist from entering the said area or contiguous district or part thereof-where statutory remedy available -writ petition not maintainable.

Held: Para 14:

Section 3 of the Act, as extracted above, empowers the District Magistrate to direct the concerned Goonda to remove himself not only outside the area within the limits of his local jurisdiction but also from any area and any contiguous district or districts or any part thereof. Such removal may be directed to be made by such route, if any, and within such time as may be specified in the order. It is also within the competence of the District Magistrate to direct the concerned Goonda to desist from entering the said area or such contiguous district or districts or part thereof until expiry of such period not exceeding six months as may be specified in the order. The District Magistrate has also power to impose other conditions specified in sub-clauses (I),(ii) and (iii) of clause (b) of sub-section (3) in the externment order besides mentioning the aforesaid conditions specified in clause (a) of sub-section (3) of section 3 of the Act. Neither section 3 nor any other provisions of the Act provides that the person against whom externment order is passed must be a resident of the district. If it appears to the District Magistrate that any person whether he is a resident of the district or not is involved in the activities referred to in clause (b) and (c) of sub-section (1) of section 3 of the Act in the district and is a 'Goonda' within the meaning of section 2(b) of the Act, he may pass the externment order of that person after making due compliance of the provisions of sub-section (1) and sub-section (2) of section 3 of the Act. There is nothing to stop a person, who is a permanent resident of a particular district, to move and indulge in various activities including the activities referred to in section 3(1) of the Act in other districts. In that situation the District Magistrate in whose district such activities are being carried out, has jurisdiction to pass an externment order under section 3(3) of the Act against such person. In out view, the submissions of the learned counsel for the petitioner that the District Magistrate, Etah and no jurisdiction on account of the fact that petitioner was not a resident of district Etah has no substance.

Case law discussed:
AIR 1999 SC 22, (2005) 6 Supreme Court Cases 499, (2003)2 SCC 107, (2004) 4 Supreme Court Cases 268, (2006) 5 S.C.C. 469, (2000) 1 UPLBEC 702.

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

1. By means of this writ petition under Article 226 of the Constitution of India, the petitioner has questioned the validity of the impugned order dated 25.03.2009 passed by the District Magistrate, Etah (Annexure No. 1 to the writ petition), whereby he has directed externment of the petitioner from the district Etah for a period of six months.

2. The learned Additional Government Advocate raised a preliminary objection regarding maintainability of the writ petition on the ground that section 6 of the U.P. Control of Goondas Act, 1970, (hereinafter referred to as the Act) provides for an alternative efficacious remedy of appeal against the impugned order. The learned A.G.A. further submitted that the petitioner instead of the approaching this Court should have filed an appeal before the Commissioner under section 6 of the Act.

3. The learned counsel for the petitioner, on the other hand, submitted the despite there being availability of efficacious remedy by way of appeal under section 6 of the Act., the writ petition under Article 226 of the Constitution of India is maintainable in view of the fact that the District Magistrate, Etah, had no jurisdiction to pass the impugned order for externment of the petitioner, as the petitioner was not resident of district Etah but was a resident of new district Kanshiram Nagar. The learned counsel for the petitioner further submitted that in view of law laid down in **Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and others AIR 1999 SC 22,** the writ petition is maintainable.

4. In order to appreciate the controversy raised in this case,it is necessary to consider certain important decisions on the subject.

5. In **Whirlpool Corporation's case** (Supra) the Supreme Court has held that under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain a Writ Petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

6. A similar view has been expressed in the case of **State of H.P. And others vs. Gujrat Ambuja Cement Ltd. And another (2005) 6 Supreme Court Cases 499,** in which the Supreme Court observed after relying on few important earlier decisions that except for a period when Article 226 was amended by the Constitution (forty second Amendment) Act 1976, the power relating to alternative remedy has been considered to be a rule of self imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative

remedy, it is within the jurisdiction or discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with jurisdiction of case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. Is somebody approaches the High Court without availing the alternative remedy provided, the High Court should ensure that he has made out a strong case or that there exist good grounds to invoke the extraordinary jurisdiction.

7. **In Harbanslal Sahnia vs. Indian Oil Corpn. Ltd. (2003) 2 SCC 107,** the Supreme Court reiterated the same principles and held that the rule of exclusion of writ jurisdiction by availability of alternative remedy is a rule of discretion and not one of compulsion and the Court must consider the pros and cons of the case and then may interfere if it comes to the conclusion that the petitioner seeks enforcement of any of the fundamental rights where there is a failure of the principles of natural justice or where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

8. It is also well settled in the case of **U.P. State Bridge Corporation Ltd. And others vs. U.P. Rajya Setu Nigam S. Karamchari Sangh (2004) 4 Supreme Court Cases 268** and others cases that it would need a very strong case indeed for the High Court to deviate from the principle that where a specific remedy is given by the Statute, the person who insists upon such remedy can avail of the process as provided in that Statute and in no other manner.

9. In the case of **A.P. Foods vs. S. Samuel and others (2006) 5 S.C.C. 469,** the Supreme Court reiterated the same principles and held that a writ petition under Article 226 of the Constitution of India should not be entertained when the statutory remedy is available under the Act, unless exceptional circumstances are made out.

10. Expressing a serious concern over the heavy arrears in this court a Division Bench of this Court held in **Manvendra Misra (Dr.) Vs. Gorakhpur University (2000) 1 UPLBEC 702** that since writ jurisdiction is a discretionary jurisdiction hence if there is an alternative remedy the petitioner should ordinarily be relegated to his alternative remedy. This is specially necessary now because of the heavy arrears in the High Court and this Court can no longer afford the luxury of entertaining writ petition even when there is an alternative remedy in existence. No doubt alternative remedy is not an absolute bar, but ordinarily a writ petition should not be entertained if there is an alternative remedy.

11. In view of decisions referred to above no writ petition under Article 226 of the Constitution should be entertained when statutory remedy is available under the concerned statute unless exceptional circumstances propounded in Whirlpool's case (supra) are made out. The petitioner's case needs to be examined in the light of these settled principles.

12. The learned counsel for the petitioner conceded that the impugned order for externment of the petitioner is appelable before the Commissioner under section 6 of the Act. In out view the Commissioner has not only power to

entertain an appeal against the externment order passed under section 3 of the Act but has also power to confirm the order with or without modification or set it aside and has power even to stay the operation of the order pending disposal of the appeal subject to such terms as he thinks fit. As such the remedy of appeal provided under section 6 of the Act being in the nature of a continuation of the original proceedings seems to be very comprehensive, in which the petitioner may not only question the legality of the impugned order on merit but may also question the jurisdiction of the District Magistrate Etah in initiating the proceeding and passing the externment order under section 3 of the Act.

13. The main contention of the learned counsel for the petitioner in support of the maintainability of the writ petition was that the District Magistrate, Etah had no jurisdiction to pass the impugned order in view of the fact that the petitioner is not a resident of district Etah but is a resident of district Kashiran Nagar. This submission seems to have no substances. The act has been enacted to make special provision for the control and supersession of Goondas for the purpose of maintaining public order. Section 3 of the Act empowers the District Magistrate to order for externment of Goondas. In order to appreciate the submission of the learned counsel for the petitioner, it is desirable to look into the relevant provisions of section 3 of the Act, which reads:

"3. *Externment, etc. of Goondas, (1) where it appears to the District Magistrate-*

(a) that any person is a Goonda; and

(b) (i) that his movement or acts in the district or any part thereof are causing, or are calculated to cause alarm, danger or harm to persons or property; or

(ii) that there are reasonably grounds for believing that he is engaged,or doubt to engage, in the district or any part thereof, in the commission of an offence referred to in Sub-clause(i) to (iii) of Clause (b) of Section , or in the abetment of any such offence; and

(c) that witness are not willing to come forwarded to give evidence against him by reason of apprehension on their part as regards the safety of their person or property,

the District Magistrate shall by notice in writing inform him of the general nature of the material allegations against him in respect of clause(a), (b) and (c) and give him a reasonable opportunity of tendering an explanation regarding them.

(2) The person against whom an order under this section is proposed to be made shall have the right to consult and be defended by a counsel of his choice and shall be given a reasonable opportunity of examining himself, if he so desires, and also of examining any other witnesses that he may wish to produc3e in support of his explanation, unless for reasons to be recorded in writing the District Magistrate is of opinion that the request is made for the purpose of vexation or delay.

(3) Thereupon the District Magistrate on being satisfied that the conditions specified in clauses (a)(b) and (c) of sub-section (1) exist may by order in writing-

(*a) direct him to remove himself outside the area within the limits of his local jurisdiction or such area and any district or districts or any part thereof, contiguous thereto, by such route, if any, and within such time as may be specified in the order and to desist from entering the said area or the area and such contiguous district or districts or part thereof, as the case may be, from which he was directed to remove himself until the expiry of such period not exceeding six months as may be specified in the said order:*

(b) (i) require such person to notify his movements, or to report himself, or to do both, in such manner, at such time and to such authority or person as may be specified in the order:

(ii) prohibit or restrict possession or use by him of any such article as may be specified in the order:

(iii) direct him otherwise to conduct himself in such manner as may be specified in the order.

Until the expiry of such period, not exceeding six months as may be specified in the order."

14. Section 3 of the Act, as extracted above, empowers the District Magistrate to direct the concerned Goonda to remove himself not only outside the area within the limits of his local jurisdiction but also from any area and any contiguous district or districts or any part thereof. Such removal may be directed to be made by such route, if any, and within such time as may be specified in the order. It is also within the competence of the District Magistrate to direct the concerned Goonda to desist from entering the said area or such contiguous district or districts or part thereof until expiry of such period not exceeding six months as may be specified in the order. The District Magistrate has also power to impose other conditions specified in sub-clauses (I),(ii) and (iii) of clause (b) of sub-section (3) in the externment order besides mentioning the aforesaid conditions specified in clause (a) of sub-section (3) of section 3 of the Act. Neither section 3 nor any other provisions of the Act provides that the person against whom externment order is passed must be a resident of the district. If it appears to the District Magistrate that any person whether he is a resident of the district or not is involved in the activities referred to in clause (b) and (c) of sub-section (1) of section 3 of the Act in the district and is a 'Goonda' within the meaning of section 2(b) of the Act, he may pass the externment order of that person after making due compliance of the provisions of sub-section (1) and sub-section (2) of section 3 of the Act. There is nothing to stop a person, who is a permanent resident of a particular district, to move and indulge in various activities including the activities referred to in section 3(1) of the Act in other districts. In that situation the District Magistrate in whose district such activities are being carried out, has jurisdiction to pass an externment order under section 3(3) of the Act against such person. In out view, the submissions of the learned counsel for the petitioner that the District Magistrate, Etah and no jurisdiction on account of the fact that petitioner was not a resident of district Etah has no substance.

15. It may not be out of context to mention that petitioner's village Patiyali was a part of the district Etah when the proceeding under section 3 of the Act was

initiated against him. Learned counsel for the petitioner conceded that the proceedings under section 3 of the Act was pending against the petitioner before the District Magistrate, Etah, when the new district Kanshiram Nagar was carved out. He further conceded that the new district Kanshiram Nagar has been carved out from a portion of he district Etah and the remaining portion is still a part of the district Etah. The show cause notice given to petitioner under section 3(1) of the Act was in regard to his externment from the entire area of the district Etah including the area that has fallen subsequently in the new district Kanshiram Nagar. Even assuming that the area comprising the new district Kanshiram Nagar is no more a part of the district Etah, the jurisdiction of the District Magistrate, Etah, did not cease to exist in regard to the area that continued to be the part of the district Etah even after formation of new district Kanshiram Nagar. It may also be mentioned that whenever new districts are formed ordinarily provisions are made in the notification to protect the pending proceedings in the old district. The petitioner has not filed the notification in regard to the formation of district Kanshiram Nagar to show as to what provisions were made in the notification in regard to proceedings pending before different courts and authorities in the old district Etah.

16. In out view, the submission of the learned counsel for the petitioner has not substance.

17. For the reasons stated above, the writ petition is not maintainable and is accordingly dismissed with costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.05.2009

BEFORE
THE HON'BLE S.P. MEHROTRA, J.

Civil Misc. Writ Petition No.59277 of 2005

Wakf Al Aulad Yusfia ...Petitioner
Versus
Controlling Authority/Commissioner and others ...Respondents

Counsel for the Petitioner:
Sri S.K. Verma,
Sri Bhagawati Prasad,
Sri R.N. Yadav

Counsel for the Respondents:
Sri K.C. Kishan Srivastava
Sri R.N. Singh
Sri G.K. Singh
Sri V.K. Singh
Sri Prabhakar Awasthi
Sri R.N. Yadav
Sri A.K. Rai
Sri S.N. Singh
S.C.

(A) Constitution of India Art., 226-read with Code of Civil Procedure-Order IX Rule 9-Suit dismissed in Default-Second Suit for same cause of action not maintainable-once the Second Suit is precluded by Specific provision-can not be subjected under writ jurisdiction.

Held: Para 32 & 33

From the above decisions, it follows that even though the provision contained in Order IX, Rule 9 of the Code of Civil Procedure, 1908 as such is not applicable to the proceedings under Article 226 of the Constitution of India, but the principle underlying the said provision may be applied to the proceedings under Article 226 of the Constitution of India.

Hence, applying the principle underlying the provision of Order IX, Rule 9, Code of Civil Procedure, 1908, which provides that once a Suit is dismissed in default, it is not open to the plaintiff to file a fresh Suit on the same cause of action, it follows that once a Suit is dismissed in default, the plaintiff cannot file a Writ Petition under Article 226 of the Constitution of India in respect of the same cause of action, as otherwise, the plaintiff will be able to achieve something which is prohibited by the provision contained in Order IX, Rule 9 of the Code of Civil Procedure, 1908.

Case law discussed:

1985 U.P.L.B.E.C 1374 (D.B.),
1992 AWC 792 (D.B.),
A.I.R. 1982 All 290,
1991 (Suppl.) R.D.27 (D.B.).

(B) U.P. Regulation of Building (Operation) Act, 1958-Application for sanction of Map-authorities have to prima faci satisfy regarding title of the land-but intricate question of title can not be decided-except the Civil Court.

Held: Para 53 & 55

In view of the principles noted above, such question of title cannot be made the subject -matter of the proceedings initiated under the Act, and the proper course for the petitioner was to file a Suit before the Civil Court.

As noted earlier, the respondent no. 1 by the order dated 9.8.2005 allowed the Revision filed by the respondent nos. 4 to 7 and set-aside the orders of the Prescribed Authority and the Appellate Authority. Further, the respondent no. 1 also went into the question of title and held that the plots in question were not proved to be the Waqf property or part of the Waqf property. It was not open to the respondent no.1 to go into the said question.

(Delivered by Hon'ble Satya Poot Mehrotra, J.)

1. The present Writ Petition under Article 226 of the Constitution of India has been filed by the petitioner, interalia, praying for quashing the judgment and order dated 9.8.2005 (Annexure no. 6 to the Writ Petition) passed by the Controlling Authority / Commissioner, Varanasi Division, Varanasi-respondent no.1 in Revision No. 74 of 2001 under Section 15-A of the U.P. (Regulation of Building Operations) Act, 1958 (hereinafter also referred to as " the Act").

2. The dispute relates to a house being House No. 95-B, Mohalla Alamganj, Jaunpur City. The said house is situated on plot nos. 17/-21,18/-26,19/-9,20/-8,21/-15,22/-12,23/-04,24/05 and 26/14 (herein after referred as "the plots in question ").

3. Pleadings have been exchanged between the parties. The Writ Petition is being disposed of finally at this stage with the consent of the learned counsel for the parties.

4. From a perusal of the Writ Petition filed by the petitioner, Counter Affidavit filed on behalf of the respondent nos. 4 to 7, Rejoinder Affidavit filed by the petitioner, Supplementary Counter Affidavit filed on behalf of the respondent nos. 4 to 7 and the Supplementary Affidavit filed by the petitioner, the following facts emerge.

5. The respondent nos. 4 to 7 claim title over the plots in question on the basis of two Registered Sale Deeds. One Sale Deed dated 12.2.1981 and registered on 19.2.1981 was executed in favour of Smt. Kamla Devi (wife of Ghanshyam Das)

(respondent no.4) by Smt. Sameeunnissa Begum and Nazim Hussain, and the other Sale Deed dated 17.2.1981 and registered on 19.2.1981 was executed in favour of Ghanshyam Das? predecessor -in-interest of the respondent nos. 4 to 7- by Smt. Sameeunnissa Begum, widow of Sayeed Shah Ahamad Hashmi and D/o Maulvi Abdul Rahman, and Deva Mani Pathak Mukhtaram of Raja Yadvendra Dutta Debey. Photostat copies of the said two Sale Deeds have been filed as Annexures - C.A.7 and C.A.8 to the Counter Affidavit filed on behalf of the respondent nos. 4 to 7.

6. It appears that the said Ghanshyam Das submitted a map for sanction on 17.1.2000. The said map was sanctioned by the Prescribed Authority on 25.1.2000.

7. Subsequently, Objections dated 22.6.2000 were filed on behalf of the petitioner, copy whereof has been filed as Annexure no. 1 to the Writ Petition.

8. It is, interalia, stated in the said Objections that Nawab Mohammad Yusuf executed a Waqfnama dated 5.4.1956 in regard to the plots in question and other property; and that the plots in question were the property of the Waqf, and the matter had been finalized up to the Supreme Court; and that the respondent nos. 4 to 7 after getting their names mutated in the official records in forged and illegal manner, were making illegal construction over the plots in question.

9. Reply dated 28.7.2000 was filed on behalf of the respondent nos. 4 to 7 against the said Objections filed on behalf of the petitioner. It is, interalia, stated in the said Reply that no waqfnama dated 5.4.1956 was executed by Nawab Yusuf in accordance with law; and that no waqf was created, nor were the plots in question property of the waqf; and that Smt. Sameeunnissa Begum was the tenant of the Zamindar Rana Yadvendra Dutt Dubey in respect of plot nos. 18,19 and 20; and that the said Smt. Sameeunnissa Begum was also the tenant of the Zamindar Nazim Hussain in respect of plot nos. 17,22,21,23,24 and 26; and that the said plots were purchased by Ghanshyam Das and Smt. Kamla Devi by two sale-deeds in February, 1981; and that after the said Sale Deeds, the respondent nos. 4 to 7 incurred huge expenditure and constructed building, shops , Mandir and garden etc. over the said plots; and that the names of the respondent nos. 4 to 7 were recorded in the Assessment Register of the Nagar Palika . Copy of the said Reply has been filed as Annexure no. 2 to the Writ Petition.

10. By the order dated 16.3.2001 (Annexure no. 3 to the Writ Petition) passed under Section 7-A of the Act, the Prescribed Authority, Regulated Area, Jaunpur, interalia, cancelled the order dated 25.1.2000 whereby sanction had been granted in respect of the map. The Prescribed Authority, interalia, held on the basis of the material on record that it was established that the plots in question were the waqf property, and the sanction granted in respect of the map was not in accordance with the Rules.

11. The respondent nos. 4 to 7 filed an Appeal under sub-section (2) of section 15 of the Act.

12. By its order dated 26.3.2002 (Annexure no. 4 to the Writ Petition), the

Appellate Authority dismissed the said Appeal filed by the respondent nos. 4 to 7.

Thereupon, the respondent nos. 4 to 7 filed Revision under Section 15-A of the Act.

13. By the order dated 9.8.2005 (Annexure no. 6 to the Writ Petition), the Controlling Authority / Commissioner, Varanasi Mandal, Varanasi (respondent no. 1) allowed the said Revision filed by the respondent nos. 4 to 7 , and set-aside the order dated 16.3.2001 passed by the Prescribed Authority and the order dated 26.3.2002 passed by the Appellate Authority. On a detailed consideration of the material on record, the respondent no.1 concluded that the plots in question were not proved to be the waqf property or part of the waqf property.

14. Thereupon, the petitioner has filed the present Writ Petition seeking the reliefs as mentioned above.

15. I have heard Sri Ikram Ahmad, learned counsel for the petitioner and Sri G.K. Singh, learned counsel for the respondent nos. 4 to 7, and have perused the record.

16. It is submitted by Sri Ikram Ahmad, learned counsel for the petitioner that the Prescribed Authority and the Appellate Authority rightly held the plots in question to be part of the waqf property, and the validity of the waqf had been upheld up-to the Supreme Court, and the respondent no. 1 acted illegally in passing the impugned order dated 9.8.2005 allowing the Revision filed by the respondent nos. 4 to 7.

17. In reply, Sri G.K. Singh, learned counsel for the respondent nos. 4 to 7 has made the following submissions:

(1) It is submitted that in regard to the same cause of action and for the same reliefs, the petitioner had also filed a suit being Suit No. 723 of 2000 in the court of Civil Judge (Junior Division), Jaunpur. He refers to a copy of the plaint of the said Suit filed as Annexure SCA-1 to the Supplementary Counter Affidavit filed on behalf of the respondent nos. 4 to 7.It is further submitted by Sri Singh that the said Suit was dismissed in default on 30th April, 2007. He has produced a certified copy of the said order dated 30th April, 2007.Let the same be taken on record.

It is further submitted by Sri Singh that in view of the fact that the petitioner was pursuing an alternative remedy in regard to the same subject-matter, the present Writ Petition is liable to be dismissed on the said ground. It is further submitted that even though the said Suit was dismissed in default on 30th April, 2007 but the same would not be relevant for the present Writ Petition, and the present Writ Petition is liable to be dismissed on the ground that the petitioner has already availed of an alternative remedy. It is further submitted that even though along-with the Supplementary Affidavit, the petitioner has filed copy of an application dated 21.3.2001, filed on behalf of the petitioner in the said Suit, wherein prayer has been made, interalia, for withdrawal of the said Suit, namely, Suit No. 723 of 2000. The said application was never allowed, and the said Suit was dismissed in default on 30th April, 2007. In any case, the submission proceeds, even after the withdrawal of the said Suit, the Writ

Petition filed by the petitioner would be liable to be dismissed.

Sri G.K. Singh, learned counsel for the respondent nos. 4 to 7 has placed reliance on the following decisions:

1. ***Sheo Nath Dubey Vs. District Inspector of Schools, Mainpuri and others, 1985 U.P.L.B.E.C 1374 (D.B.).***
2. ***M/s. Akay Organics Private Limited Vs. Oil & Natural Gas Commission and others, 1992 AWC 792 (D.B.).***

(2) Even otherwise, as is evident from a perusal of the Objections filed by the petitioner and the Reply thereto given by the respondent nos. 4 to 7 before the Prescribed Authority, the present case involves question of title, namely, as to whether the plots in question were the waqf property or not. The said question of title could not be made the subject-matter of the proceedings initiated under the Act, and the proper course for the petitioner was to file a Suit before the Civil Court.

He has placed reliance on the following decisions:

1. ***Jai Ram Lal Srivastava Vs. State of U.P., A.I.R. 1982 All 290.***
2. ***Shyam Sunder Agarwal and others Vs. District Magistrate/Vice Chairman, Banda Development Authority, Banda and others, 1991 (Suppl.) R.D.27 (D.B.).***

18. In rejoinder, Sri Ikram Ahmad, learned counsel for the petitioner submits that the Objections before the Prescribed Authority were filed on behalf of the petitioner on 22.6.2000 while the said Suit No. 723 of 2000 was filed subsequently. As the said Objections filed on behalf of the petitioner were accepted by the Prescribed Authority by its order dated 16.3.2001, the petitioner filed the Withdrawal Application dated 21.3.2001 in the said Suit, copy whereof has been filed as Annexure S.A.1 to the Supplementary Affidavit filed on behalf of the petitioner.

19. It is submitted by Sri Ikram Ahmad, learned counsel for the petitioner that as the said Withdrawal Application dated 21.3.2001 had been filed on behalf of the petitioner, the petitioner had not been pursuing the said Suit which appears to have been dismissed in default on 30th April, 2007. It is not disputed by Sri Ikram Ahmad, learned counsel for the petitioner that there is no order on record of the said Suit allowing the said Withdrawal Application filed on behalf of the petitioner.

20. I have considered the submissions made by the learned counsel for the parties.

Let us first take-up the objection raised by Sri G.K. Singh, learned counsel for the respondent nos. 4 to 7 regarding the maintainability of the present Writ Petition.

21. A perusal of the plaint of the said Suit No. 723 of 2000 shows that the said Suit was filed in respect of the land in question as detailed in the plaint of the said Suit, interalia, praying for restraining Smt. Kamla Devi and Ghanshyam Das (defendants in the said Suit) from raising construction over the plots in question. The main ground for filing the said Suit was that the land in question was the property of the waqf.

22. In the proceedings taken on behalf of the petitioner under Section 7A of the Act by filing Objections dated 22.6.2000 (Annexure No. 1 to the Writ Petition), the petitioner, interalia, prayed that the respondent nos. 4 to 7 be restrained from making illegal construction over the plots in question. The main ground for filing the said Objections was that the plots in question were the property of the waqf.

23. It is, thus, evident that the controversy involved in the said Suit was the same as was involved in the said proceedings under the Act, and the reliefs sought in the said Suit were substantially the same as were sought in the said proceedings under the Act.

24. The present Writ Petition, as noted above, has been filed against the order dated 9.8.2005 passed by the respondent no.1 whereby the Revision filed by the respondent nos. 4 to 7 was allowed, and the orders passed by the Prescribed Authority and the Appellate Authority were set-aside, and it was concluded on the basis of the material on record that the plots in question were not proved to be the waqf property or part of the waqf property.

The present Writ Petition was filed on 2.9.2005.

25. As is evident from a perusal of the Withdrawal Application dated 21.3.2001, copy whereof has been filed as Annexure S.A.1 to the Supplementary Affidavit filed on behalf of the petitioner, the petitioner prayed for withdrawal of the said Suit No. 723 of 2000. However, it is not disputed by Sri Ikram Ahmad, learned counsel for the petitioner that no order was passed on the said application permitting withdrawal of the said Suit. On the other hand, it is evident from a perusal of the certified copy of the order dated 30.4.2007 produced by Sri G.K. Singh, learned counsel for the respondent nos. 4 to 7 that the said Suit no. 723 of 2000 was dismissed in default on 30.4.2007.

26. It will thus be noticed that the present Writ Petition was filed in the year 2005, that is, prior to the dismissal of the said Suit in default on 30th April, 2007.

27. Question arises as to whether in view of the aforesaid circumstances, this Court may decline to exercise its Writ jurisdiction under Article 226 of the Constitution of India.

28. In order to decide the above question, it is necessary to refer to the relevant statutory provisions and judicial decisions.

Order IX, Rule 9 of the Code of Civil Procedure , 1908 provides:

"9. ***Decree against plaintiff by default bars fresh Suit.***

1. *Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action . But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall*

appoint a day for proceeding with the suit.

2. *No Order shall be made under this rule unless notice of the application has been served on the opposite party."*

29. This provision, thus, lays down that where a Suit is dismissed in default under Order IX, Rule 8 of the Code of Civil Procedure, 1908, no fresh Suit in respect of the same cause of action may be filed by the plaintiff. However, the plaintiff may file an application praying for an order to set aside the dismissal order.

30. In ***Sheo Nath Dubey case*** (supra), this Court has laid down as under (Paragraph Nos. 11,12,13 and 14 of the said U.P.L.B.E.C.):

"11. In the rejoinder affidavit, the petitioner has come out with an excuse for not disclosing the fact of dismissal of the suit in the writ petition which appears to us to be a lame one. His explanation is that as he was not getting leave from the College for pursuing the suit, he had no alternative but to leave the same. It was his duty to have disclosed the said fact in the writ petition. Be that as it may, from the order it appears that on the date when the suit was taken up, the defendant was present in the court and the order indicates that the petitioner had since failed to show cause for which he had been granted time, it was dismissed for want of prosecution. To the filing of the writ petition, the principle of Order IX, Rule 9 applied. In the view of the applicability of the principle, the present writ petition was barred. It is true that Order IX, Rule 9 applies to a civil suit in terms but, as stated above Order IX, Rule 9, being behind the idea that no body should be harassed unnecessarily by fresh proceedings one after the other, would apply to the maintainability of the writ petition also.

12. In that suit the controversy was relating to the seniority of the petitioner which he is claiming in this writ petition. It has been held in ***Shanker Ramachandra Abhvankar v. Krishnali Dattatraya Bapat, AIR 1970 SC 1*** *that:*

"If there were two modes of invoking the jurisdiction of the High Court and one of those modes has been chosen and exhausted, it would not be a proper and sound exercise of discretion to grant relief in the other set of proceedings in respect of the same order of the subordinate court. The refusal to grant relief in such circumstances would be in consonance with the anxiety of the court to prevent abuse of process as also to respect and accord finality to its own decisions."

13. In ***Premier Automobiles Limited v. Kamlakur Shanaram Wedke and others, AIR 1975 SC 2238****, it was observed:*

"But where the industrial dispute is for the purpose of enforcing a right, obligation or liability under the general law or the common law and not a right, obligation or liability created under the Act, then alternative forums are there giving an election to the suitor to choose his remedy of either moving the machinery under the Act or to approach the civil court. It is plain that he cannot have both. He has to choose the one or the other".

14. Independently of the doctrine of election, the question of the sound exercise of judicial discretion is that having chosen the remedy of filing a suit, the petitioner had the benefit of a meaningful hearing of the lis therein. He

cannot be permitted to harass a party by changing the forum of court from one to another. Judicial discretion requires the rejection of the writ petition on the ground."

(Emphasis supplied).

31. In ***M/s. Akay Organics Private Limited*** (supra), this Court has laid down as under (Paragraph No. 5 and 7 of the AWC):

"5. In this connection reference may be made to the case of ***Premier Automobiles Limited v. Kamlakur Shanaram Wedke, AIR 1975 SC 2238****, wherein the Supreme Court laid down as follows:*

"But where the industrial dispute is for the purpose of enforcing a right, obligation or liability under the general law or the common law and not a right, obligation or liability created under the Act, then alternative forums are there giving an election to the suitor to choose his remedy of either moving the machinery under the Act or to approach the civil court. It is plain that he cannot have both. He has to choose the one or the other".

In ***Sheo Nath Dubey v. District Inspector of Schools and others****, Writ Petition No. 10524 of 1978, decided on 28-9-1985, a Division Bench of this court had to consider some-what similar controversy. In that case the suit of the petitioner therein was dismissed for want of prosecution and thereafter writ petition was filed for the same relief, which was claimed in the suit. This Court dismissed the writ petition on the ground of the principles contained in Order IX Rule 9 of the CPC. This Court laid down as under:*

"To the filing of the writ petition, the principle of Order IX Rule 9 applied. In the view of the applicability of the principle, the present writ petition was barred. It is true that Order IX Rule 9 applies to a civil suit in terms but, as stated above Order IX Rule 9, being behind the idea that no body should be harassed unnecessarily by fresh proceedings one after the other, would apply to the maintainability of the writ petition also."

The other ground on which the writ petition of Sheo Nath Dubey (supra) was dismissed, was the doctrine of election and public policy, i.e. a person having elected to seek redress of his grievances in a civil court cannot be permitted to give it up and then to file a writ petition of this Court is quoted below:

"Independently of the doctrine of election, the question of the sound exercise of judicial discretion is that having chosen the remedy of filing a suit, the petitioner had the benefit of a meaningful hearing of the lis therein. He cannot be permitted to harass a party by changing the forum of court from one to another. Judicial discreation requires the rejection of the writ petition on that ground."

7. Learned counsel for the petitioner in the end has however, argued that the petitioner has withdrawn the suit because it was not possible to pursue it in view of the strike of the Advocates of District Courts and on account of this reason this writ petition has been filed. It is not possible to agree with the learned counsel. From the perusal of the application for withdrawing the suit, the contents of which have been quoted here-in-before, the reason given for withdrawing the suit was delay caused in the hearing of the injunction matter. The interim injunction application was filed by the petitioner before the Civil Judge on

21-2-1992 and on that very day the Civil Judge passed an order holding that it is not a fit case for granting the exparte interim injunction without hearing the other side and on that basis merely issued notice on the said application. The strike by the Advocates of the District Courts was not the reason for delay in the hearing of the injunction application and was also not the reason for withdrawing the suit. That apart, the strike of the Advocates was only for few days, as is clear from the order sheet, which has been placed before us by the learned counsel for the parties. It may also be restated, as mentioned above, that the petitioner has already presented the writ petition before the Oath Commissioner of this Court on 29-2-1992 and filed it before the Stamp Reporter on 3-3-1992. It appears that as the Civil Judge was not inclined to grant exparte interim injunction, the writ petition was prepared and filed and apprehending that the party cannot pursue two parallel remedies for the same relief, application for withdrawing the suit was filed before the Civil Judge on 3-3-1992 without seeking any permission for filing a fresh civil suit or for pursuing any other remedy. When the civil suit is withdrawn without permission to file the fresh suit, filing of the new suit is prohibited in view of Order XXIII Rule 1 of the CPC. Petitioner, in our opinion, has given-up the remedy of civil suit, which was already availed of by him, without any justification. To entertain his writ petition, in these circumstances, would be against the public policy. The petitioner cannot be permitted to harass the party by changing the forum from one court to another. As laid down by a Division Bench of this Court in the case of Sheo Nath Dubey (supra), the sound exercise of judicial discretion is that the writ petition should not be entertained and should be rejected."

(Emphasis supplied)

32. From the above decisions, it follows that even though the provision contained in Order IX, Rule 9 of the Code of Civil Procedure, 1908 as such is not applicable to the proceedings under Article 226 of the Constitution of India, but the principle underlying the said provision may be applied to the proceedings under Article 226 of the Constitution of India.

33. Hence, applying the principle underlying the provision of Order IX, Rule 9, Code of Civil Procedure, 1908, which provides that once a Suit is dismissed in default, it is not open to the plaintiff to file a fresh Suit on the same cause of action, it follows that once a Suit is dismissed in default, the plaintiff cannot file a Writ Petition under Article 226 of the Constitution of India in respect of the same cause of action, as otherwise, the plaintiff will be able to achieve something which is prohibited by the provision contained in Order IX, Rule 9 of the Code of Civil Procedure, 1908.

34. In such a situation, the Court may decline to exercise its jurisdiction under Article 226 of the Constitution of India.

35. However, the question arises as to whether the above principles are applicable in the present case,that is, as to whether the present Writ Petition is liable to be dismissed in view of the said principles.

36. While, it is true that the reliefs sought by the petitioner in the said Suit No. 723 of 2000 were substantially the same, as were sought in the proceedings under the Act but the present Writ Petition has been filed against the Order dated 9.8.2005 passed by the respondent no.1 whereby the Revision filed by the respondent nos. 4 to 7 under Section 15 - A of the Act was allowed, and the orders passed by the Prescribed Authority and the Appellate Authority were set-aside. Thus, the present Writ Petition has been filed by the petitioner, interalia, seeking quashing of the said order dated 9.8.2005. Thus the cause of action of the present Writ Petition and the relief sought in the present Writ Petition are not the same as in the said Suit No. 723 of 2000, therefore, the principles noticed above regarding non-entertainment of a Writ Petition in respect of the same cause of action as was involved in the Suit dismissed in default or withdrawn, is not applicable to the present case.

37. The present Writ Petition cannot , therefore, be dismissed on the ground of filing of the said Suit No. 723 of 2000 or its dismissal in default on 30.4.2007.

The submission made by Sri G.K.Singh, learned counsel for the respondent nos. 4 to 7 in this regard cannot be accepted.

38. Let us now consider the question regarding the finding recorded by the Prescribed Authority and the Appellate Authority that the plots in question were the Waqf property, and the Revisional Authority (respondent no.1) setting aside the said finding. While Sri Ikram Ahmad, learned counsel for the petitioner submits that the finding recorded by the Prescribed Authority and the Appellate Authority on the question was correct and the Revisional Authority (respondent no. 1) acted illegally in setting aside the said finding, the submission of Sri G.K.Singh, learned counsel for the respondent nos. 4 to 7 is that the question as to whether the plots in question were Waqf property, is a question of title, and the said question cannot be decided in the proceedings under the Act.

39. Therefore, the question arises as to whether the question of title in regard to the plots in question may be made the subject -matter of the proceedings under the Act. In this regard, it is relevant to refer to the decisions relied upon by Sri G.K. Singh, learned counsel for the respondent nos. 4 to 7.

40. In ***Jai Ram Lal Srivastava case*** (supra), a learned Single Judge of this Court was dealing with the question of validity of the order passed by the Controlling Authority rejecting the petitioner's application for compounding the offence under the U.P. (Regulation of Building Operations) Act, 1958, if any , committed by him and directing that certain constructions set-up by the petitioner be demolished. The learned Single Judge noticed various provisions of the Act, and held as under (Paragraph No. 16 of the said AIR):

"16. I may at this stage point out that the Act nowhere enables the authorities under the Act to investigate any dispute between private parties with regard to the land over which the constructions stand or are to be sanctioned or permitted. Any application moved for seeking permission for setting up of construction in a regulated area has to be dealt with under

Section 7 of the Act. Sub-section (2-A) of Section 7 lists as many as seven grounds (enumerated as (a) to (g)) on which alone the Prescribed Authority can refuse permission for erection or re-erection of a building whereas clause (d) of sub-section (2-A) lays down that erection of proposed building shall not be sanctioned if its construction would result in encroachment upon any public premises as defied in U.P. Public Premises (Eviction of Unauthorised Occupants) Act, 1972, it nowhere lays down that any such application is to be rejected for the reason that such construction would result in encroachment upon land belonging to some private person. It may be that in view of the provisions contained in clause (d) of sub-section (2-A) of Section 7 of the Act the concerned authority can enquire into and adjudicate on the question whether the objectionable construction stands on nazul land, but then it has not been enabled to decide or adjudicate upon private disputes with regard to title in respect of the land on which the objectionable construction stands. A fortiori the authorities constituted under the Act will also not be able to direct demolition of petitioner's constructions merely for the reason that they stand on land belonging to some other private individual".

(Emphasis supplied).

41. This decision, thus, lays down that the Act nowhere enables the authorities under the Act to investigate any dispute between *private parties* with regard to the land over which the constructions stand or are to be sanctioned or permitted. The authorities constituted under the Act have not been enabled to decide or adjudicate upon *private disputes* with regard to title in respect of the land on which the objectionable construction stands. A fortiori the authorities constituted under the Act will also not be able to direct demolition of the petitioner's constructions merely for the reason that they stand on the land belonging to some other private individual.

42. In ***Shyam Sunder Agarwal case*** (supra), a Division Bench of this Court was dealing with the validity of an order passed by the District Magistrate /Vice Chairman, Banda Development Authority, Banda, whereby he had stayed the operation of a sanction granted by him in favour of the petitioners for construction of a building upon an application filed by the contesting respondents.

43. A notice issued by the District Magistrate/Vice Chairman calling upon the petitioners to appear on a date fixed before him for disposing of the application filed by the contesting respondents with regard to the grant of the sanction to the petitioner, was also challenged.

44. The Division Bench allowed the Writ Petition in part, and quashed the said order as well as the said notice. It was held as under (Paragraph nos. 4,5 and 6 of the said R.D.):

"4. Coming back to the proceedings which were initiated by the contesting respondents by way of an objection against the sanction granted by the District Magistrate to the petitioners, the position is that the sole ground on which the sanction was challenged was based on the allegation that the disputed property belongs to a temple of which the respondents were priests and worshippers

and that the petitioners have no right title or interest in the disputed land.

It is apparent that the objection of the respondents involves an adjudication of a dispute pertaining to the title to the land in question. It has consistently been ruled by this Court right from the earliest time that disputes pertaining to the title to the property with respect to which sanction is sought cannot and ought not appropriately to be determined in such proceedings. Indeed there is a complete unanimity of opinion on this point, the view expressed being that such an issue is beyond the purview of the proceedings for sanction of the plan. See ***1945 Allahabad -393, 1982 Allahabad -290, 1980 Allahabad Weekly Cases -637 and finally 1991 A.C.J. 649***.

5. We are in respectful agreement with the opinion expressed by this Court in the above decisions. It is, however, unnecessary to dilate on this point further beyond stating that the contesting respondents have already instituted a suit raising the same controversy and asserting the same claim, namely, that the petitioners not being the owners of the property are liable to be evicted from the disputed land. A relief for demolition of the construction made by the petitioners pursuant to the sanction granted to them has also been claimed in the suit. Annexure RA-2 purports to be a true copy of the plaint. From the persual of the plaint it is apparent that precisely same issue of title which was urged by the contesting respondents in their objections before the District Magistrate is sought to be canvassed in that civil suit.

6. We are, therefore, clearly of the view that it will not be proper for the District Magistrate to enter into and determine the above issue which is the very matter which has to be considered and decided in the regular civil suit instituted by the petitioner".

(Emphasis supplied)

45. This decision, thus, lays down that where the objection against the sanction granted by the concerned authority for construction of a building on the land in question involves adjudication of disputes pertaining to the title to the land in question, such disputes cannot and ought not to be determined in the proceedings before the authorities dealing with the sanction of plan for making construction. Such disputes are beyond the purview of the proceedings for sanction of the plan. Such disputes should be considered and decided in a regular civil suit.

46. In view of the above decisions, it is evident that the authorities constituted under the Act, that is, the U.P. (Regulation of Building Operations) Act, 1958 cannot decide or adjudicate upon the question of title to the land over which the constructions are proposed to be raised or have been raised. In case, an application for sanction of plan for making constructions over a particular land is made before the concerned authority constituted under the Act, the concerned authority will prima-facie satisfy itself regarding the title of the person seeking sanction of plan in respect of the land in question. Once the concerned authority is satisfied that prima-facie such person has title to the land in question and grants sanction for the plan, such sanction will not be stayed /cancelled on the ground that any objection regarding the title of such person to the land in question is raised by another private person.

47. Intricate questions of title can not be adjudicated upon and decided by the authorities constituted under the Act. Such questions of title to the land in question should be raised by filing regular Suit.

48. It must, however, be emphasized that before granting sanction of plan for making construction on the land in question, the concerned authority must prima-facie satisfy itself regarding the title of the person applying for sanction of plan in respect of such land.

49. In the present case, as noted earlier, one Sale -Deed dated 12.2.1981 and registered on 19.2.1981 was executed in favour of the said Smt. Kamla Devi (respondent no.4). The other Sale-Deed dated 17.2.1981 and registered on 19.2.1981 was executed in favour of Ghanshyam Das, who was the father of the respondent nos. 5,6 and 7 and the husband of Smt. Kamla Devi (respondent no.4). On the basis of the said Sale - Deeds, the names of the said Vendees were recorded in the relevant official records. Thus, the title of the said Vendees, namely, Ghyanshyam Das and Smt. Kamla Devi in respect of the plots in question was prima-facie established. The map submitted by the said Ghanshyam Das was sanctioned by the Prescribed Authority on 25.1.2000. Subsequently, on the Objections dated 22.6.2000 filed by the petitioner, the Prescribed Authority, by the order dated 16.3.2001, under Section 7-A of the Act, cancelled the said order dated 25.1.2000 whereby sanction had been granted in respect of the map.

50. It is pertinent to note that the main ground raised by the petitioner in the Objections dated 22.6.2000 against the sanction of map was that the plots in question were the property of the Waqf . The objection of the petitioner was upheld by the Prescribed Authority, who held that it was established that the plots in question were the Waqf property, and the sanction granted in respect of the map was not in accordance with Rules. The respondent nos. 4 to 7 filed an Appeal under sub-section (2) of Section 15 of the Act which was dismissed by the Appellate Authority by the order dated 26.3.2002.Thereafter, the respondent nos. 4 to 7 filed Revision under Section 15 -A of the Act which was allowed by the Controlling Authority/ Commissioner, Varanasi Mandal, Varanasi (respondent no. 1) by the order dated 9.8.2005. The respondent no. 1 concluded that the plots in question were not proved to be the Waqf property or part of the Waqf property.

51. It will, thus, be noticed that the sanction of map granted in respect of the plots in question was objected to on the ground that the plots in question were the Waqf property.

52. Thus, the question involved before the Prescribed Authority and the other authorities was evidently, the question of title, namely, as to whether the plots in question were the Waqf property or not.

53. In view of the principles noted above, such question of title cannot be made the subject -matter of the proceedings initiated under the Act, and the proper course for the petitioner was to file a Suit before the Civil Court.

54. The Objections dated 22.6.2000 filed by the petitioner on the ground of

title in regard to the plots in question were evidently beyond the purview of the proceedings for sanction of the map before the authorities constituted under the Act . The Prescribed Authority as well as the Appellate Authority acted beyond jurisdiction in going into the question of title to the plots in question and in holding the plots in question to be the Waqf property.

55. As noted earlier, the respondent no. 1 by the order dated 9.8.2005 allowed the Revision filed by the respondent nos. 4 to 7 and set-aside the orders of the Prescribed Authority and the Appellate Authority. Further, the respondent no. 1 also went into the question of title and held that the plots in question were not proved to be the Waqf property or part of the Waqf property. It was not open to the respondent no.1 to go into the said question.

56. In view of the above, I am of the opinion that the order dated 9.8.2005 passed by the respondent no. 1 allowing the Revision under Section 15 -A of the Act , and setting-aside the order dated 16.3.2001 passed by the Prescribed Authority and the order dated 26.3.2002 passed by the Appellate Authority, is correct and legal, but the said order dated 9.8.2005 to the extent ,it went into the question of title to the plots in question, is not legal.

57. In fact, the order passed by the Prescribed Authority as well as the Appellate Authority were liable to be set-aside /quashed on the ground that the said orders decided the question of title to the plots in question which the said authorities had no jurisdiction to decide. As the order dated 9.8.2005 passed by the respondent no.1 set- aside the orders passed by the Prescribed Authority and the Appellate Authority, though for different reasons, the said order dated 9.8.2005 deserves to be upheld to the extent it set-aside the orders passed by the Prescribed Authority and the Appellate Authority. In the circumstances, the Writ Petition filed by the petitioner is liable to be dismissed.

The Writ Petition filed by the petitioner is accordingly, dismissed. However, on the facts and in the circumstances of the case, there will be no order as to costs.

58. It is made clear that this order will not come in the way of the petitioner in seeking proper reliefs before the appropriate forum.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.06.2009

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Criminal Misc. Writ Petition No. 54329 of 2008

Mahendra Singh, Constable No. 444 A.P. ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Vijay Gautam

Counsel for the Opposite Parties:
S.C.

U.P. Police Officers Subordinate Ranks (Punishment and Appeal) Rules 1991-Rule-8(2)(b)-Dismissal by exercising power under Rule 8 of without necessary

reasons of satisfaction-conclusion drawn on basis of presumption-on allegation, the petitioner allowed the juvenile to escave from medical examination-not supported by any evidence, material or fact finding enquiry-held not justified.

Held: Para 13

The Supreme Court and this Court have repeatedly held that whenever power under Rule 8(2)(b) of the Rules of 1991 is to be exercised, the disciplinary authority must be very cautious and must record satisfaction on the material collected by him in writing and give reasons, which may be subject to judicial review about the necessity in public interest to dispense with the enquiry and to dismiss the delinquent employee. In the present case the Senior Superintendent of Police, Kanpur Nagar has committed patent error in recording such satisfaction. The facts and circumstances do not justify the reasons and the conclusions drawn by him.

Case law discussed:
1985 SC 1416

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

1. Heard Shri Vijay Gautam, learned counsel for the petitioner. Learned Standing Counsel appears for the respondents.

2. The petitioner-Constable No. 444, Civil Police Mahendra Singh has filed this writ petition for a writ of certiorari to quash the orders dated 21.11.2007 passed by the Senior Superintendent of Police, Kanpur Nagar under Rule 8(2)(b) of the U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991 (in short the Rules of 1991); the order of the Deputy Inspector General of Police, Kanpur Range, Kanpur dated 30.06.2008 and the order dated 25.09.2008 passed by the Inspector Genera of Police, Kanpur Zone, Kanpur dismissing the revision. The petitioner has also prayed for writ of mandamus for direction to reinstate him in service with regular salary and all consequential benefit and has also prayed for arrears of salary.

3. The order by which the Senior Superintendent of Police, Kanpur Nagar, as a competent authority under the Rules of 1991 has dismissed the petitioner, dispensing with department enquiry on the ground that it is not reasonably practicable to hold the enquiry. It states in the order, that on 20.11.2007 the petitioner along with Constable 1039 Civil Police Umesh Prasad Gupta were relieved in pursuance of the order of the Juvenile Justice Board, Kanpur Nagar dated 16.11.2007 by G.D. Entry No. 19 at 9.00 a.m. On 20.11.2007 from the juvenile Home, Kidwai Nagar, Kanpur with juvenile accused Raju son of Somaia for medical examination to ascertain his age. They were responsible to produce the child before the Chief Medical Officer, UHM Hospital, Kanpur for examination, and thereafter to take him back to the Government Home, Kidvai Nagar, Kanpur. The constables committed gross negligence and impropriety in allowing an opportunity to the child accused to escape. They were physically more stronger than the child and were given handcuffs and rope to keep him under control. The Senior Superintendent of Police has observed that the negligence has not only tarnished the image of the police department but has also affected the credibility of the department in the estimation of the general public. He has thereafter observed that the child accused to escape from police custody, and thus he find it justifiable to adopt the procedure prescribed under Rule 8(2)(b) of the Rules

of 1991 to punish him. In his opinion recorded in the order passed under Rule 8(2)(b) of the Rules of 1991, he states that if competent authority is satisfied for the reason recorded in the order that it is not reasonably practicable to hold an enquiry before dismissal, removal or reversion of rank of the office, the competent authority can exercise the powers. In the present case after deeply examining the matter he has arrived at a conclusion that the serious irregularity committed by the petitioner in which he had intentionally helped the child accused to escape does not make it reasonably practicable to hold a departmental enquiry.

4. The Deputy Inspector General of Police as appellate authority and the Inspector General of Police as revisionary authority have upheld the orders and the exercise of powers by the Senior Superintendent of Police under Rules 8(2)(b) of the Rules of 1991.

Clause (2) of Article 311 of the Constitution of India provides that no person who holds a civil post under the Union or the State "shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges." The second proviso to clause (2), however, specifies three situations in which the requirement in Clause (2) do not apply. Clause (b) of the second proviso states that "where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to hold such an inquiry." the enquiry and the opportunity provided by clause (2) can be dispensed with and punishment imposed straightaway. Clause (3) of Article 311 is a continuation of clause (b) or the second proviso. Clause (3) says, "if, in respect of any such person as aforesaid, a question arises whether it is reasonably practicable to hold such an inquiry as is referred to in clause (2), the decision thereon on the authority empowered to dismiss or remove such person or to reduce him in rank shall be final"

5. In ***Union of India v. Tulsiram Patel, AIR 1985 SC 1416,*** the Constitution Bench of the Supreme Court held in paragraphs 130, 131, 132, 133, 134, 135, 136, 136-A and 137 as follows:

130. *The condition precedent for the application of clause (b) is the satisfaction of the disciplinary authority that "it is not reasonably practicable to hold" the inquiry contemplated by clause (2) of Article 311. What is pertinent to note is that the words used are" not reasonably practicable" and not "impracticable". According to the Oxfore English Dictionary "practicable" means "Capable of being put into practice, carried out in action, effected accomplished, or done; feasible." Webster's Third New International Dictionary defines the word "practicable" inter alia as meaning "possible to practice or perform." capable of being put into practice, done or accomplished. Feasible". Further, the words used are not "not practicable" but " not reasonably practicable". Webster's Third New International Dictionary defines the word "reasonably" as "in a reasonable manner, to a fairly sufficient extent." Thus, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was*

reasonably practicable to do so. It is not a total or absolute impracticability which is required by clause (b). What is requisite is that the holding of the inquiry is not practicablein the opinion of a reasonable man taking a reasonable view of the prevailing situation. 'it is not possible to enumerate the cases in which it would not be reasonably practicable to hold the inquiry,but some instance by way of illustration may, however, be given. It would not be reasonably practicable to hold an inquiry where the government servant, particularly through or together, with his associates, so terrorizes, threatens or intimidate witness who are going to give evidence against him with fear of reprisal as to prevent them from doing so or where the government servant by himself or together with or through others threatens, intimidates and terrorizes the officer who is the disciplinary authority or members of his family so that he is afraid to hold the inquiry or direct it to be held. It would also not be reasonably practicable to hold the inquiry where an atmosphere of violence or of general indiscipline and insubordination prevails, and it immaterial whether the concerned government servant is or is not a party to bringing about such an atmosphere. In this connection, we must bear in mind that numbers coerce and terrify while an individual may not. The reasonable practicability of holding an inquiry is a matter of assessment to be made by the disciplinary authority. Such authority is generally on the spot and knows what is happening. It is because the disciplinary authority is the best judge of this that clause (3) of Article 311 makes the decision of the disciplinary authority on this question final. A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the Department's case against the government servant is weak and must fail. The finality given to the decision of the disciplinary authority by Article 311(3) is not finding upon the court so fas as its power of judicial review is concerned and in such a se the court will strike down the order dispensing with the inquiry as also the order imposing penalty. The case of Arjun Chaubey v. Union of India (1984) 3 SCR 302:(AIR 1984 SC 1356) is an instance in point. In that case, the appellant was working as a senior clerk in the office of the Chief Commercial Superintendent, Northern Railway, Varanasi. The Senior Commercial Officer wrote a letter to the appellant calling upon him to submit his explanation with regard to twelve charges of gross indiscipline mostly relating to the Deputy Chief Commercial Superintendent. The appellant submitted his explanation and on the very next day the Deputy Chief Commercial Superintendent served a second notice on the appellant saying that his explanation was not convincing and that another chance was being given to him to offer his explanation with respect to those charges. The appellant submitted his further explanation but on the very next day the Deputy Chief Commercial Superintendent passed an order dismissing him on the ground that he was not fit to be retained in service. This Court struck down the order holding that seven out of twelve charges related to the conduct of the appellant with the Deputy Chief Commercial Superintendent who was the disciplinary authority and that if an inquiry were to be held, the principal witness for the Department would have

been the Deputy Chief Commercial Superintendent himself, resulting in the same person being the main accuser, the chief witness and also the judge of the matter.

***131**. It was submitted that where a delinquent government servant so terrorizes the disciplinary authority that neither that officer nor any other officer stationed at that place is willing to hold the inquiry, some senior officer can be sent from outside to hold the inquiry. This submission itself shows that in such a case the holding of an inquiry is not reasonably practicable. It would be illogical to hold that the administration work carried out by senior officers should be paralysed because a delinquent servant either by himself or along with or through others makes the holding of an inquiry not reasonably practicable.*

***132**. It is not necessary that a situation which makes the holding of an inquiry not reasonably practicable should exist before the disciplinary inquiry is initiated against a government servant. Such a situation can also come into existence subsequently during the course of an inquiry, for instance, after the service of a charge-sheet upon the government servant or after he has filed his written statement thereto or even after evidence has been led in part. In such a case also the disciplinary authority would be entitled to apply to apply clause (b) of the second proviso because the word "inquiry" in that clause includes part of an inquiry. It would also not be reasonably practicable to afford to the government servant an opportunity of hearing or further hearing, as the case may be, when at the commencement of the inquiry or pending it the government servant absconds and cannot be served or will not participate in the inquiry. In such cases, the mater must proceed ex parte and on the material before the disciplinary authority. Therefore, even where a part of an inquiry has been held and the rest is dispensed with under clause (b) or a provision in the service rules analogous thereto, the exclusionary words of the second proviso operate in their full vigour and the government servant cannot complain that he has been dismissed, removed or reduced in rank in violation of the safeguards provided by Article 311(2).*

***133**. The second condition necessary for the valid application of clause (b) of the second proviso is that the disciplinary authority should record in writing its reason for its satisfaction that it was not reasonably practicable to hold the inquiry contemplated by Article 311(2). This is a Constitutional obligation and if such reason is not recorded in writing, the order dispensing with the inquiry and order of penalty following thereupon would both be void and unconstitutional.*

134.** It is obvious that the recording in writing of the reason for dispensing with the inquiry must precede the order imposing the penalty. The reason for dispensing with the inquiry need not, therefore find a place in the final order. It would be usual, to record the reason separately and then consider the question of the penalty to be imposed and pass the order imposing penalty. It would however, be better to record the reason in the final order in order to avoid the allegation that the reason was not recorded in writing before passing the final order but was subsequently fabricated.* ***The reason for dispensing with the inquiry need not contain detailed particulars, but the reason must not be vague or just a repetition of the language of clause (b) of the second

proviso. For instance, it would be no compliance with the requirement of clause (b) for the disciplinary authority simply to state that he was satisfied that it was not reasonably practicable to hold any inquiry. Sometimes a situation may be such that it is not reasonably practicable to give detailed reason for dispensing with the inquiry. This case must be judged on its own merit and in the light of its own facts and circumstances.

135. *It was vehemently contended that if reasons are not recorded in the final order, they must be communicated to the concerned government servant to enable him to challenge the validity of the reason in a departmental appeal or before a court of law and that failure to communicate the reasons would invalidate the order. This contention too cannot be accepted. The constitutional requirement in clause (b) is that the reason for dispensing with the inquiry should be recorded in writing. There is no obligation to communicate the reason to the government servant. At clause (3) of Article 311 makes the decision of the disciplinary authority on this point final, the question cannot be agitated in a departmental appeal, revision or review. The obligation to record the reason in writing is provided in clause (b) so that the superiors of the disciplinary authority may be able to judge whether such authority had exercised its power under clause (b) properly or not with a view to judge the performance and capacity of that officer for the purposes of promotion etc. it would however, to better for the disciplinary authority to communicate to the government servant its reason for dispensing with the inquiry because such communication would eliminate the possibility of an allegation being made that the reasons have been subsequently fabricated. It would also enable the government servant to approach the High Court under Article 226 or, in a fit case, this Court under Article 32. If the reasons are not communicated to the government servant and the matter comes to the court, the court can direct the reasons to be produced,and famished to the government servant and if still not produced a presumption should be drawn that the reasons were not recorded in writing and impugned order would then stand invalidated. Such presumption can, however, be rebutted by a satisfactory explanation for the non-production of the written reasons.*

136*. It was next submitted that though clause (b) of the second proviso excludes an inquiry into the charges made against a government, it does not exclude an inquiry preceding it,namely an inquiry into whether the disciplinary inquiry should be dispensed with or not, and that in such a preliminary inquiry the government servant should be given an opportunity of a hearing by issuing to him a notice to show cause why the inquiry should not be dispensed with so as to enable him to satisfy the disciplinary authority that it would be reasonably practicable to hold the inquiry. This argument is illogical and is a contradiction in terms. If an inquiry into the question whether the disciplinary inquiry inquiry should be dispensed with or not is equally not reasonably practicable.*

136A*. A government servant who has been dismissed, removed or reduced in rank by applying to his case clause (b) or an-analogous provision of a service rule is not wholly without a remedy. As pointed out earlier while dealing with the various service rules. He can claim in a*

departmental appeal or revision that an inquiry be held with respect to the charges on which the penalty of dismissal, removal or reduction in rank has been imposed upon him unless the same or a similar situation prevails at the time of hearing of the appeal or revision application. If the same situation is continuing or a similar situation arises, it would not then be reasonably practicable to hold an inquiry at the time of the hearing of the appeal or revision. Though in such a ease as the government servant if dismissed or removed from service, is not continuing in service and it reduced in rank, is continuing in service, with such reduced rank, no prejudice could be caused to the government or the Department if the hearing of an appeal or revision application, as the case may be, is postponed for a reasonable time.

137*. Where a government servant is dismissed, removed or reduced in rank by applying clause (b) or an analogous provision of the service rules and he approaches either the High Court under Article 226 or this Court under Article 32, the court will interfere on grounds well established in law for the exercise or power of judicial review in matters where administrative discretion is exercised. It will consider whether clause (b) or an analogous provision in the service rules was property applied or not.* ***The finality given by clause (3) of Article 311 to the disciplinary authority's decision that it was not reasonably practicable to hold the inquiry not binding upon the court. The court will also examine the charge of malafides, if any made in the writ petition. In examining the relevancy of the reasons, the court will consider the situation which according to the disciplinary authority made it come to the conclusion that it was not reasonably practicable to hold the inquiry. If the court finds that the reasons are irrelevant. Then the recording of its satisfaction by the disciplinary authority would be an abuse of power conferred upon it by clause (b) and would take the case out the purview of that clause and the impugned order of penalty would stand invalidated. In considering the relevancy of the reasons given by the disciplinary authority the court will not, however, sit in judgment over them like a court of first appeal. In order to decide whether the reasons are germane to clause(b) the court must put itself in the place of the disciplinary authority and consider what in the then prevailing situation a reasonable man acting in a reasonable way would have done. The matter will have to be judged in the light of the then prevailing situation and not as if the disciplinary authority was deciding the question whether the inquiry should be dispensed with or not in the cool and detached atmosphere of a courtroom, removed in time, from the situation in question. Where two view are possible, the court will decline to interfere.***

6. Rule 8 of the U.P. Police Officers of Subordinate Rank (Punishment & Appeal) Rules 1991 (in short the Rules of 1991) provides for dismissal and removal of police officers in the State of U.P. Rules 8 is quoted as below:-

"8. Dismissal and removal-(1) No police office shall be dismissed or removed from service by an authority subordinate to the appointing authority.

2. No police officer shall be dismissed, removed or reduced in rank except after proper inquiry and

disciplinary proceeding as contemplated by these rules:

Provided that this rule shall not apply-

(a) Where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction or a criminal charge; or

(b) Where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason to be recorded by that authority in writing, it is not reasonably practicable to hold such enquiry; or

(c) Where the Government is satisfied that in the interest of the security of the State it is not expedient to hold such enquiry.

3. All orders of dismissal and removal of Head Constables or Constables shall be passed by the Superintendent of Police. Cases in which the Superintendent of Police recommends dismissal or removal of a Sub-Inspector-General concerned for orders.

4.(a) The punishment for intentionally or negligently allowing a person in police custody or judicial custody to escape shall be dismissal unless the punishing authority for reasons to be recorded in writing awards a lessor punishment.

(b) Every officer convicted by the court for an offence involving moral turpitude shall be dismissed unless the punishing authority for reasons to be recorded in writing considers it otherwise."

7. Rule 8 is paramateria of Art. 311(1) and (2) of the Constitution of India. The normal rule is that no punitive action entailing consequences of dismissal, removal or reduction of rank would be taken without holding a disciplinary enquiry against a member of civil service unless and until he has been informed or the charges and given a reasonable opportunity of being heard in respect of those charges. The exceptions given in Art. 311(2) of the Constitution of India embodied in Rule 8(2) are in respect of certain case, where holding of departmental enquiry has been dispensed with on the conduct, which is led to conviction of the person on a criminal charge, where authority empowered is satisfied that for some reasons to be recorded by that authority in writing, it is not reasonably practicable to hold such enquiries; or where the government is satisfied that in the interest of the security of the State, is not expedient to hold such enquiry. In Chandigarh Administration, Union Territory, Chandigarh Vs. Ajay Manchanda AIR1996 SC 3152 the Supreme Court held that though it is not necessary that reasons must find in place in the order of punishment, the authority must produce the same, when called upon to do by the Court.

8. The Division Bench of this Court have followed the aforesaid principles of law laid down by the Supreme Court in State of U.P. Vs. Chandrika Prasad 2006(1) ESC 374 (ALLD.)(DB); Pushpendra (Cp) 2187 & Anr. Vs. State of U.P. & Anr., 2008(3)ADJ 689 (DB) and Awadhesh Kumar Vs. State of U.P., Special Appeal No.217 of 2008 decided on 16.7.2008.

In this case the reasons given in the order, in finding, that it is not reasonably practicable to hold an enquiry are based only upon gravity of the incident. The Senior Superintendent of Police has come to a conclusion that the petitioner had

deliberately and intentionally given an opportunity to the child accused to escape. He did not exercise the reasonable care and used the hand cuff and rope provided to them. He was physically powerful than the child in their custody and that he could have used force, raised alarm and could have made efforts to catch them. These acts on its own were treated as sufficient to dispense with departmental enquiry. The order also mentions that in 26 years of his service the petitioner has been punished seven of times minor penalties and has been awarded a censure entry although the service record of the petitioner has not been found to be a reason to dispense with the departmental enquiry, the recital of the facts in the order demonstrates that authority took into account the service records of the petitioner in awarding him punishment of dismissal from service.

9. Shri Vijay Gautam, learned counsel for the petitioner submits that the Senior Superintendent of Police has drawn conclusions about the guilt of the petitioner without making any preliminary enquiry, or allowing the petitioner an opportunity to explain the circumstances in which the child had escaped. The matter called for framing of charges and to allow opportunity to the petitioner to explain the circumstances in which the delinquent child escaped. On the principles of law laid down by Supreme Court, the departmental enquiry in the present case could not be dispensed with. Shri Gautam submits that the neither the charge not the circumstances were such against the petitioner was not such on which it could be said that it was reasonably practicable to hold an enquiry.

10. Learned Standing Counsel submits that the petitioner along with another constable was under duty to keep the child in their custody and to take him back to the protection home. The fact that the petitioner having physical superiority and authority with handcuff and rope could not prevent escape was sufficient to draw conclusions and to record reasons that it was not reasonably practicable to hold a departmental enquiry.

11. I find substance in the contention of learned counsel for the petitioner that the required to produce him for examination in the hospital, would not by itself be a ground to dispense with the departmental enquiry. The charge of negligence in performance of duties in which a delinquent child prisoner escaped from the custody of the constables could not be a reason unless the facts and circumstances were such, which may had lead the disciplinary authority to draw such presumption. It is not a case, where a hardened criminal, terrorists or a known dacoit has escaped from the custody of the police. The circumstances in which the child escaped from the custody of the constables could be many, and may have been explained by the petitioner. The presumption drawn by the Senior Superintendent of Police that the petitioner deliberately and intentionally allowed the child to escape, are not supported by any evidence, material or fact finding enquiry. He has drawn the conclusion of the complicity of the petitioner only on the ground that the petitioner and his fellow constable were physically stronger that the child in their custody and that they were provided with handcuff and rope to tie him down.

12. The observation in the order of the disciplinary authority, that Rule 4(a) fo the Rules of 1991 provides for major penalty on the misconduct and allowing a prisoner to escape, is wholly misplaced. Such punishment can be awarded only after the police officer is found guilty of negligence in allowing the prisoner to escape. The finding in this regard can be given only after a departmental enquiry.

13. The Supreme Court and this Court have repeatedly held that whenever power under Rule 8(2)(b) of the Rules of 1991 is to be exercised, the disciplinary authority must be very cautious and must record satisfaction on the material collected by him in writing and give reasons, which may be subject to judicial review about the necessity in public interest to dispense with the enquiry and to dismiss the delinquent employee. In the present case the Senior Superintendent of Police, Kanpur Nagar has committed patent error in recording such satisfaction. The facts and circumstances do not justify the reasons and the conclusions drawn by him.

14. The writ petition is **allowed**. The order dated 21.11.2007, 30.6.2008 and 25.9.2008 are set aside. The respondents are directed to reinstate the petitioner with all consequential benefits, and with liberty to initiate departmental enquiry against him in accordance with Rules of 1991.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.06.2009

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 44867 Of 2008

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

Counsel for the Petitioner:
Sri Vijay Gautam

Counsel for the Respondents:
Sri Niraj Upadhyay
S.C.

U.P. Police Officers of Subordinate Rank (Punishment of Appeal) Rules, 1991- Rule 8 (2) (6)-Dismissal from Service-without holding enquiry-challenged on ground no reasons recorded for satisfaction of disperse with departmental enquiry-petitioner Police Constable-working as member of Security squad-in North East Express-instead of providing help-indulged in beating the passenger, robbed them, behaved indecently with women and fired with Government rifle-on protest of passenger at the interference of District Magistrate and other Higher District Authority-the situation normalized-No denial of allegations-finding about no possibility to hold enquiry and dismissal do not suffer from any error of law.

Held: Para 13

The reasons recorded by the Superintendent of Police, Railway, Agra as disciplinary authority, in the prevailing situation, finding that it was not reasonably practicable to hold disciplinary enquiry, do not suffer from any error of law. He has applied his mind to the relevant facts and has recorded

good and sufficient reasons to exercise the authority vested in him to dismiss the petitioner from service under Rule 8 (2) (b) of the Rules of 1991.

Case law discussed:

AIR 1985 SC 1416.

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

1. Heard Shri Vijay Gautam, learned counsel for the petitioner. Learned standing counsel appears for the respondents.

2. The petitioner a constable in civil police was posted at Police Station, Government Railway Police, Aligarh. He was dismissed from service by the Superintendent of Police, Railways, Agra under Rule 8 (2) (b) of the U.P. Police Officers of Subordinate Rank (Punishment & Appeal) Rules, 1991 (in short the Rules of 1991) after recording reasons that it was not reasonably practicable to hold a departmental enquiry against him. The petitioner has challenged the order on the ground, that the reasons, given for holding that it was not reasonably practicable to hold the departmental enquiry, do not satisfy the test of invoking such powers on the principles of law laid down by Constitution Bench of Supreme Court in ***Union of India v. Tulsiram Patel, AIR 1985 SC 1416***.

3. Brief facts giving rise to this writ petition are that on 23.8.2008 the petitioner was deputed as a member of security squad in North East Express from Railway Station Delhi to Railway Station Kanpur, with a government rifle and 30 cartridges. His duties required him to protect the persons and property of the passenger in the train; to curb the illegal activities of the criminals and anti social elements; to provide help to the persons in case of any incident or accident and specially to help the women and children providing them safety and security. It was reported that the petitioner, while on duty in the train instead of carrying out his responsibilities, indulged in beating passengers; robbed them; behaved indecently with the women and fired on them from government rifle. The passengers travelling in the train were angered by the conduct of the petitioner. They stopped the train at Railway Station Phaphund, District Auraiya. The entire rail traffic was stopped and was affected for about three hours. The District Magistrate, Auraiya and the Superintendent of Police, Auraiya had to reach the spot to control the demonstration by the passengers of the train. They could, with great difficulty, pacify the passengers and restored the rail traffic.

4. A report of the incident was lodged by complainant Shri Mukhtar son of Shri Niyamak resident of Village and Post Jaitakhanai Police Station Raniganj District Auraria, Bihar and was registered as as Case Crime No. 105 of 2008 Police Station G.R.P. Etawah in which the loot of Rs. 37,750/- from 27 passengers was reported as robbery under Section 394 IPC and is under investigation.

5. In the order dated 24.8.2008, the Superintendent of Police, Railways has observed that the police is a disciplined department in which every member of the force takes oath to protect and help citizens; maintain the reputation and follow the rules of the department. The petitioner misused his position as a police man. Instead of protecting the passengers he tortured them both mentally and

physically and robbed them. If the policemen appointed to protect the citizens start robbing them, the people will loose their faith in the police department and the criminal justice system of the country. The petitioner not only committed a crime of robbing the passengers but also fired on them from the government rifle assigned to him. The act was so dangerous that any of the innocent persons could have lost his life. His conduct was wholly unbecoming of a conduct of a government servant on duty.

6. The Superintendent of Police thereafter observed that the persons travelling in the train were extremely poor and were helpless labourers, who earn their livelihood by working at different places of the country. The snatching of the money from such persons is a very sad incident. The passengers had to suffer irreparable, mental and physical torture. The petitioner not only indulged in illegal activity but that because of him the entire rail traffic on Delhi-Kanpur route was obstructed for three hours causing national loss and delaying the journey of thousands of passengers.

7. The Superintendent of Police has thereafter given the reasons in coming to conclusion that it is not reasonably practicable to hold a departmental enquiry in the matter as follows:-

1. *The passengers, who were robbed and subjected to beating and indiscipline behavior by the petitioners, are all residents of far away States and it is not possible to secure their presence in the departmental enquiry.*

2. *The victims are extremely poor and helpless persons. They have already been tortured mentally and physically and thus it will be difficult to procure their presence in a departmental enquiry conducted by the same department.*

3. *It is possible that the petitioner as a police man will use in position to unduly influence the independent evidence to be led in the departmental enquiry.*

4. *The petitioner, after committing the act and going back to his duties, left the place without any information after leaving rifle and cartridges in the barrack. This fact was reported in the report No. 19 at 11.30 on 24.8.2008. His absence from duties was to avoid the departmental enquiry.*

5. *A criminal case No. 265 of 2000 under Sections 147/452/342/323/506 IPC was registered against the petitioner while he was posted at Agra in the year 2000 and that this is the second criminal act of the petitioner establishing that the petitioner is a man of criminal character.*

8. It is observed in the order that the act of the petitioner is criminal in nature and it is always possible that he will repeat such acts. He has already tarnished the image of the police department in public, which is difficult to repair. In the circumstances the Superintendent of Police, Railway recorded his satisfaction that it was not reasonably practicable to hold a

departmental enquiry against the petitioner.

9. Learned counsel for the petitioner submits that the petitioner has been dismissed on the ground of dereliction of duty which could not be treated as a serious act of misconduct. The reasons given to dispense with the enquiry are artificial, and are the result of an alleged incident, which was never subjected to any enquiry. In the writ petition it is stated that the petitioner was carrying out his duties to search and interrogate the persons on a suspicion that they were carrying illegal substance like bombs and other such materials. There was a suspect with a long beard, with suspicious activities. When the petitioner started interrogating the persons and tried to search their luggage, the men accompanying him and some women in veil made a complaint that the petitioner was misbehaving with them. They tried to assault the petitioner on which the train was stopped at the Railway Station Phaphund in District Auraiya. The petitioner came to know through the first information report that one Shri Mukhtar son of Shri Niyamak resident of Village and Post Jaitakhanai Police Station Raniganj District Araria, Bihar had lodged the first information report against him. No enquiry was made of the incident. Shri Gautam submits that the petitioner has been falsely implicated in the crime.

10. In ***Union of India v. Tulsiram Patel, AIR 1985 SC 1416***., the Constitution Bench of the Supreme Court held in paragraphs 130, 131, 132, 133, 134, 135, 136, 136-A and 137 as follows:

130. *The condition precedent for the application of clause (b) is the satisfaction of the disciplinary authority that "it is not reasonably practicable to hold" the inquiry contemplated by clause (2) of Article 311. What is pertinent to note is that the words used are "not reasonably practicable" and not "impracticable". According to to the Oxford English Dictionary "practicable" means "Capable of being put into practice, carried out in action, effected, accomplished, or done;feasible". Webster's Third New International Dictionary defines the word "practicable" inter alia as meaning "possible to practice or perform.: capable of being put into practice, done or accomplished: feasible". Further, the words used are not, ".not practicable" but "not reasonably practicable". Webster's Third New International Dictionary defines the word "reasonably" as "in a reasonable manner: to a fairly sufficient extent". Thus, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by clause (b). What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a. reasonable view of the prevailing situation. 'It is not possible to enumerate the cases in which it would not be reasonably practicable to hold the inquiry, but some instances by way of illustration may, however, be given. It would not be reasonably practicable to hold an inquiry where the government servant, particularly through or together, with his associates, so terrorizes, threatens or intimidate witnesses who are going to give evidence against him with fear of reprisal as to prevent them from*

doing so or where the government servant by himself or. together with. or through others threatens, intimidates and terrorizes the officer who is the disciplinary authority or members of his family so that he is afraid to hold the inquiry or direct it to be held. It would also not be reasonably practicable to hold the inquiry where an atmosphere of violence or of general indiscipline and insubordination prevails, and it is immaterial whether the concerned government servant is or is not a party to bringing about such an atmosphere. In this connection, we must bear in mind that numbers coerce and terrify while an individual may not. The reasonable practicability of holding an inquiry is a matter of assessment to be made by the disciplinary authority. Such authority is generally on the spot and knows what is happening. It is because the disciplinary authority is the best judge of this that clause (3) of Article 311 makes the decision of the disciplinary authority on this question final. A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely. in order to avoid the holding of an inquiry or because the Department's case against the government servant is weak and must fail. The finality given to the decision of the disciplinary authority by Article 311(3) is not binding upon the court so far as its power of judicial review is concerned and in such case the court will strike down the order dispensing with the inquiry as also the order imposing penalty. The case of Arjun Chaubey v. Union of India (1984) 3 SCR 302 : (AIR 1984 SC 1356) is an instance in point. In that ase, the appellant. was working as a senior clerk in the office of the Chief Commercial Superintendent, Northern Railway, Varanasi. The Senior Commercial Officer wrote a letter o the appellant calling upon him to submit his explanation with regard to twelve charges of gross indiscipline mostly relating to the Deputy Chief Commercial Superintendent. The appellant. submitted his explanation and on .the very next day the Deputy Chief Commercial Superintendent served a second notice on the appellant saying that his explanation was not convincing and that another chance was, being given to him to offer his explanation with respect to those charges. The appellant submitted his further explanation but on the very next day the Deputy Chief Commercial Superintendent passed an order dismissing him on the ground that he was not fit to be retained in service. This Court struck down the order holding that seven out of twelve charges related to the conduct of the appellant with the Deputy Chief Commercial Superintendent who was the disciplinary authority and that if an inquiry were to be held, the principal witness for the Department would have been the Deputy Chief Commercial Superintendent himself, resulting in the same person being the main accuser, the chief. witness and also the judge of the matter.

***131**. It was submitted that where a delinquent government servant so terrorizes the disciplinary authority that neither. that officer nor any other officer stationed at that place is willing to hold the inquiry, some senior officer can be sent from outside to hold the inquiry. This submission itself shows that in such a case the holding of an inquiry is not reasonably practicable. It would be illogical to hold that the administrative work carried out by senior officers should be paralysed because a delinquent*

government servant either by himself or along with or through others makes the holding. of an inquiry not reasonably practicable.

***132**. It is not necessary that a situation which makes the holding of an inquiry not reasonably practicable should exist before the disciplinary inquiry is initiated against a government servant. Such a situation can also come into existence subsequently during the course of an inquiry, for instance, after the service of a charge-sheet upon the government servant or after he has filed his written statement thereto or even after evidence has been led in part. In such a case also the disciplinary authority would be entitled to apply clause (b) of the second proviso because the word "inquiry" in that clause includes part of an inquiry. It would also not be reasonably practicable to afford to the government servant an opportunity of hearing or further hearing, as the case may be, when at the commencement of the inquiry or pending it the government servant absconds and cannot. be served or will not participate in the inquiry. In such cases, the matter must proceed ex parte and on the materials before the disciplinary authority. Therefore, even where a part of an inquiry has been held and the rest is dispensed with under clause (b) or a provision in the service rules analogous thereto, the exclusionary words of the second proviso operate in their full vigour and the government servant cannot complain that he has been dismissed, removed or reduced in rank in violation of the safeguards provided by Article 311(2).*

***133**. The second condition necessary for the valid application of clause (b) of the second proviso is that the disciplinary authority should record in writing its reason for its satisfaction that it was not reasonably practicable to hold the inquiry contemplated by Article 311(2). This is a Constitutional obligation and if such reason is not recorded in writing, the order dispensing with the inquiry and the order of penalty following thereupon would both be void and unconstitutional.*

***134**. It is obvious that the recording in writing of the reason for dispensing with the inquiry must precede the order imposing the penalty. The reason for dispensing with the inquiry need not, therefore find a place in the final order. It would be usual, to record the reason separately and then consider the question of the penalty to be imposed and pass the order imposing the penalty. It would, however, be better to record the reason in the final order in order to avoid the allegation that the reason was not recorded in writing before passing. the final order but was subsequently fabricated. The reason for dispensing with the inquiry need not contain detailed particulars, but the reason must not be vague or just a repetition of the language of clause (b) of the second proviso. For instance, it would be no compliance with the requirement of clause (b) for the disciplinary authority simply to state that he was satisfied that it was not reasonably practicable to hold any inquiry. Sometimes a situation may be such that it is not reasonably practicable to give detailed reasons for dispensing with the inquiry. This would not, however, per se invalidate the order. Each case must be judged on its own merits and in the light of its own facts and circumstances.*

***135.** It was vehemently contended that if reasons are not recorded in the final order, they must be communicated to the concerned government servant to enable him to challenge the validity of the*

reasons in a departmental appeal or before a court of law and that failure to communicate the reasons would invalidate the order. This contention too cannot be accepted. The constitutional requirement in clause (b) is that the reason for dispensing with the inquiry should be recorded in writing. There is no obligation to communicate the reason to the government servant. At clause (3) of Article 311 makes the decision of the disciplinary authority on this point final, the question cannot be agitated in a departmental appeal, revision or review., The obligation to record the reason in writing is provided in clause (b) so that the superiors of the disciplinary authority may be able to judge whether such authority had exercised its power under clause (b) properly or not with a view to judge the performance and capacity of that officer for the purposes of promotion etc. It would however, be better for the disciplinary authority to communicate to the government servant its reason for dispensing with the inquiry because such communication would eliminate the possibility of an allegation being made that the reasons have been subsequently fabricated. It would also enable the government servant to approach the High Court under Article 226 or, in a fit case, this Court under Article 32. If the reasons are not communicated to the government servant and the matter comes to the court, the court can direct the reasons to be produced, and famished to the government servant and if still not produced, a presumption should be drawn that the reasons were not recorded in writing and the impugned order would then stand invalidated. Such presumption can, however, be rebutted by a satisfactory explanation for the non-production of the written reasons.

***136**. It was next submitted that though clause (b) of the second proviso excludes an inquiry into the charges made against a government servant, it does not exclude an inquiry preceding it, namely. an inquiry into whether the disciplinary inquiry should be dispensed with or not, and that in such a preliminary inquiry the government servant should be given an opportunity of a hearing by issuing to him a notice to show cause why the inquiry should not be dispensed with so as to enable him to satisfy the disciplinary authority that it would be reasonably practicable to hold the inquiry. This argument is illogical and is a contradiction in terms. If an inquiry into the charges against a government servant is not reasonably practicable, it stands to reason that an inquiry into the. question whet her the disciplinary inquiry should be dispensed with or not is equally not reasonably practicable.*

***136A**. A government servant who has been dismissed, removed or reduced in rank by applying to his case clause (b) or an-analogous provision of a service rule is not wholly without a remedy. As pointed out earlier while dealing with the various service rules. he can claim in a departmental appeal or revision that an inquiry be held with respect to the charges on which the penalty of dismissal, removal or reduction in rank has been imposed upon him unless the same or a similar situation prevails at the time of hearing of the appeal or revision application. If the same situation is continuing or a similar situation arises, it would not then be reasonably practicable to hold an inquiry at the time of the hearing of the appeal or revision. Though in such a ease as the government servant if dismissed or removed from service, is not continuing in service and it reduced in*

rank, is continuing in service. with such reduced rank, no prejudice could be caused to the Government or the Department if the hearing of an appeal or revision application, as the case may be, is postponed for a reasonable time.

137**. Where a government servant is dismissed, removed or reduced in rank by applying clause (b) or an analogous provision of the service rules and he approaches either the High Court under Article 226 or this Court under Article 32, the court will interfere on grounds well established in law for the exercise of power of judicial review in matters where administrative discretion is exercised. It will consider whether clause (b) or an analogous provision in the service rules was property applied or not.* ***The finality given by clause (3) of Article 311 to the disciplinary' authority's 'decision that it was not reasonably practicable to hold the inquiry s not binding upon the court. The court will also examine the charge of malafides, if any made in the writ petition. In examining the relevancy of the reasons, the court will consider the situation which according to the disciplinary authority made it come to the conclusion that it was not reasonably practicable to hold the inquiry. If the court finds that the reasons are irrelevant, then the recording of its satisfaction by the disciplinary authority would be an abuse of power conferred upon it by clause (b) and would take the case out of the purview of that clause and the impugned order of penalty would stand invalidated. In considering the relevancy of the reasons given by the disciplinary authority the court will not, however, sit in judgment over them like a court of first appeal. In older to decide whether the reasons are germane to clause (b),, the court must put itself in the place of the disciplinary authority and consider what in the then prevailing situation a reasonable man acting in a reasonable way would have done. The matter will have to be judged in the light of the then prevailing situation and not as if the disciplinary authority was deciding the question whether the inquiry should be dispensed with or not in the cool and detached atmosphere of a courtroom, removed in time, from the situation in question. Where two views are possible, the court will decline to interfere."

11. In the present case the Superintendent of Police, Railways has, after narrating the facts of the incident, given reasons to dispense with the departmental enquiry and has found that it was not reasonably practicable to hold a departmental enquiry. The nature of incident, in which the petitioner as a constable on squad duty, misbehaved with the passengers and robbed them and thereafter fired upon them with the government weapon on which the train was stopped at Police Station Phaphund, for three hours and that the railway traffic could be resumed only on the intervention of the District Magistrate and Superintendent of Police, Auraiya, was a serious act of indiscipline. A police officer on squad duty is required to provide security and safety to the passengers. If he himself starts extracting money and looting the passengers and starts firing to terrorise them and to stop them from making protest, the law and order will completely break down. The passengers, while travelling in a train, are mostly travelling alone helpless against criminals and anti social elements. They have to be protected by the State. In a case where the constables deputed in a

squad to protect them become criminals and start looting the passengers, they will not be left with any safety at all.

12. The reasons given in the order that it will be difficult to secure the presence of the poor people, or victims of the crime committed on them, to be called from far away States and that they would not have faith in an enquiry conducted by the police against one of their constables, that petitioner will use his influence and that the conduct of the petitioner in leaving the barracks after the incident without information, were sufficient to dispense with the departmental enquiry. The petitioner has not denied that he had fired from government weapon and that the passengers did not resort to demonstration on which the train traffic was stopped for three hours at the next Railway Station. His explanation, that he was searching for suspicious activities of the passengers, is not only vague but appears to be a story set up to cover the crime committed by him. He does not say that he had reported such activity to his superior officers. The demonstration made by the angry passengers and the intervention of the District Magistrate and the Superintendent of Police, Auraiya were sufficient proof of the incident. The nature of the incident and the gravity of the situation on the spot were taken into consideration by the disciplinary authority. The tests laid down in Tulsi Ram Patel's case to dispense with the departmental enquiry, to record the finding that it is not reasonably practicable to hold the enquiry, are fully satisfied.

13. The reasons recorded by the Superintendent of Police, Railway, Agra as disciplinary authority, in the prevailing situation, finding that it was not reasonably practicable to hold disciplinary enquiry, do not suffer from any error of law. He has applied his mind to the relevant facts and has recorded good and sufficient reasons to exercise the authority vested in him to dismiss the petitioner from service under Rule 8 (2) (b) of the Rules of 1991.

14. The writ petition is **dismissed**.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.05.2009

BEFORE
THE HON'BLE JANARDAN SAHAI, J.
THE HON'BLE Y.K. SANGAL, J.

Civil Misc. Writ Petition No. 23662 of 2009

Ramendra Srivastava ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Santosh Kumar Singh
Sri Ashwani K. Misra

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

Constitution of India Art. 226-Post Office-whether Agent of addressee or sender?-petitioner qualified preliminary examination Combined State Lower Subordinate Examination 2007-petitioner send complete form for main examination through speed post on 28.3.2007, reached on 1.4.2007 returned by commission on ground according terms of advertisement -form should be reached upto 5 P.M. on 31.2.2007 Registered post or by hand to hand-where two options are open post office can not be agent of addressee -but on equity-petitioner passed pre-

examination out of one lac only two thousand candidates-No date for main examination yet fixed-general mandamus issued to accept the Form of petitioner as well as others who had send through registered post upto 30.5.2007-even not have filed writ petition-Commission to accept such forms upto 30.5.2007.

Held: Para 4

Learned counsel for the petitioner, however, submitted that great injustice would be done to the petitioner in the facts of the case, and that the petitioner should not be penalized for the fault of the postal department, which is meant to render public service. We find some merit in this contention. The peculiar equitable circumstances in this case are firstly that the petitioner has already qualified in the preliminary examination. It is stated at the Bar that more than one lac candidates had appeared in this examination, out of which only about two thousand candidates have cleared the preliminary examination and very meritorious students would thus lose the chance of appearing in the main examination. Secondly the registered letter was sent by the petitioner on 28.3.2009 by registered speed post, and it can be inferred that the petitioner was having a bona fide belief that in the normal course the letter would reach its destination within 48 hours. Shri P.S. Baghel, leaned counsel for the Commission in all fairness stated that Commission has informed him that the postal department gives some assurance that letter sent by speed post is expected to be delivered at its destination within 48 hours. Thirdly in this case it also appears that the letter had in fact reached the U.P. Public Service Commission on 1st April, 2009. Fourthly, the Commission has yet not fixed any date for the main examination and there does not appear to be any practical difficulty for the Commission in accepting and processing the form at this stage.

Case law discussed:
(2006) 1 UPLBEC 152, W.P. No.57508 of 2005, 1995 (1) Madras Law Weekly 351

(Delivered by Hon'ble Janardan Sahai, J.)

1. The petitioner passed the Preliminary Examination (Combined State/Lower Subordinate Services), 2007 held by Uttar Pradesh Public Service Commission, Allahabad. The petitioner was given intimation by the Uttar Pradesh Public Service Commission, Allahabad that he has cleared the preliminary examination. The letter of intimation to the petitioner and other candidates who had cleared the preliminary examination contains a recital that the Application Form for the Main Examination along with all the requisite annexures be submitted to the Commission by 5.00 P.M. 31st March 2009 by registered post or in person at the Counter of the Dak Section of the Commission, at Gate No.3. The petitioner sent the form for the Main Examination by registered post on 28th March, 2009. It appears that the postal cover was tendered by the post office at the address of the Commission on 1st April, 2009, and the Commission treating the form to have been submitted beyond the last date returned the same to the petitioner. The copy of the postal cover has been annexed along with this petition as Annexure No.4. It contains the seal of the post office bearing the date 1st April, 2009. As the commission has rejected the candidature of the petitioner, the petitioner has come to this Court.

2. The case of the petitioner is that the form was submitted by him in due time, and it was bona fide expected that it would reach the Commission by the last date fixed. It is also contended that the

post office was the agent of the Commission, and not that of the petitioner, and therefore, it ought to be taken that the papers were received by the Commission within time when they were handed over to the post office and in any case the petitioner cannot be made to suffer on account of delay on the part of the agent of the Commission. The apex court in the case of Income tax Commissioner, Bombay Vs. M/s. Ogale Glass Works Ltd. A.I.R. 1954, SC 429 held that there can be no doubt that as between the sender and the addressee it is the request of the addressee that the cheque be sent by post that makes the post office the agent of the addressee and that after such request the addressee cannot be heard to say that the post office was not his agent and therefore the loss of the cheque in transit must fall on the sender. The mere fact that the sender could reclaim the letter before it was delivered to the addressee it was held was a qualified right and would not have the effect of making the post office the agent of the sender. The decision of the apex court was followed in other decisions including Shri Jagadish Mills Ltd. Vs. The Commissioner of Income Tax, Bombay North, Kutch and Saurashtra, Ahmedabad, A.I.R. 1959 SC 1160. It appears from the case law that where the only mode provided for sending a letter to the addressee is by registered post the consistent view of the apex court and of the High Court is that the post office is the agent of the addressee. It also appears to be settled that where the addressee does not specify any mode for sending the letter and it is the sender who uses the postal services for sending the letter the post office would be an agent of the sender. Some difficulty arises however in the third situation where, as in the present one two alternative modes for sending the letter to it are given by the addressee. In such a case the counsel for the petitioner submits the post office would be the agent of the addressee because the choice of the sender is limited to use one of the modes prescribed by the addressee. The case law however has taken a different direction. Three Division Benches of this Court have been brought to our notice in which it has been held that the post office would be the agent of the sender because the sender was not bound to send the letter through the post office and it was the sender who had exercised that choice. These three Division Benches are; Civil Misc. Writ Petition No. 23152 of 2006 **Adil Khan Vs. State of U.P. and others** decided on 5.5.2006; (2006) 1 UPLBEC 152 **Pramod Kumar Singh Vs. State of U.P. and another** and Civil Misc. Writ Petition No. 57508 of 2005, **Anupam Vs. Public Service Commission and another, decided on 4.10.2005**. All the three Division Benches and the Full Bench of the Madras High Court relied upon in **Vinod Kumar Vs. Secretary, 1995 (1) Madras Law Weekly 351** have considered and interpreted the decision of the apex court in M/s. Ogale Glass Works Ltd. (supra). As a Bench of Coordinate jurisdiction we are bound by these decisions.

3. Learned counsel for the petitioner, however, relied upon a decision of the apex court in the case of Commissioner of Income Tax Bihar and Orissa Vs. M/s. Patney and Co. A.I.R. 1959 SC 1070 and submitted that even where two alternative modes of sending the letter one mode being by post office are provided the post office would be the agent of the addressee. It was held by the apex court that where there is an express request by

the creditor (assessee) that the amount be paid to him by cheques to be sent by post and they are so sent there is no doubt that the payment will be taken to be at the place where the cheque or cheques are posted. In the case of payment by cheques sent by post the determination of the place of payment will depend upon the agreement between the parties or the course or conduct of the parties and that if it is shown that the creditor authorized the debtor either expressly or impliedly to send a cheque by post the property in the cheque passes to the creditor as soon as it is posted. In order to determine whether the post office was the agent of the Commission the condition in the letter of intimation sent to the candidates that the form should reach the enquiry counter of the dak section of the Commission at Gate No.3 by 5 P.M. on 31.3.2009 and that the form would in no circumstances be accepted after the last date cannot be lost sight of. If the Commission had any intention of treating the post office as its agent the handing over of the letter by the sender to the post office would have been sufficient but the condition that it should reach the enquiry counter of the dak section at Gate No.3 indicates that the handing over of the letter to the post office was not being treated by the Commission as sufficient. The other mode of sending the form given by the Commission is by hand. If the Commission had prescribed delivery of the form by hand as the only mode of sending the form it would have been a highly inconvenient mode of delivery for the candidates who are spread all over the State or the country. In the circumstances it appears that it was for the convenience of the sender of the form that an optional mode to send the form by registered post was provided. Non-specification of any mode of sending the form in which case the sender would have had the option of sending the form in the mode of his choice including the mode of ordinary post may not have been regarded by the Commission a satisfactory mode for it is well known that if a letter is sent by ordinary post the sender can never be certain whether it has reached the addressee. The advantage to the sender of a letter by registered post is that its record is maintained by the post office and in case the letter is misplaced by the Commission after it has been delivered to it within time the sender can prove the delivery and the candidate would not be made responsible for the delay. The sender knows that some risk in that a letter may not reach on time is involved in sending it even by registered post but taking the risk would save him from a lot of inconvenience in adopting the other mode of depositing it personally. It appears that the option of sending the letter by registered post was left to the sender so that if he is ready to take the risk he may be saved from delivering the form in person which in many cases would be a very cumbersome procedure at least for long distance out station candidates. The post office renders public service for the sender and the addressee but if the addressee specifies a particular place where the letter must reach before a specified time indicating that it wold not accept the letter after the specified time an inference can be drawn that the addressee is not taking the consequences of the risk of non-delivery within the time specified, upon itself and that the post office in such a case is the agent of the sender. A Division Bench of this Court in Ram Autar Singh Vs. Public Service Commission, U.P., Allahabad and other, 1987 UPLBEC 316 has considered the

effect of a similar term in the advertisement of the Commission that "closing date for the receipt of application in the Commission Office will be July 14, 1986. Applications received after this date will not be entertained" and has held that acceptance of the form would have been complete only if it had reached "before the offer had lapsed on the expiry of the time prescribed." The Division Bench in Ram Autar Singh's case relied upon a previous decision of this court in Writ Petition No. 11224 of 1981 on the point of agency of the postal authority. For the reasons given above we are of the view that the post office in this case was the agent of the petitioner.

4. Learned counsel for the petitioner, however, submitted that great injustice would be done to the petitioner in the facts of the case, and that the petitioner should not be penalized for the fault of the postal department, which is meant to render public service. We find some merit in this contention. The peculiar equitable circumstances in this case are firstly that the petitioner has already qualified in the preliminary examination. It is stated at the Bar that more than one lac candidates had appeared in this examination, out of which only about two thousand candidates have cleared the preliminary examination and very meritorious students would thus lose the chance of appearing in the main examination. Secondly the registered letter was sent by the petitioner on 28.3.2009 by registered speed post, and it can be inferred that the petitioner was having a bona fide belief that in the normal course the letter would reach its destination within 48 hours. Shri P.S. Baghel, leaned counsel for the Commission in all fairness stated that Commission has informed him that the postal department gives some assurance that letter sent by speed post is expected to be delivered at its destination within 48 hours. Thirdly in this case it also appears that the letter had in fact reached the U.P. Public Service Commission on 1st April, 2009. Fourthly, the Commission has yet not fixed any date for the main examination and there does not appear to be any practical difficulty for the Commission in accepting and processing the form at this stage.

5. In view of the above facts and circumstances we direct the Commission to accept the form of the petitioner if the same is submitted personally by the petitioner by 30th May 2009 at the office of the U.P. Public Service Commission, Allahabad. We also direct that the benefit of this order would also be available to all such candidates who may not have filed any writ petition but have qualified for the main examination and whose forms though sent by registered post latest by 29.3.2009 did not reach the Commission on time. Such candidates would also be given benefit of this order if they submit their forms personally by 30.6.2009.

With the above directions the writ petition is disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.05.2009

BEFORE
THE HON'BLE KRISHNA MURARI, J.

Civil Misc. Writ Petition No. 20342 of 2000

Sunita Kumari ...Petitioner
Versus
Assistant General Manager and another ...Respondents

Counsel for the Petitioner:
Sri Kamalesh Kumar
Sri Kaushlendra Sonkar

Counsel for the Respondents:
Sri Navin Sinha
Sri Vipin Sinha

Constitution of India Art. 226-Compossinate appointment-petitioner's father died in harness- working as Security Guard-rejection of claim as his mother getting family pension Rs.2875/- apart from terminate benefits of gratuity of Rs.3.12 lacs- immovable assets worth of Rs.3.12 lacs three brothers already married-cased within the member of family-for small members of family-can not be said to be penury on destitution appointment rightly refused.

Held: Para 13

In view of the fact that the family of the deceased has been paid a sum of Rs.3.12 lacs towards terminal benefit and the widow is entitled to family pension amounting to Rs.2875/- per month and the family has immovable assets valued at Rs.1.25 lacs and three elder daughters being married, there being only two members in the family, the financial condition of the family by no stretch of imagination can be said to be penury nor that of destitution.

Case law discussed:
[2001] (2) ESC (All) 876, JT 1994 (2) SC 183, JT 2007 (3) SC 398, (2006) 7 SCC 350, JT 2007 (3) SC 35.

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

1. Heard learned counsel for the parties.

2. The writ petition is directed against the order dated 07.05.1999 passed by the respondent Bank rejecting the application of the petitioner claiming appointment on compassionate grounds. A further relief of mandamus commanding the respondents to appoint the petitioner on a Class IV post and pay consequential benefits along with arrears has also been claimed.

3. Undisputed facts are that the father of the petitioner, who was a Class IV employee working as a security guard with the respondent Bank died-in-harness on 08.06.1998 leaving behind his wife and four daughters including the petitioner. An application was filed by the petitioner seeking appointment on a Class IV post on compassionate ground. All other legal heirs are stated to have given their no objection on affidavit for appointment of the petitioner. Vide letter dated 07.05.1999, respondent no. 2, the Branch Manager informed the petitioner that the competent authority has rejected the application of the petitioner. The order passed by the competent authority has been brought on record by the respondent Bank in its counter affidavit as Annexure CA 1. A perusal of the order goes to show that the claim of the petitioner has been rejected on the ground that since a sum of Rs.3.12 lacs has been paid as terminal benefits towards provident fund, gratuity and leave encashment etc. and a sum of Rs.2875/- was liable to be paid as family pension and the three elder daughters being married and the size of the family being very small, the circumstances do not warrant compassionate appointment, inasmuch as there was sufficient funds available with the family of the deceased to maintain themselves.

4. The Bank has framed a scheme for appointment of the dependants of the deceased employees known as Scheme for Appointment on Compassionate Grounds for dependants of deceased

employees/ employees retired on medical grounds, which came into effect from 1st of January, 1979 and has been modified from time to time. The scheme updated on 01.01.1998, prevailing at the time when compassionate appointment was claimed by the petitioner, contains a stipulation that the compassionate appointment was to be offered only when the Bank was satisfied that the financial condition of the family was such, that but for the provisions of employment, the family would not be able to meet the crisis and in making assessment of the financial condition of the family, the following factors are prescribed to be taken into consideration.

(i) Family Pension
(ii) Gratuity amount received
(iii) Employee's Employer's contribution to Provident Fund
(iv) Any compensation paid by the Bank or its Welfare Fund
(v) Proceeds of LIC policies and other investments of the deceased employee
(vi) Income for family from other sources
(vii) Income of other family members from employment or otherwise
(viii) Size of the family and liabilities, if any.

5. It has been urged by the learned counsel for the petitioner that the provision of family pension and other terminal benefits received by the family after death of the employee cannot be taken to be a good ground for rejecting the appointment on compassionate ground, inasmuch as in every case the terminal benefits are received by the family and in most of the cases, widow is entitled to family pension, and as such, no appointment on compassionate ground can ever be made and the scheme of the Bank will have no meaning.

6. In support of the contention, learned counsel for the petitioner has placed reliance on a Division Bench judgment of this Court in the case of **State Bank of India & Ors. Vs. Ram Piyarey Adult, [2001] (2) ESC (All) 876**.

7. In reply, it has been submitted that under the provisions of the scheme, compassionate appointment can be made only in cases where the deceased has left the family in penury and without any means of livelihood and the scheme also provides factor to be taken into consideration while making an assessment of the financial condition of the family. It has further been urged that after taking into consideration all the factors provided for making an assessment of the financial condition of the family of the petitioner, it was found that since a huge sum has been received towards terminal benefits and widow would also be entitled to family pension and the size of the family being very small, inasmuch as the other three daughters are married, the petitioner was not entitled for compassionate appointment. It has further been submitted that order has been passed in accordance with the parameters laid down in the scheme and, thus, is not liable to be interfered with.

8. I have considered the argument advanced by the learned counsel for the parties and perused the record.

9. It cannot be disputed or doubted that compassionate appointment cannot be claimed as a matter of right nor the public office is heritable. Equally well settled is the proposition that the Court cannot

order appointment on compassionate ground, de hors the provisions of the statutory regulations and instructions and the hardship of the candidate does not entitle him to compassionate appointment de hors the statutory provisions, as held by the Hon'ble Apex Court in the case of **LIC Of India Vs. Asha Ramchhandra Ambekar (Mrs.) & Anr., JT 1994 (2) SC 183**.

10. Hon'ble Apex Court in the case of **State Bank of India & Anr. Vs. Somvir Singh, JT 2007 (3) SC 398** relied upon by the learned counsel for the respondents in support of the contention that it is not open to the High Court to interfere in such matters, has observed in paragraph 13 as under.

"In our considered opinion the High Court itself could not have undertaken any exercise to decide as to what would be the reasonable income which would be sufficient for the family for its survival and whether it had been left in penury or without any means of livelihood. The only question the High Court could have adverted itself is whether the decision making process rejecting the claim of the respondent for compassionate appointment is vitiated? Whether the order is not in conformity with the scheme framed by the appellant-Bank? It is not even urged that the order passed by the Competent Authority is not in accordance with the scheme. It is well settled that the hardship of the dependant does not entitle one to compassionate appointment de hors the scheme or the statutory provisions as the case may be. The income of the family from all sources is required to be taken into consideration according to scheme which the High Court altogether ignored while remitting the matter for fresh consideration by the appellant-Bank. It is not a case where the dependants of the deceased employee are left "without any means of livelihood' and unable to make both ends meet. The High Court ought not to have disturbed the finding and the conclusion arrived at by the appellant-Bank that the respondent was not living hand to mouth. As observed by this Court in ***General Managaer (D & PB) and others v. Kunti Tiwary and anr.,*** *the High Court cannot dilute the criteria of "penury' to one of "not very well-to-do". The view taken by the Division Bench of the High Court may amount to varying the existing scheme framed by the appellant-Bank. Such a course is impermissible in law."*

In the case of **Union of India & Ors. Vs. M.T. Latheesh (2006) 7 SCC 350,** the Hon'ble Apex Court has held that ***"Specially constituted authorities in the Rules or Regulations like the competent authority in this case are better equipped to decide the cases on facts of the case and their objective finding arrived at the appreciation on full facts should not be disturbed."***

11. Reference may also be made to another decision of the Hon'ble Apex Court in the case of **State Bank of India & Ors. Vs. Jaspal Kaur, JT 2007 (3) SC 35**, wherein while considering an almost identical situation like the one in case in hand, it has been held that the competent authority of the Bank had to consider the case of the respondents as per the parameters laid down in the scheme and specially constituted authorities in the Rules and Regulations are better equipped to decide the case on facts of the case and their objective finding arrived on the

appreciation of the full facts should not be disturbed.

12. Reliance placed upon Division Bench judgment of this Court in the case of **State Bank of India Vs. Ram Piyarey Adult** (supra) by the learned counsel for the petitioner is totally misdirected as the said case is clearly distinguishable on facts. The Division Bench while upholding that the Government or the public authority concerned has to examine the financial condition of the family of the deceased and it is only if satisfied that but for the provisions of employment the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family, but on the facts of the said case, since it was found that income of the petitioner was not sufficient to maintain, as such, the order refusing the appointment on compassionate ground was held to be unjustified and the employer was directed to reconsider the case and to take appropriate decision considering the financial stringency and hardship.

The case being clearly distinguishable on facts has no application whatsoever.

13. In view of the fact that the family of the deceased has been paid a sum of Rs.3.12 lacs towards terminal benefit and the widow is entitled to family pension amounting to Rs.2875/- per month and the family has immovable assets valued at Rs.1.25 lacs and three elder daughters being married, there being only two members in the family, the financial condition of the family by no stretch of imagination can be said to be penury nor that of destitution.

14. The findings recorded by the competent authority while rejecting the claim of the petitioner for compassionate appointment are in accordance with the parameters laid down by the scheme framed by the Bank, inasmuch as all the factors required to be considered while arriving at a conclusion with respect to the financial condition of the family have been taken into account nor any such thing could be pointed out on behalf of the petitioner which may go to show that the findings recoreded by the competent authority are factually incorrect.

15. For the aforesaid reasons, there is no scope for interference in the impugned order. The writ petition, accordingly, fails and stands dismissed. However, in the facts and circumstances, there shall be no order as to costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.03.2009

BEFORE
THE HON'BLE VIJAY KUMAR VERMA, J.

Crl. Misc. Application No. 218928 of 2008
In
Crl. Misc. Application No. 19993 of 2008

Rajesh Mishra @ Pappu. ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Manish Tiwary
Sri Ashwini Kumar Awasthi

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

Code of Criminal Procedure-S.-482-Practice & Procedure-Law laid down by Hon'ble Supreme Court-binding upon all

subordinate Courts including State of U.P.-once the application disposed of with direction to follow the direction of Amarawati case-No further direction required.

Held: Para 5

In view of these directions also, all the subordinate courts in Uttar Pradesh are under obligation to follow the law laid down in Smt. Amrawati case (supra). The direction issued by the Hon'ble Apex Court in afore-cited decision, must also be followed in letter and spirit by all the subordinate courts in Uttar Pradesh.

Case law discussed:

2004 (50) ACC 742, Criminal Appeal No. 538 of 2009 (arising out of SLP (Criminal) No. 7021 of 2007)

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

1. Heard Sri Ashwini Kumar Awasthi Advocate, appearing for the applicant and learned AGA for the State on the application dated 09.09.2008, which has been moved to grant some short time to enable the applicant to appear/surrender in the court concerned and apply for bail in compliance of the order dated 01.08.2008.

2. From the record, it is revealed that an application under section 482 Cr.P.C. was moved in Crl. Misc. Application No. 19993 of 2008 on behalf of the accused Rajesh Mishra @ Pappu, in which it was prayed that the courts below be directed to decide the bail application of the applicant-accused expeditiously on the same day in case crime No. 460 of 2008, under sections 307, 504 IPC, P.S. Cantt, District Bareilly. Application under section 482 Cr.P.C. was decided on 01.08.2008 with a direction to the courts below to hear and dispose of the bail application of the applicant in aforesaid case in accordance with the law laid down by the Seven Judges' Bench of this Court in the case of **Smt. Amrawati and another vs. State of U.P. 2004 (50) ACC 742**. By the same order three weeks' time was granted for the applicant to surrender in the court concerned, but he did not surrender in the court below within that period. Now the applicant has made prayer to grant some more time to appear in the court below and apply for bail in compliance of the order dated 01.08.2008.

3. In my opinion, there is no need to grant any further time for the applicant to surrender in the court below, because there is no legal bar for the applicant to surrender in Case Crime No. 460 of P.S. Cantt, District Bareilly, if he is wanted in that case. Any person, who is wanted in any criminal case, can surrender in the court concerned by moving application for this purpose at any time and if he is taken into custody by the court, then he has right to move the application for bail and if any bail application is moved, then the court concerned is bound to decide that bail application in accordance with law. Therefore, prayer made in the application dated 09.09.2008 is redundant.

4. It is submitted by the learned counsel for the applicant that unless a specific direction is issued by this Court for deciding the bail application on the same day or in accordance with the guidelines laid down by the Seven Judges' Bench of this Court in **Smt. Amrawati and another vs. State of U.P. 2004 (50) ACC 742**, the subordinate courts in Uttar Pradesh are not following the law laid down in that decision and hence, in present case also, a specific direction be issued again to the court below to decide

the bail application of the applicant in accordance with law laid down in **Smt. Amrawati** case (supra).

5. Having given my thoughtful consideration to the entire matter, I do not think that any further specific direction is required to be issued to the court below to decide the bail application of the applicant in accordance with guidelines laid down by Seven Judges Bench of this Court in **Smt. Amrawati** case (supra), because the law laid down in that decision by this Court is binding on all the subordinate courts in Uttar Pradesh. In this context, reference may be made to Rule 6 of General Rules (Civil) 1957, which provides that "All subordinate courts shall follow the rulings of the High Court which are in force". Every subordinate court in Uttar Pradesh is supposed to follow the law and guidelines laid down in **Smt. Amrawati** case (supra) and for this purpose no separate specific direction is required to be issued by this Court. Agreeing with the view of this Court in **Smt. Amrawati** case (supra), the Hon'ble Supreme Court vide order dated 23rd March 2009 passed in **Criminal Appeal No. 538 of 2009 (arising out of SLP (Criminal) No. 7021 of 2007) Lal Kamlendra Pratap Singh vs. State of U.P.& others** has directed all the courts in Uttar Pradesh to follow the decision of Smt. Amrawati case (supra)in letter and spirit. It is also directed by the Hon'ble Apex Court in afore-cited decision that 'in appropriate cases interim bail should be granted pending disposal of the final bail application, since arrest and detention of a person can cause irreparable loss to a person's reputation'. In view of these directions also, all the subordinate courts in Uttar Pradesh are under obligation to follow the law laid down in **Smt. Amrawati** case (supra). The direction issued by the Hon'ble Apex Court in afore-cited decision, must also be followed in letter and spirit by all the subordinate courts in Uttar Pradesh.

6. With the observations mentioned herein-above, the application is disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.05.2009

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 19454 Of 2007

Class IV Employees Association, High Court of Judicature at Allahabad and another ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Shashi Nandan
Sri Namit Srivastava

Counsel for the Respondents:
Sri Zafar Naiyer, Addl. Adv. General
Sri K.R. Sirohi
Sri Yashwant Verma
Sri Rajni Kant Tiwari
Sri J.K. Khanna
Sri M.C. Tripathi
S.C.

Constitution of India, Art. 229 (2)-Pay Scale-Parity claimed by the Class IV employees of High Court as per salary given to Class IV employees working in Delhi High Court-four judges Committee recommended for the same pay scale considering their qualification, nature of duty etc.-Hon'ble Chief Justice send the draft of Rules for approval by Hon'ble Governor for financial grant-matter

never placed before Hon'ble Governor, nor any discussion made by the state authorities-out rightly rejection by a petty authority amounts to sit over the constitutional machinery-order impugned can not sustain-Quashed-mandamus issued to approve the draft of Rules as per recommendations of Hon'ble the Chief Justice.

Held: Para 30 & 38

There is another aspect which needs consideration, namely, sub Clause (3) of Article 229 of the Constitution, which contemplates that the administrative expenses of a High Court including salaries, allowances and pensions payable to or in respect of the officers and servants of the Court shall be charged upon a consolidated fund of the State and as per Article 203 of the Constitution, such administrative expenses shall not be submitted to the vote of the Legislative Assembly. This provision was incorporated mainly to maintain the independence of the judiciary, which is achieved by putting the administrative expenses of a High Court including all salaries, allowances and pension payable to or in respect of officers and servants of the Court at the same level as the salaries and allowances of the judges of the High Court nor can the amount of any expenditure so charged be varied even by the Legislature. The Supreme Court while interpreting the proviso to Article 229(2) of the Constitution has held that the approval was required from the Governor in matters relating to salaries, allowances, leave of pensions etc. The Supreme Court has further held that the Governor cannot be compelled to grant approval, but, further held that whenever the Chief Justice, who is a very high dignitary of the State, frames such Rules, it should be looked upon with respect and ordinarily, the Rules should be approved unless there are strong and cogent reasons for not approving. The Supreme Court further went on to say that, if approval cannot be granted, the Governor could not straightway refuse to grant such approval, but before doing so, there must be an exchange of thoughts between the State Government and the Chief Justice of the High Court.

Accordingly, the Court finds that the stand adopted by the State Government cannot be accepted. There is another aspect of the matter. The Court finds that the State Government has taken a decision mechanically without any application of mind and the order was passed only to get over the contempt proceedings that was drawn against them. The record does not indicate that the Chief Minister or the Council of Ministers has disapproved the recommendations and, it transpires, that the impugned order has been passed by the Principal Secretary on its own accord. Article 229(2) of the Constitution requires an approval of the Governor. No doubt the Governor acts in accordance with the advice of the Council of Ministers. In the present case, the Court finds that the matter was never placed by the State Government before the Governor and that the State Government rejected the recommendation on its own accord. The Court finds, that there has been an unnecessary interference by the executive. Needless to point out, the Supreme Court in Paliwals' case (supra) pointed out that where the Chief Justice had taken a progressive step to ameliorate the service conditions of the officers and staff of the High Court, the State Government could hardly raise any objections either to the sanction of creation of post or fixation of salary.

Case law discussed;

1989 (4) SCC 187, 1999 (3) SCC 217, 1971 (2) SCC 137, 1989(4) SCC 187, 2004 (1) SCC 334, 2004 (2) SCC 150, 1998 (3) SCC 72, 2002(2)SCC 141, 2004(1)SCC 334,

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

1. By means of this petition, the petitioners have prayed for the quashing of the order dated 28.2.2007 passed by the

Principal Secretary (Nyay) whereby the recommendation of the Chief Justice for the enhancement of the pay scale of Class-IV employees of the High Court, made under Article 229 (2) of the Constitution of India, has been refused. The petitioners have also prayed for the quashing of the resolution dated 29.7.2006 made by a high powered Committee comprising of the officers of the High Court and officers of the State Government, which was constituted to sort out the differences with regard to the proposed enhancement of the pay scale. The petitioners have also prayed that a mandamus be issued to the State Government to implement the recommendation of the Chief Justice with regard to the fixation of the pay scale.

2. The facts leading to the filing of the writ petition is, that the petitioner is an Association of the Class-IV employees of the High Court of Judicature at Allahabad and had filed a writ petition No.15211 of 1997 seeking a writ of mandamus commanding the State Government to grant the pay scale of Rs.975-1600 to Class-IV employees w.e.f. 1.1.1986 with all consequential benefits and also the scale of Rs.1000-1750 w.e.f. 1.1.1986. The contention raised in the said writ petition for granting a higher pay scale was that similarly situated persons were receiving a higher pay scale in the Delhi High Court. The said writ petition was allowed by a judgment dated 6.2.1998. The operative portion of the judgment of the learned Single Judge is quoted herein:

"For the reasons stated above, present writ petition succeeds and is allowed. The respondents are hereby directed to pay salary in the pay scale of Rs.975-1660/- to all those class-IV employees who are presently in the pay scale of Rs.750-940/- and the salary of Rs.1000-1750/- to all such class IV employees who are presently in the pay scale of Rs.775-1025/- without affecting, in any manner, the allowances which they are presently getting. The revised pay scales shall be made available to the class-IV employees of this Court with effect from 1st July, 1994 (1.7.1994). The petitioners shall be paid the salary in the revised scale of pay, as said above, for the month of February payable on 1st March, 1998. So far as arrears part is concerned (w.e.f. 1.7.1994 to January, 1998 payable in February, 1998), the same shall be payable only after issuance of Government order in the light of directions contained in this judgment."

3. Aggrieved, by the decision of the learned Single Judge, the State Government preferred an intra Court appeal, being Special Appeal No.200 of 1998, which was allowed by a judgment dated 5.11.2003 and the order of the learned Single Judge was set aside. The Division Bench held that it was open to the Chief Justice to take a decision with regard to grant of a higher pay scale.

4. Apart from Class-IV employees of the High Court, the Section Officers, Bench Secretaries and the Private Secretaries were also agitating for a higher pay scale. Several writ petitions of Section Officers, Private Secretaries, Bench Secretaries and Assistant Registrars were allowed by the High Court by various judgments dated 29.7.1998, 22.11.1999, 16.11.2000 and 20.5.2003. Against these judgments, the State Government filed a Special Leave Petition which was allowed by the Supreme Court by a judgment dated

27.9.2004 in Civil Appeal No. 1980 of 2000, **State of U.P. vs. Section Officer Brotherhood and another**. The Supreme Court, while setting aside the judgments of the High Court directed as under:-

"We, therefore, are of the opinion that the impugned judgments cannot be sustained which are set aside accordingly. However, this order shall be subject to the rules framed by the Chief Justice in the case of the Private Secretaries of the High Court. It will, however be open to the Chief Justice of the Allahabad High Court to frame appropriate rules as has been done in the case of the Private Secretaries or constitute an appropriate committee for the said purpose. We have no doubt in our mind that if such committee is constituted and any recommendation is made for enhancement of the scale of pay for the concerned officers by the Chief justice, the same would be considered by the State Government in its proper perspective and in the light of the observations made hereinbefore expeditiously.

For the reasons aforementioned, these appeals are allowed with the aforementioned observations. No Costs."

5. The Supreme Court issued the aforesaid directions based on the reasoning that no mandamus could be issued by the High Court under Article 226 of the Constitution with regard to the increase in the pay-scale of an employee of the High Court and that such determination of the pay-scale could only be done by the Chief Justice under Article 229 of the Constitution of India. The Supreme Court held:

"There cannot be any doubt or dispute whatsoever that determination of different scales of pay for different categories of employees would ordinarily fall within the realm of an expert body like the Pay Commission or Pay Committee. The Chief Justice of a High Court exercises constitutional power in terms of Article 229 of the Constitution of India."

and at another place, the Supreme Court held that the provision of Article 229 was evidently made to uphold the independence of the judiciary. The Supreme Court, at yet another place, further held:

"A bare perusal of the aforementioned provision would clearly go to show that laying down the conditions of service applicable in the case of staff and officers of a High Court is within the exclusive domain of the Chief Justice but in case of any financial implication involving therein the approval of the State Governor is imperative."

6. The Supreme Court, while referring to its earlier decision in **State of Maharashtra vs. Association of Court Stenos., P.A.,P.S. and another,** 2002(2)SCC 141, and in the **Supreme Court Employees' Welfare Association vs. Union of India and another**,1989(4)SCC 187, held that any rules made by the Chief Justice relating to salaries, allowances, leave or pension of the employees of the High Court would require approval of the Governor and that such approval was a condition precedent to the validity of the rules made by the Chief Justice. The Supreme Court further held that when the Chief Justice of the High Court makes a rule providing a particular pay scale for its employees, the same should ordinarily be approved by

the Governor unless there was a justifiable reason for not approving the same. At another place, the Supreme Court held:

"Having regard to the high position and status enjoyed by the Chief Justice, it was observed, his recommendations should ordinarily be approved by the State and refusal thereof must be for strong and adequate reasons."

7. In the light of the aforesaid decisions of the Supreme Court in the matter of Section Officers, Bench Secretaries, etc., the Special Leave Petition of the present petitioners was accordingly disposed of in terms of the said decision by a judgment dated 15.10.2004.

8. In accordance with the directions issued by the Supreme Court, the Chief Justice, by its order dated 28.11.2004, constituted a Committee of four Hon'ble Judges to consider and recommend the Rules with regard to the pay-scale of the employees of the establishment of the High Court. The aforesaid Committee submitted its report on 23.12.2004 and gave its recommendation of the pay-scales of Section Officers, Bench Secretaries, etc. The Committee also recommended the pay-scale of Class-IV employees. The relevant portion of the recommendation of the Committee with regard to Class-IV employees for which this petition is concerned, is quoted herein:

"For class-IV employees we recommend that all Class-IV employees irrespective of their categories, except those for whom the recruitment is provided by promotion namely, Jamadar, Daftari, Bundle lifter and Head Mali in Rule 4(b) to (e) of the rules of 1976 and those who are required to possess technical qualifications for recruitment, should be placed in the pay scale of Rs.3050-4590/-. The others namely the promotional posts and technical posts be given the pay scale of Rs.3200-4900/- with all admissible allowances which they are getting at present in respect of different categories of post with regard to the nature of duties performed by them."

9. The aforesaid recommendation was approved by the Chief Justice by an order dated 24.12.2004, holding:

"I find the recommendations to be reasonable and accept the report. Government be moved forthwith with a request to implement the recommendations at the earliest."

10. In accordance with the recommendations made by the Committee vis-à-vis, the Chief Justice, a draft Rule known as "Allahabad High Court Officers and Staff (Conditions of Service and Conduct) (Amendment) Rules 2005 (hereinafter referred to as the "Rules of 2005') and "Allahabad High Court Bench Secretaries Conditions of Service Rules, 2004" were framed and the Registrar General remitted the same to the State Government for necessary approval. The State Government, by an order dated 8.10.2005, communicated the approval of the Governor with regard to the Allahabad High Court Bench Secretaries Conditions of Service Rules 2004. No decision was however, taken by the State Government with regard to the Rules of 2005.

11. The correspondence between the High Court and the State Government (as

culled out from various affidavits filed) suggests that the Registrar General wrote a letter, dated 26.12.2004, to the Principal Secretary (Judicial) to move the Government for taking necessary action on the implementation of the recommendations. Vide letter dated 16.2.2005, the draft Rules were transmitted by the Registrar General. It transpires that a High Power Committee involving officers of the High Court and the State Government was constituted, which met on 21st May, 2005 in which a decision was taken that the High Court should review its recommendation since the Finance Department of the State Government was of the opinion that the pay scale recommended by the High Court for its Class-IV employees was different and higher than the pay scales of the Class-IV employees of the State Government which would also create financial problems on the State exchequer. The said minutes were placed before the Chief Justice, who by an order dated 1.8.2005, directed the Registrar General to place the minutes before the Four Judges Committee, which had made the relevant recommendations and further placed a note of absolute disapproval of the minutes to the effect that the pay-scale which had been recommended, if allowed to continue, would not create any financial complications.

12. In the meanwhile, the State Government issued letters dated 30.9.2005 and 27.10.2005 asking for certain clarification and raised certain queries with regard to the conditions of service, educational qualification and creation of post in the draft rules. The queries raised in the letter dated 30.9.2005 was replied by the Registrar General vide its letter dated 19.12.2005 which apparently was based on the recommendation made by the Four Judges Committee reiterating its earlier recommendations. The Registrar General in its letter dated 19.12.2005 categorically informed the State Government that the recommendation made by the Chief Justice under Article 229 of the Constitution of India did not require any clarification or justification.

13. Since no decision was taken by the State Government, the petitioners filed writ petition No.27201 of 2006, which was disposed of by an order dated 17.5.2006 directing the State Government to process the recommendation made by the Chief Justice by convening a meeting of the concerned officers of the State Government and the High Court and thereafter, proceed to take a decision in the matter, as expeditiously as possible, within four months from the date of the presentation of the copy of the order.

14. It transpires, that based on the aforesaid direction of the Court, a Committee was again constituted comprising of officers of the High Court and of the State Government, which met on 29.7.2006, and the minutes of this meeting was recorded. In this meeting, the Principal Secretary (Law) opined that the pay scale had to be fixed in accordance with the work performed by the person and that, if the Rules framed by the High Court are accepted, it will cause a financial burden on the State Government. The minutes records the contention placed by the Registrar General to the effect that on the basis of the pay scale given to similarly situated employees of the Delhi High Court, a writ petition was allowed and a mandamus was issued to pay a higher pay scale on the basis of which the

Class-IV employees started receiving a higher pay scale and continued to receive the higher pay scale till the said judgment was set aside by a Division Bench. The Registrar General further submitted that the reduction in the pay scale was causing a lot of resentment to the employees, and that, in any case, the Chief Justice had now framed the Rules under Article 229 of the Constitution which should be approved. The record indicates that the Registrar General wrote letters dated 18.9.2006 and again on 5.9.2007 requesting the State Government to take action and have the draft Rules approved from the Governor.

15. It transpires that, after the aforesaid meeting of 29.7.2006, the State Government did nothing to sort out the matter and the stalemate continued. The Registrar General issued reminders to take a decision on the recommendation sent by the Chief Justice, which fell on deaf ears. It seems that the State Government just sat over the matter. Eventually, the petitioners filed a contempt petition No.5387 of 2006 which was entertained and notices were issued to the respondents which triggered the State Government into passing an order dated 28.2.2007 holding that it was not possible for the State Government to enhance the pay scale of Class-IV employees of the High Court of Allahabad. The petitioners, being aggrieved by the aforesaid decision, has now filed the present writ petition.

16. Sri Shashi Nandan, the learned senior counsel counsel for the petitioner, duly assisted by Sri Namit Srivastava, Advocate, submitted that the Chief Justice is the supreme authority and has framed the Rules under Article 229 of the Constitution of India which is required to be approved by the Governor. The learned senior counsel submitted that the State Government cannot abridge or curtail the powers conferred on the Chief Justice by placing impediments by raising frivolous queries and thereby allowing the matter to be kept in a state of limbo. The learned counsel submitted that once the Rules framed by the Chief Justice are sent to the State Government for approval, the State Government is required to preform a ministerial task and is required to approve the Rules unless there are strong and cogent reasons for disapproving the draft Rules. In the present case, a petty officer has taken a decision which is not a decision of the State Government in refusing to accord approval of the recommendation made by the Chief Justice under Article 229 of the Constitution of India. The learned counsel submitted that there is no decision of the State Government in refusing to approve the Rules nor has the matter been placed before the Governor as required under the proviso to sub Section (2) of Article 229 of the Constitution of India. The learned counsel further submitted that by the impugned order, the Principal Secretary has refused to approve the Rules on the ground of financial constraints and submitted that financial constraint by itself is not a valid or cogent reason and is only a petty excuse to delay the matter. The learned counsel submitted that pursuant to the judgment delivered by the Single Judge of the High Court, Class-IV employees started receiving a higher pay scale for several years till it was set aside by the Division Bench and, during this period, the State Government did not object to the higher pay scale being paid to the employees of the High Court. Consequently, the ground for refusal apparently does not exist. The learned

counsel submitted that the impugned order is manifestly erroneous in law since no cogent or valid reasons has been given and is therefore, liable to be quashed. The learned counsel submitted that since the State Government was only placing petty objections and was unnecessarily delaying the matter, consequently, a writ of mandamus should also be issued commanding the State Government to accord approval to the draft Rules submitted by the Chief Justice in accordance with the provisions of Article 229 of the Constitution of India.

17. Sri Zafar Naiyer, the Additional Advocate General, appeared on behalf of the State Government and contended that the writ petition was not maintainable and was liable to be dismissed. The learned counsel submitted that the petitioners had earlier filed a writ petition in which a mandamus was issued commanding the State Government to give a higher pay scale which was subsequently set aside by a Division Bench of the High Court and, later on, affirmed by the Supreme Court. Consequently, a second writ petition, on the same issue and, on the same cause of action, does not arise and, therefore the writ petition was liable to be dismissed.

18. Sri Zafar Naiyer, further contended that in the conference of the Chief Justices and Chief Ministers, held in Bombay in 1962, a resolution was adopted, namely, that the employees of the High Court would be given parity with the pay given to the employees of the State Government. Pursuant to this resolution, the employees of the High Court are getting the same pay as given to the employees of the State Government. Consequently, there was no occasion to disturb this parity and approve the Rules framed by the Chief Justice by which Class-IV employees would get a higher pay scale than that of similarly situated employees of the State Government. The Additional Advocate General submitted that the parity should not be disturbed. The Additional Advocate General, further submitted that, in any case, the difference in the pay scale being recommended by the Chief Justice would create an anomaly and further impose a financial burden upon the State exchequer and therefore, it was not possible to approve the Rules. The Additional Advocate General, further contended that the writ petition was also premature, inasmuch as, the State Government was still pondering over the matter and had not taken a final decision and that a final decision would be taken after the State Government receives a reply to the queries being raised vide its letter dated 27.10.2005 which queries have not been replied by the High Court till date. The learned counsel further submitted that the employees of the High Court are in fact claiming parity with the pay scale of the employees of the Delhi High Court which is not permissible nor is binding upon the State Government. In support of his submission the learned Additional Advocate General relied upon a decision of the Supreme Court in **State of H.P. vs. P.D. Attri and others**, 1999(3)SCC 217. The Additional Advocate General submitted that the Rules recommended by the Chief Justice would create financial burden upon the State Government and would violate the resolution of 1962 and, consequently, the Rules cannot be approved.

Sri Yashwant Verma, Advocate, appearing on behalf of the High Court, submitted that the State Government was unnecessarily raising frivolous objections

and sending queries which was neither warranted under the law nor was required. The learned counsel submitted that the queries raised by the State Government through various letters were with regard to the qualifications and conditions of service of the employees of the High Court which was beyond their jurisdiction as is clear from a plain reading of Article 229 of the Constitution of India. The learned counsel submitted that any Rules framed by the Chief Justice under Article 229 of the Constitution of India had to be given effect to and that the State Government was required to approve the rules only with regard to the matters relating to salaries, allowances, leave or pension. The learned counsel submitted that the queries, as per the letters dated 30.9.2005 and 27.10.2005, related to the deletion of the post of Water Boy or with regard to the educational qualifications of Class-IV employees or with regard to the qualification of an electrician, etc, which queries were unwarranted and outside the jurisdiction of the State Government. The learned counsel submitted that, in any case, the queries raised by the State Government was duly replied vide letter of the Registrar General dated 19.12.2005 and again vide letter dated 25.10.2008 which was sent when the Court directed the Registrar General to give a specific reply to the letter of the State Government dated 27.10.2005. The learned counsel submitted that upon sending the letter dated 25.10.2008, the State Government has sent another letter dated 23.12.2008 again raising frivolous objections and requesting the High Court to mention the educational qualification for each post and further directing the High Court to incorporate the pay scale of each post on the basis of the pay scale being given on such post by the State Government, meaning thereby that the pay scale should be in accordance with the pay scale of the State Government. The learned counsel further submitted that pursuant to the judgement of the Single Judge, the Class-IV employees of the High Court started receiving a higher pay scale which was not objected by the State Government, and that, the enhanced pay scale was stopped after the judgment of the Single Judge was set aside by the Division Bench as a result of which, the employees of the High Court are now receiving a lower pay scale which was bringing a lot of discontentment.

19. The learned counsel for the High Court further submitted that pursuant to the decision of the Supreme Court, the Chief Justice constituted a Committee of Four Hon'ble Judges, and that, the Committee, after considering all aspect of the matter and after considering the work performed by the Class-IV employees, their duties and responsibility, recommended the pay scale. The learned counsel submitted that the recommendation of the Committee was duly accepted by the Chief Justice, and on that basis, the draft rules were sent to the State Government for necessary approval, which has not been forwarded by the State Government for necessary approval to the Governor. The learned counsel submitted that under Article 229 of the Constitution of India, the Rules framed by the Chief Justice are required to be approved by the Governor and that the action of the State Government in not approving the Rules was unwarranted. The learned counsel for the High Court has also placed the recommendation of the Four Judges Committee, which the Court has perused and which will be dealt with at the appropriate place.

20. In the light of the submissions raised by the parties and the case laws referred which will be dealt hereinafter, it would be proper that the provisions of Article 229 of the Constitution of India is perused. For the facility, the provisions of Article 229 is quoted herein below:-

***"229. Officers and servants and the expenses of High Courts**.- (1) Appointments of officers and servants of a High Court shall be made by the Chief Justice of the Court or such other Judge or officer of the court as he may direct:*

Provided that the Governor of the State may by rule require that in such cases as may be specified in the rule no person not already attached to the court shall be appointed to any office connected with the court save after consultation with the State Public Service Commission.

(2) Subject to provisions of any law made by the Legislature of the State, the conditions of service of officers and servants of a High Court shall be such as may be prescribed by the rules made by the Chief Justice of the Court or by some other Judges or officer of the court authorized by the Chief Justice to make rules for the purpose:

Provided that the rules made under this clause shall, so far as they relate to salaries allowances, leave or pensions, require the approval of the Governor of the State.

(3) The administrative expenses of a High Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the court, shall be charged upon the Consolidated Fund of the State, and any fees or other moneys taken by the court shall form part of that Fund."

21. The provisions of Article 229 (2) of the Constitution has been a subject of interpretation by the Supreme Court through various judgments.

22. In **M. Gurumoorthy vs. Accountant General, Assam and Nagaland and others**, 1971(2) SCC 137, the Supreme Court held that the Governors' approval must be sought because the finance has to be provided by the Government and to that extent the Government has to approve it. The Supreme Court further held that the Chief Justice of High Court has exclusive powers under Clause (1) read with Clause (2) of Article 229 of the Constitution not only in the matter of appointments but also with regard to prescribing the conditions of service of officers and servants of a High Court. The Supreme Court held –

"The unequivocal purpose and obvious intention of the framers of the Constitution in enacting Article 229 is that in the matter of appointment of officers and servants of a High Court it is the Chief Justice or his nominee who is to be the supreme authority and there can be no interference by the executive except to the limited extent that is provided in the article. This is essentially to secure and maintain the independence of the High Courts. The anxiety of the Constitution-makers to achieve that object is fully shown by putting the administrative expenses of a High Court including all salaries, allowances and pension payable to or in respect of officers and servants of the Court at the same level as the salaries and allowances of the judges of the High

Court nor can the amount of any expenditure so charged be varied even by the Legislature. Clause (1), read with clause (2) of Article 229 conferred exclusive power not only in the matter of appointments but also with regard to prescribing the conditions of service of officers and servants of a High Court by Rules on the Chief Justice of the Court. This is subject to any legislation by the State Legislature but only in respect of conditions of service. In the matter of appointments even the Legislature cannot abridge or modify the powers conferred on the Chief Justice under clause (1). The approval of the Governor, as noticed in the matter of rules, is confined only to such rules as relate to salaries, allowances, leave or pension. All other rules in respect of conditions of service do not require his approval."

23. In **State of Andhra Pradesh and another vs. T. Gopalakrishnan Murthi and others**, 1976 (2) SCC 883, the Supreme Court held that grant of approval by the Government under Article 229 of the Constitution is not a formality. The Supreme Court held-

"One should expect in the fitness of things and in view of the spirit of Article 229 that ordinarily and generally the approval should be accorded. But surely it is wrong to say that the approval is a mere formality and in no case it is open to the Government to refuse to accord their approval."

24. In **Supreme Court Employees' Welfare Association vs. Union of India and another**, 1989(4) SCC 187, the Supreme Court held that when a rule is framed by the Chief Justice, it should ordinarily be approved since the rules has been framed by a very high dignitary and should be looked upon respect unless there was a good reason for not approving the reasons. The Supreme Court held:-

"So far as the Supreme Court and the High Courts are concerned, the Chief Justice of India and the Chief Justice of the concerned High Court, are empowered to frame rules subject to this that when the rules are framed by the Chief Justice of India or by the Chief Justice of the High Court relating to salaries, allowances, leave or pensions, the approval of the President of India or the Governor, as the case may be, is required. It is apparent that the Chief Justice of India and the Chief Justice of the High Court have been placed at a higher level in regard to the framing of rules containing the conditions of service. It is true that the President of India cannot be compelled to grant approval to the rules framed by the Chief Justice of India relating to salaries, allowances, leave or pensions, but it is equally true that when such rules have been framed by a very high dignitary of the State, it should be looked upon with respect and unless there is very good reason not to grant approval, the approval should always be granted. If the President of India is of the view that the approval cannot be granted, he cannot straightway refuse to grant such approval, but before doing so, there must be exchange of thoughts between the President of India and the Chief Justice of India."

25. Similar view was expressed by the Supreme Court in the **High Court Employees Welfare Association, Calcutta and others vs. State of W.B. and others**, 2004 (1) SCC 334. In **Union of India and Another vs. S.B.Vohra and**

others, 2004 (2) SCC 150, the Supreme Court held as under:

"Independence of the High Court is an essential feature for working of the democratic form of government in the country. An absolute control, therefore, has been vested in the High Court over its staff which would be free from interference from the Government subject of course to the limitations imposed by the said provisions. There cannot be, however, any doubt whatsoever that while exercising such a power the Chief Justice of the High Court would only be bound by the limitation contained in clause (2) of Article 229 of the Constitution of India and the proviso appended thereto. Approval of the President/Governor of the State is, thus, required to be obtained in relation to the rules containing provisions as regards salary, allowances, leave or promotion. It is trite that such approval should ordinarily be granted as a matter of course."

26. In the High Court of Judicature for **Rajasthan vs. Ramesh Chandra Paliwal and another,** 1998(3) SCC 72, the Supreme Court held:-

"Since, under the Constitution, the Chief Justice has also the power to make rules regulating the conditions of service of the officers and servants of the High Court, it is obvious that he can also prescribe the scale of salary payable for a particular post. This would also include the power to revise the scale of pay. Since such a rule would involve finances, it has been provided in the Constitution that it will require the approval of the Governor which, in other words, means the State Government. This Court in State of A.P. vs. T. Gopalakrishnan Murthi had expressed the hope that "one should accept in the fitness of things and in view of the spirit of Article 229 that the approval, ordinarily and generally, would be accorded". This was reiterated by this Court in Supreme Court Employee's Welfare Ass. vs. Union of India. We again reiterate the hope and feel that once the Chief Justice, in the interest of High Court administration, has taken a progressive step specially to ameliorate the service conditions of the officers and staff working under him,the State Government would hardly raise any objection to the sanction of creation of posts or fixation of salary payable for that post or the recommendation for revision of scale of pay if the scale of the equivalent post in the Government has been revised."

27. In **State of Maharashtra vs. Association of Court Stenos.,P.A.,P.S. and another,** 2002(2)SCC 141, the Supreme Court:-

"Under the Constitution of India, appointment of officers and servants of a High Court is required to be made by the Chief Justice of the High Court or such other Judge or officer of the Court as the Chief Justice directs. The conditions of service of such officers and servants of the High Court could be governed by a set of rules made by the Chief Justice of the High Court and even the salaries and allowances, leave or pension of such officers could be determined by a set of rules to be framed by the Chief Justice, but so far as it relates to salary and allowances etc. it requires approval of the Governor of the State. This is apparent from Article 229 of the Constitution. On a plain reading of Article 229(2), it is apparent that the Chief Justice is the sole

authority for fixing the salaries etc. of the employees of the High Court, subject to the Rules made under the said article. Needless to mention, rules made by the Chief justice will be subject to the provisions of any law made by the legislature of the State. In view of proviso to sub-article (2) of Article 229, any rule relating to the salaries, allowances, leave or pension of the employees of the High Court would require the approval of the Governor, before the same can be enforced. The approval of the Governor, therefore, is a condition precedent to the validity of the rules made by the Chief Justice and the so-called approval of the Governor is not on his discretion, but being advised by the Government. It would, therefore, be logical to hold that apart from any power conferred by the Rules framed under Article 229, the Government cannot fix the salary or authorise any particular pay scale of an employee of the High Court."

28. Under the constitution, the appointment of officers and servants of the High Court is required to be made by the Chief Justice. The conditions of service of such officers and servants of the High Court is governed by a set of Rules framed by the Chief Justice of the High Court. Even the salaries and allowances, leave or pension of such officers and servants are also determined by the Chief Justice. However, the Rules relating to salaries and allowances etc. is required to be approved by the Governor of the State. This is apparent from a plain reading of Article 229(2) of the Constitution. It is also apparent that the Chief Justice is the sole authority for fixing the salaries, etc. of the employees of the High Court. It is also apparent from a reading of Article 229 of the Constitution that it is primarily the responsibility of the State Legislature to lay down the conditions of the service of the officers and servants of the High Court, but so long as the State Legislature does not lay down such conditions of service, the Chief Justice is empowered to make Rules for the purpose. This legislative function is, in fact, has been delegated to the Chief Justice of the High Court by Article 229(2) of the Constitution. Constitutionally, the function of the Chief Justice in framing Rules laying down the conditions of service is legislative in nature, which necessarily includes the salaries, allowances, leave and conditions of the officers and servants of the High Court. The proviso to sub Clause (2) of Article 229 puts a restriction on the power of the Chief Justice by providing that the Rules relating to salaries and allowances etc. would require the approval of the Governor.

29. In the light of the aforesaid judgments of the Supreme Court, it is clear, that the Rules framed by the Chief Justice with regard to the conditions of service of the employees and officers of the High Court is final and conclusive except with regard to salaries, allowances, leave or pension which require approval of the Governor and the reasons for requiring such approval is the involvement of the financial liability of the Government.

30. There is another aspect which needs consideration, namely, sub Clause (3) of Article 229 of the Constitution, which contemplates that the administrative expenses of a High Court including salaries, allowances and pensions payable to or in respect of the

officers and servants of the Court shall be charged upon a consolidated fund of the State and as per Article 203 of the Constitution, such administrative expenses shall not be submitted to the vote of the Legislative Assembly. This provision was incorporated mainly to maintain the independence of the judiciary, which is achieved by putting the administrative expenses of a High Court including all salaries, allowances and pension payable to or in respect of officers and servants of the Court at the same level as the salaries and allowances of the judges of the High Court nor can the amount of any expenditure so charged be varied even by the Legislature. The Supreme Court while interpreting the proviso to Article 229(2) of the Constitution has held that the approval was required from the Governor in matters relating to salaries, allowances, leave of pensions etc. The Supreme Court has further held that the Governor cannot be compelled to grant approval, but, further held that whenever the Chief Justice, who is a very high dignitary of the State, frames such Rules, it should be looked upon with respect and ordinarily, the Rules should be approved unless there are strong and cogent reasons for not approving. The Supreme Court further went on to say that, if approval cannot be granted, the Governor could not straightway refuse to grant such approval, but before doing so, there must be an exchange of thoughts between the State Government and the Chief Justice of the High Court.

31. The Supreme Court in **Union of India and another vs. S.B.Vohra and others (supra)** has held that independence of the High Court is an essential feature for the working of the democratic form of the Government in the country and that absolute control was vested in the High Court over its staff, which is free from interference from the Government subject to the limitation imposed under the proviso. The Supreme Court in the aforesaid case went on to hold that when such Rules are placed for approval, such approval should ordinarily be granted as a matter of course.

32. In the light of the aforesaid provisions, the Court finds that the stand taken by the State Government is contradictory. At one place the State Government states that the matter is pending consideration and that certain queries have been asked from the High Court, which is pending consideration. On the other hand, the State Government has taken a decision not to grant approval of the pay scale recommended by the Chief Justice for the Class-IV employees. With regard to the queries raised by the State Government, it is has come on record, that the High Court has issued a reply, and promptly, the State Government has again asked for certain queries. From a perusal of the queries raised by the State Government, it is clear that the objections raised by the State Government are without jurisdiction. The queries relate to the conditions of service of the employees and officers of the High Court and therefore encroaches upon the legislative function of the Chief Justice. The State Government has no business to request the Chief Justice to delete the post of Water Boy or change the qualification of the electrical technician and make it in accordance with the qualification given by the State Government. Such matters are totally outside the domain of the State Government.

33. The Supreme Court has categorically held that the State Government is only required to grant approval with regard to the salaries, allowances, leave or pension. The State Government, however, cannot refuse to accord approval solely on the ground that, if the pay scale is approved, it will cause financial implications. If this ground is allowed to be taken, it will give a handle to the State Government to deny approval on each and every occasion whenever the matter comes up before it with regard to the approval relating to the pay scales, salaries allowances, leave, pension etc. and the High Court would be saddled with a begging bowl in its hands, which was never the intention of the framers of the Constitution. It is apparent that in order to maintain the independence of the judiciary, the framers of the Constitution thought it wise and expedient to make a provision as contained in Clause (3) of Article 229 of the Constitution. It is not sufficient for the State Government to refuse to grant an approval on the strength of financial constraint. In **Union of India and another vs. S.B. Vohra and others (supra),** the Supreme Court has held that financial implications cannot be made a ground to disapprove the Rules. The Supreme Court held:

"It has to be further borne in mind that it is not always helpful to raise the question of financial implications vis-a-vis the effect of grant of a particular scale of pay to the officers of the High Court on the ground that the same would have adverse effect on the other employees of the State. Scale of pay is fixed on certain norms; one of them being the quantum of work undertaken by the officers concerned as well as the extent of efficiency, integrity etc. required to be maintained by the holder of such office. This aspect of the matter has been highlighted by this Court in the case of the judicial officers in All India Judges' Assn. v. Union of India as well as the report of the Shetty Commission."

34. In **High Court Employees Welfare Association, Calcutta and others vs. State of W.B. and others**, 2004(1)SCC 334, the Supreme Court held-

"The Government will have to bear in mind the special nature of the work done in the High Court which the Chief Justice and his colleagues alone could really appreciate. If the Government does not desire to meet the needs of the High Court., the administration of the High Court will face severe crisis."

35. The Supreme Court, in the light of the aforesaid decisions also held, that before refusing to grant approval there should be an exchange of thoughts between the Chief Justice and the State Government. In the present case, the Court finds that a Committee was constituted comprising of officers of the High Court and that of the State Government. A perusal of the minutes of this High Power Committee indicates the narrow mindset of the State Government. The only hurdle before the State Government appears that the parity granted pursuant to the resolution of the Chief Justices and the Chief Ministers in the year 1962 would be disturbed, in the event a higher pay scale is granted, and that, it would also create financial problems. It is also apparent that the State Government is insisting that the pay scale of the Class-IV employees should be

similar to the pay scale of the Class-IV employees of the State Government.

36. In my opinion, the contention of the State Government that the pay scale of the Class-IV employees should be at par with the Class-IV employees of the State Government, cannot be accepted. There is nothing in the record of the State Government, which has been produced before the Court, to indicate that the State Government considered the relevant factors which are required for fixation of the pay-scale. There is nothing to indicate that the pay scale fixed by the Chief Justice was arbitrary and that the relevant factors was not considered. The Court has perused the recommendations of the Four Judges Committee and finds that the Committee of Four Judges took into consideration the nature of work discharged by the Class-IV employees of the High Court with that of the Class-IV employees in other departments of the State Government. The Committee found that the Class-IV employees are performing important duties and jobs which are entrusted to them for maintaining the dignity and standard of the High Court. The Committee further found that Class-IV employees are contributing to the smooth functioning of the Court and performing important public duties of dispensation of justice and are performing onerous duties without any complaint and keeping longer hours without any special allowances as paid to the employees of the State Secretariat. The Committee further found that Class-IV employees are performing different nature of duties and are required to work for longer hours not only in the High Court but at the residence of the Hon'ble Judges. The Committee came to the conclusion that it was difficult to equate the Class-IV posts of the High Court with that of the State Government and found that the employees of the High Court are performing no less onerous and arduous duties as their counter parts in the Delhi High Court.

37. Consequently, the Court finds that relevant considerations were considered in detail by the Four Judges Committee while recommending a higher pay scale to the Class-IV employees. The nature of work and duties performed by the Class-IV employees were found to be distinct and different from the Class-IV employees of the State Government. Consequently, the State Government fell in error in insisting that the pay scales of the Class-IV employees should be similar to the pay scale of Class-IV employees of the State Government. The State Government further fell in error in insisting that parity should be maintained. It is settled law that the principle of equal pay for equal work postulates scientific determination of principle of fair comparison. Comparison is made from the work performed by an employee and not by designation. In the opinion of the Court, comparison by designation is misleading in the present case. The Court finds from a perusal of the record of the State Government that no attempt was made to ascertain the nature of work performed by a Class-IV employees of the High Court whereas the Four Judges Committee has dwelt the matter in detail and ascertained the nature of work of an employee in each category of staff of the High Court and only thereafter determined the pay structure and recommended the same to the Chief Justice.

38. Accordingly, the Court finds that the stand adopted by the State Government cannot be accepted. There is another aspect of the matter. The Court finds that the State Government has taken a decision mechanically without any application of mind and the order was passed only to get over the contempt proceedings that was drawn against them. The record does not indicate that the Chief Minister or the Council of Ministers has disapproved the recommendations and, it transpires, that the impugned order has been passed by the Principal Secretary on its own accord. Article 229(2) of the Constitution requires an approval of the Governor. No doubt the Governor acts in accordance with the advice of the Council of Ministers. In the present case, the Court finds that the matter was never placed by the State Government before the Governor and that the State Government rejected the recommendation on its own accord. The Court finds, that there has been an unnecessary interference by the executive. Needless to point out, the Supreme Court in Paliwals' case (supra) pointed out that where the Chief Justice had taken a progressive step to ameliorate the service conditions of the officers and staff of the High Court, the State Government could hardly raise any objections either to the sanction of creation of post or fixation of salary.

39. In the light of the aforesaid, the Court is of the opinion, that the order of the Principal Secretary, dated 28.2.2007, cannot be sustained. The petitioners have also prayed that a mandamus should be issued directing the Government to implement the recommendations sent by the Chief Justice. A question, which niggles the mind of the Court is, whether in such circumstances the Court should issue a mandamus under Article 226 of the Constitution or not? The Supreme Court after considering a large number of cases held in **Comptroller Auditor General of India vs. K.S. Jagganath**, 1986(2) SCC 679:

"There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or as writ in the nature of mandamus or to pass orders and give necessary directions where the government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a police decision of the government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such direction has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the court may itself pass an order or give directions which the government or the public authority should have passed or given had it properly and lawfully exercised its discretion."

40. In the light of the aforesaid decision, the Court finds that the State Government was unnecessarily raising

frivolous queries which were beyond their jurisdiction. In so far as the Rules relating to salaries, etc. was concerned, the Court finds that no steps whatsoever was taken by the State Government to arrive at a consensus. The State Government was adamant that parity should not be disturbed and that a higher pay scale should not be given to the Class-IV employees of the High Court. In the light of the aforesaid, the Court finds that a direction to the State Government to again constitute a Committee and resolve the issue amicably would not lead to any fruitful result. The matter is hanging fire for the last five years and no result can be seen in the near distance. Consequently, remitting the matter again to the State Government for reconsideration does not appear to be a feasible option. A mandamus is a discretionary remedy under Article 226 of the Constitution and can be issued to compel the performance of public duty. The State Government was required to perform a public duty and place the Rules before the Governor for its approval. By placing fetters in raising frivolous objections, the State Government failed to perform its duty. When the authority, which in the present case, is the State Government, does not perform its constitutional duty, the Court could be compelled to intervene in the matter not only to quash an order but also issue a mandamus to that authority.

41. In the light of the aforesaid, the impugned order dated 28.2.2007 cannot be sustained and is quashed. The writ petition is allowed and a mandamus is issued to the State Government to place the draft Rules framed by the Chief Justice under Article 229 of the Constitution of India for approval before the Governor. This exercise is required to be carried out by the State Government as early as possible. In the circumstances of the case, the parties shall bear their own cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.05.2009

BEFORE
THE HON'BLE SABHAJEET YADAV, J.

Civil Misc. Writ Petition No. 15252 of 2008

Shiv Prasad ...Petitioner
Versus
State of U.P. and others...Respondents

Counsel for the Petitioner:
Sri Dinesh Rai

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

U.P. Recruitment of Dependent of Govt. Servant Dying in Harness Rules, 1974- read with section 12 & 16 of Hindu Adoption and Maintainace Act 1955- compassionate appointment-claimed by adopted son-rejected on ground of pendency of civil suit by a person not belonging to family of deceased employee-suit for declaration of legal heir-even if deceased can not be appointed held-once adoption deed executed acted upon-being registered deed even on service record of deceased employee-name of petitioner shown as nominee-claim for compassionate appointment can not be denied.

Held: Para 14 & 17

From a joint reading of Section 12 and Section 16 of 1956 Act it is clear that with effect from the date of adoption, the adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes and would be

engrafted in the family of his/her adoptive mother and father and from such date all the ties in the family of his or her birth shall be deemed to be severed and replaced by those created by adoption in adoptive family. It implies that in Hindu law on such adoption the adopted child gets all the rights, privilege and obligations of child in the adoptive family, therefore, there remains no difference between real child and adopted child and if the adoption is registered under any law for time being in force, it shall be presumed that adoption has been done in accordance with the provisions of law unless and until it is disproved.

These statements of fact made in writ petition have not been denied by the respondents, therefore, I have no option but to assume them as correct. In this view of the matter, I am of the considered opinion that the petitioner is entitled to be considered for compassionate appointment on account of death of Triveni Prasad as his son under Dying in Harness Rules 1974, unless his adoption is disproved and registered adoption deed is cancelled or declared null and void and inoperative.

Case law discussed:

2005 (4) E.S.C. (All.J) 2706, {(1996) 1 UPLBEC 4, {2008 (4) ESC 2895 (All)}, AIR 1979 S.C. 734, Legislation and Interpretation (4th Edition page 304 to 311), (1955) 2 SCR 603, AIR 1968 SC 413, AIR 1965 SC 33, 1994 (68) F.L.R. 283, (1996) 1 U.P.L.B.E.C. 4, 2005 (4) E.S.C. (All) 2706,

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

By this petition, the petitioner has challenged the letter/communication of Executive Engineer, Irrigation Department, Obra Dam Khand, Obra, Sonebhadra dated 23.2.2008 wherein it is stated that the compassionate appointment of petitioner would be considered after the decision in Original Suit No. 631 of 2004 instituted by Sri Mohan Prasad son of Jaipati in the court of Civil Judge (Junior Division), Deoria. The aforesaid letter was communicated to the petitioner in pursuance of direction given by this Court in Writ Petition No. 58491 of 2007 decided on 28.1.2007, earlier filed by petitioner.

2. The brief facts of the case are that one Sri Triveni Prasad, who was a permanent class IV employee in the office of Executive Engineer, Irrigation Department, Obra Dam, Obra, district Sonebhadra/respondent no.2, died while in service on 4.10.2003. The petitioner claims to be adopted son and dependent of said Triveni Prasad thus moved an application in the office of respondent no.2 for his appointment on compassionate ground against class IV post on 13.1.2004. Since no action was taken by the respondent no.2 for appointment of petitioner in spite of several representations and reminders, he filed writ petition referred herein before and while deciding said writ petition vide order dated 28.11.2007 this Court has directed the respondent no.2 to decide the claim of compassionate appointment of petitioner within a period of three months. In pursuance thereof vide impugned order /letter dated 23.2.2008 the respondent no.2 while deciding the representation of the petitioner has deferred the consideration of claim of compassionate appointment of petitioner and declined to appoint him at the moment on account of pendency of Suit No. 631 of 2004 in the court of Civil Judge (Junior Division), Deoria instituted by Sri Mohan Prasad son of Jaipati @ Jairasi Prasad respondent no.3, hence this petition.

3. It is stated in writ petition that Late Triveni Prasad adopted the petitioner

as his son during the life time of his wife when the petitioner was only two years of age. The adoption was made according to rites and after adoption, the petitioner has started living with his adoptive father and mother. The adoption deed was also got regisrered by Triveni Prasad, adoptive father of the petitioner which is on record as Annexure-2 of the writ petition. It is also stated that the wife of Triveni Prasad i.e. adoptive mother of petitioner had died earlier, therefore, the petitioner was only heir and legal representative of his adoptive father Triveni Prasad. Thus in his service book, he had also recorded the name of petitioner for the purpose of benefit of death-cum-retirement gratuity as well as for family pension. A copy of relevant extract of service book of Late Triveni Prasad is on record as Annexure-3 of the writ petition. It is also stated that the adoption of petitioner as son of Triveni Prasad was entered in the school register wherein the name of Triveni Prasad has been shown as father of petitioner. Even in the copy of family register issued by Gram Panchayat Mohan Mundera Vikas Khand, Rampur, district Deoria, which is native place of Triveni Prasad, the petitioner has been shown as adopted son of Late Triveni Prasad. A copy of family register issued by Gram Panchayat Mohan Mundera Vikas Khand, Rampur is on record as Annexure-5 of the writ petition.

4. In para 11 of the writ petition, it is stated that respondent no.3 Mohan Prasad has no concerned with Late Triveni Prasad as he does not come within the purview of family of Triveni Prasad as defined under U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974. Even in suit instituted by respondent no.3 he has shown himself as son of Jaipati and not as son of Late Triveni Prasad. True copy of the plaint of suit no. 631 of 2004 instituted by Mohan Prasad in Civil Court, Deoria is on record as Annexure-8 of the writ petition. It is further stated in para 12 of the writ petition that respondent no.2 in his written statement filed in Suit No. 631 of 2004 on his own behalf as well as on behalf of State of U.P. has specifically stated in para 17 and 18 of the said written statement that the respondent no.3 cannot be given appointment on compassionate ground as he is not son of Late Triveni Prasad and does not fall within the definition of family of deceased Government servant. In this view of the matter he could not decline to accept the claim of compassionate appointment of petitioner, who is only son (adopted by Late Triveni Prasad) and his name has already been mentioned by Late Triveni Prasad in his service book as well as in the documents for gratuity and family pension as adopted son of Triveni Prasad. A copy of written statement filed by respondent no.2 in Suite No. 631 of 2004 filed by respondent no.3 Sri Mohan Prasad is on record as Annexure-9 of the writ petition. In para 15 of the writ petition, it is specifically stated that the sole case of respondent no.3 is that he is legal representative and heir of deceased Triveni Prasad. A legal representative/heir of a deceased person, if he died issueless, cannot be given appointment under dying in harness rules unless such legal heir and representative comes within the definition of family defined under said rule and further unless he is found to be dependent upon a deceased Government servant.

5. A detailed counter affidavit has been filed on behalf of respondents no.1

and 2 wherein the relevant replies of various paragraphs of the writ petition given in paras 3,4,5,6,7, and 8 are as under:-

"3. That in reply to the contents of para 1 of the writ petition it is stated that as for the same dispute and controversy, involved in the present writ petition, the respondent no.3 Mohan Prasad has filed a suit in the court of Civil Judge (Junior Division) Deoria, which is pending for consideration, as such, due to this reason, the claim of the petitioner being the legal heir of late Triveni Prasad is pending. Hence, due to pendency of the matter for declaration of legal heir of deceased Triveni Prasad in the court of Civil Judge (Junior Division), Deoria, it is not possible for the answering respondents to dispose of the matter for declaration of heir of deceased Triveni Prasad.

4. That the contents of paras 2,3,4,5 and 6 of the writ petition do not need any specific reply, being matter of record.

5. That in reply to the contents of para 7 of the writ petition it is stated that due to pendency of suit for declaration of legal heir of deceased Triveni Prasad, in the court of Civil Judge (Junior Division), Deoria, no consideration on the petitioner's application for his appointment on compassionate ground, is being possible by the answering respondents.

6. That the contents of para 8 of the writ petition, as stated, need no reply, for want of specific knowledge.

7. That in reply to the contents of para 9 of the writ petition, it is stated that the copy of the order dated 28.11.2007 passed in Writ Petition No. 85491 of 2007 was made available in the office of answering respondents on 1.1.2008. But due to pendency of the dispute regarding declaration of legal heir of deceased Triveni Prasad in the court of Civil Judge (Junior Division), Deoria, the answering respondents are not in a position to decide the application of the petitioner for appointment on compassionate ground.

8. That in reply to the contents of paras 10 to 17 of the writ petition it is stated that suitable reply in detail have already been given in the foregoing part of this counter affidavit, which may kindly be perused here and the same need not be repeated here over again. As the claim of the petitioner and respondent no.3 for declaration of legal heir of deceased Triveni Prasad, is pending consideration in the court of Civil Judge (Junior Division), Deoria, as such, the respondent no.2 has rightly passed the impugned order dated 23.3.2008. Until and unless the claim for declaration of legal heir of deceased Triveni Prasad is not decided by the Civil Court, the answering respondent no.2 is not in a position to decide the claim of the petitioner. In view of the aforesaid facts, the impugned order dated 23.2.2008 passed by the respondent no.2, is wholly just, valid and legal and the same does not suffer from any legal infirmity. The petitioner is not entitled to any of the relief, at present. The entire action taken by the respondent no.2 is wholly just and legal."

6. Heard learned counsel for the petitioner and learned Standing counsel for respondents no.1 and 2 but in spite of service of notice upon the respondent no.3 no one is present on his behalf.

7. The contention of learned counsel for the petitioner in nut shell is that it is not disputed by the respondents no.1 and 2 in their counter affidavit filed in this petition that the petitioner is adopted son

of deceased Government employee namely Sri Triveni Prasad and is also nominee in his service records as his adopted son for post retiral benefits and family pension. It is also not disputed that in the school and family register the name of the petitioner has been shown as adopted son of Late Sri Triveni Prasad. It is also not disputed that he was dependent upon Triveni Prasad, therefore, merely because of the fact that Sri Mohan Prasad respondent no.3 has instituted a suit for declaring him to be heir and legal representative of deceased Triveni Prasad, compassionate appointment cannot be denied to the petitioner.

8. While elaborating his submission learned counsel for the petitioner further urged that although the suit No. 631 of 2004 instituted by Sri Mohan Prasad can not be decreed as it stands but assuming for the sake of argument, even if the relief claimed in the suit that he is heir and legal representative of Late Triveni Prasad is granted to him even then no compassionate appointment can be given to him for the simple reason that Sri Mohan Prasad respondent no.3 has described himself as son of Jaipati who was brother of Triveni Prasad and has claimed merely to be heir and legal representative of Late Triveni Prasad on the basis of any will alleged to be executed by him in his favour. Therefore, unless he would prove himself to be member of family of deceased Government servant as defined under the rules concerned, and further found to be dependent upon him, relief for compassionate appointment can not be given to him by decreeing said suit, as such respondent no.2 could not defer and decline to consider the claim for compassionate appointment of petitioner merely on account of pendency of aforesaid suit. In support of his case learned counsel for the petitioner has placed reliance upon the decisions rendered by this Court in **Ravindra Kumar Dubey Vs. State of U.P. and others, 2005 (4) E.S.C. (All.J) 2706, Singhasan Gupta Vs. State of U.P. and another {(1996) 1 UPLBEC 4 and Robin Mritunjai Tewari Vs. State of U.P. and others, {2008 (4) ESC 2895 (All)}.**

9. In order to appreciate the submission of learned counsel for the petitioner, it is necessary to examine the legal impact and implication of pendency of suit for succession and compassionate appointment filed by the respondent no.3, referred herein before. In this connection it would be useful to examine the definition of "family" given under **U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 hereinafter referred to as Dying in Harness Rules 1974** as well as provisions of Sections-12 and 16 of the **Hindu Adoption and Maintenance Act-1956** hereinafter referred to as 1956 Act, which have material bearing with the question in controversy involved in the case.

10. The relevant part of Rule 2 of Dying in Harness Rules 1974 containing the definition of "family" is extracted as under:-

***"2. Definitions.--** In these rules, unless the context otherwise requires:*
(a) x x x x x x x x x x x x
(b) x x x x x x x x x x x x
(c) "family" shall include the following relations of the deceased Government servant—

(i) Wife or husband;

(ii) Sons;

(iii) Unmarried and widowed daughters;

(iv) if the deceased was unmarried Government servant, brother, unmarried sister and widowed mother dependant on the deceased Government servant;"

11. Now before proceeding to deal with the import of word or expression "family" defined under definition clause of Rule 2 of Dying in Harness Rules 1974 it is necessary to make reference to a decision of Hon'ble Apex Court rendered in S.K. Gupta and another Vs. K.P. Jain and another, AIR 1979 S.C. 734, wherein Hon'ble Apex Court has dealt with the manner in which the words and expressions defined under the definition clause of a statute has to be interpreted. The pertinent observations of Hon'ble Apex Court made in para 25 of the said decision are extracted as under:-

"25. The noticeable feature of this definition is that it is inclusive definition and where in a definition clause the word 'include' is used, it is so done in order to enlarge the meaning of the words or phrases occurring in the body of the statute when it is so used, these words or phrases must be construed as comprehending not only such things which they signify according to their natural import, but also those things which the interpretation clause declares that they shall include (see Dilworth v. Commr. of Stamps (1899) AC 99 at p. 105)). Where in a definition section of a statute a word is defined to mean a certain thing, wherever that word is used in that statute, it shall mean what is stated in the definition unless the context otherwise requires. But where the definition is an inclusive definition, the word not only bears its ordinary, popular and natural sense whenever that would be applicable but it also bears its extended statutory meaning. At any rate, such expansive definition should be so construed as not cutting down the enacting provisions of an Act unless the phrase is absolutely clear in having opposite effect (see Jobbins v. Middlesex Country Council (1949) 1 KB 142). Where the definition of an expression in a definition clause is preceded by the words 'unless the context otherwise requires', normally the definition given in the section should be applied and given effect to but this normal rule may, however, be departed from if there be something in the context to show that the definition should not be applied (see Khanna, J. in Indira Nehru Gandhi v. Raj Narain (1975) Supp. SCC 1 at p. 97 : (AIR 1975 SC 2299). It would thus appear that ordinarily one has to adhere to the definition and if it is an expansive definition the same should be adhered to. The frame of any definition more often than not is capable of being made flexible but the precision and certainty in law requires that it should not be made loose and kept tight as far as possible."

12. It appears that in Rule-2 of Dying in Harness Rules which defines various words or expressions mentioned in the definition clause, these words and expressions are preceded by the words 'unless the context otherwise requires'. It means that the definitions given in the definition clause should be normally applied and given effect to but this normal rule may however be departed from if there be something in context to show that definition should not be applied. In view of legal position stated by Hon'ble Apex

Court referred hereinbefore, the definition of expression 'family' given in the definition clause appears to be an inclusive definition as the definition clause used the word 'include' in the definition of family. Such definition is known as expansive definition and is used to enlarge the meaning of the words or phrases occurring in the body of statute and when it is so used, the words or phrases should be construed as comprehending not only such thing which they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. Where the definition is an inclusive definition, the word not only bears its ordinary, popular and natural sense whenever that would be applicable but it also bears its extended statutory meaning. Contrary to it, where in a definition clause of a statute a word is defined to mean certain thing whenever that word is used in that statute, it shall mean what is stated in the definition 'unless the context otherwise requires'. Such definition is known as restrictive definition and used to restrict the meaning of expression defined in the definition clause and whenever such word or expression is used in the body of the statute, it shall be restricted to meaning assigned in the definition clause and popular or natural meaning of such word or expression shall not be applied.

13. Now the provisions of Sections 12 and 16 of the Hindu Adoption and Maintenance Act 1956 are extracted as under:-

"12. Effects of adoption.-- *An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family:*

Provided that—

(a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;

(b) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;

(c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption.

16. Presumption as to registered documents relating to adoption.-- *Whenever any document registered under any law for the time being in force is produced before any court purporting to record an adoption made and is signed by the person giving and the person taking the child in adoption, the court shall presume that the adoption has been made in compliance with the provisions of this Act unless and until it is disproved."*

14. From a joint reading of Section 12 and Section 16 of 1956 Act it is clear that with effect from the date of adoption, the adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes and would be engrafted in the family of his/her adoptive mother and father and from such date all the ties in the family of his or her birth shall be deemed to be severed and replaced by those created by adoption in adoptive family. It implies that in Hindu

law on such adoption the adopted child gets all the rights, privilege and obligations of child in the adoptive family, therefore, there remains no difference between real child and adopted child and if the adoption is registered under any law for time being in force, it shall be presumed that adoption has been done in accordance with the provisions of law unless and until it is disproved.

15. Late Jagdish Swarup, eminent jurist and author, in his Book- **Legislation and Interpretation (4th Edition page 304 to 311)** has observed that a legal fiction is one which is not an actual reality but which the law requires the court to accept it as reality, therefore, in case of legal fiction the court believes something to exist which in reality does not exist. In other words it is nothing but a presumption of existence of a state of affairs which in actual reality is non-existent. When viewed from this context there is not much difference between a legal fiction and presumption. However, it cannot be said that legal fiction and presumption are wholly identical in all respects. A presumption may be conclusive or it may be rebuttable. A presumption gives rise to a legal fiction it is conclusive, if no evidence can be permitted to be led to deny it. In case of presumption which is rebuttable unless the contrary is established, fictitious state of affairs is presumed to exist as if it is an actual reality. As held by Hon'ble Apex Court in ***Bengal Immunity Co. Vs. State of Bihar (1955) 2 SCR 603, Braithwaite and Company (India) Ltd. Vs. Employees State Insurance Corporation AIR 1968 SC 413 and Income Tax Commissioner Vs. Express Newspaper Ltd. AIR 1965 SC 33***, that the legal fictions are created only for some definite purpose for which they are created and they should not be extended beyond the legitimate field. In this view of the matter, there can be no scope for doubt to hold that by Section 12 of 1956 Act the legislature has created a legal fiction requiring the court to accept adopted child as real child of adoptive father and mother. In my opinion, such legal fiction was created for this legitimate and limited purpose.

16. It is stated in the writ petition that the petitioner is adopted son of deceased Government Servant Late Triveni Prasad through registered adoption deed, therefore, in my opinion, unless aforesaid adoption is disproved and the registered document relating to his adoption is cancelled, he shall be deemed to be the real son of Late Triveni Prasad for all the purposes including for compassionate appointment under Dying in Harness Rules 1974. The inclusive definition of said Rules further fortified the aforesaid view and in my opinion the adopted son shall be included within the meaning of son, defined as member of family of deceased Government servant under Dying in Harness Rules, 1974 and the petitioner can claim all the benefits like real son of Late Triveni Prasad including compassionate appointment under aforesaid Rules.

17. Further the petitioner has stated in the writ petition that he is also nominee of Late Triveni Prasad in his service book for the purposes of post retiral dues including death-cum-retirement dues as well as family pension and in the family register and school register the name of petitioner has been shown as adopted son of Triveni Prasad and he claims to be dependent of Late Triveni Prasad. These

statements of fact made in writ petition have not been denied by the respondents, therefore, I have no option but to assume them as correct. In this view of the matter, I am of the considered opinion that the petitioner is entitled to be considered for compassionate appointment on account of death of Triveni Prasad as his son under Dying in Harness Rules 1974, unless his adoption is disproved and registered adoption deed is cancelled or declared null and void and inoperative. The aforesaid view taken by me also finds support from several decisions of this Court rendered in **Sunil Saxena Vs. State of U.P. and others 1994 (68) F.L.R. 283, Singhasan Gupta Vs. State of U.P. and another (1996) 1 U.P.L.B.E.C. 4** and **Ravindra Kumar Dubey Vs. State of U.P. and others 2005 (4) E.S.C. (All) 2706**.

18. Now coming to the case of Sri Mohan Prasad son of Jaipati, it is clear that he is brother's son of deceased Government servant and does not come within the definition of family under the said rule even if inclusive definition of family is applied, therefore, he can not claim compassionate appointment on account of death of Late Triveni Prasad irrespective of the fact that he has instituted a suit for declaration that he may be declared heir and legal representative of deceased employee. In my opinion, even on such declaration also he can not claim compassionate appointment on account of death of Triveni Prasad. Therefore, on account of pendency of aforesaid suit instituted by the respondent no.3 the action of respondent no.2 deferring the consideration of claim of compassionate appointment of the petitioner can not be held to be justified. Accordingly the impugned order/letter dated 23.2.2008 passed by respondent no.2 cannot be sustained and the same is hereby quashed, in the result writ petition succeeds and is allowed.

19. The respondent no.2 is directed to consider the claim of compassionate appointment of the petitioner within two months from the date of production of certified copy of this order before him by ignoring the pendency of suit referred hereinbefore filed by the respondent no.3 and offer him appointment if he is found otherwise eligible for any Class-III or Class-IV post under Dying in Harness Rules 1974.

20. With the aforesaid observation and direction, writ petition stands allowed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.05.2009

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

Criminal. Misc. Application No. 10811 of 2009

Har Dayal and others ....Applicants
Versus
State of U.P. & another ...Opposite Party

Counsel for the Applicants:
Sri Pramod Dwivedi

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

Code of Criminal Procedure-Section 460- with permission of magistrate under section 155(2)-Police submitted charge sheet in non cognizable offences-cognizance taken by magistrate-under

challenge-held -submissions of report by Police to be treated as complaint-procedure of complaint case shall be adopted during trial-argument that cognizance taken by magistrate on such report in NCR case-misconceived in view of provisions contained in section 460 Cr.P.C.

Held: Para 8:

Sub section E of Section 460 Cr.P.C. goes to this extent that even if cognizance is taken, clause (a) or (b) or sub-section 1of section 90 Cr.P.C. by a magistrate not being empowered to do so, even then it will not vitiate the proceedings. In the present case with the permission case before me, the police investigated the non-cognizable case with the permission of Magistrate under section 155(2) Cr.P.C. And submitted charge sheet, therefore, cognizance taken was under Section 190 sub-section 1, clause(b), Cr.P.C., for which the learned Magistrate was empowered. No where in section 460 Cr.P.C. It has been given that such procedural mistake will vitiates the proceedings.

(Delivered by Hon'ble R. N. Misra, J.)

1. By way of this petition, under Section 482 Cr.P.C., the applicants have challenged the entire proceedings of Criminal Case No. 1406 of 2008, under Section 323 I.P.C. pending in the court of Chief Judicial Magistrate, Hathras.

2. I have heard Sri Pramod Dwivedi, learned counsel for the applicants and learned A.G.A. for the State.

3. It transpires from the record that on the application of respondent no.2 Malkhan Singh, the Sasni police of district Hathras registered a non-cognizable case on crime no, 143 of 2008, under Section 323 I.P.C. As is evident from Annexure 1 and the police officer got the permission from the Magistrate concerned under Section 155(2) Cr.P.C. and after investigation, submitted charge sheet (Annexure 3) against the accused-applicants. The learned Chief Judicial Magistrate vide order dated 11.4.2008 (Annexure 4) took cognizance and proceeded as State case. The accused-applicants moved application (Annexure 5) before the learned Magistrate to recall order dated 11.7.2008 taking cognizance. In that application, the procedure adopted by the trial court was also challenged. The learned Magistrate rejected that application vide order dated 11.9.2008 (Annexure 6) and aggrieved by the same this petition, under Section 482 Cr.P.C. has been preferred.

4. As regards rejection of application of accused-applicants for recalling order taking of cognizance is concerned that is legal and correct. Learned counsel for the applicants has also conceded this legal position during his argument but as regard objection regarding procedure is concerned that has force.

5. It has been contended by learned counsel for the applicants that when non-cognizable case is investigated by the police after getting permission, under Section 155(2) Cr.P.C. and submitted charge sheet, the procedure of complaint case should be followed. The word "complaint" has been defined under Section 2(d) of Cr. P.C. which rules as under:

2(d):- "**Complaint"** means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person,

whether known or unknown, has committed an offence, but does not include a police report.

6. From the above definition, it is clear that when after investigation, the commission of non-cognizable offence is disclosed and police officials conducting investigation submit charge sheet under Section 190 (b) Cr. P.C., that police report has to be treated as complaint and the police officer submitting report shall be treated as complainant. Naturally when the police report has been treated as complaint, the procedure for complaint case shall be adopted for trial of the offence. No doubt, when on such police report, the cognizance is taken, it is not necessary for the Magistrate concerned to examine the complainant under section 200 Cr.P.C. because it will be treated as complaint by the public servant acting in discharge of his official duty. His personal attendance on each and every date can also be dispensed with by the learned Magistrate as has been given under section 256 Cr.P.C. Similar provision has been given under section 249 Cr. P.C. and the discretion has been given to the Magistrate for dismissing or not dismissing the complaint in absence of complainant. This argument of learned counsel for the applicants has no force that the cognizance taken by the learned Magistrate on the charge sheet I n non-cognizable case is bad and vitiates the entire proceedings. In this connection I would like to refer provision of Section 460 Cr.P.C. which runs as under:

7. "**460-Irregularities which do not vitiate proceedings-** If any Magistrate not empowered by law t do any of the following things, namely:-

(a) to issue a search warrant under section 94;
(b) to order, under section 155, the police to investigate an offence;
(c) to hold an inquest under section 176;
(d) to issue process under section 187 for the apprehension of a person within his local jurisdiction who has committed an offence outside the limits of such jurisdiction;
(e) to take cognizance of an offence under clause (a) or clause (b) of sub section (1) of section 190;
(f) to make over a case under sub-section (2) of section 192;
(g) to tender a pardon under section 306;
(h) to recall a case and try it himself under section 410; or
(i) to sell property under section 458 or section 459,
erroneously in good faith does that thing, his proceedings shall not be set aside merely on the ground of his not being so empowered.

8. Sub section E of Section 460 Cr.P.C. goes to this extent that even if cognizance is taken, clause (a) or (b) or sub-section 1of section 90 Cr.P.C. by a magistrate not being empowered to do so, even then it will not vitiate the proceedings. In the present case with the permission case before me, the police investigated the non-cognizable case with the permission of Magistrate under section 155(2) Cr.P.C. And submitted charge sheet, therefore, cognizance taken was under Section 190 sub-section 1, clause(b), Cr.P.C., for which the learned Magistrate was empowered. No where in section 460 Cr.P.C. It has been given that such procedural mistake will vitiates the proceedings.

9. In view of above, the petition under section 482 Cr.P.C. Is partly dismissed and partly allowed. Learned Magistrate is directed to adopt procedure of complaint for the trial. The cognizance taken by him is not erroneous.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.05.2009

BEFORE
THE HON'BLE VIJAY KUMAR VERMA, J.

Criminal Misc. Bail Application No.7444 of 2008

Hari Shankar ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri V.S. Parmar

Counsel for the Opposite Party:
Sri Dinesh Kumar Gupta
A.G.A.

Code of Criminal Procedure -Section-439-Bail Application-offence under section 363/366/376/506 IPC readwith 3 (I) (XII) SC/ST Act-gang rape by different person on different time-heinous anti social crime-selling by one person to other-does not deserve for bail-rejected

Held: Para 6

I have carefully gone through the statement of the prosecutrix recorded under section 164 Cr. P.C. although the prosecutrix did not support the case of the prosecution in her statement recorded under section 161 Cr. P.C., but when her statement was recorded before the Magistrate under section 164 Cr. P.C. She has fully supported the case of the prosecution. Therefore, without expressing any opinion on merit of the case, in this heinous anti social crime of gang rape and selling the prosecutrix from one person to other person, the applicant does not deserve bail.

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

1. Heard Sri V.S. Parmar, Advocate appearing for the applicant, Sri Dinesh Kumar Gupta, learned counsel for the complainant and AGA for the State and also perused the record.

2. An FIR was lodged on 27.06.2007 by the complainant Chottey Lal @ Babloo at P.S. Khanna District Hamirpur, where a case under section 363,366,376,506 IPC and section 3 (1)(XII) SC/ST Act was registered against Parasram, Pankaj, Dilip, Ram Kishore, Dhiru @ Dhiraj and Harishankar.

3. The allegations made in the FIR in brief, are that on 01.02.2007 at about 4.00 p.m. The prosecutriz (name not disclosed as per the direction of the Hon'ble Apex Court), daughter of the complainant, was going to Khanna market for purchasing goods. She was caught by the accused Parasram, Pankaj, Dilip, Ram Kishore and one other person and they all committed rape on her after keeping her in the house of Prem Narayan @ Lal Vishwakarma. Thereafter, she was sold to Hari Shankar Vishwakarma (applicant herein), who also committed rape with her. After that she was sold to Banda Vishwakarma, aged about 65 years from where she was recovered by the police.

4. It is submitted by the learned counsel for the applicant that in her statement recorded under section 161 Cr. P.C., prosecutrix did not support the case of the prosecution and from the statement, it transpires that she was consenting party

and had married with the applicant Hari Shankar Vishkarma. Next submission is that the statement of prosecuttrix was recorded before SDM and in that statement also, she has not supported the case of the prosecution. Regarding the statement recorded under section 164 Cr.P.C. of the prosecutrix, it is submitted by learned counsel that from that statement also, it appears that the prosecutrix was consenting party in living with the applicant. It is further submitted that other witnesses have not supported the case of the prosecution

5. AGA and learned counsel for the complainant have opposed the bail application stating that prosecutrix has fully supported the case of the Cr.P.C. and hence, in this heinous crime of gang rape, applicant should not be granted bail.

6. I have carefully gone through the statement of the prosecutrix recorded under section 164 Cr. P.C. although the prosecutrix did not support the case of the prosecution in her statement recorded under section 161 Cr. P.C., but when her statement was recorded before the Magistrate under section 164 Cr. P.C. She has fully supported the case of the prosecution. Therefore, without expressing any opinion on merit of the case, in this heinous anti social crime of gang rape and selling the prosecutrix from one person to other person, the applicant does not deserve bail.

7. Consequently, the bail application of the applicant Hari Shankar is hereby rejected.

8. The trial court is directed to conclude the trial of the applicant within a period of six months applying the provisions of section 309 Cr.P.C. and avoiding unnecessary adjournment.

9. Office is directed to send a copy of this order within a week to the trial court concerned for necessary action.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.06.2009

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Criminal Revision No. 2308 of 2009

Roop Ram ...Revisionist
Versus
State of U.P. ...Opposite Parties

Counsel for the Revisionist:
Sri Jai Shanker Audichya

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

Code of Criminal Procedure-Section 156 (3)-Rejection of application by magistrate-with observation the dispute appear to be civil nature to approach before police for action under Section 107/116-without considering this aspect whether cognizable offence is made out or not?-held-illegal-although the Magistrate's power discretionary one-but has to be exercised in judicial and not arbitrary manner-considering groving tendency of 156 (3) Application Court expressed its great concern-to find out the way certain guidelines issued to check up the arbitrariness of Police-in-charge to face disciplinary proceeding if refused to lodged FIR and cognizable offence found to be made out by the Magistrate.

Held: Para 32

Considering the above observations this Court gives further the following directions:

(i) When a Police Officer-in-Charge of the police station or any other police Officer, acting under the directions of the Officer-in-Charge of police station refuses to register an information disclosing a cognizable offence, the informant may either approach the Superintendent of Police under Section 154 (3) or the Magistrate concerned under section 156 (3) of the Code.

(ii) If the Informant approaches the Superintendent of Police, who finds that the refusal of registration of F.I.R. by the police Officer-in-Charge of the police station was unjust or for reasons other than valid, and where he directs for investigation, he shall initiate disciplinary proceedings against the Officer-in-Charge of the police station for such non observance of statutory obligation treating the same to be a serious misconduct justifying a major penalty and complete the proceedings within three months from the date he passes an order for investigation into the matter.

(iii) Where, the informant approaches the Magistrate concerned under Section 156 (3) of the Code and the Magistrate ultimately finds that information discloses a cognizable offence and direct the police to proceed for investigation, he shall cause a copy of the order sent to Superintendent of Police/Senior Superintendent of Police (hereinafter referred to as the S.P/S.S.P) of the concerned district and such S.P./S.S.P. shall cause a disciplinary inquiry into the matter to find out the person guilty of such dereliction of duty i.e. failure to discharge statutory obligation i.e. registration of an information disclosing cognizable offence treating the said failure as a serious misconduct justifying major penalty and shall complete the disciplinary proceedings within three months from the date of receipt of the copy of the order from the concerned Magistrate. After completing the disciplinary proceedings, the S.P./S.S.P. concerned shall inform about the action taken against the concerned police Officer-in-Charge of the police station to the Magistrate concerned within 15 days from the date of action taken by him but not later than four months from the date of receipt of the copy of the order from the Magistrate concerned.

(iv) The Magistrate concerned shall review the cases in which the copy of the orders passed under Section 156 (3) of the Code has been sent to concerned S.P./S.S.P. quarterly and when it is found that the concerned S.P./S.S.P. has also failed to comply with the above directions of this Court, he shall sent a copy of his order along with the information about non- compliance of this Court's order/direction by the concerned S.P./S.S.P. to the Director General of Police, U.P., Lucknow and the Principal Secretary (Home), U.P., Lucknow who shall look into the matter and take appropriate action as directed above against the police Officer-in-Charge of the police station concerned as well as the S.P./S.S.P. concerned for his inaction also into the matter within three months and communicate about the action within next one month to the Magistrate concerned. The Principal Secretary (Home), U.P., Lucknow and the Director General of Police, U.P. Lucknow shall also submit a report regarding number of the cases informed by the concerned Magistrate in a calender year and also the action taken, by them as directed above by the end of February of every year to the Registrar General of this Court.

(v) Besides above, non compliance of the above directions of this Court shall also be treated to be a deliberate defiance by the concerned authorities above mentioned constituting contempt of this Court and may be taken up before the Court concerned having jurisdiction

in the matter, whenever it is brought to the notice of this Court.

Case law discussed:

[2007 (1) JIC 204 (All)], [2007 (1) JIC 205 (All)], 1992 Supp. (1) SCC 335, A.I.R. (32) 1945 Privy Council 18, 1980 (2) SCC 471, 2003 SCC (Crl.) 1305, JT 2008 (2) SC 8, JT 2006 (1) SC 10, 2001 (3) Cr.L.J. 3363, 2008 (7) SCC 164.

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

1. Learned counsel for the revisionist at the out set submitted that he may be permitted to delete the opposite parties no. 2 and 3 from the array of parties and to make necessary corrections in the memo of revision. The request is allowed. The necessary corrections be made during the course of the day.

2. Heard Sri Jai Shanker Audichya, learned counsel for the revisionist and Sri Mehrotra, learned A.G.A. for the State and as agreed by the said learned counsel, this revision is being decided finally.

3. The revision has been preferred aggrieved by the order dated 13th February, 2009 passed by the Special Judge (D.A.A.) Farrukhabad in Misc. Case No. 04/12/08 (Roop Ram Versus Sonu and another) rejecting the application of the revisionist preferred under Section 156 (3) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Code') seeking a direction to the police to make investigation in respect to his complaint constituting commission of a cognizable offence after registering a first information report (hereinafter referred to as the "F.I.R.").

4. It is contended by the learned counsel for the revisionist that the court below has rejected the application observing that a Magistrate is not bound to accept an application under Section 156 (3) of the Code and it is his discretion. Further, it is also said by the court below that the dispute prima facie appears to be of a civil dispute, the Police reached the spot took, appropriate action under Sections 107 and 116 of the Code apprehending breach of peace, the allegations of the revisionist have not been believed by the Police and it is open to the revisionist to file a complaint case. Learned counsel for the revisionist submitted that the court below has erred in law in failing to consider as to whether the allegations or the information of the revisionist amounts to occurrence of cognizable offence or not and if that be so, the court below ought to have directed for investigation in the matter instead of entering into the correctness of the complaint. It was beyond its jurisdiction at this stage to look into the truth of the allegations. It is also contended that discretion exercised under Section 156 (3) of the Code is not arbitrary, but has to be exercised in a lawful manner and in accordance with law. In support of his submissions reliance has been placed upon ***Har Prasad Vs. State of U.P. [2007 (1) JIC 204 (All)] and Ram Pal Singh Vs. State of U.P. [2007 (1) JIC 205 (All)]***

5. Sri Mehrotra, learned A.G.A. having gone through the order of the court below could not justify the aforesaid order as also could not dispute the proposition advanced on behalf of the revisionist.

6. I have heard the matter at length and perused the record as well as the authorities cited at the Bar.

7. This matter ex-facie appears to be plain and simple involving the correctness of an order of the Magistrate under Section 156 (3) of the Code refusing to direct the Police to make investigation into complaint of the applicant about the occurrence of a cognizable offence but judicial cognizance can be taken of the fact that a large number of such cases are being filed under Section 156 (3) of the Code before the Magistrate concerned and consequential proceedings have also been carried to this Court.

8. Section 154 (1) of the Code provides that every information relating to the commission of a cognizable offence, if given orally or in writing to an Officer-in-charge of a police station, shall be reduced to writing by him or under his direction, shall be signed by the person giving it and the substance thereof shall be entered into a book to be kept by such officer in such form as the State Government may prescribe. A copy of such information free of cost is supposed to be given to the informant as provided under Section 154 (2) of the Code.

9. The law has also perceived a situation where the Officer-in-Charge of a police station may refuse to record the information referred to in sub-section 1 and in such a case the informant can approach the Superintendent of Police concerned by giving him in writing and by post the above information and if the Superintendent of Police is satisfied that the information disclosed commission of a cognizable offence, he shall either investigate the case himself or direct investigation by any police officer subordinate to him in the manner provided in the Code. The entire Section 154 of the Code, therefore, makes it obligatory on the part of the Officer-in-Charge of the police station as well as the Superintendent of Police, as the case may be, to record information and to make investigation provided the information relates to commission of a cognizable offence. The only scope of enquiry at the stage of Section 154 of the Code is about the fact that the information discloses commission of a cognizable offence.

10. In ***State of Haryana and others Vs. Bhajan Lal and others 1992 Supp. (1) SCC 335***, the Apex Court had the occasion to consider Section 154 of the Code and it was held that the recording of report under Section 154 (1) of the Code, known as registration of a criminal case, is a legal mandate. The concerned police officer cannot embark upon an enquiry as to whether the information given is reliable and genuine or not and on the contrary, subject to only scrutiny as to whether the information discloses a cognizable offence, the Officer-in-Charge of a police station is under an obligation to register a case and then to proceed with the investigation. The refusal on the part of an Officer-in-Charge of a police station to register a report amounts to violation of a statutory duty cast upon him, if in-spite of the fact that the information discloses a cognizable offence yet it is not registered by him.

11. Further, in case of such a refusal, the informant has remedy to apprise the Superintendent of Police about the commission of a cognizable offence and if the information discloses such an offence, the Superintendent of Police is also under a statutory obligation to make or to direct for investigation either by himself or by an officer subordinate to him. The Apex Court very categorically has held in

Bhajan Lal (supra) that the police officer should not refuse to record an information relating to commission of a cognizable offence and to register a case thereon on the ground that he is not satisfied with the reasonableness or credibility of the information. The credibility or reasonableness of the information in fact is not a condition precedent for registration of a case. It would be useful to reproduce the following extract from the above judgment:

*"**30**. The legal mandate enshrined in Section 154 (1) is that every information relating to the commission of a "cognizable offence" (as defined under Section 2 (c) of the Code) if given orally (in which case it is to be reduced into writing) or in writing to "an officer in charge of a police station" (within the meaning of Section 2 (o) of the Code) and signed by the informant should be entered in a book to be kept by such officer in such form as the State Government may prescribe which form is commonly called as **"First Information Report"** and which act of entering the information in the said form is known as registration of a crime or a case.*

***31.** At the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence in compliance with the mandate of Section 154 (1) of the Code, the concerned police officer cannot embark upon an enquiry as to whether the information, laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not reliable or credible. On the other hand, the officer in charge of a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which he is empowered under Section 156 of the Code to investigate, subject to the proviso to Section 157 (As we have proposed to make a detailed discussion about the power of a police officer in the field of investigation of a cognizable offence within the ambit of Sections 156 and 157 of the Code in the ensuing part of this judgment, we do not propose to deal with those sections in extenso in the present context.) In case, an officer in charge of a police station refuses to exercise the jurisdiction vested in him and to register a case on the information of a cognizable offence reported an thereby violates the statutory duty cast upon him, the person aggrieved by such refusal can send the substance of the information in writing and by post to the Superintendent of Police concerned who if satisfied that the information forwarded to him discloses a cognizable offence, should either investigate the case himself or direct an investigation to be made by any police officer subordinate to him in the manner provided by sub-section (3) of Section 154 of the Code.*

***32.** Be it noted that in Section 154(1) of the Code, the legislature in its collective wisdom has carefully and cautiously used the expression **"information"** without qualifying the same as in Section 41 (1)(a) or (g) of the Code wherein the expressions, **"reasonable complaint"** and **"credible information"** are used. Evidently, the non-qualification of the word "information" in Section 154 (1) unlike in Section 41 (1) (a) and (g) of the Code may be for the reason that the police officer should not refuse to record an information relating to the commission of a cognizable offence and to register a case thereon on the ground that he is not*

satisfied with the reasonableness or credibility of the information. In other words 'reasonableness' or 'credibility' of the said information is not a condition precedent for registration of a case. A comparison of the present Section 154 with those of the earlier Codes will indicate that the legislature had purposely thought it fit to employ only the word "information" without qualifying the said word. Section 139 of the Code of Criminal Procedure of 1861 (Act 25 of 1861) passed by the Legislative Council of India read that ***'every complaint or information'*** *preferred to an officer in charge of a police station should be reduced into writing which provision was subsequently modified by Section 112 of the Code of 1872 (Act 10 of 1872) which thereafter read that 'every complaint' preferred to an officer in charge of a police station shall be reduced in writing. The word 'complaint' which occurred in previous two Codes of 1861 and 1872 was deleted and in that place the word 'information' was used in the Codes of 1882 and 1898 which word is now used in Sections 154, 155, 157 and 190 (c) of the present Code of 1973 (Act 2 of the 1974). An overall reading of all the Codes makes it clear that the condition which is sine qua non for recording a first information report is that there must be an information and that information must disclose a cognizable offence.*

33. *It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station satisfying the requirements of Section 154 (1) of the Code, the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information."*

(emphasis added)

12. The Apex Court has further gone into the question as to whether mere registration of the criminal case under Section 154 (1) of the Code ipso facto warrants the setting in motion of an investigation under Chapter XII of the Code and said that the police officer if, has reason to suspect the commission of a cognizable offence, may proceed to investigate the matter without the order of the Magistrate but if he finds that the offence is not of a serious nature or that there is no sufficient ground for entering on an investigation, he shall not investigate the same but in case a decision taken for not investigation, he has to submit his report to the Magistrate along with the reasons and shall notify the same to the informant that he will not investigate the same or cause it to be investigated.

13. In fact, in ***Emperor Vs. Khwaja Nazir Ahmad, A.I.R. (32) 1945 Privy Council 18,*** it was held that receipt and recording of information is not a condition precedent to the setting in motion of a criminal investigation. If the police is in possession through their own knowledge or by means of a credible though informal intelligence, which genuinely leads them to believe that a cognizable offence has been committed, should on their own motion undertake an investigation into the truth of the matter alleged. The provisions pertaining to recording of an information that is registration of F.I.R. are enacted for other reasons. Its object is to obtain early information of alleged criminal activity, to record the circumstances before there is

time for them to be forgotten or embellished. Further, the report can also be put in evidence when the informant is examined, if it is desired to do so. The Privy Council on page 22 said-

"In India as has been shown there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring any authority from the judicial authorities, and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the Court. The functions of the judiciary and the police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the Court to intervene in an appropriate case....."

14. In ***State of Punjab and another Vs. Gurdial Singh and others 1980 (2) SCC 471,*** it has been observed that obligation to register a case is not to be confused with the remedy, if the same is not registered. The obligation of registering F.I.R. may be excused if the Officer-in-Charge of the police station finds that the information does not discloses a cognizable offence or that the dispute is pure and simple of civil nature from the bare narration of the facts without going into its truthfulness or that ex-facie the information appears to be fictitious.

15. It may also be mentioned at this stage that no particular procedure of drafting of information which has to be registered, that is F.I.R., is prescribed in the Code. In ***Superintendent of Police, CBI and others Vs. Tapan Kumar Singh, 2003 SCC (Crl.) 1305,*** in Para 20, the Apex Court said:

20. "It is well settled that a first information report is not an encyclopaedia, which must disclose all facts and details relating to the offence reported. An informant may lodged a report about the commission of an offence though he may not known the name of the victim or his assailant. He may not even know how the occurrence took place. A first informant need not necessarily be an eyewitness so as to be able to disclose in great detail all aspects of the offence committed. What is of significance is that the information given must disclose the commission of a cognizable offence and the information so lodged must provide a basis for the police officer to suspect the commission of a cognizable offence. At this stage it is enough if the police officer on the basis of the information given suspects the commission of a cognizable offence, and not that he must be convinced or satisfied that a cognizable offence has been committed. If he has reasons to suspect, on the basis of information received, that a cognizable offence may have been committed, he is bound to record the information and conduct an investigation. At this stage it is also not necessary for him to satisfy himself about the truthfulness of the information. It is only after a complete investigation that he may be able to report on the truthfulness or otherwise of the information. Similarly, even if the information does not furnish all the details he must find out those details in the course of investigation and collect all the necessary evidence. The information

given disclosing the commission of a cognizable offence only sets in motion the investigative machinery, with a view to collect all necessary evidence, and thereafter to take action in accordance with law. The true test is whether the information furnished provides a reason to suspect the commission of an offence, which the police officer concerned is empowered under Section 156 of the Code to investigate. If it does, he has no option but to record the information and proceed to investigate the case either himself or depute any other competent officer to conduct the investigation. The question as to whether the report is true, whether it discloses full details regarding the manner of occurrence, whether the accused is named, and whether there is sufficient evidence to support the allegations are all matters which are alien to the consideration of the question whether the report discloses the commission of a cognizable offence. Even if the information does not give full details regarding these matters, the investigating officer is not absolved of his duty to investigate the case and discover the true facts, if he can.

16. A cumulative reading of Sections 154 to 157 of the Code shows that so far as the registration of an information about commission of a cognizable offence is concerned, the only thing which is to be seen is whether the information constitute a cognizable offence and then it has to be registered but so far as the investigation part is concerned, there is some scope of discretion vested with the Police Officer-in-Charge of the concerned police station but that is also subject to scrutiny by the Magistrate having jurisdiction in such matter and since he has also to record reasons for not making investigation and to inform the informant, the informant can also have the remedy of challenging the same before the appropriate forum. It is in this way, the Apex Court in ***Bhajan Lal (supra)*** has dealt with the aforesaid provisions in para 36 to 40.

17. In the case, this Court is not concerned about the decision of the police authorities to investigate the matter but the basic question is about the registration of an information regarding commission of a cognizable offence and the scope of discretion of Magistrate in directing for investigation.

18. It is no doubt true that it has been held that the power under Section 156 (3) of the Code is a discretionary one vested in the Magistrate but at the same time, it is also a well settled proposition of law that a discretion vested in a judicial authority has to be exercised judiciously and not arbitrarily. This Court in ***Ram Pal Singh (supra)*** has said that-

"At the stage of Section 156 (3) Cr.P.C. which is a pre-cognizance stage, once cognizable offence is disclosed through that application it was the duty of the concerned Court to order for registration and investigation of the offence as crime detection and crime prevention are the foremost duty of the police and not of the Court."

19. The Apex Court also in ***S.K. Sinha, Chief Enforcement Officer Versus Videocon International Ltd. and others JT 2008 (2) SC 8*** said that when the Magistrate applies his mind for taking action i.e. ordering investigation under Section 156 (3) of the Code, he cannot be said to have taken cognizance of the

offence, meaning thereby, the stage is earlier. There, since the stage of directing for investigation under Section 156 (3) of the Code is a pre-cognizance stage, the truth or correctness of the allegation/information is not supposed to be undergone by the Magistrate.

20. Registration of an F.I.R. in a case like present one involves only the process of entering the substance of the information relating to the commission of cognizable offence in a book kept by Officer-in-Charge of the police station as indicated in Section 154 of the Code. It is for this reason that the Magistrate under Section 156 (3) of the Code is not required to examine the complainant on oath since he has not taken cognizance of any offence therein. The investigation in a matter of a crime is the prime responsibility of the police, the Magistrate therefore, instead of wasting his time can order investigation by the Police and for the said purposes the F.I.R. has to be registered by the Police.

21. In ***Mohammad Yusuf Vs. Smt. Asfaq Jaha and another JT 2006 (1) SC 10*** it was held that for the purpose of enabling the police to start investigation, it is open for the Magistrate to direct the Police to register F.I.R. and there is no illegality therein even though Magistrate does not say in so many words by directing investigation under Section 156 (3) of the Code that an F.I.R. should be registered. It is the duty of the Officer-in-Charge of the police station to register F.I.R. regarding the cognizable offence disclosed by the complainant and that police officer should take further steps contemplated under Chapter XII of the Code only thereafter. It also held that Section 156 (3) is wide enough to include all such powers in a Magistrate which are necessary for ensuring a proper investigation and it includes the power for order of registration of an F.I.R. and of ordering a proper investigation, if the Magistrate is satisfied that the proper investigation has not been done or not being done by the police.

22. Sometimes in a given case, application containing information of a cognizable offence when presented before the Magistrate under Section 156 (3) of the Code, from a bare reading of the allegations may show an improbability or falsity in the allegations or lack of genuinty or exaggerated facts. In such circumstances, though the Magistrate, may not be required to go into the truth of the information but what appears to it from a bare reading of the complaint, improbability or falsity in the allegations may justify an order of refusal but such cases would be rare and exceptional. Normally when an information in an application discloses commission of a cognizable offence, instead of going into the veracity of the matter, the Magistrate should direct the police to investigate into the matter for which the police would be under an obligation, thereafter, to register a report and proceed for investigation. However, this would not deprive the Magistrate his power to treat an application or information as a complaint under Section 190 of the Code, even though there may not be any prayer seeking trial and to proceed accordingly. This is the procedure and the course which can be adopted by the Magistrate as held by a Full Bench of this Court in ***Ram Babu Gupta and another Versus State of U.P. and others 2001 (3) Cr.L.J. 3363.***

23. It is thus clear that power of the Magistrate under Section 156 (3) of the Code for directing investigation may be discretionary, but the same is to be exercised judiciously. The discretion, therefore, has to be exercised by the Magistrate on his own, from the facts stated in the complaint and not upon the view of the police and that too, not arbitrarily. So far as the police is concerned, it is under a statutory mandate of registering report under Section 154 of the Code as when the information is given regarding commission of a cognizable offence and dereliction of police officer in discharge of the above statutory duty cannot be taken lightly but deserves to be taken in a more stricter manner.

24. In the case in hand, the Magistrate though has held that a civil dispute between the parties, was pending in the Court of Civil Judge, Farrukhabad but simultaneously he has permitted the revisionist to file a complaint, meaning thereby, he has not found that the information is incorrect or appears to be false or that the information does not constitute a cognizable offence but impressed with the fact that the police does not believe the information of the revisionist, and that it has taken proceedings under Sections 107 and 116 of the Code, he has rejected the application though has made it open to the applicant to file complaint. In view of **Ram Babu Gupta, (Supra)** he could have treated the application as complaint under Section 190 of the Code and proceeded accordingly.

25. I therefore, while having no doubt on the exposition of law that power of Magistrate under Section 156 (3) of the Code is discretionary but is clearly of the view that it has not been correctly exercised by the court below in the case in hand and the order impugned is erroneous and is liable to be set-aside.

26. However, this matter does not end here. It is true that for an orderly society, the importance of an effective and efficient police force dedicated to the public service is of utmost importance and is the necessity of the time. It is a matter of common knowledge that the people run from pillar to post after occurrence of a serious crime for mere registration of the report but the concerned police authorities failed to realise trauma and harassment of such people and simply ignore the observance of their statutory duty despite of the same being declared mandatory and is the law of the land settled by the Apex Court. Crime detection and adjudication are two separate though inseparable wings of justice delivery system. The former is the basic obligation of the police and latter is in the hands of judiciary. Though the Code provides for an alternative remedy of approaching the Superintendent of Police and thereafter to the Magistrate concerned under Section 156 (3) but such remedy instead of providing any solace and relief to the harried lot, on the contrary is adding to their sufferance due to persistent lacklustre attitude of Police compelling a common man to run from one authority to another for a simple cause of registration of an information constituting commission of a cognizable offence, so that the police may make investigation according to the procedure prescribed in the Code.

27. The Subordinate Courts are already heavily burdened with the huge number of such cases where the people

having approached the Police authorities in vain, then had approached the Magistrate concerned under Section 156 (3). Even this Court is now being burdened for the only reason that the information has not been registered by the Police under Section 154 of the Code. What normally ought to have been an exception has turned out to be a routine exercise. A very large number of applications are being filed under Section 156 (3) of the Code before the Magistrates concerned and consequential proceedings are coming frequently to this Court also. Huge time is consumed only in such matters though it could have been utilized for other matters of substance and that too only for the reason that the police has shown blatant slackness in observance of its statutory obligations. It appears that the police is conveniently omitting to remind itself that its fundamental and basic duty is to prevent occurrence of any crime and if it has already occurred, to investigate and detect the crime so as to bring the accused to justice. The first step in this regard is as soon as the information of a cognizable offence is received, it must register the same and thereafter to proceed to investigate the matter in accordance with law.

28. This Court also take judicial notice of the fact that the tendency developed with the police authorities in refusing to register F.I.R. is not for any valid reason, as said above, but perhaps for administrative reasons namely to show to the higher authorities improvement of law and order in the area within their jurisdiction on the ground that number of F.I.R. registration has got down drastically comparing to the corresponding past or in respect to the period when some other police officers were posted thereat. It appears that the State Government and the higher authorities of the police department, while assessing the performance of a police Officer-in-Charge of a police station, take into consideration whether FIR's have reduced comparing to the predecessor in office as a major factor to judge the position of law and order. The basic data taken into account by the State Government or the higher authorities of the police department is the number of F.I.R. of cognizable offence registered in the concerned police station. Probably this has led the tendency in the concerned police authorities to refuse recording of F.I.R. and thereby creating artificially good record showing reduction in crime rate due to lessor recording of F.I.R. It totally ignores the fact that due to none registration of F.I.R. in a large number of cases, pertaining to cognizable offence, the people are compelled to approach the Magistrate by filing applications under Section 156 (3) of the Code. This demonstrates that the declaration of law by the Apex Court as well as this Court that police is under a statutory obligation to register F.I.R. has gone down on blind eyes with the police authorities as well as the Government. The situation has not shown any improvement in the method of functioning of the police authorities in such matters despite of repeated observations by the Court.

29. The Court cannot overlook the fact that criminal justice system in the State is already over burdened. A large number of vacancies of judicial officers in subordinate courts are lying for one or the other reason. Mere inaction on the part of police authorities in observance of their statutory duty and/or faulty system of investigation is adding further to the

already over burdened justice system. This has gone to an extent that the people who are arrested in the early younger age are still awaiting for their trial etc. though have attained advanced old age. In many of the matters, large number of accused have died but the court proceedings could not have been completed and even not commenced in some of the cases. In many others the trial etc. suffers due to death of material witnesses due to prolonged time taken in the Courts. At this stage, it would be prudent to notice some of the observations/directions of the Apex Court in ***Lalita Kumari Vs. Government of Uttar Pradesh and others 2008 (7) SCC 164***. Paras 4 and 5 the Apex Court held :

4. It is a matter of experience of one of us (B.N. Agrawal,J.) while acting as Judge of the Patna High Court, Chief Justice of the Orissa High Court and Judge of this Court that inspite of law laid down by this Court, the police authorities concerned do not register FIRs unless some direction is given by the Chief Judicial Magistrate or the High Court or this Court. Further, experience shows that even after orders are passed by the Courts concerned for registration of the case, the police does not take the necessary steps and when matters are brought to the notice of the inspecting Judges of the High Court during the course of inspection of the Courts and Superintendents of Police are taken to task, then only FIRs are registered. In a large number of cases investigations do not commence even after registration of FIRs and in a case like the present one, steps are not taken for recovery of the kidnapped person or apprehending the accused person with reasonable dispatch. At times it has been found that when harsh orders are passed by the members of the judiciary in a State, the police becomes hostile to them, for instance, in Bihar when a bail petition filed by a police personnel, who was the accused was rejected by a member of the Bihar Superior Judicial service, he was assaulted in the courtroom for which contempt proceeding was initiated by the Patna High Court and the erring police officials were convicted and sentenced to suffer imprisonment.

5. On the other hand, there are innumerable cases that where the complainant is a practical person, FIRs are registered immediately, copies thereof are made over to the complainant on the same day, investigation proceeds with supersonic jet speed, immediate steps are taken for apprehending the accused and recovery of the kidnapped persons and the properties which were the subject-matter of theft or dacoity. In the case before us allegations have been made that the Station House Officer of the police station concerned is pressurising the complainant to withdraw the complaint, which, if true, is a very disturbing state of affairs. We do not know, there may be innumerable such instances.

30. It is high time now that this Court must endeavour to find out some ways to make the police authority adhere to their statutory duties. The time perhaps has ripened when this Court in exercise of its inherent power must look into this disease in a more serious manner and find out ways by issuing appropriate directions to the concerned authorities, which may result in compelling the police authorities either to observe their statutory duties faithfully or to face consequences.

31. In the above facts and circumstances, this revision is allowed. The impugned order dated 13.02.2009 passed by Special Judge (D.A.A.) Farrukhabad in Misc. Case No. 4/12/08 (Roop Ram Vs Sonu and another) is hereby set-aside. The matter is remanded back to the Special Judge (D.A.A.) Farrukhabad to re-consider the application of the revisionist and pass a fresh order in accordance with law.

32. Considering the above observations this Court gives further the following directions:

(i) When a Police Officer-in-Charge of the police station or any other police Officer, acting under the directions of the Officer-in-Charge of police station refuses to register an information disclosing a cognizable offence, the informant may either approach the Superintendent of Police under Section 154 (3) or the Magistrate concerned under section 156 (3) of the Code.

(ii) If the Informant approaches the Superintendent of Police, who finds that the refusal of registration of F.I.R. by the police Officer-in-Charge of the police station was unjust or for reasons other than valid, and where he directs for investigation, he shall initiate disciplinary proceedings against the Officer-in-Charge of the police station for such non observance of statutory obligation treating the same to be a serious misconduct justifying a major penalty and complete the proceedings within three months from the date he passes an order for investigation into the matter.

(iii) Where, the informant approaches the Magistrate concerned under Section 156 (3) of the Code and the Magistrate ultimately finds that information discloses a cognizable offence and direct the police to proceed for investigation, he shall cause a copy of the order sent to Superintendent of Police/Senior Superintendent of Police (hereinafter referred to as the S.P/S.S.P) of the concerned district and such S.P./S.S.P. shall cause a disciplinary inquiry into the matter to find out the person guilty of such dereliction of duty i.e. failure to discharge statutory obligation i.e. registration of an information disclosing cognizable offence treating the said failure as a serious misconduct justifying major penalty and shall complete the disciplinary proceedings within three months from the date of receipt of the copy of the order from the concerned Magistrate. After completing the disciplinary proceedings, the S.P./S.S.P. concerned shall inform about the action taken against the concerned police Officer-in-Charge of the police station to the Magistrate concerned within 15 days from the date of action taken by him but not later than four months from the date of receipt of the copy of the order from the Magistrate concerned.

(iv) The Magistrate concerned shall review the cases in which the copy of the orders passed under Section 156 (3) of the Code has been sent to concerned S.P./S.S.P. quarterly and when it is found that the concerned S.P./S.S.P. has also failed to comply with the above directions of this Court, he shall sent a copy of his order along with the information about non- compliance of this Court's order/direction by the concerned S.P./S.S.P. to the Director General of Police, U.P., Lucknow and the Principal Secretary (Home), U.P., Lucknow who

shall look into the matter and take appropriate action as directed above against the police Officer-in-Charge of the police station concerned as well as the S.P./S.S.P. concerned for his inaction also into the matter within three months and communicate about the action within next one month to the Magistrate concerned. The Principal Secretary (Home), U.P., Lucknow and the Director General of Police, U.P. Lucknow shall also submit a report regarding number of the cases informed by the concerned Magistrate in a calender year and also the action taken, by them as directed above by the end of February of every year to the Registrar General of this Court.

(v) Besides above, non compliance of the above directions of this Court shall also be treated to be a deliberate defiance by the concerned authorities above mentioned constituting contempt of this Court and may be taken up before the Court concerned having jurisdiction in the matter, whenever it is brought to the notice of this Court.

The Registrar General of this Court is directed to send a copy of this order forthwith to the Principle Secretary (Home), U.P. Lucknow, the Director General of Police, U.P. Lucknow so that they may issue necessary instructions in respect of the compliance of the various directions contained in the judgement to the concerned S.P./S.S.P. of the concerned districts of the State of U.P. and also to the various Police Officers-in-Charge of the concerned police stations apprising them about the directions of this Court and for compliance thereof.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.05.2009

BEFORE
THE HON'BLE SUBHASH CHANDRA AGARWAL, J.

Criminal Revision No.350 of 2001

Hari Prakash Kasana ...Revisionist/ Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Anurag Khanna

Counsel for the Opposite Party:
Sri V.M. Zaidi

Code of Criminal Procedure-Section-438-direction for lodging FIR against S.H.O.-while deciding bail application by the Session Judge-two police constable involved in offence7/13 prevention of corruption Act, read with 348 IPC during course of argument that those constable were forced for taking bribery and were subjected to manhandled by concern S.H.O.-duly supported by medical report-direction to lodge FIR against revisionist-held-illegal. Session Judge executed its jurisdiction-except the Magistrate U/s 156 (3)-the Session Judge has no jurisdiction.

Held: Para 9

After hearing the learned counsel for the revisionist and learned AGA, I find that order passed by the learned Sessions Judge directing the registration of FIR against the revisionist cannot be sustained and is liable to be set aside. In the code of criminal procedure, the powers to direct for registration of FIR has been specifically conferred on the Magistrate under Section 156 (3) Cr.P.C. If such an application was moved before the Magistrate and was rejected, only

then in revision, the Sessions Judge could have directed the Magistrate to pass appropriate orders but the Sessions Judge himself cannot direct for registration of FIR against any person. If the learned Sessions Judge was of the opinion that there was some truth in the allegations made by Mohd. Arif Khan, he should have directed Mohd. Arif Khan to file complainant before the Magistrate or to move an application under Section 156 (3) Cr.P.C. Before the Magistrate. While deciding an application for bail learned Sessions Judge exceeded his jurisdiction in directing the registration of FIR against Hari Prakash Kasana. Therefore, revision deserves to be allowed.

(Delivered by Hon'ble S.C. Agarwal, J.)

1. Heard Sri Anurag Khanna, learned counsel for the revisionist and learned AGA for the State.

2. This criminal revision has been filed against the order dated 1.2.2001 passed by the learned Sessions Judge, Bijnor in bail application no. 129 of 2001 whereby while granting the bail to the accused Mohd. Arif Khan and Ravindra Raghav, learned Sessions Judge directed for registration of FIR against the revisionist Hari Prakash Kasana, Inspector P.S. Kotwali, District-Bijnor for committing an offence punishable under relevant provision of the Indian Penal Code.

3. In brief the facts of the case are that Mohd. Arif Khan and Ravindra Raghav was accused in Case Crime No.908 of 2000, under Section 7/13 Prevention of Corruption Act and Section 384 IPC, P.S. Kotwali City, District-Bijnor. The prosecution case was that the on 19.10.2000 at 9.15 p.m., complainant Sardar Harbhajan Singh was taken his combine on road and he was stopped by three constables, namely accused Mohd. Arif Khan, Ravindra Raghav and co-accused Gian Prakash and sum of Rs.50/- was demanded as bribe. When bribe was not paid, he was scolded, threatened and beaten by the accused persons. In the meantime, Inspector Hari Prakash Kasana came on the spot and rebuked the constable and obtained a written report from Sardar Harbhajan Singh, on the basis of which FIR was registered on 20.10.2000, at about 4.30 p.m.

4. At the time of hearing of the bail application on behalf of Mohd. Arif Khan and Ravindra Raghav, it was argued on their behalf that no case under Section 7/13 of Prevention of Corruption Act was made out and at the most it was a matter of extortion punishable under relevant provision of the Indian Penal Code. It was further submitted before learned Sessions Judge that SHO H.P. Kasana was a very corrupt officer and he pressurized the police constables to give him hush money and when they refused, they were manhandled and accused Mohd. Arif Khan was beaten by Mr. Kasana. Mohd. Arif Khan got himself medically examined on 20.10.2000 and injuries were found on his person. It was further argued that FIR was obtained by H.P. Kasana from the complaint in the back date.

5. Agreeing with the submission made by the learned counsel for the accused persons, learned Sessions Judge was convinced that Mohd. Arif Khan was manhandled by the SHO, therefore, while granting bail to the accused Mohd. Arif Khan and Ravindra Raghav, the Sessions Judge directed that a case be registered against Mr. Hari Prakash Kasana,

Inspector P.S. Kotwali City, District-Bijnor for committing an offence under the relevant provisions of Indian Penal Code and that of misconduct on the basis of statement of Mohd. Arif Khan and directed investigation by a Senior Officer. Senior Superintendent of Police CBCID was directed to nominate a Senior Officer to investigate the matter. Against the impugned order Hari Prakash Kasana had preferred this revision.

6. It is submitted by the learned counsel for the revisionist that while deciding the application for bail, learned Sessions Judge had no jurisdiction to order for registration of FIR against the revisionist. It is contended that only provision in the Cr.P.C. regarding registration of FIR is under Section 154 and Section 156 (3). Under Section 156 (3) Cr.P.C. only Magistrate is empowered to direct the police to register the FIR and to make an investigation if prima facie cognizable offence is made out. Under Section 154 Cr.P.C., the police can register the FIR on the basis of written report or oral statement made by the complainant.

7. It is further submitted that the Sessions Judge himself cannot exercise the powers conferred on the Magistrate while deciding an application for bail.

8. Learned AGA is unable to defend the impugned order. It is submitted by him that if the Sessions Judge was of the opinion that an investigation into oral complaint made by Mohd. Arif was required, he should have directed him to present himself before the Magistrate for filing an application under Section 156 (3) Cr.P.C. or to file complaint under Section 190 Cr.P.C.

9. After hearing the learned counsel for the revisionist and learned AGA, I find that order passed by the learned Sessions Judge directing the registration of FIR against the revisionist cannot be sustained and is liable to be set aside. In the code of criminal procedure, the powers to direct for registration of FIR has been specifically conferred on the Magistrate under Section 156 (3) Cr.P.C. If such an application was moved before the Magistrate and was rejected, only then in revision, the Sessions Judge could have directed the Magistrate to pass appropriate orders but the Sessions Judge himself cannot direct for registration of FIR against any person. If the learned Sessions Judge was of the opinion that there was some truth in the allegations made by Mohd. Arif Khan, he should have directed Mohd. Arif Khan to file complainant before the Magistrate or to move an application under Section 156 (3) Cr.P.C. Before the Magistrate. While deciding an application for bail learned Sessions Judge exceeded his jurisdiction in directing the registration of FIR against Hari Prakash Kasana. Therefore, revision deserves to be allowed.

10. The revision is allowed. Part of the order dated 1.2.2001 passed by the learned Sessions Judge, Bijnor on bail application No.129 of 2001 in Case Crime No. 908 of 2000, P.S. Kotwali City, Bijnor directing the registration of FIR against Hari Prakash Kasana and further directing the investigation by a Senior Officer of C.B.C.I.D. is set aside.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.05.2009

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

Civil Misc. Writ Petition No.2167 of 1992, 2168 of 1992,5513 of 1992,2169 of 1992,2821of1992,10957 of 1992,24132 of 2003

Rakesh Kumar Singh and others ...Petitioners
Versus
District Magistrate, Maharajganj and others ...Respondents

Counsel for the Petitioners:
Sri Suresh Chandra Dwivedi

Counsel for the Respondents:
Sri Ashok Mehta

Constitution of India, Art. 226-Appointment-Dismissal order passed by District Magistrate-without disclosing any reason for dismissal-petitioners were appointed by the D.D.O. inspite of restraint order passed by D.M. without following procedure for appointment-interview held by compelling the members of committee to affixed their signature on plain paper-appointment termed as fraudulent based on extraneous considerations-but termination also made without following the procedure-even no reason disclosed-held-illegal-reinstatment with direction to work on their respective basic pay without increments through out service life-D.D.O. to pay one lace Rs. To each of petitioners towards compensation, in case of death amount shall be recorded from the assets of erring D.D.O.

Held: Para 16

Accordingly, as held above, on the one hand, all the appointments were utterly illegal and fraudulent; the then D.D.O., Shiv Ram Bhatt made the appointment for extraneous considerations and no rule was followed. Appointments were made in spite of restraint order by the D.M. No interview was held for these posts. Reasonable opportunity to apply was not provided to the general public. Accordingly, all the appointments were illegal. However, I find that the cancellation order dated 16.01.1992 is also not in accordance with law as it did not give any reason and due to this callousness of the then D.M., all the writ petitioners got stay orders from this Court.

Case law discussed:
AIR 1997 SC 399

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

1. Heard learned counsel for the parties.

2. These are unusual cases. Neither appointments of the petitioners nor order of cancellation of appointment is in accordance with law. Accordingly, unusual relief has to be granted to the petitioners. In the first writ petition, there are six petitioners. In the second writ petition, there are nine petitioners. In the third writ petition, there is one petitioner. In the fourth writ petition, there are two petitioners. In the fifth writ petition, there is one petitioner. In the sixth writ petition, there are two petitioners. In the seventh writ petition, there are six petitioners.

3. Petitioners of W.P. Nos.2167, 2168 and 5513 (first three writ petitions) were appointed as clerks by District Development Officer (D.D.O.), Maharajganj on 13.01.1992. All the appointments of class III & IV employees made in the office of District Development during last six months were cancelled by D.M. Maharajganj by order

dated 16.01.1992 which is only of two lines. In the first line it was mentioned that all the appointments on classes III & IV posts in the office of District Development during last six months were cancelled therewith. In the second line, it was mentioned that the all the employees appointed in this manner would be treated to have been relieved from the duty from the date of the order. Absolutely, no reason was mentioned in the termination order and no opportunity of hearing was provided. However, in the counter affidavit, excellent reasons have been provided. According to the allegations made in the first three writ petitions, advertisement for 12 clerks in the office in question was issued on 02.12.1991 and published in daily Hindi Newspaper "Daink Jagaran' on 05.12.1991. In the advertisement, it was provided that applications could be filed by 07.12.1991 and interview would be held on 23rd and 24th December, 1991. Thereafter, another advertisement was issued in the same newspaper on 11.01.1992 to the effect that interview, which was scheduled to be held on 23rd and 24th December 1991, would be held on 13th and 14th January 1992 in the office of District Development Officer, Maharajganj. Thereafter, it is alleged that interview was held on 13.01.1992. Appointment letters are Annexure-5. Appointment letters were issued by D.D.O., Maharajganj on 13.01.1992.

4. In W.P. Nos.2167, 2168 and 5513, petitioners, who are 16 in total, claimed to have been appointed as clerk against advertisement on 13.01.1992. It has not been explained that how against 12 advertised posts, 16 persons could be appointed.

5. As absolutely no reason was given for cancelling the appointments, hence this Court had no option except to grant interim order in all the writ petitions.

6. In the counter affidavit, a horrible state of affairs has been disclosed. The appointments made were a fraud played by the then D.D.O., who was to retire on 31.01.1992. In the first advertisement, which was published in the newspaper on 05.12.1991, the last date for receipt of application was mentioned as 07.12.1991, i.e. only three days' time was granted. The Supreme Court in **AIR 1997 SC 399 "Chander Chinar Bada Akhara Udasin Society Vs. State of J. & K."** has held that even one weeks time for applying is too short and arbitrary. Accordingly, D.M. through order dated 19.12.1991 directed that time to file applications should be extended till 30.12.1991, however D.D.O. did not comply with that and did not issue any corrigendum or second advertisement. Accordingly, D.M. through order dated 21.12.1991 cancelled the selection process. Copy of the said order is Annexure-1 to the counter affidavit.

7. The D.M. was away from the District from 10th to 18th January 1992. Taking advantage of his absence, D.D.O. issued fresh advertisement in the newspaper on 11.01.1992 stating that the interview which had been cancelled would be held on 13rd and 14th January 1992. It is also stated that Munsif City, Maharajganj through an interim order passed in O.S. No.21 of 1992 on 13.01.1992 had stayed the interview, which was scheduled to be held on 13.01.1992. On 13.01.1992, In-charge D.M., Maharajganj issued a direction to

D.D.O. not to hold the interview on 13th and 14th January 1992. In spite of these directions, interview was held on 13.01.1992. Typing test was not taken. Apart from their names, no other questions were asked from the applicants. The members of the interview board gave letters to the D.M. Maharajganj that D.D.O. compelled them to participate in the interview. On 13.01.1992, itself appointment letters were issued and selected candidates joined. Two of the selected candidates, i.e. Dharmnath Prasad and Rajeev Kumar Srivastava on the same date joined at another Vikas Khand, which is at a distance of 45-50 kms. from the head office where interview was held. It is also stated that the selection committee was not formed in accordance with relevant rules.

8. As interview was advertised to be held on 13th and 14th hence there was no occasion to declare result, issue appointment letters and take joining reports on 13th January 1992. The tearing hurry proves only one thing, i.e. as fraud had been exposed, there was large scale hue and cry, In-charge D.M. and Munsif had issued restraint orders hence D.D.O. was not in a position to wait till 14th otherwise his plan would have failed.

9. From the above, it is quite clear that the D.D.O. for extraneous considerations had already made the selection and advertisement, interview etc. were merely a show of fulfilment of formalities. Three days' time to file application is utterly illegal. D.M. had already directed that selection process should be cancelled. D.M. as administrative head of the District has got full authority to check illegal activities of sub-ordinate officers.

10. However, the D.M. also did not give any reason in the order dated 16.01.1992 cancelling the appointments. If even the gist of the reasons given in the counter affidavit had been mentioned in the cancellation order, this Court would not have granted the stay orders.

11. Local M.L.A. had written a letter to the D.M., copy of which is annexed along with the counter affidavit filed in Writ Petitions No.2168 and 5513. In the said complaint, it was stated that Sri Shiv Ram Bhatt, D.D.O. wanted to appoint two of his sons and it was for this reason that in the advertisement published on 05.12.1991, applicants were not required to give their fathers' name. This allegation is substantiated by Annexure-3 to the writ petition No.2168, which is copy of advertisement. In the proforma of the application given in the Newspaper advertisement, there is no column for father's name.

12. One of the members of selection committee was Udai Chandra Prasad, B.D.O., Lakshmipur, Maharajaganj. He wrote a letter to D.M., Maharajganj on 20.01.1992 stating that as a Scheduled Caste member of selection committee, he was forced to participate in the interview on 13.01.1992 along with D.D.O. and Dr. Gilani. In Para-3 of the counter affidavit filed in W.P. No.2168, it has been stated that one of the members of selection committee, Dr. Gilani stated that D.D.O. got his signatures on blank papers and he had not awarded any marks to any candidate according to his performance and ability.

As far as Writ Petition No.2169 of 1992 (IV petition) is concerned, it has been filed by two petitioners. They claim

that they were appointed as messengers on ad hoc basis in the office of B.D.O./ Shiswa and Lakshmipur on 15.10.1991. They further allege that the said posts were advertised (Para-10 of the writ petition) and they appeared before the selection committee on 13.01.1992 in the office of D.D.O. Thereafter, it is mentioned in Para-13 that posts were advertised on the notice board of the office on 02.12.1991. Through order of D.M. dated 16.01.1992, their appointments also stood cancelled. Admittedly posts were not advertised in any news papers, hence apart from the reasons given in the earlier part of this judgment for holding the appointments of the petitioners of first three writ petitions to be illegal, appointments of both the petitioners of W.P. No.2169 of 1992 were illegal on the additional ground that posts were not advertised in the newspapers.

13. As far as Writ Petition No.2821 of 1992 (V petition) is concerned, its petitioner has alleged that he was appointed as driver by D.D.O., Maharajaganj on 12.04.1991 as daily wager and thereafter appointment was converted into ad hoc appointment by order of D.D.O. dated 21.10.1991. In the order dated 21.10.1991, there is a reference to some earlier order dated 05.10.1991, copy of which has not been annexed. In the said order, it is also mentioned that petitioner was being returned to Development Block, Brijman Ganj and appointed as substitute as Block Development Officer, Brijman Ganj had intimated that no fund was available in contingency fund for payment to Jeep driver. It clearly means that there was no vacant post of Jeep driver available. Accordingly, appointment of the petitioner of this writ petition was utterly illegal and it also stood cancelled by order dated 16.01.1992.

14. As far as Writ Petition No.10957 of 1992 (VI petition) is concerned, both the petitioners of the said writ petition claim that they were appointed as watchman, that they were working on ad hoc basis since 17.07.1991, that regular vacancies of watchmen were advertised (Para-10). However, the form of advertisement is not mentioned in the said para. In Para-13, it is mentioned that on 02.12.1991, vacancies were notified on the notice board of the office. It has further been stated in Para-11 that petitioners appeared before the selection committee on 13.01.1992 in the office of D.D.O., Maharajaganj and they were issued appointment on 13.01.1992. Annexure-4 to the writ petition is appointment letter dated 01.10.1991 by the D.D.O. Maharajaganj. Annexure-5 is the appointment letter dated 13.01.1992. It also stood set aside by order dated 16.01.1992. As the posts were not advertised in the newspaper, hence appointment was also illegal on this additional ground.

15. As far as Writ Petition No.24132 of 2003 (VII petition) is concerned, it has been filed by the same petitioners, who had filed Writ Petition No.2167 of 1992. Writ Petition No.2167 of 1992 was dismissed as infructuous on 19.04.2002. Thereafter, services of the petitioners were terminated on 08.05.2003 on the ground that writ petition No.2167 of 1992 had been dismissed. Order dated 08.05.2003 has been challenged through writ petition No.24132 of 2003. However Writ Petition No.2167 of 1992 was restored afterwards and the same is also being decided through this judgment.

16. Accordingly, as held above, on the one hand, all the appointments were utterly illegal and fraudulent; the then D.D.O., Shiv Ram Bhatt made the appointment for extraneous considerations and no rule was followed. Appointments were made in spite of restraint order by the D.M. No interview was held for these posts. Reasonable opportunity to apply was not provided to the general public. Accordingly, all the appointments were illegal. However, I find that the cancellation order dated 16.01.1992 is also not in accordance with law as it did not give any reason and due to this callousness of the then D.M., all the writ petitioners got stay orders from this Court.

17. Accordingly, writ petitions are disposed of with following directions:

18. All the petitioners must be permitted to continue to work on the posts on which they were appointed until they attain the age of superannuation. However they must be paid the salary at the lowest level of the same pay scale on which they were appointed. They must not be entitled for any increment or any revision of pay subsequently affected. Petitioners of the first three writ petitions were appointed in the pay scale Rs.950-1500/-. Accordingly, they must be continued to be paid only the basic pay of Rs.950/- basic without any increment or benefit of revision of pay apart from dearness allowance admissible on Rs.950/- pay. No other allowances shall be given to them. They shall not be entitled for any promotion. If any promotion has already been granted, the same shall stand withdrawn with immediate effect. They shall not be entitled for any retiral benefit apart from the amount which they may have contributed towards provident fund. However, salaries and other benefits paid to the petitioners till date shall not be refundable.

19. Sri Shiv Ram Bhatt, the then D.D.O. is liable to pay damages of Rs.1 lac for each of the petitioners (total Rs.21 lacs). This amount shall be recovered from him like arrears of land revenue. If he has died, the amount shall be recovered from the property left behind by him. Recovery shall positively be made by the Collector concerned within four months and the amount shall be deposited in the government treasury. The other two members of selection committee are also liable to pay Rs.25,000/- each per petitioner as damages to the State (5.25 lacs each) as they were equal partners in illegal design of D.D.O., Sri Shiv Ram Bhatt. . The said amount shall also be recovered from them in the same manner.

20. Compliance report shall be filed within six months.

21. Office is directed to supply a copy of this judgment to learned Chief Standing Counsel within a week.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.05.2009

BEFORE
THE HON'BLE S.P. MEHROTRA, J.

Civil Misc. Writ Petition No. 1671 of 2006

Bachchu Ram Singh & another ...Petitioner
Versus
Additional Commissioner (Judicial) Allahabad Division & others ...Respondents

Counsel for the Petitioners:
Sri Mahendra Narain Singh
Sri Mahesh Narain Singh

Counsel for the Respondents:
Sri V.K. Singh
Sri B.N. Singh
Sri Dhirendra Singh
S.C.

U.P.Z.A. & L.R. Act-Section 34-correction of forged entry-forged and fraudulent entry can not be allowed to continue-but the entry can be corrected only after giving opportunity of hearing to the effected persons-order passed in violation of the principle of Natural Justice can not sustain.

Held: Para 30

This decision thus lays down that whether an entry in revenue record is fake or based on some forgery or fraud is a question of fact and is required to be established and proved like any other fact which necessarily implies an opportunity of hearing to the affected persons. The finding in respect of fraud or forgery cannot be recorded ex parte and it cannot be ruled that the principles of natural justice in such cases have no application at all. Thus in accordance with principles of natural justice a notice and opportunity of hearing to the affected person is a must before expunging entry even in cases where the authority is prima facie of the opinion that entry was a result of some fraud, forgery or manipulation.

Case law discussed:
2005 (98) RD 244, 2005 (1) AWC 919.

(Delivered by Hon'ble S.P. Mehrotra, J.)

1. The present Writ Petition has been filed by the petitioners under Article 226 of the Constitution of India, inter-alia, praying for quashing the Judgment and Order dated 29.11.2005 (Annexure-6 to the Writ Petition) passed by the Additional Commissioner (Judicial), Allahabad Division, Allahabad (respondent no. 1) and the Judgment and Order dated 28.3.2005 (Annexure-4 to the Writ Petition) passed by the Sub-Divisional Officer, Khaga, Fatehpur (respondent no. 2).

2. It is, inter-alia, averred in the Writ Petition that the land in question was initially recorded as Naveen Parti, and by resolution of the Gaon Sabha dated 18.9.1969, the Patta was granted for the School in question. Copy of the said Resolution dated 18.9.1969 of Gaon Sabha has been filed as Annexure-1 to the Writ Petition.

3. It is, inter-alia, further averred in the Writ Petition that after the grant of the aforesaid Patta, the name was also recorded in the revenue record by the order of the Sub-Divisional Officer, Khaga in Case no. 754, Junior High School Vs. Gaon Sabha. Copy of the Order dated 28.7.1970 passed in Case no. 754 has been filed as Annexure-2 to the Writ Petition.

4. It is, inter-alia, further averred in the Writ Petition that since then, the School in question is running over the land in question, and the Junior High School has upgraded to Intermediate College; and that for the welfare of the public at large in the locality, the Graduate College was opened, and the same has also been recognized by the State Government with Art subject and that for the purposes of Degree College, namely, Ram Swaroop Singh Mahavidyalaya Ayurveda Shiksha Snatak Mahavidyalaya, Arhauli, District Fatehpur, the land in question has been

purchased after fulfilling all formalities through Gyan Singh, Manager of the Inter College on 4.9.2002 by registered Sale Deed, and the name has been mutated in the revenue records. Copy of the said Sale Deed dated 4.9.2002 has been filed as Annexure-3 to the Writ Petition, a perusal whereof shows that the said Sale-Deed was executed by Gyan Singh, Manager, Arhauli Inter College, Arhauli in favour of Bachchu Ram Singh, Ram Swaroop Singh Mahavidyalaya Ayurveda Shiksha Snatak Mahavidyalaya, Arhauli, District Fatehpur.

5. It is, inter-alia, further averred in the Writ Petition that an order dated 28.3.2005 (Annexure-4 to the Writ Petition) was passed by the Sub-Divisional Officer, Khaga, Fatehpur (respondent no. 2). By the said Order dated 28.3.2005, the name of Bachchu Ram Singh, Ram Swaroop Singh Mahavidyalaya Ayurveda Shiksha Snatak Mahavidyalaya, Arhauli, (petitioners) was directed to be expunged from the revenue record.

6. It is, interalia, further averred in the Writ Petition that no notice or opportunity of hearing was given to the petitioners before passing the said order.

7. It is, inter-alia, further averred in the Writ Petition that as soon as the said Order dated 28.3.2005 came into the knowledge of the petitioners, a revision was immediately filed before the Commissioner, Allahabad Division, Allahabad. Copy of the memorandum of Revision dated 20.5.2005 has been filed as Annexure-5 to the Writ Petition.

8. By the order dated 29.11.2005 (Annexure-6 to the Writ Petition), the respondent no. 1 dismissed the said Revision filed by the petitioners.

9. Thereafter, the petitioners have filed the present Writ Petition seeking the reliefs as mentioned above.

10. A Supplementary Affidavit, sworn on 16.1.2006, was filed on behalf of the petitioners. Photostat copy of the Sirdari Patta dated 12.1.1970 granted in favour of Junior High School, pursuant to the Resolution dated 18.9.1969 of Gaon Sabha, has been filed as Annexure SA-1 to the said Supplementary Affidavit. Photostat copy of Khatauni for the period 1376-1378 Fasli has been filed as Annexure SA-2 to the Supplementary Affidavit, which shows amaldaramad over the land in question in favour of the Junior High School, Arhauli as Sirdar on 10.9.1970.

11. A Counter Affidavit on behalf of the respondent no. 4 (Gaon Sabha, Arhauli) has been filed.

12. A Supplementary Counter Affidavit has also been filed on behalf of the respondent no. 4.

13. It is, inter-alia, averred on behalf of the respondent no. 4 in the supplementary counter affidavit that during the year 1964, the consolidation proceedings took place in village Arhauli; and that since there was no play-ground for the children/students, as such, the land about 19 bighas was allotted in the name of the "School Farm" which was used as play-ground, and for Agriculture work and Bagwani by the students and that the land is in use of/by Basic Primary School and by local youth as play-ground for a long time; and that the *Nakal Khatauni* of

the "School Farm" issued by the Tehsildar, Khaga for 1411-1416 Fasli shows 25 plots in the name of the "School Farm" out of which 12 plots were sold by Gyan Singh to Bachchu Ram Singh and *Ram Swaroop Singh Mahavidyalaya Ayurveda Shiksha Snatak Mahavidyalaya, Arhauli, District-Fatehpur*. Copy of the said Nakal Khatauni has been filed as Annexure SCA-1 to the said Supplementary Counter Affidavit.

14. A Rejoinder Affidavit has been filed on behalf of the petitioners in reply to the aforesaid Counter Affidavit and Supplementary Counter Affidavit. In the Rejoinder Affidavit, the petitioners have reiterated the facts stated in the Writ Petition and the Supplementary Affidavit. It is, interalia, further stated in the Rejoinder Affidavit that initially the land in question was reserved and allotted in the name of Junior High School/Higher Secondary School, which was being run over the land in question and which was subsequently upgraded into the Degree College and it is on account of the aforesaid subsequent up-gradation of the Junior High School into the Degree College that by Resolution dated 14.11.2001 (Annexure RA-2 to the Rejoinder Affidavit) passed by the Management of the School, certain land was separated for construction of building and for other purposes of the Degree College, and as on date the Degree College is running and imparting education to several thousands of students.

15. I have heard Sri M.N. Singh, learned counsel for the petitioners, the learned Standing Counsel appearing for the respondent nos. 1,2 & 3, and Sri B.N Singh appearing for the respondent no. 4, and perused the record.

16. It is submitted by Sri M.N. Singh, learned counsel for the petitioners that before passing the Order dated 28.3.2005 (Annexure-4 to the Writ Petition) whereby the names of the petitioners were expunged from the revenue records and the name of Gaon Sabha was directed to be recorded, no notice or opportunity was given to the petitioners. Sri Singh refers to Paragraph 11 of the Writ Petition.

17. It is further submitted by Sri M.N. Singh that in any view of the matter, the impugned orders suffer from manifest illegality, and the findings recorded therein are perverse.

18. Sri B.N. Singh, learned counsel for the respondent no. 4 submits that the Sub-Divisional Officer, Khaga, Fatehpur (respondent no. 2) in the Order dated 28.3.2005 has found that the Order of Naib Tehsildar dated 4.7.2003 (mentioned in Annexure SCA-1 to the Supplementary Counter Affidavit filed on behalf of the respondent no. 4) was obtained by committing fraud, and was based on a void Sale Deed dated 4.9.2002, and the same was liable to be set-aside.

19. The said Order dated 28.3.2005, the submission proceeds, was upheld by the respondent no. 1 by its Order dated 29.11.2005 passed in the Revision filed by the petitioners. It is submitted that as the names of the petitioners were recorded by committing fraud, the impugned orders have rightly been passed by the respondent nos. 1 and 2.

I have considered the submissions made by the learned counsel for the parties.

In Paragraph 11 of the Writ Petition, it is stated as under:-

"11. That, no notice or opportunity of hearing has been given to the petitioner before passing aforesaid order dated 28.03.2005 by the respondent no. 2 and as such, as soon as it came into knowledge of the petitioner, immediately a Revision has been filed before the Commissioner, Allahabad Division, Allahabad."

The averments made in Paragraph 11 of the Writ Petition have been replied to in Paragraph 6 to the Counter Affidavit as follows:-

"6. That the contents of Paragraphs no. 9 to 11 of the Writ Petition are matter or record. However, it is submitted that the land in dispute belongs to Gaon Sabha and recorded in the Khata of Gaon Sabha and as such, there is no need with regard to forged entry."

20. It will thus be noticed that the categorical averments made in Paragraph 11 of the Writ Petition that no notice or opportunity of hearing was given to the petitioners before passing the said Order dated 28.3.2005 by the respondent no. 2, have not been specifically denied in the Counter Affidavit.

21. In the circumstances, it is evident that before passing the said Order dated 28.3.2005, the Sub-Divisional Officer, Khaga, Fatehpur (respondent no. 2) did not give any notice to the petitioners. No opportunity of being heard was given to the petitioners before the said Order dated 28.3.2005 was passed.

22. The respondent no. 2, as is evident from a perusal of the said Order dated 28.3.2005, was of the view that in case any order had been obtained by committing fraud, no notice or opportunity of hearing was required to be given.

23. The respondent no. 1 in passing the Order dated 29.11.2005 dismissing the Revision filed on behalf of the petitioners held that no notice was required to be given before cancellation of the names of the petitioners recorded in the revenue records, and again recording the land in question as "**Sarvajanik bhumi**".

24. I am of the opinion that the view of the respondent nos. 1 & 2 that no notice or opportunity was required to be given to the petitioners before expunging their names from the revenue records on the ground that the same had been recorded by committing fraud, is not correct.

25. Admittedly, the entries in the revenue records had already been made in the names of the petitioners. In case the said entries were being expunged/cancelled on the ground of fraud or on any other ground, notice was required to be given to the petitioners to present their version. The recorded entries in the names of the petitioners could have been expunged/cancelled only after giving reasonable opportunity of being heard to the petitioners. This will be in accord with the basic requirements of the principles of natural justice.

26. In this regard, reference may be made to the decisions relied upon by Sri M.N. Singh, learned counsel for the petitioners.

In ***Chaturgun and others Vs. State of U.P. and others, 2005 (98) RD 244***, this Court laid down as under (Paragraphs 8 & 9 of the said RD):

8. Accordingly, it is held that when-ever an entry in the revenue record is to be cancelled and substituted particularly when the entry is continuing for more than a year, notice must be given to the party in whose favour entry, stands even if prima-facie authority/Court concerned (i.e. Deputy Collector/Sub-Divisional Officer in most of the cases) is of the opinion that the entry is result of fake order or fraud. Similarly if name of an Asami pattedar is to be expunged from the revenue records on the ground of expiry of period of patta or any other ground., notice must be given to him before expunging his name. In a recent authority ***Hari Ram V. Collector, 2004 (2) RD 360****, it has been held by this Court that apart from suit for ejectment* ***under section 202 of U.P. Z.A. & L.R. Act****, asami pattedar may be evicted after expunging his name from the revenue records* ***under section 34 of U.P.Z.A. & L.R. Act*** *but it can be done only after providing opportunity of hearing to the pattedar/lessee. However, if entry is expunged or any other order is passed without hearing the person affected then he is entitled to file an application for post decisional hearing and recall of the order before the Court/authority which passed the ex-parte order, if such an application is filed then the Court/authority concerned shall hear the applicant and in case it comes to the conclusion that the earlier order is not correct then the said order shall be set aside. In such situation it is not necessary to first set aside the order and then hear the party concerned. Alongwith such application such evidence must be filed which the party considers necessary for his case. It has been held by the Supreme Court in* ***A.M.U. Aligarh v. M.A. Khan, AIR 2000 SC 2783,*** *that a person who complains about denial of opportunity of hearing must show that in case opportunity had been provided to him, what cause he would have shown or what defence he would have taken. (Similar view has been taken in* ***S.L. Gupta v. A.D. Gupta, 2003 AIR SCW 7089 (para 29), and Canara Bank v. S.D. Das, AIR 2003 SC 2041****, supra). Against ex-parte orders of expunging of names it is not proper to file revision and appeal etc. directly. However, if revision, appeal etc. is directly filed then revisional Court/appellate Court may also instead of deciding the revision or appeal on merit may grant leave to the affected party to apply for post decisional hearing and recall of order before the Trial Court/authority. The revisional/appellate authority may also decide the matter on merit after providing opportunity of post decisional hearing (i.e. opportunity to show that earlier entry was not fake) as mentioned in the judgment of Supreme Court in Canara Bank (supra).*

9. Revenue authorities/Courts must remember that a party can in some cases successfully show that entry of his name in the revenue record is correct and not fake or based upon

fake order. This question can be decided only and only after hearing the party concerned and likely to be affected."

(Emphasis supplied)

27. This decision thus lays down that whenever an entry in the revenue record is to be cancelled and substituted, notice must be given to the party in whose favour entry stands even if prima facie the authority/Court concerned is of the opinion that the entry is result of fake order or fraud.

28. In ***Shardadeen Vs. State of U.P. and others, 2005 (1) AWC 919,*** this Court held as under (Paragraph 3 of the said AWC):

"3. Today I have decided Writ Petition No. 14 of 2005, Chaturgun and others v. State of U.P. and others, involving similar point. In the said judgment after discussing several decisions of Supreme Court I have held that even before cancelling allegedly farzi entries in revenue record it is necessary to hear the person in whose name entry is continuing. In the said judgment I have also held that in case revenue entry is cancelled without hearing person concerned then he can apply for post decisional hearing and recall of order."

(Emphasis supplied)

This decision thus lays down that even before cancelling allegedly farzi entries in revenue record, it is necessary to hear the person in whose name the entry is continuing.

29. In ***Rakesh and others Vs. Collector/District Deputy Director of Consolidation, Baghpat and others, 2006 (2) ADJ 689 (All),*** this Court laid down as under (Paragraphs 12 & 13 of the said ADJ):

"12. It is no doubt correct that entries made in revenue records on the basis of forged or non-existing order cannot be allowed to continue as soon as the facts come to light. However, the question which arises for consideration is whether in such a situation the affected persons are entitled for an opportunity of hearing before the entries of their names could be expunged.

13. Whether an entry in revenue record is fake or based on some forgery or fraud is a question of fact and is required to be established and proved like any other fact which necessarily implies an opportunity of hearing to the affected persons. Equally important is that any action based on fraud has to be set aside and the person cannot be allowed to take any advantage of his own misdeeds even for a moment. But the finding in respect of fraud or forgery cannot be recorded ex parte and it cannot be ruled that the principles of natural justice in such cases have no application at all. It may be that the person affected be possessed of sufficient materials by which he may be able to establish that entries are not a result or based on any fraud or forgery. Thus in accordance with principles of natural justice a notice an opportunity of hearing to the affected person is a must before expunging entry even in cases where the authority is prima facie of the opinion that entry was a result of some fraud, forgery or manipulation."

(Emphasis supplied)

30. This decision thus lays down that whether an entry in revenue record is fake or based on some forgery or fraud is

a question of fact and is required to be established and proved like any other fact which necessarily implies an opportunity of hearing to the affected persons. The finding in respect of fraud or forgery cannot be recorded ex parte and it cannot be ruled that the principles of natural justice in such cases have no application at all. Thus in accordance with principles of natural justice a notice and opportunity of hearing to the affected person is a must before expunging entry even in cases where the authority is prima facie of the opinion that entry was a result of some fraud, forgery or manipulation.

31. In view of the above, I am of the opinion that the Orders dated 28.3.2005 and 29.11.2005 cannot be sustained, and the same are liable to be quashed.

32. Accordingly, the Writ Petition is allowed. The impugned Order dated 28.3.2005 (Annexure-4 to the Writ Petition) passed by the respondent no. 2 and the impugned Order dated 29.11.2005 (Annexure-6 to the Writ Petition) passed by the respondent no. 1, are quashed. The matter is sent back to the respondent no. 2 (Sub-Divisional Officer, Khaga, Fatehpur) for deciding the same afresh in accordance with law after giving reasonable opportunity of being heard to all concerned including the petitioners. The respondent no. 2 will decide the matter expeditiously, preferably, within a period of three months from the date the petitioners and the respondent no. 4 appear before him (Sub-Divisional Officer, Khaga, Fatehpur) along-with certified copy of this order.

33. Sri M.N. Singh, learned counsel for the petitioners and Sri B.N. Singh learned counsel for the respondent no. 4 are agreed that their respective parties will appear before the Sub-Divisional Officer, Khaga, Fatehpur (respondent no. 2) on 13th July 2009 along-with certified copy of this order.

34. On the facts and in the circumstances of the case, there will be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.05.2009

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

First Appeal No. 682 of 1992

Smt. Mithlesh ...Appellant
Versus
The Collectore, Agra and others ...Respondents

Counsel for the Appellant:
Sri K.C. Jain
Smt. Sunita Agrawal

Counsel for the Respondents:
Sri Shreekant
Sri R.C. Srivastava
Sri P.K. Singhal

Land Acquisition Act No. 68 of 1984-Section 28A and 23-Award of additional amount-in addition to market value and interest-appeal confined in respect of rate of interest and for additional amount-reference made on 27.2.90 much after the enforcement amended provision-non payment of excess amount-court under statutory obligation to award interest-held-entitled for interest on damage at the rate of 9% one year of possession 15% thereafter till the date of actual payment.

Held: Para 15

Thus, the second point as raised is answered in favour of the claimant/appellants. They are held entitle to interest at the rate of 9% p.a. for the first year of possession and thereafter at the rate of 15% p.a. on the excess amount awarded by the Tribunal.

Case law discussed:

1991 ALJ 8, 1991 AWC 1376, AIR 1989 SC 1933, (1990) 1 SCC 277, 1995 (1) SCC 367, 2008 AIR SCW 2723, 2009(4) A.D.J. 563, 2008(8) A.D.J. 466

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

1. These are two appeals by the claimants against the judgment, order and award dated 27.2.90 by the Nagar Mahapalika Tribunal, Agra in Land Acquisition Case No.5 of 1975 and 7 of 1975 whereby the claimants have been awarded compensation to the tune of Rs.94,261.92 and Rs.1,53,798.74 respectively, damages @ Rs.18/- per sq. yard and interest thereon at the flat rate of 9% from the date of the possession.

2. The land in dispute was acquired under the provisions of Section 357 of the Nagar Mahapalika Adhiniyam (hereinafter referred to as the 'Adhiniyam') which is para materia with Section 4 of the Land Acquisition Act (hereinafter referred to as the 'Act'). The notification under the aforesaid provision was issued on 23.4.1960 and the notification under Section 363 of the Adhiniyam which is analogous to Section 6 of the Act was issued on 26.9.1964. The possession was taken on 18.6.1971. The Special Land Acquisition Officer made the award on 22.6.72 against which the above two references were preferred by the claimants separately.

3. Heard Sri K.C.Jain learned counsel for the claimant/appellants in both the appeals, Shri Shreekant for respondent no.4 to whom the scheme was transferred and Sri R.C. Srivastava learned standing counsel for respondents no.1, 2 and 3.

4. Learned counsel for the appellants has submitted that he is not pressing his claim for enhancement of the market value as awarded by the Tribunal. He has made two submissions. First, in view of the amended provisions of the Act the claimants are entitle to interest on damages. Secondly, the claimants are also entitle to interest at the higher rate as provided under the amended provisions of Section 28 of the Act i.e. at the rate of 9% for the first year of possession and at the rate of 15% for subsequent years on the excess amount of compensation awarded.

5. A perusal of the impugned award of the Tribunal indicates that the claimant has been awarded damages at the rate of Rs.18/- per sq. yard but on this amount no interest has been given. In the case of ***Neeta Vs. Collector, Agra 1991 ALJ 8*** which was also a case relating to the same acquisition, this Court has ruled that for the delay in awarding compensation the claimant is entitled to damages under Section 48-A of the Act and interest under Section 28 of the Act is also admissible on such damages. To the same effect is another decision of this Court which is reported in ***1991 AWC 1376 Inder Chandra Jain and others Vs. Collector, Agra and others***. No contrary view on the point has been placed. Therefore, in view of aforesaid two decisions it is held that the claimant appellants are is entitle to interest on the damages as awarded by the

reference court on compensation/damages under Section 48-A of the Act.

6. Now comes the second submission of the learned counsel for the appellant as to the rate of interest which is admissible to the claimant/appellants on the excess amount of compensation awarded by the Tribunal if the same is not paid and deposited within one year of taking possession. According to him, under the proviso to Section 28 of the Act (as amended) interest on such excess amount at the rate of 15% per annum is admissible. This has been objected to by Shri Shreekant learned counsel for respondent no.4 and the learned standing counsel and it has been urged that in view of the decision of the Apex Court in the case of ***Union of India Vs. Raghubir Singh reported in AIR 1989 SC 1933*** the interest of 15% on such excess amount for the period after one year of possession is admissible only if the award of the Special Land Acquisition Officer and that of the Collector falls within the interregnum period i.e. between 30.4.1982 and 24.9.1984 and would not be applicable where the award was made beyond the above two dates.

7. The Bill for amendment of the Land Acquisition Act No.68 of 1984 was introduced on 30.4.1982 and it was passed and enforced with effect from 24.9.1984. By the said amendment apart from introducing and new provisions in the Land Acquisition Act, i.e. Section 11-A and 28-A of the Act specific amendments for the purposes of awarding compensation and interest were also made in Section 23 and 28 of the Act. In this regard Section 23(1-A) was added and it was provided that in addition to the market value the Court shall in every case award additional amount at the rate of 12% per annum on the market value from the date of publication of the notification under Section 4 of the Act till the award of the Collector or the date of possession of the land whichever is earlier. The provisions of Section 23(2) of the Act with regard to payment of 15% solatium was amended and the rate of solatium was increased to 30% of the market value. Similarly in Section 28 of the Act the rate of interest admissible on excess amount of compensation determined by the Court was increased from 6% to 9% per annum from the date of possession till the payment of excess amount in the Court with a further modification that in case such excess amount is not paid within one year of possession interest at the rate of 15% in place of 9% shall be payable on such excess amount after expiry of the period of one year. The aforesaid Amending Act was enforced with effect from 24.9.1984. Therefore, irrespective of the date of initiation of the acquisition proceedings or its completion, the aforesaid enhanced benefits are admissible in all cases where award either by the Collector or the Court are made after the aforesaid date. In the instant case, the award of the reference court was admittedly made on 27.2.1990 i.e. much after the enforcement of the Amending Act and therefore, logically interest as per the amended provisions of Section 28 on the excess amount determined was payable at the rate of 15% after the expiry of one of one year from the date of possession in the event of non payment of such excess amount. Thus, the court was under a statutory obligation to award such increased rate of interest.

8. However, some difficulty arises in extending the aforesaid benefits on

account of the language used in Section 30(2) of the Amending Act which provides as under:

"30. Transitional provisions:(1).....

(2) The provisions of sub-clause (2) of Section 23 and Section 28 of of the principal Act, as amended by clause (b) of Section 15 and Section 18 of this Act respectively, shall apply, and shall be deemed to have applied, also to, and in relation to, any award made by the Collector or Court or to any order passed by the High Court or Supreme Court in appeal against any such award under the provisions of the principal Act after the 30th day of April, 1982 [the date of introduction of the Land Acquisition (Amendment) Bill, 1982, in the House of the People] and before the commencement of this Act."

9. The provisions of Section 30(2) of the Amending Act are only transitional and not ment to be applied where the award of the Collector or the Court is made after coming into force of the Amending Act. The aforesaid transitional provision is only for the purpose to meet the peculiar situation with regard to the awards of the Collector or the Court made before the enforcement of the Amending Act but not earlier to the introduction of the Bill for the aforesaid amendments. Thus, it was provided that the benefits contained under the amended provisions of Section 23(2) i.e. solatium and Section 28 i.e. interest shall be deemed to be applicable even to the awards of the Collector or the Court made between the aforesaid two dates. There is no provision which restricts or creates bar to the extension of above benefit to the award of the Collector or the Court made after the aforesaid dates. It was in this context that the Apex Court while interpreting Section 30(2) of the Amending Act in the case of Raghubir Singh (supra) laid down that the benefit of the Amending Act would be available in every case where the award of the Collector or of the Court is made between 30.4.82 and 24.9.84. It was nowhere said by the Supreme Court that such benefit of Section 23(2) or Section 28 would not be admissible to the claimants where the awards are made after the enforcement of the Amending Act.

10. A plain reading of Section 30(2) of the Amending Act would itself make it clear that the benefit of Section 23(2) of the Act and Section 28 of the Act (as amended) is available in relation to any award made by the Collector or the Court or any order passed by the High Court or the Supreme Court in appeal against any such award made after 30.4.1982 but before 24.9.1984 also. The words *"deemed to have applied"* and *"also"* used in Section 30(2) of the Amending Act are very material and relevant and connotes that the award of higher rate of solatium and interest is not only limited to the award of the Collector or the Court made between the aforesaid two dates but extends to other situations also which obviously refer to the award of the Collector or the Court made subsequent to the enforcement of the Amending Act.

11. This is what has been interpreted to mean by the Supreme Court in the case of ***Union of India and others Vs. Filip Tiago De Gama of Vedem Vasco De Gama reported in (1990) 1 SCC 277*** and it was held that in view of construction of Section 30(2) the enhanced benefit under the Amending Act would be available

even in the cases where the awards are made after September 24, 1984. The Supreme Court in the aforesaid decision has observed as under:

"17. Section 30(2) provides that amended provisions of Section 23 (2) shall apply, and shall be deemed to have applied, also to, and in relation to, any award made by the Collector or court between April 30, 1982 and September 24, 1984, or to an appellate order therefrom passed by the High Court or Supreme Court. The purpose of these provisions seems to be that the awards made in that interregnum must get higher solatium inasmuch as to awards made subsequent to September 24, 1984. Perhaps it was thought that awards made after the commencement of the Amending Act 68 of 1984 would be taken care of by the amended Section 23(2). The case like the present one seems to have escaped attention by innocent lack of due care in the drafting. The result would be an obvious anomaly as will be indicated presently. If there is obvious anomaly in the application of law the court could shape the law to remove the anomaly. If the strict grammatical interpretation gives rise to absurdity or inconsistency, the court could discard such interpretation and adopt an interpretation which will given effect to the purpose of the legislature. That could be done, if necessary even by modification of the language used ***[See Mahadeolal Kanodia v. Administrator General of West Bengal AIR 1960 SC 936].*** *The legislators do not always deal with specific controversies which the courts decide. They incorporate general purpose behind the statutory words and it is for the courts to decide specific cases. If a given case is well within the general purpose of the legislature but not within the literal meaning of the statute, then the court must strike the balance.*

18. The criticism that the literal interpretation of Section 30(2), if adhered to would lead to unjust result seems to be justified. Take for example two acquisition proceedings of two adjacent pieces of land, required for the same public purpose. Let us say that they were initiated on the same day - a day some time prior to April 30, 1982. In one of them the award of the Collector is made on September, 23, 1984 and in the other on September 25, 1984. Under the terms of Section 30(2) the benefit of higher solatium is available to the first award and not to the second. Take another example: the proceedings of acquisition initiated, say, in the year 1960 in which award was made on May 1, 1982. Then the amended Section 23(2) shall apply and higher solatium is entitled to. But in an acquisition initiated on September 23, 1984 and award made in the year 1989 the higher solatium is ruled out. This is the intrinsic illogicality if the award made after September 24, 1984, is not given higher solatium. Such a construction of Section 30(2) would be vulnerable to attack under Article 14 of the Constitution and it should be avoided. We, therefore, hold that benefit of higher solatium under Section 23(2) should be available also to the present case. This would be the only reasonable view to be taken in the circumstances of the case and in the hight of the purpose of Section 30(2). In this view of the matter, the higher solatium allowed by the High Court is kept undisturbed."

12. The three Judges Bench of the Supreme Court in the case of ***K.S. Paripoornan (II) Vs. State of Kerala***

1995 (1) SCC 367 also after considering the ***Raghubir Singh's (supra)*** case held that the restricted interpretation given to Section 30(2) of the Amending Act should not be understood to mean that the benefit thereof would not be available to the award of the civil court which was made after the enforcement of the Amending Act. Thus, the benefits of the Amending Act are admissible in all those cases where the award of the Collector or the Court is made after the enforcement of the Amending Act and by virtue of transitional provisions of Section 30 of the Amending Act even to those cases where awards of the Collector or the Court made during the interregnum period i.e. 30.4.82 to 24.9.84. Therefore, in view of above legal position, it appears reasonable to hold that the claimants/appellants in the instant case are entitled to interest at the rate of 15% on the excess amount of compensation determined by the Tribunal after the period of one year of possession in view of the proviso to section 28 of the Act as the award of the reference court was made on 27.2.1990, i.e. much after the enforcement of the Amending Act i.e. 24.9.1984.

13. Learned counsel for the respondent no.4 further placed reliance upon the reference order of the Supreme Court in the case of ***Smt. Leelawati Agarwal Vs. State of Jharkhand and another 2008 AIR SCW 2723*** wherein the view expressed in the case of ***K.S. Paripoornan (II) (supra)*** has been referred to the larger Bench. The said reference has not yet been decided and the view which has been expressed in the case of Filip Tiago De Gama of Vedem Vasco De Gama (supra) has not been considered therein. There is no authority which overrules the view taken in the above two cases i.e. ***K.S. Paripoonnan (supra)*** and ***Filip Tiago De Gama of Vedem Vasco De Gama (supra).*** Therefore, the view expressed therein still holds the field and this Court, as such, is bound by the same. It is a recognised principle of law that the view expressed by the Court in the order of reference does not constitute a precedent or a law as declared by the Court.

14. A Division Bench of this Court in the case of ***Globe Metal Industries and others Vs. State of U.P. and others reported in 2009(4) A.D.J. 563*** has held that where the larger Bench of the Supreme Court has not decided the reference the earlier decisions of the smaller Bench continues to hold the field and the courts would be bound by the same. A Single Judge of this Court in the case of ***Ram Adhar Vs. State of U.P. and others reported in 2008(8) A.D.J. 466*** in context of the reference order in the case of ***Smt. Leelawati Agarwal (supra)*** has held that as the larger Bench to which the matter has been referred in the Supreme Court has not decided the same, the earlier decision, i.e. the decision in the case of ***K.S. Paripoornan (II) (supra)*** shall govern the appeals.

15. Thus, the second point as raised is answered in favour of the claimant/appellants. They are held entitle to interest at the rate of 9% p.a. for the first year of possession and thereafter at the rate of 15% p.a. on the excess amount awarded by the Tribunal.

16. Accordingly, both the appeals succeed in part. The judgment, order and award of the Tribunal dated 27.2.1990 is

modified and the claimants/appellants are held entitled to:

(i) interest on damages as awarded by the Tribunal under Section 48-A of the Act; and

(ii) interest on compensation at the rate 9% p.a. for one year of possession and at the rate 15% p.a. thereafter.

17. However, in view of the reference pending before the Supreme Court, liberty is given to the respondents to apply for review, if necessary, in accordance with the view ultimately expressed by the Apex Court in the pending reference of ***Smt. Leelawati Agarwal (supra).***

18. Parties to bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.05.2009

BEFORE
THE HON'BLE S.P. MEHROTRA, J.

Civil Misc. Writ Petition No. 3365 of 2007

Rashi Kesh ...Petitioner
Versus
Veer Bahadur Singh Poorvanchal University, Jaunpur and others ...Respondents

Counsel for the Petitioner:
Sri P.N. Saksena
Sri S.M. Yadav

Counsel for the Respondents:
Sri Anil Tiwari
S.C.

Constitution of Indian-Art. 226- Cancellation of M.Com. Degree as well as the registration of research Scholar-on the ground after M.B.A. 2002-petitioner got registration for Ph.D. Course from Purvanchal University-submits thesis in the year 2005-during this period persue the M.Com. Degree and also worked as teacher in self finance institution affiliated to the university-appointment was duly approved-consequently the executive council takes impugned decision-without any notice or opportunity of hearing-held-principle of Natural Justice violated- order quashed-with liberty take fresh decision in accordance with law after given full opportunity of hearing to petitioner.

Held: Para 26 & 27

In my opinion, before taking the above decisions, the Academic Counsel (Respondent no. 2) was bound to give notice to the petitioner, and after affording reasonable opportunity of hearing to the petitioner, any decision in the matter should have been taken. The Academic Council has evidently taken the above decisions in total disregard of the principles of natural justice.

In the circumstances, the decision of the Academic Council (respondent no. 2) taken in its meeting held on 9.12.2006 in regard to the petitioner under Agenda - Item No. 3 under the heading "Other points raised with the permission of the Chairman" whereby the petitioner's M.Com. Degree as well as his registration for Ph.D. have been cancelled, cannot be sustained, and the same is liable to be quashed, and the matter is liable to be remanded to the Academic Council for deciding the same afresh after getting reasonable opportunity of being heard to the petitioner.

(Delivered by Hon'ble S.P. Mehrotra, J.)

1. The petitioner has filed the present Writ Petition under Article 226 of the Constitution of India, interalia, praying for quashing the decision of the Academic Council dated 9.12.2006

(Annexure No. 6 to the Writ Petition) regarding the cancellation of the petitioner's M.Com degree and his registration of Ph.D.

2. From the averments made in the Writ Petition, it appears that the petitioner passed his B.B.A (Bachelor of Business Administration) from Veer Bahadur Singh Poorvanchal University- respondent no.1 in the year 2000. The petitioner passed M.B.A. Examination in the year 2002.

3. The petitioner applied for and was registered as Ph.D student under Dr. G.C. Jaiswal, the then Reader in Master of Finance Control Department of the respondent no.1- University on 12.7.2003. Copy of the application of the petitioner has been filed as Annexure 1 to the Writ Petition.

4. Clause (2) of the declaration made by the petitioner in the application was as under:

"2. मैं यह भी सत्य निष्ठापूर्वक घोषणा करता हूँ कि विश्वविद्यालय के नियम / परनियम / अध्यादेशों के अन्तर्गत मैं किसी पूर्णकालिक शैक्षणिक पाठ्यक्रम में इस अथवा अन्य किसी विश्वविद्यालय में साथ-साथ अध्ययनरत नहीं रहूँगा । यदि ऐसा पाया जाय तो उपर्युक्त कृत्यों के लिए मेरा शोध पंजीकरण / शोध उपाधि निरस्त कर दी जाय ।"

5. It is, interalia, further averred in the Writ Petition that the petitioner was appointed as Lecturer in the Department of Business Administration in Ideal Department of Management Science, Mirzapur with the approval of the respondent no. 1-University; and that the said institution is affiliated to the respondent no.1 -University and is being run under the Self -Financing Scheme; and that the petitioner worked as Lecturer from 1.5.2004 to 30.4.2005.

6. It is, interalia, further averred in the Writ Petition that in the year 2004, the petitioner appeared as a Private Candidate for M. Com. Part -1 Examination and he passed the same and thereafter, the petitioner appeared in M. Com. Final Examination in the year 2005 again as a Private Candidate of the respondent no.1-University which he passed in First Division and secured Ist Position for which he was awarded Gold-Medal.

7. It is, interalia, further averred in the Writ Petition that after completing the research, the petitioner submitted his Ph.D. Thesis to the Academic Section of the respondent no.1-University for evalution on 24.12.2005.

8. It is, interalia, further averred in the Writ Petition that on 12.1.2007, the petitioner learned that Academic Council -respondent no. 2 had cancelled the petitioner's M. Com. Degree as well as his registration for Ph.D. and consequently, the petitioner's Ph.D. Thesis was not to be sent for evaluation.

9. Copy of the Minutes of the Meeting of the Academic Council dated 9.12.2006 has been filed as Annexure No. 6 to the Writ Petition.

10. Agenda-Item No.3 under " Other points raised with the permission of the Chairman" of the Academic Council deals with the case of the petitioner.

11. It is, interalia, stated in the decision taken by the Academic Council in respect of the said Agenda- Item no.3 that the Academic Council has unanimously decided that M. Com. Degree of the petitioner as well as registration of the petitioner for Ph.D., be

cancelled, and the thesis submitted by the petitioner be not got evaluated, and information in this regard be published in the Newspapers, and the other Universities be also informed in this regard.

Counter Affidavit on behalf of the respondents has been filed.

12. In the said Counter Affidavit, it is, interalia, stated that the petitioner, after getting the M.B.A. Degree in the year 2002, was registered with the respondent no.1-University in the Month of July, 2003 for Ph.D. Course; and that the petitioner submitted his thesis on 24.12.2005; and that the petitioner had also completed M. Com. Course in the duration of 1.7.2003 to 30.6.2005; that the petitioner was also working as a Teacher on contract basis in the Self -Finance College, namely, 'Ideal Academy of Management Sciences' ,Shiwala, Mirzapur affiliated with the respondent no. 1-University from May, 2004; and that for the said appointment , necessary approval was sought by the College from the respondent no.1-University which was granted by the letter dated 29.4.2004 (Annexure CA 1 to the Counter Affidavit); and that the petitioner had, thus, obtained two degrees and was also doing job during the same period; and that thus, the petitioner had violated his undertaking given in the application form for registration for Ph.D.

13. I have heard Sri P.N.Saxena, learned Senior Counsel assisted by Sri S.M.Yadav, learned counsel appearing for the petitioner and Sri Anil Tiwari, learned counsel appearing for the respondents, and perused the record.

14. Sri P.N. Saxena, learned Senior Counsel has stated that no Rejoinder Affidavit is proposed to be filed on behalf of the petitioner, and the matter may be heard for final disposal.

15. Sri P.N. Saxena, learned Senior Counsel submits that before cancelling the petitioner's M. Com. degree and his registration for Ph.D., no notice or opportunity of hearing was given to the petitioner to present his version.

16. It is further submitted by Sri P.N. Saxena, learned Senior Counsel that the petitioner had not violated the undertaking given by him, as the petitioner passed M. Com. (Previous) Examination in the year 2004 and M. Com. (Final) Examination in the year 2005 as a private candidate, while the undertaking given by the petitioner prohibits the petitioner from perusing study in any full-time educational course.

17. In reply, Sri Anil Tiwari, learned counsel for the respondents submits that as there was violation of the undertaking given by the petitioner on the face of it, the cancellation of M. Com. Degree of the petitioner as well as his registration for Ph.D. was fully justified. He further submits that for getting Ph.D., a person is required to devote his full-time in the work of research for at least twenty months, and the said person is deemed to be a student as provided in the Ordinances of the respondent no. 1-University.

18. In rejoinder, Sri P.N. Saxena, learned Senior Counsel appearing for the petitioner reiterates his submissions made earlier.

19. I have considered the submissions made by the learned counsel for the parties, and perused the record.

In paragraph No. 14 of the Writ Petition, it is stated as under:-

"14. That on 12.01.2007, petitioner learnt that Academic Council, respondent no.2 has cancelled the petitioner's M.Com. Degree as well as his Registration for Ph.D. and consequently, petitioner's Ph.D thesis was not to be sent for evaluation. Petitioner had absolutely no notice or knowledge of the said proceeding or decision of the Academic Council. Petitioner has succeeded in obtaining minutes of meeting of Academic Council dated 09.12.2006 which shows that meeting of the Academic Council was held on 09.12.2006, there was no item regarding cancellation of petitioner's M. Com. Degree or his Registration for Ph.D. on agenda but this item with regard to petitioner was taken up by the Academic Council with permission of Chairman of Academic Council /Vice Chairman and Academic Council without any notice or opportunity of hearing or considering relevant ordinances cancelled the petitioner's M. Com. Degree and his Registration for Ph.D."

20. Reply to the averments made in paragraph no. 14 of the Writ Petition, has been given in paragraph no. 20 of the Counter Affidavit, which is as under :

"20. That in reply to the contents of paragraph no. 14,15, and 16 of the Writ Petition, it is submitted that the petitioner has obtained the aforesaid degree and submitted his thesis in absolute contravention of his undertaking, therefore, the same was rightly cancelled. Rest of the averments are matters of record can be verified. It is further submitted that the action under challenge is in the direction of his undertaking thus no opportunity of hearing is required."

21. From a perusal of the above quoted paragraph no. 14 of the Writ Petition, it is evident that specific averment was made that no notice or opportunity of hearing was given to the petitioner before the Academic Council took its decision in respect of the petitioner in the meeting held on 9.12.2006 cancelling the petitioner's M. Com. Degree as well as his registration for Ph.D.

22. A perusal of paragraph no. 20 of the Counter Affidavit shows that the said averment made in paragraph no. 14 of the Writ Petition has not been specifically denied in the said paragraph of the Counter Affidavit. In fact, paragraph no. 20 of the Counter Affidavit states that no opportunity of hearing is required.

23. From the above, it is clear that after the petitioner had completed his M. Com. Degree and got Gold Medal for standing first in the respondent no.1-University his M. Com. Degree was cancelled by the Academic Council in the meeting held on 9.12.2006 by its decision regarding Agenda-Item No. 3 under the heading "Other points raised with the permission of the Chairman".

24. Again, after completing his research, the petitioner had submitted his thesis for Ph.D. on 24.12.2005, but his registration for Ph.D. was cancelled by the Academic Council in the above meeting, and it was decided that the thesis

of the petitioner would not be sent for evaluation.

25. No notice or opportunity of hearing was given to the petitioner before taking the above decisions which vitally affect the petitioner's academic career.

26. In my opinion, before taking the above decisions, the Academic Counsel (Respondent no. 2) was bound to give notice to the petitioner, and after affording reasonable opportunity of hearing to the petitioner, any decision in the matter should have been taken. The Academic Council has evidently taken the above decisions in total disregard of the principles of natural justice.

27. In the circumstances, the decision of the Academic Council (respondent no. 2) taken in its meeting held on 9.12.2006 in regard to the petitioner under Agenda -Item No. 3 under the heading "Other points raised with the permission of the Chairman" whereby the petitioner's M.Com. Degree as well as his registration for Ph.D. have been cancelled, cannot be sustained, and the same is liable to be quashed, and the matter is liable to be remanded to the Academic Council for deciding the same afresh after getting reasonable opportunity of being heard to the petitioner.

28. In view of the above, the Writ Petition deserves to be allowed, and the same is, accordingly, allowed. The decision of the Academic Council taken in its meeting held on 9.12.2006 (Annexure No. 6 to the Writ Petition) regarding Agenda-Item No. 3 under the heading " Other points raised with the permission of the Chairman" whereby the petitioner's M. Com. Degree and his registration for Ph.D., have been cancelled, is quashed, and the matter is remanded to the Academic Council (Respondent no. 2) for deciding the same afresh in accordance with law after affording reasonable opportunity of being heard to the petitioner.

29. It is made clear that this Court has not considered the case of the petitioner on merits, as the same is to be considered by the Academic Council.

30. On the facts and circumstances of the case, there will be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.03.2009

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

Criminal Misc. Writ Petition No. 4990 of 2009

Varnit Kumar ...Petitioner
Versus
State of U.P. & others ...Opposite Parties

Counsel for the Petitioner:
Sri Manoj Misra

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

Constitution of India Art. 226-Quashing F.I.R.-offence under Section 2/3 U.P. Gangesters & Anti Social Activities Act, 1986-petitioner involve in theft of Motorcycle gang-argument that use of force must be there-while in theft of Motorcycle-nothing like that-No ground for quashing FIR made out-hence arrest can not be stayed on interim mesure-petition dismissed.

Held: Para 8

For these reasons, we find no good ground to interfere with the investigation or to quash the F.I.R. in this writ petition. The petition is accordingly dismissed.

Case law discussed:

2006 (54) ACC, 1015, 1987 (24) ACC 164, 1999 (38) ACC 315

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

1. This petition has been filed for quashing an F.I.R. dated 31.01.2009 under sections 2/3 of the U.P. Gangsters & Anti Social Activities (Prevention) Act, 1986 (hereinafter referred to as the Act), Police Station Sadar Bazar, district Saharanpur in Case Crime No. 99 of 2009.

2. The allegations in the F.I.R. were basically that the petitioner belonged to a gang of motorcycle thieves and some F.I.Rs. were lodged against him.

3. It was argued by the learned counsel for the petitioner that three F.I.Rs. were lodged on the same day and that the petitioner could not be considered a member of the gang on that basis. Specifically our attention was drawn to the definition of gang under section 2 (b) of the Act, which reads as follows:-

2 (b) "Gang means a group of persons, who acting either singly or collectively, by violence, or threat or show of violence, or intimidation, or coercion, or otherwise with the object of disturbing public order or of gaining any undue temporal, pecuniary, material or other advantage for himself or any other person, indulge in anti-social activities, namely:

4. It was argued that the indispensable requirement for considering a person to be a member of the gang would be that he should have either singly or collectively have used violence, or threat or show of violence, or intimidation, or coercion, and thus the use of force was essential for constituting a gang, and a member of the said gang could only then be shown to be a gangster. However, we find that apart from the aforesaid requirements as to use or show of violence, the definition of gang also has a supplementary clause of "or otherwise", for the objective of disturbing public order or of gaining undue temporal, pecuniary, material or other advantage, when the accused engages in anti-social activities, as delineated under sections 2 (b)(i) to (xiv).

5. It was, then argued by petitioner's counsel that the expression "or otherwise" should be *ejusdem generic* with the other terms which require the use of force or violence mentioned in the earlier part of the definition of a "gang" under section 2 (b).

6. We are not in agreement with this submission. The offences and other anti-social activities which are described in section 2 (b) (i) to (xv) include offences under Chapter XVII of the Indian Penal Code, which include the offence of theft under section 378. Now theft involves dishonestly taking any movable property out of the possession of any other without his consent. Theft is usually a stealthy act, which is committed without the knowledge of the victim of the theft. Again Chapter XVII of the Indian Penal Code also includes offences under section 403 and the related sections, dealing with criminal misappropriation of property. Under these offences the moveable property of another person is dishonestly misappropriated or converted to by the accused for his own use. Likewise under section 405 and allied sections dealing with the crime of criminal breach of trust, dishonest misappropriation

of property entrusted to any person for his own use are covered. The provisions do not require the existence of force, violence. Similarly section 410 I.P.C. and related sections concern stolen property, Section 420 IPC and related sections deal with offences of cheating, which only involve deception, fraudulent or dishonest inducement to a person to part with his property or to consent to something which he would not have otherwise done, were he not so deceived. No element of force or violence is involved under these provisions also. Other anti-social activities which could be committed by a gang under section 2 (b) (ii) are distilling or manufacturing or storing or transporting or importing or exporting or selling of distributing any liquor, or intoxicating or dangerous drugs etc., in contravention of the provisions of U.P. Excise Act, 1910 or Narcotic Drugs and Psychotropic Substances Act. These crimes may be accompanied by violence in some conditions, but use of violence is not a pre-condition for constituting these crimes. Again although occupying or taking possession of the immovable property of another in violation of law is usually a crime of violence, but not necessarily so, when someone seeks in obtaining the title or possession to the property of another by forgery or fraud. Again offences under section 3 of the U.P. Public Gambling Act may again not necessarily involve the use of force. Inducing a person to go to a foreign country on a false representation with the promise that he would be provided with employment, trade or a profession in the foreign country under section 2 (b) (xiii) of Gangsters Act again does not involve the use of violence or show of violence, but it may be the result of a fraud and deception practiced on the victim. Therefore, the contention of the learned counsel for the petitioner that expression word "otherwise" must be read *ejusdem generic* with the other instances of violence mentioned in the earlier part of the sub-section is not correct and the Gangsters Act seeks to prevent and punish activities which may result in undue temporal, pecuniary, material or other advantage to the gangster or any other person and which may or may not necessarily involve the use of violence.

7. Another criticism of the contention raised by the petitioner is that in the decision of *Kishan Pal @ K.P. versus State of U.P. and another, 2006 (54) ACC, 1015* relying on the Full Bench decision in *Ashok Kumar Dixit vs. State of U.P. and another, 1987 (24) ACC 164,* it has been observed that it is not possible to quash the investigation in the proceeding under the Gangsters Act pending before the Special Judges in writ petitions, and the writ Courts cannot scrutinize individual cases of investigation for granting relief in direct conflict with the Full Bench decision in *Ashok Kumar Dixit.* Relying on the decision of S*hamsul Islam v. State of U.P., 1999 (38) ACC 315,* it is further pointed out that if the original relief of quashing of the first information report cannot be granted in the writ petition, the additional relief of stay of arrest of the accused can also not be granted.

8. For these reasons, we find no good ground to interfere with the investigation or to quash the F.I.R. in this writ petition. The petition is accordingly dismissed.

9. However, it is directed that in case, the petitioner surrenders before the Special Judge concerned within three weeks, his prayer for bail may be considered and disposed of expeditiously in accordance with the provisions of the Gangsters Act.
