ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.01.2009

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 67121 of 2008

Chandra Kant Singh ...Petitioner
Versus
The Secretary, Madhyamic Shiksha Parishad and others ...Respondents

Counsel for the Appellant:
Sri Shailendra Kumar Singh

Counsel for the Respondents:
S.C.

Constitution of India Art. 226-Date of Birth-petitioner at the time of appearing High School Exam. Given his date of birth in registration form as 18.07.89–two different date of birth mentioned by Board in certificate as well as in mark sheet-inspite of direction of writ court-rejected the representation on ground of delay-held-Board can not be allowed to take benefit of its own negligence for jeopardizing the future of student-direction for necessary correction within week issued.

Held: Para 9

After hearing learned counsel for the parties I am of the opinion that the Board could not have given two different dates of births in the Marksheet as well as in the Certificate of High School for the reason that the petitioner had disclosed his date of birth in his Registration form as 18.7.1989. Both the dates of births given in the Marksheet and Certificate are, therefore, incorrect and the Board is duty bound to correct the same. In such cases limitation ought not to be raised by the Board for its own mistake jeopardizing the future of the students. The Board was under bounded moral and legal duty in the circumstances to have corrected the mistake committed by its staff and officials and should not shelve the matter on the ground of limitation to hid its mistake/inefficiency.

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

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

2. The parties agree that the writ petition may be disposed of at this stage as there is no factual controversy involved in this writ petition.

3. The petitioner has filed this writ petition for quashing the impugned order dated 15.9.2008 passed by respondent no. 1, the Secretary, Madhyamik Shiksha Parishad, U.P. Allahabad. He has also prayed for a writ of mandamus directing respondent no. 1 to correct his date of birth in High School Mark-sheet and Certificate as 18.7.1989.

4. The facts of the case are that the petitioner appeared in the High School Examination conducted by the Madhyamik Shiksha Parishad, U.P. Allahabad in the year 2004 and in his Registration form he had given his date of birth as 18.7.89. After obtaining Marksheet of the High School and Certificate he came to know that incorrect date of birth has been recorded in Marksheet as 18.7.1988 and in the Certificate as 10.10.1987 whereas in both the Marksheet and Certificate of High School his date of birth should have been written as 18.7.89.

5. The contention of learned counsel for the petitioner is that the date of birth of the petitioner is 18.7.89 and the

marksheet and certificate of High School of the petitioner show that two different dates of birth other than 18.7.89 written by the petitioner in his examination form.

6. The petitioner moved several applications before the Regional Secretary, Madhyamik Shiksha Parishad, U.P. Varanasi for correction of his date of birth. When no action was taken he filed Civil Misc. Writ Petition no. 35821 of 2008 before the High Court for a direction to the Board to correct his date of birth in the Marksheet and Certificate of High School, which was disposed of vide order dated 23.7.2008 with a direction to respondent no. 1 to decide the grievance of the petitioner by a reasoned and speaking order. Pursuant to thereof, the matter was taken up by the Secretary of the Board which was rejected by the Board vide order dated 15.9.2008 on the ground of delay in moving the application.

7. According to the Standing counsel 2 years limitation are provided under Chapter III Rule 7 of the Calendar of the Board for any correction in the date of birth.

8. Learned counsel for the petitioner submits that due to own fault of the Board incorrect date of birth has been endorsed and the petitioner has only approach this Court for correction of his date of birth and in his Examination Form he had given correct date of birth, therefore, question of limitation will not apply.

9. After hearing learned counsel for the parties I am of the opinion that the Board could not have given two different dates of births in the Marksheet as well as in the Certificate of High School for the reason that the petitioner had disclosed his date of birth in his Registration form as 18.7.1989. Both the dates of births given in the Marksheet and Certificate are, therefore, incorrect and the Board is duty bound to correct the same. In such cases limitation ought not to be raised by the Board for its own mistake jeopardizing the future of the students. The Board was under bounded moral and legal duty in the circumstances to have corrected the mistake committed by its staff and officials and should not shelve the matter on the ground of limitation to hid its mistake/inefficiency.

10. Considering the facts and circumstances of the case, the Secretary of the Board is directed to issue necessary orders/direction for correction of the date of birth of the petitioner in the Marksheet and Certificate of High School forthwith within a period of one week as 18.7.89 and thereafter instruct the college for issuing the same to the petitioner within two weeks.

The writ petition is disposed of accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.01.2009

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

Civil Misc. Writ Petition No. 4752 of 2009

Sayeed Alam and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Appellant:
Sri J.P.S. Chauhan

Counsel for the Respondents:
S.C.

Land Acquisition Act-Section 28-A-Application for enhancement of compensation moved prior to filling appeal by State-after dismissal of appeal-consideration of application can not be denied on ground of delay-but the claimant-petitioner status regarding illiterate and other condition requires fresh consideration- direction issued for consideration of those conditions with specific period.

Held: Para 18

from the facts of the present case, we find that the application in fact was made by the petitioner even before the date the appeal filed by the State before this Court was finally decided. Further, we find that requisite averments qua petitioner being illiterate and other conditions referred to above be satisfied need examination.

Case law discussed:
1996(2) A.W.C.1237, (1986) 4SCC 151, 1991 SC 730, 1995(2)SCC689, (1995) 2 SCC 733, (1995)2 SCC 735, 1995 SC 2259, (1995)2SCC 766, (2004) 7 SCC 753, (2003)7 SCC 280, (1997)6 SCC 280, 2006 SC 1716.

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

1. The petitioners before this Court claim to be the recorded tenure holders of plot bearing Khata Nos. 156 and 38. It is stated that the land covered by the aforesaid khata number, was subject matter of acquisition proceeding under the Land Acquisition Act (hereinafter referred to as 'the Act') as per the Notification dated 28.05.1989 issued under Section 6 (1) of the Act. It is stated that the petitioner accepted the compensation determined by the Land Acquisition Officer and did not make any reference in that regard under Section 18 of the Act. It is further stated that other tenure holders whose land was also acquired under the same Notification, made a reference qua rate of payment of compensation. The matter was adjudicated under an award dated 16th August 1999 passed in L.A.R. No. 42 of 1993 the rate of compensation for the land so acquired has been enhanced.

2. On the aforesaid award being made, the petitioner made an application under Section 28 A of the Act before the Land Acquisition Act for payment of compensation at the enhanced rates with reference to award dated 16.08.1999. The application so made by the writ petitioner was rejected vide order dated 17.01.2007 (Annexure No. 3 to the writ petition) on the ground that against the award dated 16.08.1999, the State of U.P. has preferred First Appeal No. (550) of 2005 before the Hon'ble High Court.

3. Since there was delay in filling of the said appeal by the State, an application under Section 5 of the Limitation Act was also filed. Section 5 application made by the State Government in the aforesaid first appeal was rejected by the Hon'ble High Court vide order dated 17.01.2007. As a result whereof, the appeal stood dismissed being barred by limitation.

4. The petitioner has therefore come up before this Court by means of this writ petition for a writ of mandamus commanding the respondent to consider and decide the application made by the petitioner under Section 28 A of the Land Acquisition Act dated 16th August 1999 in the light of the order passed in L.A.R. No. 42 of 1993 under Section 18 of the Land Acquisition Act.

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

6. A Division Bench of this Court in the case of ***Nanak and others Versus State of U.P. and others, 1996(2) A.W.C. 1237,*** has laid down the conditions pointwise which are required to be satisfied before an application under Section 28A of the Land Acquisition Act can be entertained. Reference para 17 which is quoted herein below:

"17. *Thus, is view of the above, we are constrained to direct the respondent No.5, to issue notices to respondent No.6, Ghaziabad Development Authority, the other contesting parfty and after hearing all the parties concerned, to determine whether:*
(i) The applications were filed by the petitioners within limitation.
(ii) *Petitioners belong to the indigent class of the society for whose benefit, provisions of Section 28 A were enacted particularly in the light of the law laid down by the Hon'ble Supreme Court in the cases of Mewa Ram, Scheduled Caste Co-operative Society and Babua Ram(supra).*
(iii) The Court's award in L.A.R. No. 304/77, Hemchand (supra) has become final or whether any appeal arising out of the same or any other award in respect of any land covered by the same Section 4 notification dated 16.7.60 is pending before this Court or Supreme Court.
(iv) The nature, location and quality of the land of the petitioners are identical to the land which had been subject-matter of the Court's award in Hemchand(supra).

If all the aforesaid conditions are fulfilled in the cases of the petitioners, the Special Land Acquisition Officer, respondent no. 5 is directed to decide the applications under Section28A of the Act and dispose them of finally within a period of six months from the date of receipt of a certified copy of this judgment strictly in accordance with law as explained above."

7. The legal position qua maintainability of under Section28A application has further been explained both by the Hon'ble Supreme Court as well as by the Division Benches of this Court as follows:

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

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

9. The Apex Court approved the law laid down in Mewa Ram (Supra) again in Scheduled Caste Cooperative Owning Society Ltd. Batinda Vs. Union of India and others, AIR 1991 SC 730.

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

"Legislature made a **discriminatory policy between the poor and inarticulate** as one class of persons to whom the benefit of Section 28-A was to be extended and comparatively affluent who had taken advantage of the reference under Section 18 and the latter as a class to which the benefit of Section 28-A not extended. Otherwise, the phraseology of the language of the non-obstante clause would have been differently worded.....It is true that the legislature intended to relieve hardship to the poor, indigent and inarticulate interested persons who generally failed to avail the reference under Section 18 which is an existing bar and to remedy it, Section 28-A was enacted giving a right and remedy for redetermination....The legislature appears to have presumed that the same state of affairs continue to subsist among the poor and inarticulate persons and they generally fail to avail the right under sub-section (1) of Section 18 due to poverty or ignorance or avoidance of expropriation."

11. A similar view has been taken by a Division Bench of this Court in Nanak & Ors. Vs. State of U.P. & Ors.,1996 AWC 1237 placing reliance of large number of judgments of the Hon'ble Supreme Court.

12. Thus, it is apparent that the legislature has carved out an exception in the form of Section 28-A and has made a special provision to grant some relief to a particular class of society, namely poor, illiterate, ignorant and inarticulate people. The provision has been made only for little Indians. The provisions of Section 28-A refers to the "person interested" which means the original owner and that original owner interested must further be a person aggrieved by the award of the Collector.

13. In **G. Krishna Murthy & Ors. Vs. State of Orissa, (1995)2 SCC 733; D Krishna Vani & Anr. Vs. State of Orissa, (1995) 2 SCC 735; Union of India & Anr. Vs. Pradeep Kumari & Ors., AIR 1995 SC 2259; and U.P. State Industrial Development Corporation Ltd. Vs. State of U.P.& Ors., (1995) 2 SCC 766,** it has been held by Hon'ble Supreme Court that a person who prefers a Section 18 reference cannot maintain an application under Section 28-A of the Act.

14. In **Des Raj & Ors. Vs. Union of India & Anr., (2004) 7 SCC 753** it was held by the Hon'ble Supreme Court that if a person has applied under Section 18 of the Act and persued the matter further, he is not entitled to maintain the application under Section 28-A for redetermination of compensation. The Court further held that it is mandatory to file the application within prescribed limitation, which runs from the date of the Award under Section 18 of the Act. While deciding the said case the Court placed reliance upon its earlier judgments, including Scheduled Caste Co-operative Land Owning Society Ltd., Bhatinda Vs. Union of India & Ors., (1991) 1 SCC 174.

15. In **State of Andhra Pradesh & Anr. Vs. Marri Venkaiah & Ors., (2003)7 SCC 280,** the Hon'ble Supreme Court had dealt with the issue of limitation and held as under:-

"Plain language of the aforesaid section would only mean that the period of limitation is three months from the date of the award of the court. It is also provided that in computing the period of three months, the day on which the award was pronounced and the time requisite for obtaining the copy of the award is to be excluded. Therefore, the aforesaid provision crystallizes that application under Section 28-A is to be filed within three months from the date of the award by the court by only excluding the time requisite for obtaining the copy. Hence, it is difficult to infer further exclusion of time on the ground of acquisition of knowledge by the applicant."

16. While deciding the said case Court placed reliance on its earlier judgment in **Tota Ram Vs. State of U.P. & Ors., (1997)6 SCC 280.** The Court further rejected the contention that limitation would run from the date of knowledge distinguishing the earlier judgments on fact and law in **Raja Harish Chandra Raj Singh Vs. Deputy Land Acquisition Officer, AIR 1961 SC 1500; and State of Punjab Vs. Qaisar Jehan Begum, AIR 1963 SC 1604.**

17. In **Union of India Vs. Munshi Ram & Ors., AIR 2006 SC 1716,** the Apex Court has laid down the law that such an application is maintainable provided a person has not filed an application under Section 18 of the Act. The Court held that Section28A seeks to confer the benefit of enhanced compensation on those owners who did not seek Reference under Section 18.

18. From the facts of the present case, we find that the application in fact was made by the petitioner even before the date the appeal filed by the State before this Court was finally decided. Further, we find that requisite averments qua petitioner being illiterate and other conditions referred to above be satisfied need examination.

19. We are, therefore of the opinion that interest of substantial justice would be served if the petitioners' application is reconsidered in the light of the conditions specified by the Division Bench of this Court in the case of ***Nanak*** (supra) and the law as noticed above within 12 weeks from the date a certified copy of this order is filed before Additional District Judge who shall examine the correctness of the averments made and satisfying himself with the requirement of law as explained above. Fresh final order may be passed on the application accordingly without being influenced with the order dated 17.01.2007.

20. With the aforesaid observation, the writ petition is disposed of.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.01.2009

BEFORE
THE HON'BLE VIJAY KUMAR VERMA, J.

Criminal Revision No. 63 of 2002

Ram Dhani ...Revisionist
Versus
State of U.P. & another ...Opposite parties

Counsel for the Revisionist:
Sri Ashok Kumar Srivastava

Counsel for the Opposite Parties:
Sri B.N. Singh
Sri H.N. Singh
A.G.A.

Criminal Revision-order passed under Section 156 (3) for registration and investigation-revision preferred by prospective accused-held-not maintainable as he has no right to stop registration and investigation of case-not effected person.

Held: Para 13

In view of the law laid down in the aforesaid cases, I am of the considered opinion that the prospective accused has no right to stop the registration of the FIR by challenging the order passed by the Magistrate under section 156(3) Cr.P.C. allowing the application and directing investigation. Therefore, in present case also, the Revision preferred by the revisionist against the impugned order is not legally maintainable and is liable to be dismissed on this ground alone.

Case law discussed:
others 2008(60) ACC 476, 1997 (34) ACC 163, 2008 (61) ACC 922, 2000(41) ACC 435, 2006 (56) ACC 910, 2007(57) ACC 508, 2001 (42) ACC 451,

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

The case has been taken up in the revised list. None is present for the revisionist.

2. Heard arguments of Sri H. N. Singh, learned counsel for the opposite party no. 2 and AGA for the State and perused the material on record.

3. By means of this Revision, order dated 09.01.2002 passed by the Chief Judicial Magistrate, Sonbhadra in criminal misc. application no. 17 of 2002 (Smt. Maya Devi Vs. Ram Dhani and others) under section 462, 466, 468, 471, 419, 420 IPC has been challenged by the prospective accused.

4. By the impugned order, the learned Chief Judicial Magistrate has allowed the application of Smt. Maya Devi under section 156(3) Cr.P.C. and S.O. P.S. Robertsganj has been directed to investigate the case after registration of the FIR.

5. At the outset, it is contended by learned counsel for the opposite party no. 2 and learned AGA that revision against the impugned order is not legally maintainable as the prospective accused has no right to challenge the order passed by the Magistrate allowing the application under section 156(3) Cr.P.C. directing investigation after restoration of the FIR. The contention of the learned counsel for the opposite party no. 2 is that on the FIR being lodged in pursuance of the impugned order, the accused persons could seek remedy under Article 226 of Constitution of India for quashing the FIR and they have no right to challenge the impugned order either in Revision or in the proceedings under section 482 Cr.P.C.

6. Having given my thoughtful consideration to the submissions made by the learned counsel for the opposite party no. 2 and learned AGA, I agree that prospective accused can not challenge the order passed by the Magistrate under section 156(3) Cr.P.C. allowing the application and directing investigation by the police.

7. I had an occasion to consider this matter in the case of **Prof. Ram Naresh Chaudhary and another Vs. State of U.P. and others 2008(60) ACC 476**. The following observations made in para 9 of the said judgement are worth mentioning:-

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

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

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

9. This matter was considered again by me in the case of **Gulam Mustafa @ Jabbar Vs. State of U.P. and others 2008 (61) ACC 922**. The following observations made in para 8 of the report at page 924 are relevant:-

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

surpasses all suppositions to comprehend that he possesses a right to resist registration of F.I.R."

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

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

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

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

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

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

13. In view of the law laid down in the aforesaid cases, I am of the considered opinion that the prospective accused has no right to stop the registration of the FIR by challenging the order passed by the Magistrate under section 156(3) Cr.P.C. allowing the application and directing investigation. Therefore, in present case also, the Revision preferred by the revisionist against the impugned order is not legally maintainable and is liable to be dismissed on this ground alone.

14. Consequently, the Revision is hereby dismissed. Interim order dated 17.01.2002 stands vacated.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.02.2009

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Second Appeal No. 126 of 2009

Central Bank of India & others ...Appellants
Versus
Dinesh Kumar Agarwal and others ...Respondents

Counsel for the Appellants:
Sri Himanshu Tewari

Counsel for the Respondents:
Sri M.K. Gupta
Sri Nitin Kumar Agarwal

Code of Civil Procedure-Section 100-Maintainability of Second Appeal-suit for permanent injunction restraining the respondent to in cash the bank draft subsequently Bank Draft converted into FDR-after dismissal of suit-Second Appeal by Bank without filing First Appeal or cross Appeal-held not maintainable.

Held: Para 7

Having considered the submission of the learned counsel for the parties, this Court is of the opinion that the objection raised by the caveators has some force. Nothing prevented the appellant bank from filing its own appeal or taking cross-objection against that part of the decree of the trial court by which it directed the bank to prepare F.D.R. in the name of the Court. The dismissal of the appeal of the plaintiff has not resulted in any modification or interference in the decree of the trial court. The appellate court has only affirmed the decree of the trial court. In my opinion, on account of the failure of the bank to file a first appeal against the decree of the trial court or to take a cross-objection, the bank has allowed that part of the decree of the trial court to achieve a finality which cannot be allowed to be raised or questioned in a second appeal. Consequently, this Court is of the opinion that the second appeal filed by the defendant-appellant bank is not maintainable and is dismissed.

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

1. Heard Sri Himanshu Tiwari, the learned counsel for the appellant and Sri M.K.Gupta, the learned counsel assisted by Sri Nitin Kumar Agarwal, for the caveators-respondent Nos.2 and 3.

2. The plaintiff-respondent No.1 filed a suit for permanent prohibitory injunction restraining the defendants from encashing the bank-drafts and from paying the amount as detailed in Schedule-A to the plaint. It was alleged that the plaintiff had purchased six demand drafts from the defendant/appellant bank, which was payable to the present respondent Nos.2 and 3/defendants, but the said drafts amounting to Rs.25,000/- each, were lost and therefore, the suit for prohibitory injunction.

3. An application for temporary injunction was also filed. The trial court, initially granted an injunction, restraining the bank from getting the bank drafts encashed. Subsequently, on a stay vacating application filed by respondent Nos.2 and 3, the injunction order was vacated and the injunction application of the plaintiff was rejected with a direction that the bank drafts will be converted by the bank in a F.D.R. in the name of the Court. This interim order continue till the pendency of the suit. Eventually, the suit of the plaintiff was dismissed and the trial

court while dismissing the suit directed the bank to release the F.D.R. along with the accruing interest in favour of respondent Nos.2 and 3.

4. Aggrieved, by the dismissal of the suit, the plaintiff filed a First Appeal before the High Court which was subsequently transferred to the lower appellate court. The appeal was eventually dismissed by judgment dated 15.11.2008 and the decree of the trial court was affirmed.

5. The defendant bank has now filed the present second appeal contending that the direction of the trial court to pay the interest on the disputed draft amount was perverse and was liable to be set aside. The defendants submitted that the Court without ascertaining itself and without satisfying itself that the disputed draft was not presented for encashment by the defendants for its conversion into F.D.R., no F.D.R. came into existence and therefore, consequently the direction for payment of interest could not arise.

6. A preliminary objection has been raised by the caveators with regard to the maintainability of the appeal. The caveators submitted that the defendants-appellant bank had neither filed a First Appeal against the decree of the trial court nor had filed any cross-objection with regard to that part of the finding of the trial court directing the bank to get the F.D.Rs. prepared in the name of the Court which decision had become final and therefore, no second appeal could be filed under Section 100 of the C.P.C.

7. Having considered the submission of the learned counsel for the parties, this Court is of the opinion that the objection raised by the caveators has some force. Nothing prevented the appellant bank from filing its own appeal or taking cross-objection against that part of the decree of the trial court by which it directed the bank to prepare F.D.R. in the name of the Court. The dismissal of the appeal of the plaintiff has not resulted in any modification or interference in the decree of the trial court. The appellate court has only affirmed the decree of the trial court. In my opinion, on account of the failure of the bank to file a first appeal against the decree of the trial court or to take a cross-objection, the bank has allowed that part of the decree of the trial court to achieve a finality which cannot be allowed to be raised or questioned in a second appeal. Consequently, this Court is of the opinion that the second appeal filed by the defendant-appellant bank is not maintainable and is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.01.2009

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Second Appeal No. 1421 of 2007

Ramapati Tiwari ...Appellant
Versus
The District Registrar, Allahabad and others ...Plaintiff-Respondents

Counsel for the Appellant:
Sri V.K.S. Chaudhary
Sri Deo Prakash Singh
Sri Vishnu Gupta

Counsel for the Respondents:
Sri M.D. Singh "Shekhar"
Sri P.K. Kesari
Sri Radhey Shyam

Registration Act 1908-Section-77-Registration of will-on refusal by sub-Registrar-whether civil suit maintainable-held-'No'-aggrieved party may take recourse of writ under Art. 226/227.

Held: Para 14

The lower appellate court has passed the decree in complete ignorance of the law laid down by the aforesaid full bench decision of the Andhra Pradesh High Court and as such where such a decree has been passed in ignorance of settled law/precedent there is no reason to deny its correction in appeal or second appeal. Accordingly, I answer the first substantial question of law in favour of the appellant and hold that a suit under Section 77 of the Act for a decree directing to register a 'will' is not maintainable.

Case law discussed:
AIR 1959 AP 626, 1997 (1) AWC 346

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

1. I have heard Sri V.K.S. Chaudhary, Senior Advocate assisted by Sri Deo Prakash Singh learned counsel appearing for the appellant and Sri M. D. Singh 'Shekhar', Senior Advocate assisted by Sri P.K. Kesari learned counsel for the respondent no. 3, the main contesting party. The other respondents are only formal in nature.

2. The suit/appeal owes its origin to a dispute relating to ownership of a plot of land 22-B Church Lane, Allahabad on which a huge house was constructed by one Tribhuwan Sukh Tiwari who was an Assistant Commissioner of Excise, U.P. On his death the said property had devolved upon his wife Smt. Ram Lalli who died on 21.3.1979. They had no issue. The two nephews of late Tribhuwan Sukh Tiwari set up two contradictory unregistered 'wills' of Smt. Ram Lalli. One dated 20.2.1979 by Rama Pati and the other dated 11.3.1979 by Girja Prasad, both sons of Param Sukh one of the elder brothers of late Tribhuwan Sukh Tiwari. Girja Prasad presented the 'will' dated 11.3.1979 of Smt. Ram Lalli which is said to be in his favour for registration before the Registering Authority on 25.4.1979. The registration of the said 'will' was refused to him by an order dated 10.11.1980 against which he preferred an appeal under Section 72 of the Registration Act, 1908. It was dismissed on 27.3.1982. Therefore, he instituted Original suit no. 289 of 1982 on 21.4.1982 under Section 77 of the Registration Act, 1908 for a decree directing the Registering Authority to register the 'will'. In the suit the other nephew Rama Pati was impleaded as one of the defendants as he had set up a different 'will' dated 20.7.1979. The suit after due contest was dismissed vide judgment and order dated 24.9.1994 passed by the Court of first instance. However, in appeal the judgment, order and decree of the court of first instance has been set aside and the suit has been decreed vide judgment and order dated 17.10.2007 with the direction to the Registering Authority to register the 'will'. The present second appeal as such has been preferred by one of the defendants i.e. Rama Pati assailing the judgment, order and decree passed by the lower appellate court.

3. Whether a suit under Section 77 of the Registration Act, 1908 for posthumous registration of a 'will' is maintainable is the core question of substance which has been raised in the present appeal.

4. However, apart from the above, on the preliminary objection raised, another important substantial question of law arises in this appeal ie., whether the appellant has any legal right to oppose the registration of the 'will' and in turn to maintain the appeal?

5. Both the above legal questions are substantial in nature as they are debatable and have not been settled previously by any decision of the Supreme Court (at least none has been brought to my notice). They may also ultimately affect the rights of the parties in the immovable properties covered by the 'will'. Besides, the above questions are pure questions of law which can be decided effectively on the admitted facts alone without the aid of any evidence. Learned counsel for the parties on being made known of these two questions, have eloquently addressed the Court on merit and therefore, I have ventured to proceed and decide the appeal on the above aspects finally at the admission stage.

6. The maintainability of the suit is a pure question of law which goes to the root of the jurisdiction rendering the decree so passed in such a suit to be a nullity. Therefore, even if such an objection/ground was not raised in the Courts below in so many words it can certainly be raised and considered in second appeal before the High Court.

7. The Registration Act, 1908 (hereinafter in short as an 'Act') contemplates two types of documents for the purposes of registration. First, the documents of which registration is mandatory under law. These documents have been enumerated under Section 17 of the Act. The other are documents of which registration is optional. The list of such documents is given in Section 18 of the Act. Registration of "wills" is not compulsory and it is only optional in nature in view of Section 18 (e) of the Act. The Act does not prescribe any penal consequences for non registration of documents mentioned in Section 18 of the Act including "wills".

8. The general procedure required to be followed by the registering authority for registering a document is provided in Section 71 to 76 of part XII of the Act. The registering authority is not obliged to register every document and it has power to order for refusal of registration by recording reasons in a book kept for the purpose. Section 72 of the Act provides for an appeal to the Registrar against the order of refusal so passed by the registering authority provided the refusal is not on the ground of denial of execution. Simultaneously, in certain circumstances where the registering authority refuses to register a document a provision for an application to the Registrar has been made in Section 73 of the Act. By virtue of Section 76 (2) the order passed by the Registrar is final as no further appeal has been provided against the order of the Registrar so passed either on appeal or on the application. However, a suit within 30 days of such refusal by the Registrar for a decree directing the document to be registered has been provided under Section 77 of the Act.

9. The aforesaid provisions contained in part XII from Sections 71 to 77 are of general nature. They are applicable to all documents presented for registration. However, in so far as registration of "wills" is concerned, the Act contains separate special provisions

under part VIII ie. Sections 40 and 41 of the Act.

10. Section 40 read with Section 41 of the Act provides that the testator or after his death any person claiming as executor or otherwise may present a 'will' for registration before the Registrar or Sub-Registrar and it shall be registered if the registering officer is satisfied that the 'will' was executed by the testator; the testator is dead; and the person presenting the 'will' is entitle to present the same. Therefore, for the registration of 'will' on the death of the testator following three conditions are required to be satisfied;

(i) Execution of the 'will' by the testator;
(ii) Death of the testator; and
(iii) The person presenting the 'will' for registration is entitle to present the same.

11. It is only on the satisfaction of the Registering Authority that all the above three conditions have been satisfied that a 'will' can be registered after the death of the testator, otherwise the Registering Authority can refuse its registration.

12. A combined reading of the provisions of part VIII and part XII of the Act indicates that the legislature has intentionally placed the "wills" into a separate docket distinguishing "wills" from other documents of which registration is either mandatory or optional. The purpose of keeping "wills" aloof from other documents is simple. The genuineness and the due execution of the "wills" is normally required to be established by a probate case by a petition for probate under Section 276 of the Indian Succession Act, 1925 or in a regular civil suit before a civil Court where such a 'will' is produced for claiming rights and is disputed. In such a probate proceedings or a suit a definite 'lis' is required to be adjudicated which is generally done after notices to the authorities and the public including the parties concerned. The due execution of the 'will' so presented or its genuineness is thereupon decided in accordance with the provisions of the Succession Act. All this is not done in a suit under Section 77 of the Act wherein no 'lis' with regard to the 'will' is decided but the matter is confined only to the registration or non-registration of the 'will'. Therefore, it appears that the intention of the legislature by providing special provisions regarding registration of "wills" under Section 40/41 of the Act is to keep the "wills" out of the purview of Section 77 of the Act for the purposes of registration. There appears to be no need to subject "wills" to proceedings before Civil Court twice; first for registration and then with regard to its genuineness and due execution when the registration has no impact whatsoever on the document itself.

13. Since the registration of "wills" is optional in nature and there is no obligation upon the registering authority to register "wills", it does not appeal to reason to compel the registering authority to register the same when the act does not provides for its mandatory registration. The person presenting a 'will' for registration as such has no legally enforceable right to get a 'will' registered. Therefore, logically the provisions of Section 77 of the Act enabling a party presenting a document for registration to maintain a suit in the event its registration is refused by the registering authority and the District Registrar, would not be applicable where the document presented

for registration is a 'will'. Therefore, by a necessary implication Section 77 of the Act providing for a suit for a decree directing for the registration of documents is confined only to documents which are set out for compulsory registration under Section 17 of the Act and not to any other document covered by Section 18 of the Act.

14. This view of mine finds complete support from a Full Bench decision of the Andhra Pradesh High Court reported in ***AIR 1959 AP 626 Padala Satya Narayana Murti Vs. Padala Gangamma and others***. In the aforesaid decision it has been categorically and in unequivocal terms laid down that Section 77 applies only to instruments falling within ambit of Section 17 and can have no application to the "wills". I have no reason to deviate from the above Full Bench decision and to take a different stand. The lower appellate court has passed the decree in complete ignorance of the law laid down by the aforesaid full bench decision of the Andhra Pradesh High Court and as such where such a decree has been passed in ignorance of settled law/precedent there is no reason to deny its correction in appeal or second appeal. Accordingly, I answer the first substantial question of law in favour of the appellant and hold that a suit under Section 77 of the Act for a decree directing to register a 'will' is not maintainable.

15. It is another thing that a party aggrieved may take recourse to proceedings under Article 226/227 of the Constitution of India to challenge the orders of the registering authority or the Registrar or to establish his rights on the basis of such a 'will' either though a probate petition or in a civil suit when occasion arise.

16. In support of the second question learned counsel for the respondent has placed reliance upon a decision of the Division Bench of this Court reported in ***1997 (1) AWC 346 Kumari Sushila Saxena Vs. Sub-Registrar, Sahajahanpur and others*** wherein while considering the provisions of Section 40/41 of the Act the Court held that registration of a document is merely a notification of the fact that such a document has been executed. It has nothing to do with the legality of the transaction covered by the document which may be open to challenge by the affected person in appropriate forum. Therefore, the matter of registration of a 'will' is basically a one between the presenter and the registering authority and no other person is legally entitle to object to its registration.

17. The authority of ***Kumari Sushila Saxena (Supra)*** relied upon by the learned counsel for the plaintiff respondent operates in a totally different facts and set of circumstances. It is in the proceedings under Section 40/41 of the Act which are of administrative or a quasi judicial nature that it has been held that the matter of registration of a 'will' is between a party presenting it for registration and the registering authority. It would have no application to judicial proceedings of a suit of a civil nature issuing a decree. Accordingly, the above authority is of no assistance to the plaintiff respondent.

18. In a civil suit of any nature there has to be a contesting party. In the event it is held that the appellant has no right to

oppose a registration of a 'will' in a suit under Section 77, if at all it is maintainable, it would mean that the suit would go uncontested as naturally the authorities enjoined upon to register a document have no interest in the subject matter and would not therefore, likely to put up any resistance thus, allowing the suit to be decreed virtually ex-parte. In other words, it would mean that any suit filed under Section 77 of the Act for a decree for getting a 'will' registered would in all probabilities would be decreed in the absence of any opposition. This cannot be the intention of the legislature therefore, the dictum of law as laid down by the division bench in ***Km. Sushila Saxena (Supra)*** has to be confined to proceedings under Section 40/41 of the Act and not where the matter has been agitated in a suit.

19. Moreover, in the instant suit the appellant was impleaded as one of the respondents and was allowed to contest the proceedings. He was a party to the suit. The order of allowing his implement became final and conclusive as it was neither challenged earlier nor is being assailed by any cross objection or an appeal. Therefore, a person who is a party to the suit naturally has a right to prefer an appeal against the decree passed in such a suit/appeal.

20. Accordingly, the contention of the respondents that the appellant had no right to oppose the registration of the 'will' in the suit and to prefer this second appeal, has no merit and is rejected.

21. Above all, the second question of law as formulated looses all significance once the first question has been answered and it is held that the suit itself was not maintainable.

22. In the totality of the facts and circumstances of the case the two substantial questions of law formulated above are answered by me as under :

1. Whether a suit under Section 77 of the Registration Act, 1908 for posthumous registration of a 'will' is maintainable ?

The answer to this question as discussed above is that the suit is not maintainable as the provisions of Section 77 of the Act are applicable only in respect of the documents of which registration is mandatory under Section 17 of the Act.

2. Whether the appellant has any legal right to oppose the registration of the 'will' and in turn to maintain the appeal ?

23. In view of the answer to question no. 1 this question losses its significance. Nonetheless, it is held that though a person like appellant has no right to oppose the registration of a 'will' in proceedings under Section 40/41 of the Act but he certainly has a right to defend the suit.

24. Thus, the Court is of the opinion that his second appeal deserves to be allowed and is accordingly allowed. The decree passed by the lower appellate Court dated 17.10.2007 in Civil Appeal No. 298 of 1994 decreeing the original suit No. 289 of 1982 Girja Prasad Tiwari Vs. Zila Nibandhak and others is set a side.

25. The parties are directed to bear their own costs. Appeal allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.02.2009

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

Civil Misc. Writ Petition No. 2536 of 2009

Kameshwar Prasad ...Petitioner
Versus
U.P. Public Service Commission and others ...Respondents

Counsel for the Petitioner:
Sri Kameshwar Prasad (In Person)
Sri Shiv Kant Pandey

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

U.P. Judicial Service Rules 2001-Rule 15- Reduction of number of vacancies-355 of Civil Judge (J.D.) post advertised-selection list finalized by commission-by notification dated 23.4.2008 15 posts reduced to give way to the candidates of Sanjay Singh case decided by Supreme Court-held-valid reason for revision of vacancies-No question of violation of fundamental rights.

Held: Para 10

In this case it is not disputed that the number of vacancies have been reduced on account of appointments made pursuant to the directions of the Apex Court in the case of Sanjay Singh (supra) which is admittedly a valid reason for revising the number of vacancies determined under Rule 15 of 2001 Rules.

Case law discussed:
2007(2) SC 534, 1991(3) SCC 47

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

1. Heard Sri Shiv Kant Pandey, learned counsel for the petitioner, Sri Puspendra Singh, for respondent no. 1, Sri Amit Sthalekar, for respondent no. 2 and learned Standing Counsel for respondent no. 3.

2. Petitioner through this writ petition under Article 226 of the Constitution of India is seeking a writ of certiorari for quashing the revised requisition sent by High Court i.e. respondent no. 2 to the State Government on 23.04.2008 reducing the vacancies of Civil Judge (Junior Division), 2006 from 355 to 339. He has further sought a writ of mandamus commanding the respondent-Commission to appoint the petitioner on the post of Civil Judge (Junior Division) against 15 seats so reduced by the respondents illegally in contravention of the mandate of Hon'ble Apex Court in **Sanjay Singh and another Vs. U.P. Public Service Commission, Allahabad and another, 2007(2) SC 534** as well as this Court in **Writ Petition No. 51491 of 2007 (Sanjay Kumar Singh and others Vs. State of U.P. and others)** decided on 17.01.2008.

3. Sri Pandey contended that for recruitment to the post of Civil Judge (Junior Division) the government in consultation with the High Court determined 355 vacancies under Rule 15 of U.P. Judicial Service Rules, 2001 (*hereinafter referred to as the "2001 Rules")* which were requisitioned to the Commission for holding examination in accordance with the provisions of 2001 Rules but subsequently in order to give appointment to some other candidates pursuant to the Hon'ble Supreme Court

Sanjay Singh (supra) as well as this Court in **Sanjay Singh (supra)** it has decided to reduce the number of vacancies from 355 to 339 though in the meantime the entire recruitment process has already been completed by the Commission and, therefore, it is not upon to the respondents to reduce the number of vacancies at this later stage. He also argued that once the Commission actually advertised 355 vacancies under Rule 15 of 2001 Rules it is not open to the respondents to reduce the same subsequently after the recruitment process is complete since the respondents are bound to fill in all the vacancies unless they are reduced by issuing a notification as provided under Rule 21(2) of 2001 Rules. He submitted that the number of vacancies advertised have to be filled in from the select list under Rule 20(3) unless the vacancies are varied after due notification. In the present case it is submitted that no such notification has been issued by the respondents till date and, therefore, it is not open to the Commission to publish the final select list of only 339 candidates i.e. as per the reduced vacancies instead of 355 which were advertised earlier. He further contended that the persons who have been given appointment pursuant to the directions of this Court and Apex Court are not actually entitled for such post. He thus contended that the decision to reduce vacancy from 355 to 339 is wholly arbitrary and contrary to law. He lastly contended that under Article 16(1) of the Constitution the petitioner has a fundamental right for consideration as well as appointment against the number of vacancies advertised by the authorities concerned since it amounts to denial of right of equal opportunity.

4. Having considered the aforesaid submissions at length we, however do not find any force in the submission for the reasons given hereto.

5. From the very perusal of Rule 15 it appears that for commencing the procedure for recruitment to the service the first requirement is to determine the number of vacancies and for the said purpose the Governor in consultation with the High Court is required to give the number of vacancies which are to be filled in during the year of recruitment. The term "year of recruitment" has also been defined under Rule 4(m) which reads as under:

"(m) "Year of recruitment" means a period of twelve months commencing from the first day of July of the calendar year in which the process of recruitment is initiated by the appointing authority;"

6. It nowhere requires that after the vacancies to be filled in during the year of notification issued by the government in consultation with the High Court or even when the vacancies are intimated to the Commission for that purpose also any notification is required to be issued. The procedure prescribed under Rule 15 is only to tentatively decide the number of vacancies which have to be filled in during the year of recruitment but it nowhere restricts the government or this Court from revising the vacancies as determined under Rule 15 which are to be filled in during the year of recruitment. Thus the submission of learned counsel for the petitioner cannot be accepted. It is well established that when there is no ambiguity in the language of the statute the same has to be read as it is.

7. Further Rule 21(2) also shows that it only lays down life of the select list which provides that after filling the vacancies by due notification as advertised or varied the select list would lapse.

8. Now coming to the second submission we find that the reduction of vacancies if is decided not in any arbitrary manner but for cogent and valid reasons the same is not illegal. In the case of **Shankarsan Dash Vs. Union of India, 1991(3) SCC 47** the Hon'ble Apex Court said:

"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana v. Subhash C7hander Marwaha and Others, [1974] 1 SCR 165; Miss Neelima Shangla v. State of Haryana and Others, [1986] 4 SCC 268 and Jitendra Kumar and Others v. State of Punjab and Others, [1985] 1 SCR 899."

9. The aforesaid judgement clearly shows that even a selected candidate has no indefeasible right to get appointment.

10. In this case it is not disputed that the number of vacancies have been reduced on account of appointments made pursuant to the directions of the Apex Court in the case of Sanjay Singh (supra) which is admittedly a valid reason for revising the number of vacancies determined under Rule 15 of 2001 Rules.

11. Now coming to the last submission that Rule 16(1) only confers right of consideration which has already given to the petitioner since it is not his case that in the recruitment process he has not been considered or participated.

12. For the reasons given above, we do not find any merit in this writ petition and it is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.01.2009

BEFORE
THE HON'BLE SHASHI KANT GUPTA, J.

Civil Misc. Writ Petition No.17529 of 2004

Rafi Abbas ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri. V.M. Zaidi
Sri. Vivek Prakash Mishra

Counsel for the Respondents:
Sri C.B. Yadav
Sri. S.K. Garg

Constitution of India, Article 226- Regularisation of Daily wages-working for few hours in a day for filling water in pots w.e.f. 1983 to 1990-engaged without following procedure of recruitment Rules-no substantive right to claim regularisation merely on long period of working

Held: Para 14

There is nothing on record to show that the appointment/engagement of the petitioner was on a vacant sanctioned post or was in terms of relevant rules. If it were an engagement or appointment on daily wages or casual basis the same would come to an end when it was discontinued. Merely because a temporary employee or a casual wage worker is continued for a long time, he would not be entitled to be absorbed in regular service or made permanent merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules.

Case law discussed:
JT 2006(4) 420; 2008(10) SCC 1

(Delivered by Hon'ble Shashi Kant Gupta, J.)

1. This writ petition has been filed by the petitioner for the following relief:

"to issue a writ of mandamus directing the respondents to accommodate the petitioner on the post of Class IV employee existing in the department in pursance of the order passed by this Hon'ble Court. "

2. The brief facts emerging from the writ petition are as follows:-

3. The petitioner was engaged as waterman on daily wages in the Sub Registrar Office, Dhampur, District Bijnor on 1.1.1983 and since then he was discharging his duties as waterman in the said office. The petitioner from time to time had also worked against the leave vacancy of Class, IV employee occurred in the department. The respondent no.1 issued a Circular dated 12.08.1998 whereby all concerned authorities were directed not to engage any outsider as waterman or for any other purpose, however, if any such person was already working he should be immediately. discontinued. In pursuant to the said order, respondent no. 4 discontinued the engagement of the petitioner as waterman in Sub Registrar Office, Dhampur, hence the petitioner filed a Writ Petition No.35179 of 1998 and this Hon'ble Court passed the following order:-

"Heard the parties counsel and I have gone through the record.

It has been admitted by the learned counsel for the petitioners that the petitioner no. 1 has been working as Water-man in the establishment of the respondents fr4om January 1983 while the petitioner no.2 had been working from September, 1990. It is not disputed that the petitioners are not Government servants and they are not on regular establishment of Sub Registrar. They are casual workers appointed on fixed wages. Their services have been terminated on the ground that no such appointment be made in future from outside and those who are already working may be ceased to work. It has been submitted by the the learned counsel for the petitioner that the post of Water man still exists in the department and it is, therefore, directed

that in case such post exists in the Department, the petitioner shall be accommodated in the view of the fact that they have served for a long time in the department.

With these observation, petition is disposed of finally"

4. It is further pleaded in the writ petition that despite the order passed by this Court the authority concerned did not accommodate the petitioner. Hence this writ petition.

5. In para 5 of the counter affidavit it has been stated that the petitioner was only engaged on casual basis as a waterman on fixed wages and it was further pleaded that petitioner did not work continuously but was engaged on casual basis from time to time as and when necessity arose. It was further pleaded that petitioner never worked or treated as daily wager on the post of Class IV employee and in the year 1998 when the necessity of engaging him ceased, he was discontinued. It was further pleaded in para 4 of the counter affidavit that there is no post of waterman existing as such the order dated 10.4.2002 can not be implemented. The supplementary counter affidavit was also filed by the respondents and in para 3 & 4 it was stated as follows:-

"3- The petitioner has made a prayer for directing the respondents to accommodate the petitioner on class IV posts of the department. It is submitted that the petitioner was actually a part time casual worker and engaged for few hours in a day for filling water pot. This engagement was never made against any substantive vacancy of the department and never made adopting the selection procedure in any of the provisions of the existing service rules.

4- The petitioner's prayer made in the writ petition are not admitted as separate provisions have been provided for appointment on the Class IV posts of the department and the petitioner can apply in case of vacancy if eligible and he fulfills the criteria."

6. In reply to para 3 & 4 of the supplementary counter affidavit, petitioner filed supplementary rejoinder affidavit and in para 4 & 5 it was stated as follows:-

"4- That in reply to averments made in para-3 of the affidavit it is submitted that the petitioner had worked continuously as an Class IV employee in the department since 1983 till 1998. It is further submitted that the respondents are still adopting the pick and choose policy for regularizing the services of the workers who were engaged in the same capacity as of the petitioner. Therefore, the averments made to the contrary in the para under reply are not correct and they are denied.

5-That in reply to the averments made in para-4 of the affidavit, it is submitted that the petitioner as stated above, has continuously worked for last 15 years. Therefore, in view of the said fact he is eligible for being appointed and to get regularized his services as class IV employee in the department."

7. It was submitted by the counsel for the petitioner that despite the order dated 10.4.2002 passed by this Court in Writ Petition No.35179 of 1998, respondents deliberately and knowingly on account of some extraneous

consideration have failed to accommodate the petitioner. It was further submitted that respondent no.2 has accommodated other persons who were working as waterman in the department on the basis of the direction given by this court, therefore, the action of the respondents in not accommodating the petitioner as Class IV employee in the department is wholly illegal and void. It was further submitted that the petitioner is fully eligible for being appointed as Class IV employee in any of the department of the respondents.

8. On the other hand learned Standing counsel has submitted that petitioner has got no right to hold the post, he was neither appointed as a regular employee nor was appointed on daily wages. It was further submitted that he was simply engaged on casual basis as waterman as when the need arose. It was further submitted that the petitioner did not work continuously from 1983 to 1998 and has got no legal enforceable right to claim the appointment. It was further categorically stated that there does not exist any post of waterman as such the order dated 10.4.2002 passed by this Court in Writ Petition No.35179 of 1998 cannot be implemented. It was further submitted that certain orders annexed alongwith the writ petition has got no bearing on the case in hand.

9. Heard the learned counsel for the petitioner and learned Standing counsel appearing on behalf of the respondents and perused the record of the case.

10. In para 3 of the supplementary counter affidavit it was stated that the petitioner was actually a part time casual worker and engaged for a few hours in a day for filling a water pot. It was further pleaded that this engagement was neither made against any substantive vacancy of the department nor made by following a due process of selection as envisaged by relevant Rules. In para 4 of the supplementary counter affidavit it was further stated that separate provisions have been provided for appointment on the Class IV posts of the department and the petitioner can apply in the case of vacancy if he fulfills the criteria. In para 3 of the counter affidavit it has been further stated that there exist no post of waterman in the department as such the order that 10.04.2002 passed by this Court in the previous Writ Petition No. 35179 of 1998 cannot be implemented.

11. The Apex Court in *"Secretary, State of Karnataka and others Vs. Umadevi and others JT 2006(4) 420"* has observed as follows:-

".....Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end of the contract, if it were an engagement or appointment on daily basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not be made permanent on the expiry of his term of appointment. It has to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent merely on the

strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the Court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by very nature of their appointment, do not acquire any right. High Courts acting under Article 226 of the Constitution of India, Should not ordinarily issue directions for absorption, regularisation or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme.

..... The Courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instrument to facilitate the by passing of the constitutional and statutory mandates."

..... While directing that appointments, temporary or casual, be regularised or made permanent, Courts are swayed by the facts that the concerned person has worked for some time and in some cases for considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be true he is not in a position to bargain -not at arms length- since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitution scheme of the appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee.

..... Normally, what is sought for by such temporary employees when they approach the court, is the issue of a writ of mandamus directing the employer, the State or its instrumentalities, to absorb them in permanent service or to allow them to continue. In this context, the question arises whether a mandamus could be issued in favour of such persons. At this juncture, it will be proper to refer to the decision of the Constitution Bench of this Court in Dr. Rai Shiverndra Bahadur V. The Governing Body of Nalanda College [(1962) Supp.2 SCR 144]. That case arose out of a refusal to promote the writ petitioner therin as the Principal of a college. This Court held that in order that mandamus may issue to compel the authorities to do something, it must be shown that the statute imposes a legal duty on the authority and the aggrieved party had a legal right under the statute or rule to enforce it. This classical position continues and a mandamus could not be issued in favour of the employees directing the government to make them permanent since the employees cannot show that they have an enforceable legal right to be permanently absorbed or that the State has a legal duty to make them permanent."

12. The Apex Court further in Official Liquidator Vs. Dayanand and

others 2008(10) SCC 1 has observed as follows:

" The creation and abolition of posts, formation and structuring/ restructuring of cadres, prescribing the source and mode of recruitment and qualifications and criteria of selection, etc. are matters which fall within the exclusive domain of the employer. Although the decision of the employer to create or abolish posts or cadres or to prescribe the source or mode of recruitment and laying down qualification, etc is not immune from judicial review, the Court will always be extremely cautious and circumspect tinkering with the exercise of discretion by the employer.

.....the Court cannot sit in appeal over the judgement of the employer and ordain that a particular post or number of posts be created or filled by a particular mode of recruitment. The power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any constitutional or statutory provisions or is patently arbitrary or vitiated by mala fides."

13. The Apex Court further in case of State of Harayana and others Vs. Navneet Verma has inter alia in para 17 of the judgment has held

" that the power to create or abolish a post rest with the Government; whether a particular post is necessary is a matter depending upon the exigencies of the situation and administrative necessity; creation and abolition of the post is a Government policy and every sovereign Government has this power in the interest and necessity of internal administration; creation, continuance and abolition of posts are all decided by the Government in the interest of administration and general public; the court would be the least competent in the face of scanty of material to decide whether the Government acted honestly creating a post or refusing to create a post or its decision suffers from mala fides, legal or factual; as long as the decision to abolish the post is taken in good faith in the absence of material, interference by the court is not warranted"

14. There is nothing on record to show that the appointment/engagement of the petitioner was on a vacant sanctioned post or was in terms of relevant rules. If it were an engagement or appointment on daily wages or casual basis the same would come to an end when it was discontinued. Merely because a temporary employee or a casual wage worker is continued for a long time, he would not be entitled to be absorbed in regular service or made permanent merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules.

15. There is nothing on record to establish that the petitioner worked continuously from 1983 upto 1998 as waterman in establishment. The engagement of the petitioner appears to be through back door entry without following any process of law. Therefore, his disengagement in the year 1998 was fully justified. **Moreover the respondents in para 3 of the counter affidavit have categorically stated that there exists no post of waterman in the department as such the order dated 10.4.2002 passed in the previous Writ**

Petition No.35179 of 1998 cannot be implemented.

16. In view of the above, the respondents cannot be compelled to create any supernumerory post. However, if, according to the petitioner, the earlier order passed by this Court on 10.4.2002 was not implemented deliberately without any cogent reasons, then he could have taken the contempt proceedings against the authorities concerned in accordance with law but instead of doing so, he preferred to execute the earlier order dated 10.4.2002 passed by this Court, through the present writ petition.

17. The petitioner has also annexed a few orders passed by this Court in different writ petitions without pleading the facts and circumstances of those cases in the present writ petition as such, said orders in the absence of any pleadings cannot be taken into consideration.

18. In view of the discussion made hereinabove, this writ petition is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.01.2009

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 30802 of 1999

Banaras Hindu University, Varanasi and another ...Petitioners
Versus
Presiding Officer Labour Court, U.P., Varanasi and another ...Respondents

Counsel for the Petitioners:
Sri V.K.Upadhya
Sri Pankaj Naqvi
Sri Dinesh Kacker
Sri V.B. Singh

Counsel for the Respondents:
Sri Manish Goyal
Sri Rajarshi Gupta
Sri J.K. Chakraborty
Sri J.P. Pandey

Constitution of India-Art. 226-Industrial Dispute-reference made by State Government-workman the employees of B.H.U.-fully controlled owned and financed by central Govt.-without least concern of State Government-held-State Government not empowered to refer the dispute.

Held: Para 27

The finding of the Labour Court completely overlook the admitted facts that the entire grant is received by the University from the Central Government and that the Executive Council which control with the finances and administrative under the supervision of the Visitor of the University and the Vice Chancellor is the full time salaried officer of the University and executive head appointed by the Visitor. The Banaras Hindu University has not only a central character but is a University which is controlled and managed by the Central Government. The State Government as such did not have the authority to make a reference nor any such authority was delegated to it by the Central Government under Section 39 of the U.P. Industrial Disputes Act. The reference under Section 4k by the State Government as such was not competent and thus the proceedings in pursuance of the reference are liable to be set aside.

Case law discussed:
(2007) 2 SCC 428, (2006) 6 SCC 516, 2008(7) ADJ 122, (2006) 13 SCC 727, (1969) 1 SCC 769, (1975) 4 SCC 679, (1997) 9 SCC 377, 2002 (93) FLR 606, 1989 UPLBEC 149, 1995(70) FLR 20

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

1. The Banaras Hindu University has filed this writ petition against an Award of the Labour Court, Varanasi dated 10.7.1988 in Adjudication Case No. 31 of 1995, Banaras Hindu University vs. B.N. Bhattachrya, reinstating Shri Brij Nath Bhattacharya respondent no.2, with continuity in service and back wages from the date of reference. The Labour Court further directed that in case the post of Fuse-Man is still vacant, the respondent no, 2 shall be appointed against the said post, and if there is no vacancy, he may be adjusted on an equivalent post.

2. By an interim order dated 28.7.1999, the operation of the award was stayed, provided the petitioner goes on paying respondent no. 2 month by month an amount equivalent to the wages last drawn by him. The writ Petition was heard in the absence of parties, and was dismissed on 17.7.2002 and the interim order was vacated. The petitioner were directed to reinstate respondent no, 2 forthwith, within one month and to pay his arrears of salary and other benefits to which he would have been made entitled in terms of the award.

3. The Banaras Hindu University challenged the order in Civil Appeal No, 10274 of 2003. The Civil Appeal was allowed by the Supreme Court on 27.10.2005:-

"Heard parties.

In the impugned Judgement itself, it has been set out that the list was revised and that neither party appeared before the Court. Instead of adjourning the matter or dismissing for default, the High Court proceeded to deliver a detailed judgement even citing case laws and then distinguishing those cases.

Before us both parties admit that the list had been revised and therefore the advocate could not remain present.

Under the circumstances, we set the impugned judgement and remit the Writ Petition back to the High Court for decision on merits. The High Court shall dispose of the Writ Petition as expeditiously as possible and in any event within three months from today.

Interim order, if any, passed by the High Court during the pendency of the Writ Petition will continue to operate till the disposal of the Writ Petition.

The Appeal stands disposed of accordingly. There will be no order as to costs.

Sd/-(S.N. Variava)
Sd/-(A.R.Lakshman)
Sd/-(S.H. Kapadia)"

4. The matter was thereafter adjourned on several dates. The Banaras Hindu University engaged Shri V.B. Singh and thereafter Shri Dinesh Kakker to argue the matter. The Court adjourned the case on 14.08.2007 and then again on 23.08.2007 for a possible settlement. It was thereafter nominated to some other bench. Finally it was heard on 08.12.2008.

5. Heard Shri Dinesh Kakker appearing for the Banaras Hindu University (in short the 'University') and Shri Manish Goyal for the respondent no. 2 workman.

6. Briefly stated the facts, giving rise to this writ petition, are that respondent-workman was working as Fuse-Man under the Chief Engineer, Electricity and Water Supply w.e.f. 1.4.1982. His

services were terminated without assigning any reason on 6.7.1991. The respondent-workman alleged that he had requested for the regular pay scale and other service benefits, on which the employee were annoyed with him. He was appointed by the Selection Committee after interviews on permanent basis. He sent letters for reconsideration of the decision to terminate his services. The employee however did not give any response.

7. The University stated in its written statement that the Banaras Hindu University is a Central University and is run and managed from the funds received from the Central Government. It is known as a Central University. The reference therefore could be made only by the Central Government and not by the State Government. The respondent-workman was appointed as a Fuse-Man only for three months i.e. 1.4.1982 to 30.06.1982. His appointment was extended for six months on each occasion and that his last extension was given on 1.11.1990 to 30.04.1991. The respondent-workman thereafter did not attend to work, nor his service were extended. He absented thereafter without any explanation. A letter was sent to him on 11.6.1991 for explaining his unauthorized absence from 1.2.1991 to 9.3.1991; 22 .3.1991 to 1.4.1991 and 3.4.1991 to 11.6.1991, but he did not reply.

8. The parties filed their documents in evidence. The workman examined himself. Shri Ram Singh, Senior Workshop Assistant was examined on behalf of the employer. Shri K.S. Gupta, Assistant Supervisor, Electricity and Water Supply examined himself and Shri Lal Chandra, Deputy Registrar (Administration-II) were also examined. The Labour Court found that it was not clear whether the post of Fuse-Man was advertised. The respondent workman had applied for appointment. An appointment letter was issued on 22.7.1981, which shows that the workman was appointed for a period of three months from 1.4.1982 to 30.6.1982 on a vacancy caused temporarily on the promotion of Shri S.N. Srivastava. The workman was qualified in the electrician trade and holds a certificate from Industrial Training Institute. His service were extended upto 31.12.1985. permanently, he should be adjusted on the post. A notice was sent on 11.6.1991 to the workman on his office address for explaining his absence from 1.2 .1991 to 9.3.1991; 23.3.1991 to 1.4.1991 and 3.4.1991 to 11.6.1991.

9. The documentary evidence for the last extension of service for a period between 1.5.1990 to 31.10.1990 bearing the signatures of the workman was filed by the employer.

10. The workman examined himself to depose and prove the facts stated in his written statement. Shri Ram Singh, Senior Workshop Assistant appearing on behalf of the employer stated that the workman had worked upto 22.3.1991 and then absented from duties. His name continued in the register upto July 1991 and was scored out in August, 1991. He stated that he has no knowledge whether there is any post of Fuse-man and did not produce the attendance register. Shri K.S. Gupta, Assistant Supervisor stated that there was no suspension after 30.4.1991 and that the workman had worked regularly from 1.4.1982. Shri Lal Chand, Deputy Registrar (Administration) stated that the

Registrar has powers of appointment only for a period of six month.

11. The Labour Court found that the respondent-workman was asked to give explanation for failing to attend duties on 30.4.199, which makes it clear that the respondent workman was given the extension of service even beyond that period but that the suspension letter was not produced by the employer. Even if a person was engaged by the employer for 5-6 years, it was not just and proper to remove him in the absence of any further extension for his continuance. The provisions of Section 25-F of Industrial Dispute Act were attracted. And that the removal of the workman's name from the attendance register amounted to his retrenchment. The University is an autonomous body, which receives its entire grants from the Central Government and thus it will be treated to be a Central Government Establishment. A number of cases have been decided by the Labour Court in respect of the employees and the workmen. The Labour Court found that the respondent workman is entitled to reinstatement with continuity in service. Since the workman did not give his representation for wages, he will be entitled to the wages from the date of reference i.e. 29.3.1995 and the appointment. If the post of the Fuse-man has been filled up, the employer shall adjust him on any other equivalent post.

12. Shri Dinesh Kakker, learned counsel appearing for the University would submit that the University was established under the Banaras Hindu University Act 1915 to establish and incorporate a teaching and residential Hindu University of Banaras. The University is an autonomous body. The President of India is the Visitor of the University under Section 5(i) of the Act with Executive council as the highest executive body. The Chancellor elected by the Court is the Head of the University under Section 7-A. The Vice Chancellor is a whole time salaried officer under Section 7B of the Act. The condition of service of officers and teachers is provided under a written contract under Section 16B. The Act provides for Statutes under Section 17, and Ordinances under Section 18 and the powers to make regulation under Section 19. The Statutes, Ordinances and Regulations do not provide for service conditions of the employees of the University. They are appointed on contract and that their services come to an end on the expiry or termination of the contract.

13. Shri Kakker submits that the University receives its entire funds from the Central Government and thus the appropriate government for making a reference for any industrial dispute under Section 2-A of the Industrial Dispute Act is the Central Government, and not the State Government and thus the reference dated 27.3.1995 made by the State of Uttar Pradesh was bad in law. He would further submit that without prejudice his first submission, the employment on contract under proviso to section 2 (oo)(bb) of Industrial dispute Act, 1947, the termination of service of the workman as a result of non-renewal of the such contract being terminated under a stipulation in that behalf, is not included within the meaning of the term 'retrenchment'. The contract of the respondent workman was not renewed and thus the termination of his service will not be treated as a retrenchment.

14. Shri Kakker submits that the question, as to whether the reference in respect of Central Government establishment can be made by the Central Government or the State Government in whose jurisdiction the cause of action has arisen, was considered and decided by a Constitution Bench of the Supreme Court in **Steel Authority of India vs. National Union Water Front Workers and others, 2001, 7 SCC 1.** The judgement has been followed by the Supreme Court in **Hindustan Aeronautic Ltd. vs. Hindustan Aero Canteen Sangh, Civil Appeal No, 3559 of 2002 decided on 8.7.2002,** holding that the Hindustan Aeronautic Limited is an undertaking of the Central Government and it is the Central Government which exercise full control over the same. The issuance of licence by the State Government is no criteria to come to a conclusion that the State Government would be the appropriate government. In **National Textile Corporation, U.P. Limited vs. State of U.P., Writ Petition No, 45538 of 2003, decided on 14.9.2004,** this court held that the Central Government does not have any financial and administrative control over the NTC (UP) Ltd. Following the **Steel Authority of India (supra)** this Court held that under Section 39 of the U.P. Industrial Disputes Act, the State Government can exercise delegated powers of the Central Government while making a reference. In that case the State Government, did not make reference under Section 39 of the Industrial Dispute Act, 1947, rather it exercised its jurisdiction under 4-K of the U.P. Industrial Disputes Act, 1947. Since the appropriate government in that case was the Central Government, the reference itself was incompetent.

15. Shri Dinesh Kakker would submit, relying upon the supplementary rejoinder affidavit of Shri C.M. Chakraborty, Senior Assistant, Legal Cell, Banaras Hindu University, that the University is run under the control of the Central Government. The framing of the Statutes and Ordinances are required to have the approval of the Central Government. The decisions are subject to the final orders of the Visitor. The selection process also involves nominee of the Government. The autonomous character of the University does not imply that it has any independence of control or that it does not function under the authority of the Central Government. The funds of the University Grant Commission are paid to it by the Central Government and that the recommendations/directions of the University Grants Commission are based upon the policy and directions of the Central Government. He would submit that there is no delegation of powers under Section 39 of the U.P. Industrial Disputes Act, 1947, and that since the University is a Central Government with ultimate control of the financial and administration with the Central Government, the reference could only be made by the Central Government.

16. Shri Kakker has then relied upon the judgements in **Punjab State Electricity Board vs. Sudesh Kumar Puri, (2007) 2 SCC 428** to support his submission that the conditional engagement for specific period as a regular Meter Reader under a contract and the non-renewal of the contract would not amount to termination of his services to be treated as retrenchment under Section 2(oo)(bb) of the Act. He has also relied upon **Municipal Council, Samarala vs.**

Sukhwinder Kaur, (2006) 6 SCC 516 for the same proposition.

17. For reinstatement with back wages, Shri Kakker has relied upon judgements in **Indian Institute of Technology, Kanpur vs. Presiding Officer, Labour Court Ii, Kanpur Nagar, 2008(7) ADJ 122** in which this court held that by virtue of the operation of Selection 13(3) of the Institute of Technology Act, 1961, the employee, whose probation was never extended, would be deemed to have continued in temporary employment, terminable on one month's notice and that the re-engagement with full back wages should not have been allowed.

18. Shri Kakker submits, that the Labour Court could not have directed regulation on the post or any equivalent post. He submits that in **Regional Manager, State Bank of India vs. Mahatma Mishra, (2006) 13 SCC 727,** the Supreme Court held that the Labour court could only award reinstatement with back wages. It could not have directed regularisation giving permanent status to a casual workers and that orders cannot be passed on sympathetic consideration.

19. Shri Manish Goyal, on the other hand, submits that the 'appropriate government' under Section 2(a) of the Industrial Dispute Act, 1947 in relation to any industrial disputed under Section 2(a)(i) concerning any industry carried on by or under the authority of the Central Government is the Central Government and in relation to any other industrial dis pute under (ii) is the State Government. The legal position on this regard has been settled in **Steel Authority of India (supra)** which has affirmed the **Heavy Engg. Mazdoor Union v. State of Bihar (1969) 1 SCC 769** and **Hindustan Aeronautic Ltd. v. Workmen (1975) 4 SCC 679** and that the contrary view in Air India Statutory Corporation v. United Labour Union, (1997) 9 SCC 377 was overruled. The Supreme Court held in Steel Authority of India (supra):

"....the criteria to determine whether the Central Government is the appropriate government within the meaning of the CLRA Act, is that the industry must be carried on by or under the authority of the Central Government and not that the company/undertaking is an instrumentality or an agency of the Central Government for purposes of Art. 12 of the Constitution; such an authority may be conferred either by a statute or by virtue of relationship of principal and agent or delegation of power and this fact has to be ascertained on the facts and in the circumstances of each case. In view of this conclusion, with due respect, we are unable to agree with the view expressed by the learned judges on interpretation of the expression 'appropriate government' in Air India's case. Point no. 1 is answered accordingly."

20. Shri Goyal would submit that there is no administrative, financial and functional control exercised by the Central Government under the Banaras Hindu University Act, 1915. It is not run under the authority of the Central Government and is autonomous in its operations. The University is not required to seek approval of the Central Government for discharging its functions.

21. Shri Goyal would further submit that the U.P. Legislature has deliberately excluded, clause(bb) in the definition

clause of the U.P. Industrial Dispute Act, 1947 to define the term 'retrenchment' as it is contained in the Central Act and therefore the provisions of Section 2(oo)(bb) of Central Act is not applicable to the present case. He has relied upon the judgement in **U.P. State Sugar Corporation Ltd. Vs. Om Prakash Upadhyay 2002(93)FLR 606** to submit that the decision in **Jai Kushum vs. Uttar Pradesh Co-operative Bank Ltd., 1989 UPLBEC 149** is to be preferred as against the decision of the same High Court in **Smt. Pushpa Agrawal vs. Regional Inspector of Girls School Meerut, 1995(70)FLR 20,** and that since the Industrial Dispute Act, 1947 the Act is not to override any State law, the definition of retrenchment under Section 2(oo)(bb) of the Industrial Dispute Act 1947 will not be applicable in the matters covered by the U.P. Industrial Dispute Act, 1947.

22. On merits Shri Goyal submits that E.W.I. Admitted that the respondent workman had worked continuously from 1.4.1982 until he was given extension. There was no break in his work. Shri Ram Singh stated that he had no knowledge about the extension and that Shri Lal Chandra admitted that the Banaras Hindu University has not filed any paper after paper No. 62, which is incomplete. He would submit that the respondent workman was given extension from time to time and that the fact, that he was given a show cause notice as to why he is not attending to work, would clearly show and was correctly interpreted by the Labour Court to mean that the workman was given further extension but that his service were illegally and arbitrarily terminated before the last extension came to an end.

23. The question, that calls for consideration of the court, is whether the reference in this case by the State Government was competent. The Banaras Hindu University is a University established and incorporated by a Statute. The Central Act dissolved the Hindu University Society registered under the Societies Regularisation Act, 1860 and vested all the rights, which were vested in the said society in the University. A survey of the provisions of the Act would show that President of India is the Visitor of the University under Section 5 with powers to cause an inspection to be made by such person as he may direct. He may address the Vice Chancellor under sub section (4) and that the Executive Council is authorized to communicate with the Visitor through the Vice Chancellor under sub section (5). The Chancellor is appointed by the Court to hold office for three years under Section-7 and is the Head of the University under Section 7A. The Vice Chancellor is appointed by the Visitor on the recommendations of the Selection Committee, constituted by the Visitor under Section 7B to be a whole time salaried officer of the University under sub section (2). He is the principal executive and academic officer of the University under Section 7C and ex-officio Chairman of the Executive Council; the Academic Council and the Finance Committee. The Court the executive Council; the Academic Council; the finance Committee; the faculties and such other authorities as may be declared by the Statutes to be the authorities of the University are the authorities of the University under Section 8A. The Court is an advisory body under Section9. The Executive revenue and property of the University under Section 10. The University is required to maintain

permanent reserves to cover recurring charges under Section 14 and the corpus of Rs.45 lacs permanent endowment to meet the recurring charges of the University other than charges in respect of scholarships, prizes and rewards provided that, (1) any Government securities, as defined by the Indian Securities Act 1920 which may be held by the University shall be reckoned at their face value; and (2) the sum of Forty-five lakhs shall be reduced by such sum at the commencement of the Banaras Hindu University(Amendment) Act 1966. The Central Government shall, declare to be the total capitalised value, for the purposes of grants of money which have been made to the University any Ruler of an Indian State, and the total income accruing from immovable property which has been transferred to the University. The university has to constitute Pension or Provident fund or insurance scheme under Section 16A for the benefit of its officers, teachers and other employees. The conditions of service of officers and teachers shall be under a written contract to be lodged with the University to t Tribunal of Arbitration consisting of one member appointed by the Executive Council, one member nominated by the officer or the teachers concern and an umpire appointed by the Visitor. The decision of the Tribunal or Arbitration shall be final and shall not be questioned in any court of law under sub section (3) of Section 16B. The University functions through the Statute and Ordinance made under Section 17 and 18 of the Act to be made by the Executive Council and approved by the Visitor and regulation with regard to the procedure to be observed in the meetings of all other matters which by the Act, the Statutes or Ordinances are to be prescribed by the Regulations.

24. It is submitted that the entire grant is received by the University from the Central Government on the allocation by the University Grants Commission. The Executive Council is to consist of the Vice Chancellor, Ex-Officio and 8 persons nominated by the Visitor under Statute 14(1) and that the Executive Council has a right to manage and regulate the finances, accounts, investments, property business and other administrative affairs of the University. The University is for all practical purposes an instrumentality of the State for which the entire finances are provided by the Central Government. The President of India as the Visitor appoints the Vice Chancellor on the recommendation of the selection committee to be the whole time salaried officer and that the Executive Council is headed by Vice Chancellor and 8 persons to be nominated by the Visitor to perform the entire financial and administrative function of the University. Every new statute or its amendment or repeal under Section 17(iv) requires previous approval of the Visitor and that every Ordinance has to be submitted under Section 18(6) to the Visitor who may disallow any such Ordinance or remit it to the Executive Council for further consideration. The President of India as an executive of the Union acting under the aid and advice of the Cabinet exercises full and complete control on the University. The University as such is a extended hand of the Central Government. It has always been treated so, and is also called as a Central University.

25. In **Hindustan Aeronautics Ltd (supra)** the Supreme Court following the **Steal Authority of India's case (supra)** held:-

"*The question that arises for consideration in this case is, whether the High Court is justification holding that the State Government is the "Appropriate Government" under the provisions of the relevant Act. The Constitution Bench recently has considered the relevant provisions of the Contract Labour regulation act in the case of Steel Authority of India and others vs. National Union Waterfront Workers & Ors.(2001)7 SCC 1 and has come to the conclusion that the Appropriate Government" will be the Government which exercises control and authority over the concerned organization. It is undisputed that the Hindustan Aeronautics Ltd. Is an undertaking of the Central Government and it is the Central Government which exercises full control over the same. Issuance of license by the State Government is no criteria to come to a conclusion that the State Government would be the "Appropriate Government". The impugned judgement of the High Court therefore is on the fact of it erroneous in view of the Constitution Bench decision of this Court referred to earlier. We, therefore, set aside the impugned judgement of the High Court and hold that the Central Government is the "Appropriate Government".*

26. The Labour Court held that the Banaras Hindu University is an autonomous body and it is getting financial grants from the Central Government. It shall not be treated as part of the Central Government and that a number of cases of Banaras Hindu University have been decided by the Labour Court and no such issue has been raised. The State Government was thus competent to refer the matter.

27. The finding of the Labour Court completely overlook the admitted facts that the entire grant is received by the University from the Central Government and that the Executive Council which control with the finances and administrative under the supervision of the Visitor of the University and the Vice Chancellor is the full time salaried officer of the University and executive head appointed by the Visitor. The Banaras Hindu University has not only a central character but is a University which is controlled and managed by the Central Government. The State Government as such did not have the authority to make a reference nor any such authority was delegated to it by the Central Government under Section 39 of the U.P. Industrial Disputes Act. The reference under Section 4k by the State Government as such was not competent and thus the proceedings in pursuance of the reference are liable to be set aside.

28. The Contract, on which the respondent workman was appointed has not been brought on record and thus the argument that the matter could only be refereed to Arbitrator cannot be appreciated and accepted by the Court.

29. In view of the findings on the first question, that the reference under Section 4 K by the State Government was not competent, it is not necessary for the Court to decide the other issues.

30. The writ petition is **allowed.** The award dated 10.7.1998 passed by the Labour Court, Varanasi in Adjudication

Case No. 31 of 1995 Banaras Hindu University and others vs. Brij Nath Bhattacharya published on 15.3.1999 is set aside. There shall be no order as to costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.01.2009

BEFORE
THE HON'BLE VINOD PRASAD, J.

Criminal Misc. Application No. 19905 of 2008

Kalim Ahmad @ Anwar Miyan and others ...Applicants
Versus
State of U.P. & another ...Opposite Parties

Counsel for the Applicants:
Sri Sushil Shukla

Counsel for the Opposite Parties:
Sri Azhar Hussain
A.G.A.

Code of Criminal Procedure Section 482- Quashing of Criminal proceeding Trail for offence under Section 467, 468, 474 IPC- parties entered into compromise do not want to litigate the case-held- technicality will not come in their way- No useful purpose served-in continuing and passing the futile order.

Held: Para 7

After hearing both the sides, I am of the view that since the matter has been compromised and both the litigating sides do not want to litigate any further therefore technicality of law should not come in their way to compromise the matter and therefore, while exercising my power under Section 482 Cr.P.C. I quash the proceedings of the aforesaid Complaint Case No.2257 of 2004, Krishna Lal Vs. Kalim Ahmad @ Anwar Miyan and others, under Sections 467, 468, 471 IPC, P.S. Kotwali, District Bareilly, pending in the court of Ld. JM Ist Bareilly.

Case law discussed:
(2008) 2 SCC (Crl) 464

(Delivered by Hon'ble Vinod Prasad, J.)

1. Kalim Ahmad @ Anwar Miyan, Shahid Ahmad @ Shahid Miyan, Jaheer Ahmad @ Jaheer Miyan and Sajid Ahmad @ Guddu, four sibling brothers all sons of Late Nawab Ali, resident of 153, Shahbad, P.S. Prem Nagar, District Bareilly have invoked the inherent jurisdiction of this Court by filling of the instant Criminal Miscellaneous Application with the prayer to quash the proceeding of Complaint Case No. 2257 of 2004 for offences under Sections 467, 468, 471 IPC, P.S. Kotwali, District Bareilly, pending in the court of Ld. JM Ist Bareilly.

2. I have heard Sri Sushil Shukla, learned counsel for the applicants in support of this application as well as Sri Azhar Hussain, learned counsel for the respondent and learned AGA in opposition and perused the record of this application.

3. In a bird eye view, the allegations against the applicants, as is contained in Annexure No.1 are that Sri Kishan Lal Suri son of Sri Bhagwan Das Suri, resident of 23-A Model Town, P.S. Baradari, district Bareilly had purchased a house from Smt. Shanti Devi wife of Kunj Lal, who was holding power of attorney of his wife namely Smt. Shanti Devi, which house was allotted a new Municipal Number being House No.218/154. The said house was given under the tenancy of Nawab Ali, father of

the applicants. After the demise of Nawab Ali, the four applicants, as heirs of the deceased came in possession over the said house, as tenants. Further allegations are that the aforesaid applicants by impersonating Smt. Shanti Devi through an imposter lady got executed a fictitious sale deed through a sham transaction in their favour and got it registered in the office of Deputy Registrar Registration and started claiming the ownership of the aforesaid house. Since the property was purchased through a sham transaction, FIR Annexure No. 1 was got lodged by Kishan Lal Suri on 29.5.1999 at 5.00 p.m. at P.S. Kotwali, district Bareilly showing the date of the incident as 29.5.1992, which FIR was registered as Crime No. 2350 of 1999 for offences under Sections 420,467,468,471 IPC.

4. The police of police station Kotwali, district Bareilly engineered the investigation and after concluding the same submitted a final report on 9.2.2000 (Annexure No.2). Thereafter what transpires is that a protest petition was filed by the informant, which was treated to be a complaint by the concerned Magistrate who recorded the statement of the informant under Section 200 Cr.P.C. and that of his witnesses P.W. 1 Manohar Lal and P.W. 2 Om Prakash Goyel under Section 202 Cr.P.C. Basing his opinion on the aforesaid recorded statements vide order dated 22.4.2004 Ld J.M. Ist, Bareilly in the aforesaid case summoned the applicants to stand the trial for offences under Sections 467, 468, 471 and 420 IPC fixing 21.5.2004 for their appearance before him. It is this proceeding, which is sought to be quashed by filing of the present Criminal Miscellaneous Application.

5. Learned counsel for the applicants contended that the matter has been compromised and the informant now does not want to prosecute the applicants. He further contended that the ordeal of the trial procedure will be a futile effort and wastage of time of the Court. Learned counsel for the applicants relied upon a judgment of apex court rendered in **(2008) 2 SCC (Crl) 464 Madan Mohan Abbot Vs. State of Punjab**. He contended that since the parties do not want to litigate, the case should be closed. Learned counsel for the applicants further submitted that the dispute was primarily civil in nature and therefore, no useful purpose will be served to go on with the trial procedure.

6. Learned counsel for the respondent also agreed to the fact that the dispute has been compromised and the parties do not want to litigate any further.

7. After hearing both the sides, I am of the view that since the matter has been compromised and both the litigating sides do not want to litigate any further therefore technicality of law should not come in their way to compromise the matter and therefore, while exercising my power under Section 482 Cr.P.C. I quash the proceedings of the aforesaid Complaint Case No.2257 of 2004, Krishna Lal Vs. Kalim Ahmad @ Anwar Miyan and others, under Sections 467, 468, 471 IPC, P.S. Kotwali, District Bareilly, pending in the court of Ld. JM Ist Bareilly.

8. This application is allowed.

Copy of this order is directed to be sent to the trial Magistrate for his intimation.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.01.2009

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Misc. Application No. 24729 of 2008

Rajendra Prasad Misra ...Applicant
Versus.
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Rahul Mishra

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

Code of Criminal Procedure-Chargesheet quashing-offence under Section 466, 477, 468, 471, 409 , 120 read with Prevention of Corruption Act, 1988 Section 13(1) and Section 13(2) -no irregularities in investigation disclosed-nor the Magistrate committed any illegality in taking cognizance-cannot be interfered under inherent power-considering old age-Magistrate to consider the bail application on same day the discharge application in accordance with law.

Held: Para 6

On the ground of delay of submission of charge sheet after the retirement of the applicant is not a proper ground for quashing the charge sheet. There is no illegality in submission of the charge sheet, therefore, the prayer for quashing the same is refused.

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

1. Heard Sri Rahul Mishra, learned counsel for the applicant and learned AG.A for the State of U.P. and perused the record.

2. This application has been filed with a prayer to quash the charge sheet dated 31.05.2007 under Sections 466, 467, 468, 471, 409, 120B I.P.C. and Section 13(2) read with Section 13 (1) C.D. of Prevention of Corruption Act, 1988 in Case Crime No. 115 of 1998, P.S. Kotwali Nagar, District Gonda pending in the court of learned Special Judge, Corruption Act, Gorakhpur vide S.T. No. 04 of 2008.

3. The facts in brief of this case are that the F.I.R. of this case has been lodged by Sri Rama Shanker Singh Yadav, Inspector U.P. Vigilance Establishment, Faizabad Sector, Faizabad against the applicant and other co-accused persons on 06.02.1998 alleging there in that one Awadhesh Singh son of Jagpal Singh moved an application in respect of the corruption of different. departments of District Gonda, the same was forwarded by Kunwar Ajay Pratap Singh @ Lalla Bhaiya, M.L.A, on that application, the Government has initiated an enquiry, in enquiry report dated 30.9.1996 it was found that in the construction of the building of Vikas Bhawan, Gonda certain irregularities were found, the work of the construction was done by Gramin Adhiniyantran Sewa Vibhag, Gonda. It was found that the use of cement and saria was shown in excessive whereas such material was not used, for the same purpose the forged documents were prepared in connivance of the applicant and other co-accused persons and some of the records was missing at the instance of the applicant and another co-accused persons so that the criminal liability may not be fixed against the applicant and other co-accused persons. It was found that the building of the Vikas Bhawan was not constructed up to the mark. After

preliminary enquiry the F.I.R. of this case has been lodged. After investigation the charge sheet date 31.05.2007 has been filed by the 1.O. in the court of learned Special Judge, Anti Corruption on which the learned Special Judge concerned has taken the cognizance on 2.2.2008.

4. It is contended by learned counsel for the applicant that applicant was posted as executive engineer in Gonda in Rural Engineering Services U.P. The contract of the construction of the building of the Vikas Bhawan was not in the hands of the applicant. The applicant has not committed any forgery, cheating or corruption. The allegations are in respect of use of the material in the construction of the building of the Vikas Bhawan According to the terms and work done by the Contractor the payment of the bills has been made. There is no evidence to shows that applicant had made any conspiracy in commission of the alleged offence. The preliminary enquiry was not properly done and without doing the proper enquiry the F.I.R. of this case has been lodged only on the basis of the presumption that sufficient material has not been used in the construction of the building of the Vikas Bhawan. The proper sanction has not been accorded for the prosecution of the applicant by authority concerned. In the present case the proper investigation has not been done by the I.O. and without collecting the cogent evidence disclosing the commission of the offence the charge sheet has been submitted. The charge sheet has been submitted in view of the technical report submitted by the Chief Engineer. The applicant has retired in the year 1992, the charge sheet has been submitted after 15 years of his retirement. The charge sheet has been submitted by the I.O. is simply misuse of the process of law whereas no offence is made out against the applicant and in a routine manner without perusing the material collected by the I.O. the learned Special Judge has taken the cognizance and summoned the applicant to face the trial, therefore, the charge sheet of the present case may be quashed.

5. In reply of the above contention it is submitted by learned AG.A that in the present case the preliminary enquiry has been done on the basis of the complaint received by the Government. In preliminary enquiry it was found that applicant and other co-accused persons have committed the alleged offence thereafter the F.I.R. has been lodged. The matter was properly investigation, during investigation the cogent evidence has been collected by the I.O. disclosing the commission of the offence. Thereafter the charge sheet dated 31.5.2007 has been submitted in the court of learned Special Judge Anti Corruption, Gorakhpur who take the cognizance on 2.2.2008. During investigation the proper sanction has also been obtained. There is no illegality in the sanction also, only delay in submitting the charge sheet is not a proper ground for quashing the charge sheet. The application filed by the applicant is devoid of merits and the same may be dismissed.

6. Considering the submission made by learned counsel for the applicant, learned AG.A and from the perusal of record it appears that in the present case on the basis of the complaint made by Sri Awadhesh Singh, the same was forwarded by Kunwar Ajay Pratap Singh @ Lalla Bhaiya, M.L.A. open enquiry has been conducted by the Government, in enquiry it was found that proper material of

cement and iron rods not been used in the construction of building of Vikas Bhawan It is alleged that the payment of the high quantity of cement and iron has been made whereas such quantity was not used in construction of the building for which the forged records has also been prepared even some of the record has been misplaced. The I.O. has recorded the statement of the witnesses and collected the material which prima facie discloses the commission of the offence and for the purpose of the prosecution the sanction has also been obtained from the authorities concerned. The I.O. has not committed any error in submitting the charge sheet dated 31.5.2008 which discloses the commission of the offence. The learned Special Judge Anti Corruption has also not committed any error in taking the cognizance vide order dated 2.2.2008. The charge sheet has been submitted on 31.05.2007 in respect of the incident which had occurred in the year 1998. On the ground of delay of submission of charge sheet after the retirement of the applicant is not a proper ground for quashing the charge sheet. There is no illegality in submission of the charge sheet, therefore, the prayer for quashing the same is refused.

7. However, considering the old age of the applicant, it is directed that applicant shall appear before the court concerned within 30 days from today, in case he applies for bail, the same shall be heard and disposed of expeditiously, if possible on the same day by the court concerned thereafter in case the applicant moves discharge application before the court concerned, the same may be heard and disposed expeditiously of in accordance with the provisions of law.

8. With the above directions, this application is finally disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.02.2009

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 28040 of 2004

Chhote Lal ...Petitioner
Versus
Regional Manager, Bank of Baroda, Bareilly Region, Bareilly & others ...Respondents

Counsel for the Petitioner:
Sri Kuldeep Jauhri
Sri Dharmendra Singh

Counsel for the Opposite Parties:
Sri Vipin Sinha
Sri Ashish Srivastava
Sri K.C. Sinha

Industrial Dispute Act, 1947-Section 25-F-Retrenchment compensation-denied by Tribunal-workman worked only 222 days-240 days to be calculated from the date of termination after joining backwards to 12 months-falure of such consideration-held- illegal-matter remitted to back for fresh reconsideration.

Held: Para 9

In the light of the aforesaid judgment, the Industrial Tribunal is required to calculate 240 days starting from the date of the termination and going backwards 12 months which has not been done. This calculation is required to be based on the basis of the payment vouchers issued by the bank and such other evidence which the parties may placed before the Tribunal.

Case law discussed:
AIR 1981 SC 1253

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

1. Heard Sri Dharmendra Singh, holding the brief of Sri Kuldeep Jauhari, the learned counsel for the petitioner and Sri Ashish Srivastava, holding the brief of Sri Vipin Sinha, the learned counsel for the respondent bank.

2. The petitioner has challenged the validity and legality of the award whereby his claim with regard to the validity of his order of termination was rejected by the Industrial Tribunal, New Delhi. The facts leading to the filing of the writ petition is, that the petitioner was appointed as a peon allegedly w.e.f. 10.6.1991 and worked for a limited period of time and thereafter his services was dispensed with. It is alleged that the petitioner was re-engaged and eventually worked till 14.11.1994 when his services was terminated without any prior notice. The petitioner contended that he had worked for more than 240 days in a calendar year and, therefore, his services could not be terminated without complying with the mandatory provisions of issuing notice and payment of retrenchment compensation which had not been done.

3. The petitioner being aggrieved by his alleged termination of services, raised a dispute which was referred by the Ministry of Labour to the Industrial Tribunal, in the year 1997. Before the Tribunal the employers, namely, the bank, denied the claim of the petitioner and submitted that he had never worked as a permanent peon nor had he completed 240 days in a calender year.

4. The Industrial Tribunal after considering the evidence on record passed an award dated 23.2.2004 rejecting the claim of the petitioner holding that the workman had not worked for 240 days in a calender year and therefore, the provision of Section 25-F of the Industrial Disputes Act was not attracted and that the petitioner was not entitled for the payment of retrenchment compensation, etc. The petitioner, being aggrieved, has filed the present writ petition.

5. Heard the learned counsel for the parties.

6. A perusal of the written statement and the rejoinder statement filed by the petitioner indicates the number of days which the petitioner had worked from 1991 till the date of his alleged termination, i.e., 14.11.1994. Further, the rejoinder affidavit indicates not only the number of days which he had worked but also indicates the payment which he had received from the employer for the number of days the petitioner had worked. A perusal of paragraph 13 of the rejoinder of the workman filed before the Tribunal indicates that he had worked for 295 days from 8.12.1993 to 14.11.1994. The workman has alleged in the said paragraph that not only he had worked for those days but was also paid and that the statement is based on the basis of the payment vouchers.

7. In spite of this specific averment being made by the petitioner, the Tribunal has given a finding that the petitioner has worked for 202 days between November, 1993 to October 1994 which apparently appears to be based on surmises and conjectures. The conclusion drawn by the Tribunal does not appear to be borne out from the records. It appears that the finding of having worked for less than 240 days is made on the basis that 12

calender months has to be calculated from 1st January to 31st December. In my opinion, this basis is patently erroneous.

8. In **Mohan Lal vs. The Management of M/s Bharat Electronics Ltd.,** AIR 1981 SC 1253, the Supreme Court held that 240 days in a calender year has to be counted starting from the date of termination and then counting 12 months backwards and if the workman had worked for 240 days in those 12 months in that event, by a deeming eviction, the workman would be deemed to be in continuous service of one year. The Supreme Court held-

*"**14**. We have already extracted Section 25B since its amendment and the change in language is the legislative exposition of which note must be taken. In fact, we need not further dilate upon this aspect because in Surendra Kumar Verma v. Central Government Industrial-cum-Labour Court, New Delhi, (1980) 4 SCC 443 : (AIR 1981 SC 422) Chinnappa Reddy, J., after noticing the amendment and referring to the decision in Sur Enamel and Stamping Works (P) Ltd. case (AIR 1963 SC 1914) held as under (at p. 426 of AIR) :*

"These changes brought about by Act 36 of 1964 appear to be clearly designed to provide that a workman who has actually worked under the employer for not less than 240 days during a period of twelve months shall be deemed to have been in continuous service for a period of one year whether or not he has in fact been in such continuous service for a period of one year. It is enough that he has worked for 240 days in a period of 12 months, it is not necessary that he should have been in the service of the employer for one whole year."

In a concurring judgment Pathak J. agreed with this interpretation of Section 25B (2). Therefore, both on principle and on precedent it must be held that Section 25B (2) comprehends a situation where a workman is not in employment for period of 12 calendar months but has rendered service for a period of 240 days within the period of 12 calendar months commencing and counting backwards from the relevant date, i. e. the date of retrenchment. If he has. he would be deemed to be in continuous service for a period of one year for the purpose of Section 25B and Chapter VA."

9. In the light of the aforesaid judgment, the Industrial Tribunal is required to calculate 240 days starting from the date of the termination and going backwards 12 months which has not been done. This calculation is required to be based on the basis of the payment vouchers issued by the bank and such other evidence which the parties may placed before the Tribunal.

10. In view of the aforesaid, the award of the Tribunal is manifestly erroneous in law and cannot be sustained and is quashed. The writ petition is allowed. The matter is remitted again to the Industrial Tribunal with a direction to re-decide the matter within a period of six months from the date of the production of a certified copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.01.2009

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

Civil Misc. Writ Petition No. 29644 of 2006

D.A.V. Public School (U.P.) Meerut ...Petitioner

Versus

Prescribed Authority (Minimum Wages Act) 1948/ Assistant Labour Commissioner-Bijnor and others ...Respondents

Counsel for the Petitioner:
Sri Vijay Bahadur Singh
Sri Ashok Kumar Lal
Sri Shakti Swarup Nigam

Counsel for the Respondents:
Sri Arun Kumar Singh
S.C.

Industrial Dispute Act, 1947-Section 22-C (2)-claim for arrear of wages-workman already drawing more than 1600/- per month-direction for payment of arrears of salary Vth pay commission and imposition by fine as per beyond jurisdiction.

Held: Para 8

Moreover by virtue of Section 1(6) of Payment of Wages Act an employee drawing more than Rs.1600/- per month cannot make any claim under the said Act. Not only the claimed per month wages but even the per month wages actually paid to respondent No.2 were more than Rs.1600/-

Case law discussed:
2006 (109) FLR 1101, 1992 (2) U.P.L.B.E.C. 1472, 2008 AIR SCW 7233, AIR 2006 SC 1581, 2007 (113) FLR 50 : 2007 (2) ADJ 25 (SC), 2006 (10) SCC 211.

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

1. Heard learned counsel for the parties.

2. Respondent No.2, Arun Kumar was an employee of petitioner school. His services were terminated on 31.03.2001. Thereafter, on 23.06.2004, he filed an application before Prescribed Authority under Payment of Wages Act, 1936, which was registered as P.W.A. Case No.60 of 2004. In the said application, he claimed that from 13.04.1991, he was appointed as O.S.D. in the petitioner school and he was paid less wages than the wages required to be paid in accordance with the recommendations of V Pay Commission w.e.f. 01.04.1996. It was stated that the difference came to Rs.6,75,918/- (about Rs.6,80,000/-). Ten times compensation was also claimed.

3. It has been held in **U.P. Basic Parishad, Allahabad Vs. Prescribed Authority under Payment of Wages Act, 2006 (109) FLR 1101 and R.D.S.O. Basic School Vs. Prescribed Authority, 1992 (2) U.P.L.B.E.C. 1472** that Payment of Wages Act, 1936 is not applicable to educational institutions.

4. Through order dated 20.12.2004, Prescribed Authority under Payment of Wages Act condoned the delay. The only ground mentioned in the said order for condoning the delay was that since September, 2001 till March, 2004, respondent No.2 gave several applications to the management. This is absolutely no ground for condoning the delay. In any case for delay since 1996 till 2001 when services of respondent No.2 were terminated, there was absolutely no explanation. Against order dated

20.12.2004, appeal was filed, which was dismissed by District Judge Bijnore on 15.02.2005. I find that both the orders are utterly illegal as neither any ground for delay was taken nor any finding was recorded. The Supreme Court in the following authorities has held that filing repeated representations is no ground to condone the delay and it cannot keep a course of action alive.

1. C. Jocob Vs. Director of Geology & Mining, 2008 AIR SCW 7233
2. AIR 2006 SC 1581 "Karnataka Power Corporation Ltd. v. K.Thangappan"

5. Ultimately, Prescribed Authority under Payment of Wages Act, 1936 allowed the claim of respondent No.2 through order dated 25.03.2006 holding that from 01.04.1996 to 31.03.2001 respondent No.2 is entitled to salary in accordance with the V Pay Commission amounting to about Rs.2,70,000/- (for this period about Rs.2,40,000/- were paid). Seven times of the said amount, i.e. Rs.18,85,429/- was imposed as damages. Total amount directed to be paid came to Rs.21,54,776/-. This writ petition is directed against orders dated 20.12.2004 and 25.03.2006.

6. Recommendations of V Pay Commission when accepted by the Government are applicable upon government employees. They are not applicable on privately managed educational institutions.

7. Disputed question of entitlement to a particular pay or pay scale cannot be decided in proceedings under Payment of Wages Act. The same principle which applies to applications under Section 33-C(2) of Industrial Disputes Act applies to Payment of Wages Act. It has repeatedly been held by the Supreme Court that there cannot be any adjudication under Section 33-C(2) of I.D. Act. In this regard, reference may be made to the authority reported in **Ghaziabad Zila Sahakari Bank Ltd. Vs. Additional Labour Court, Commissioner, 2007 (113) FLR 50 : 2007 (2) ADJ 25 (SC). In U.P.S.R.T.C. Vs. Virendra Bhandari, 2006 (10) SCC 211**, it has been held that salary in terms of recommendations of Pay Commission cannot be recovered through proceedings under Section 33-C(2).

8. Moreover by virtue of Section 1(6) of Payment of Wages Act an employee drawing more than Rs.1600/- per month cannot make any claim under the said Act. Not only the claimed per month wages but even the per month wages actually paid to respondent No.2 were more than Rs.1600/-

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

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.01.2009

BEFORE
THE HON'BLE VINOD PRASAD, J.

Criminal Misc. Application No.35450 of 2008

Krishna Pal ...Applicant
Versus
State of U.P. & another ...Opposite Parties

Counsel for the Applicant:
Sri R.P.S. Chauhan

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

Code of Criminal Procedure-Section 319-Summoning-on the basis of materials available during course of Trial-satisfaction of Trial Court is material-High Court can not substitute the power of Trial Court-held-summoning order can not be termed illegal or capricious/made-observation for consideration on same day of bail application made.

Held: Para 8

The trial judge was satisfied that the present applicant can be tried along with already trying accused persons and the evidence led before it is sufficient to summon him by exercising power under section 319 Cr.P.C. The said opinion of the trial judge cannot be said to be capricious, illegal or not sustainable in law.

Case law discussed:
2007 (58) ACC 254

(Delivered by Hon'ble Vinod Prasad, J.)

1. The order dated 11.02.2008 passed by Addl. District and Sessions Judge in S.T. No.1122 of 06, State Vs. Ram Charan and another under Section 307 and 504 IPC has been questioned in this application under section 482 Cr.P.C. invoking inherent jurisdiction of this Court.

2. I have heard learned counsel for the applicant at a great length and perused the record including annexure-3 and the impugned order.

3. Sri Chauhan, learned counsel for the applicant raised many contentions first being that during the investigation the complicity of the applicant was found to be false, secondly, only the role of exhortation has been assigned to the present applicant in the deposition of the injured recorded in the aforesaid sessions trial, thirdly, the applicant has no criminal history and has got no conviction to his credit and lastly, he relied upon a judgment of Apex Court, reported in 2007 (58) ACC 254, Mohd. Shafi Vs. Mohd. Rafique and another to support his argument that the summoning of the applicant exercising power under section 319 Cr.P.C. is bad in law and the impugned order be quashed.

4. Learned AGA vehemently refuted all the contentions raised by the learned counsel for the applicant.

5. Dealing with the contentions raised by the learned counsel for the applicant first of all material collected during investigation is wholly irrelevant and is beyond the scope of Section 319 Cr.P.C. What is to be looked into, for summoning a person under section 319 Cr.P.C. is the recorded evidence during trial and not materials collected during investigation. All the allegations made during the investigation are alien for exercise of power under section 319 Cr.P.C. therefore, first contention raised by the learned counsel for the applicant is hereby repelled.

6. Coming to the second contention that the only role of exhortation has been assigned to the applicant, the applicant can very well be convicted with aid of Section 34 or 149 of I.P.C.

7. Coming to the third contention that applicant does not have any criminal history and therefore, should not be prosecuted, to say the least, the said

argument is wholly irrelevant and has been advanced without any basis.

8. Coming to the judgement relied upon by the applicant, the said decision does not apply at all on the fact of the present case. What happened in the case of Mohd. Shafi was that the trial judge, on the basis of examination-in-chief only did not thought it fit to summon the accused by exercise of power under Section 319 Cr.P.C. Informant being aggrieved from the aforesaid inaction on the part of the trial judge approached the concerned High Court challenging the non summoning of the accused. The High Court while allowing the prayer of the informant set aside the order passed by the trial judge and directed the trial judge to summon the accused persons. The accused was aggrieved by the order passed by the High Court against him and therefore, he had approached the Supreme Court. The Apex Court set aside the order of the High Court for the reasons that under section 319 Cr.P.C. it is the satisfaction of the Trial Judge to summon any person as an accused. The High Court cannot not substitute its satisfaction with that of the trial judge. The Apex Court has held that if the trial judge was not satisfied only on the basis of examination-in-chief to summon the accused, no fault can be find with the order of the trial judge and therefore, the Apex Court set aside the order of High Court. This fact is clear from paragraph no. 12 and 13 of the aforesaid judgment of Mohd. Shafi (supra). That is not the situation here. The trial judge was satisfied that the present applicant can be tried along with already trying accused persons and the evidence led before it is sufficient to summon him by exercising power under section 319 Cr.P.C. The said opinion of the trial judge cannot be said to be capricious, illegal or not sustainable in law.

9. In view of the above discussions, I find no reason to set aside the impugned order dated 11.2.08 passed by Additional Sessions Judge in S.T. No. 1122 of 06 State Vs. Ram Charan and others. This application is therefore devoid of merit and is hereby dismissed.

10. After this order was passed, learned counsel for the applicant requested for a direction for disposal of bail prayer of the applicant in the aforesaid trial.

11. On the peculiar facts of the case, I direct the trial judge to consider and dispose of the bail prayer of the applicant in the aforesaid trial on the same day on which it is moved after hearing the public prosecutor as complete materials against the applicant is already available with the trial judge.

12. This application stands dismissed with aforesaid direction.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.01.2009

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No.37954 of 1996

M/s Hindustan Aeronautics Ltd.
...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri S.D. Singh

Counsel for the Respondents:
Sri Harish Chand Kohli (In Person)
Sri S.C. Tripathi
S.C.

Code of Civil Procedure-Order 9 R. 13- Restoration of appeal-application remained pending for 13 years-delaying tactice by appellant-No satisfactory explanation for non appearance-first appellate court recorded so many reasons for not allowing first application-can not be interfered either under Article 226 or 227 of constitution.

Held: Para 14

The Appellate Court has given cogent reasons for rejecting the application as noted above. The appeal was pending for hearing for last 13 years and was adjourned at the instance of the appellant for 4th July, 1996. The Appellate Court has found that no satisfactory explanation was given for non-appearance of the counsel on 4th July, 1996.

Case law discussed:
(2000) 3 S.C.C. 54, AIR 1984 S.C. 1447, 2003 (6) SCC 675

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

1. Heard Sri S.D. Singh, learned counsel for the petitioner and Sri Harish Chand Kohli, who has appeared in person on behalf of respondent No.2. Earlier the case was adjourned on the request of the learned counsel for the petitioner to get the matter settled outside the Court. However, when the case was taken up today, the settlement between the parties is not seen. In view of the aforesaid, we have proceeded to decide the writ petition on merit.

2. This writ petition has been filed praying for quashing the order dated. 15.11.1996 (Annexure No.8 to the writ petition) by which order, the 5th Additional District Judge, Kanpur Nagar has rejected the application of the petitioner for restoring the FAFO which was dismissed on July, 1996. The FAFO was filed by the petitioner against the order dated 14.4.1983 by which order the arbitration award awarding a sum of Rs.79000 to the respondent was made Rule of the Court. When the FAFO was called on several occasion, neither the petitioner nor the petitioner's counsel appeared hence the Court dismissed the appeal. An application was filed for restoration of the appeal along with the affidavit of Sri A.P. Trivedi, Supervisor. The objection was filed to the said restoration application. The Court heard the parties and has dismissed the application. The Court did not believe the cause shown by the petitioner for non-appearance on 4th July t 1996. It was noticed by the Court that 4th July, 1996 was the date fixed on the request made by the petitioner and the appeal which was pending for 13 years was to be heard finally on 4th July 1996. Neither the petitioner appeared nor his counsel appeared although respondent and his counsel were present. The explanation given by the petitioner was that there was workers' agitation in the establishment due to which, no one could come to the Court and the file of the case was with the Supervisor. The Court disbelieved the case set up by the petitioner and has observed that no Senior Officer has filed any affidavit with regard to extent of the workers' agitation and it has not even stated that there has been any violence resorted by the workers in the establishment. The Court also did not believe that there was no facility of telephone and the case file was not with the counsel. The Court observed that in a

case where appeal was pending for last 13 years and adjourned for 4th July, 1996 on the request of the petitioner, the file of the case be not with the counsel, is not believable. Against the order dismissing the restoration application, this writ petition was filed by the petitioner on 26th November 1996 which remained pending in this Court for another 13 years.

3. By an interim order passed on 16.12.1996, the respondent was restrained from taking the money which has been deposited in the Court in pursuance of the award.

4. Learned counsel for the petitioner challenging the order contended that the Court below has committed error in rejecting the restoration application. The Court ought to have put some conditions for restoration of the appeal. He submits that sufficient cause was shown. In support of his contention, the learned counsel for the petitioner has placed reliance on the judgement of the Supreme Court ***(2000) 3 S.C.C. 54, G.P. Srivastava Versus R.K. Raizada and others***.

5. We have considered the submissions and perused the record.

6. The Appellate Court vide impugned judgement dated 15.11.1996 dismissed the application filed by the petitioner refusing to recall the order dated 4th July, 1996. The following are the reasons which have been given in the impugned order for rejecting the application:

(1) The appeal which earlier fixed for 2nd July, 1996 for hearing, was adjourned at the instance of the petitioner to 4th July, 1996 for hearing.

(2) The appeal is 13 years old appeal and serious efforts were required to be taken by the appellant for hearing of the appeal but on that date no one appeared on behalf of the appellant. The HAL is a reputed and a big establishment but with regard to labour unrest, no affidavit of any Senior Executive Officer was filed and affidavit of only a subordinate employee has been filed who is not expected to assess the nature and seriousness of labour unrest.

(3) It is not acceptable that no employee or officer could contact his counsel whereas there is no mention that workers resorted to rampage or violence.

(4) It is not acceptable that telephone services had become zero.

(5) The fact that file of the counsel went with Sri A.P. Trivedi along with other documents cannot be believed. No satisfactory reasons have been given as to why the counsel for the appellant in such important and old case could not appear on 4th July, 1996.

(6) The party who is interested in delaying the disposal of a case absent itself to get the case dismissed in default and subsequently efforts are made to get it restored by which process he gets opportunity to delay the matter and in the present case this appears to be reason for non-appearance.

7. From the reasons as indicated in the impugned order as noticed above, it is clear that Court has considered the explanation given by the petitioner-appellant for non-appearance on 4th July, 1996 and the objection taken to the application by the respondent. It is not disputed that appeal was filed against an order passed by the learned Civil Judge by which order, award given by arbitrator was made Rule of the Court. The dispute between the parties arose out of an arbitration proceeding. The petitioner and respondents entered into a contract for carrying out certain constructions. The dispute arose between the parties with regard to which arbitrator gave an award on 24.3.1981. The award was submitted to the Court for making it Rule of the Court on which Suit No. 140 of 1980 (M/s Kohli Construction Ltd. Vs. H.A.L.) was registered. The learned 1st Additional Civil Judge vide his judgement and order dated 14th April, 1983 made the award granted by the arbitrator for Rs.79,000/- plus interest the Rule of the Court against which order, the appeal was filed by the petitioner being FAFO No. 378 of 1983. The appeal remained pending for long 13 years and was fixed for hearing on 2nd July, 1996 but on the request made by the appellant's counsel, the appeal was adjourned for 4th July, 1996 for hearing on which date when the case was called on several occasion, neither the petitioner nor his counsel appeared. The explanation given by the petitioner for nonappearance on 4th July 1996 was that due to workers' unrest in the factory, the representative of the Company could not contact the counsel on 4th July, 1996, hence no one appeared. It has been stated by the petitioner himself in his application filed for recall of the order that the counsel was briefed on the evening of 3rd July, 1996 for hearing of the appeal. On 4th July 1996, when the case was called, counsel did not appear and no satisfactory explanation has been given in the affidavit for non-appearance of the counsel. The appeal which was an old appeal, pending for last 13 years and on the last occasion was adjourned at the instance of the petitioner's counsel, it was expected that the counsel would appear and argue the matter. The learned Appellate Court has rightly observed that in facts of the present case, a serious endeavour was required to made on behalf of the petitioner towards hearing of the appeal which was not done. The explanation that file of the counsel was mixed up and was with Official of the factory was rightly not believed. The Appellate Court who was to hear the appeal, was in best know of the proceedings before it. With an order having considered the explanation submitted by the petitioner and not having found it satisfactory enough to recall order dated 4th July, 1996, the scope of interference in writ jurisdiction is too limited.

8. The judgement of Apex Court in **G.P. Srivastava's** case (supra) relied by the counsel for the petitioner was a case where the Apex Court laid down that for setting aside the ex-parte decree under Order 9 Rule 13 C.P.C. the words "*was prevented by any sufficient cause from appearing*" must be liberally construed to enable the Court to do complete justice between the parties particularly when no negligence or inaction is imputable to the erring party. It is useful to quote paragraph No.7 of the judgement which is as follows:

"7. Under Order 9 Rule 13 CPC an ex parte decree passed against a

defendant can be set aside upon satisfaction of the Court that either the summons were not duly served upon the defendant or he was prevented by any "sufficient cause" from appearing when the suit was called on for hearing. Unless "sufficient cause" is shown for non-appearance of the defendant in the case on the date of hearing, the court has no power to set aside an ex parte decree. The words" was prevented by any sufficient cause from appearing" must be liberally construed to enable the court to do complete justice between the parties particularly when no negligence or inaction is imputable to the erring party. Sufficient cause for the purpose of Order 9 Rule 13 has to be construed as an elastic expression for which no hard and fast guidelines can be prescribed. The courts have a wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case."

9. There can be no dispute to the above proposition as laid down by the Apex Court. The Apex Court in the above paragraph has clearly laid down that the Court have a wide discretion in deciding the sufficient cause keeping in view the peculiar facts and circumstances of each case. Thus, whether the sufficient cause is made out in a particular case depends on the facts and circumstances of that case. Coming to the facts in the case before the Apex Court in G.P Srivastava's case, the *ex parte* decree was passed on 10.3.1983. On the date fixed, the tenant could not appear due to reason that he was indisposed at a site which was 85 Kms. away from Lucknow where the case was fixed and on 10th March, 1983 which was the date fixed in the case, the young nephew of the counsel met with an accident and expired which prevented the counsel to appear in the Court on that date. The facts of that case as noted in para 5 of the judgement and reasons given by Court in para 8 are as follows:

"5. On 10.3.1983 the case was called on for hearing by the Court in the early hours but as no one appeared on behalf of the appellant, the same was again taken up at 2 p.m. As none appeared at that time also, the suit was decreed ex parte on the basis of evidence produced in the case. In his application under Order 9 Rule 13 of the Code of Civil Procedure, praying for setting aside ex parte judgement and decree, the appellant submitted that he was posted as an Assistant Engineer in the Irrigation Department and on account of the construction of the bridges over the casual drains he had to remain at the site in the interests of public. He became indisposed in the evening of 8.3.1982 at the site which was about 85 kilometers away from Lucknow and could not move or return back to Lucknow till 11.3.1983 which prevented him from appearing in the trial court on 10.3.1983. Unfortunately, the young nephew of the counsel of the appellant met with an accident on 10.3.1983 and expired which prevented him (the counsel) counsel also to appear in the Court on that date.

8. In the instant case, it is not is disputed that the nephew of the counsel of the appellant had died in a road accident on the date of hearing and that the appellant himself was not at the station on account of his employment and illness."

10. From the facts of the above case, it is clear that the explanation given for non-appearance of both the tenant and his counsel were held to be sufficient by the

Revisional Court and the *ex parte* decree was set aside. The High Court interfered with the findings of fact recorded by the Revisional Court which order was set aside by the Supreme Court. In the above case, the nonappearance of the counsel on 10th March, 1983 was due to death of nephew of the counsel on the very same day. The case of **G.P. Srivastava** is on its own fact and does not help the appellant in the present case.

11. In the present case, this Court is to ex min the correctness of the impugned judgement given by the 5th Additional District Judge on the parameters which have been laid down for exercise of jurisdiction under Articles 226 and 227 of the Constitution of India. The present is a writ petition challenging the order of the 5th Additional District Judge, Kanpur Nagar. The order of Additional District Judge was well within the jurisdiction of the Court and has been passed after considering the affidavit filed by the petitioner and other materials on the records.

12. The Apex Court in ***AIR 1984 S.C. 1447, Jagdish Prasad Vs. Smt. Angoori Devi,*** has considered the scope of issuing a writ of certiorari by the High Court in exercise of jurisdiction under Article 226 of the Constitution. Following was laid down in paragraph 3:

"3. In the case of Syed Yakoob v. K.S. Radha Krishnan (1964) 5 SCR 64: (AIR 1964 SC 477), a Constitution Bench of this Court indicated the the scope of interference in a certiorari proceeding by saying that a writ of certiorari is issued for correcting the errors of jurisdiction committed by the courts or tribunals in cases where they exceed their jurisdiction or fail to exercise it or exercise it illegally or improperly, i.e. where an order is passed without hearing the party sought to be affected by it or where the procedure adopted is opposed to principles of natural justice. A caution was indicated by saying that the jurisdiction to issue a writ of certiorari is a supervisory one and in exercising it, the court is not entitled to act as a court of appeal. That necessarily means that the findings of fact arrived at by the inferior court of tribunal are binding. An error of law apparent on the face of the record could be corrected by a writ of certiorari but not an error of fact, however grave it may appear to be. The rule in Yakoob's case (AIR 1964 SC 477) when applied to the present facts would lead to the conclusion that the High Court exceeded its jurisdiction in interfering with the order of the Additional District Judge"

"Para 3 to be quoted"

13. The Apex Court has also laid down the scope and parameters of exercise of jurisdiction by this Court under Article 227 in ***Surya Dev Rai Vs, Ram Chander Rai and Others, 2003 (6) SCC 675***. It has been laid down by the Apex Court in the said judgement that jurisdiction under Article 227 is a supervisory jurisdiction and not an appellate jurisdiction. The High Court while exercising its jurisdiction under Article 227 shall not interfere with the impugned judgement even though two views are possible out of which one has been followed by the Subordinate Court. The High Court in exercise of jurisdiction under Article 227 shall not re-appraise the evidence and can interfere only when the findings are based on no evidence or perverse. The Supreme Court while

summing up the scope of exercise of jurisdiction under Article 227 laid down in para 38 (4,5 and 6) which are as follows:

"38 (4). Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When a subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High court may step in to exercise its supervisory jurisdiction.

(5). Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

(6). A patent error is an error which is self-evident i.e. which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view, the error cannot be called gross or patent."

14. Applying the parameters as laid down by the Apex Court in above two cases, the impugned judgement of 5th Additional District Judge cannot be said to be a judgement which can be interfered with in exercise of jurisdiction by this Court under Article 226 or 227 of the Constitution of India. The Subordinate Court has neither assumed a jurisdiction which it does not have nor has failed to exercise jurisdiction which it does have nor there is any manifest error apparent on the face of record committed by the Court below. The Appellate Court has given cogent reasons for rejecting the application as noted above. The appeal was pending for hearing for last 13 years and was adjourned at the instance of the appellant for 4th July, 1996. The Appellate Court has found that no satisfactory explanation was given for non-appearance of the counsel on 4th July, 1996.

15. We are satisfied that in passing the impugned judgement, the Appellate Court has not committed such error which may warrant interference by this Court in exercise of its jurisdiction under Articles 226/227 of the Constitution of India. The writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.01.2009

BEFORE
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition (PIL) No.47304 of 2005
Connected with
Civil Misc. Writ Petition No. 10070 of 2006
Civil Misc. Writ Petition No. 57395 of 2008
Civil Misc. Writ Petition No. 58410 of 2008

Ramesh Chandra & others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri B.B. Paul
Sri A.P. Paul

Counsel for the Respondents:
Sri B.D. Mandhyan
Sri Satish Mandhyan
Sri Indradeo Mishra

Constitution of India-Art. 226-Publice Interest Litigation-challenging notification-cancellation of notification bringing the village in question out of consolidation-none of petitioner disclosed their status as former and inhabitant of concerned village-held-'No locus standi'-even otherwise it would be interference with the functioning of legislation by the judiciary who is best judge to consider the actual grievance of citizen.

Held: Para 22 & 34

The petitioners in my considered view have no interest or locus standi in the matter. The writ petition is liable to be dismissed on the ground of lack of material particulars relating to the interest of the petitioners in the present dispute. It is not the case of the petitioners that the inhabitants and agriculturists of the village in question are so poor that they cannot approach the Court for redressal of their grievance, if any. Apparently, the present litigation is not a bonafide one.

Viewed as above, the preponderance of judicial opinion is that in such matters the writ as claimed by the petitioners for quashing the notification issued under section 6 of the Act, cannot be issued. It is not necessary for me to discuss the other cases referred by the learned counsel for the parties being besides the issue involved.

Case law discussed:
1976 RD 35, AIR 1973 Alld. 382, 1959 ALJ 209, 1984 R.D. 110, 2000 R.D. 30, 2001 (3) A.W.C. 2149, 2004 RD 454, 2006 ACJ 2114, 2007 (1) ADJ 630, 1952 SC 252, AIR 1967 S.C. 1895, 1990 RD 117, 1999 RD 400, 1999 RD 468.

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

1. In all the above writ petitions, a common question of law is involved. In these writ petitions, quashing of notification issued under section 6 of the U.P.CH Act has been sought for. The writ petition (PIL) No.47304 of 2005 is the leading case. The arguments were heard in the said writ petition.

2. The writ petition No.10070 of 2006 is with respect to the notification issued under section 6 of the Act relating to villages Bachgaon, Bhidarwa, Julendhi & Sakha, Pargana, Tehsil & District Mathura dated 21.7.2005.

3. Writ petition No.57395 of 2008 relates to the village Kuchesar, Pargana and Tehsil Siyana, District Bulandshahar which was notified for consolidation proceedings under section 4 of the Act. The Consolidation Commissioner by the order dated 25th July, 2008 impugned in the present writ petition has dismissed the representation of the petitioners to keep the village outside the purview of the consolidation operation. The quashing of the said order has been sought for.

4. The writ petition No. 58410 of 2008 is in respect of notification dated 25th October, 2007 issued by the Consolidation Commissioner, U.P. Lucknow under section 6 of the U.P. CH Act cancelling the notification dated 10th October, 1992 issued under section 4 of the Act. Quashing of the notification issued under section 6 of the Act has been sought for in this petition.

5. In all these petitions common question of law as to whether a writ can be issued quashing the notifications

issued under sections 4 or 6 of the Act, is involved.

6. The writ petition No. 47304 of 2005 is the leading case and it is necessary to notice the facts from the said writ petition.

7. The petitioners who are eight in numbers have preferred this writ petition titled as PIL for quashing the notification issued under section 6 of the U.P. Consolidation of, Holdings Act dated 24th of March, 2005 issued by the respondent no.2 and have sought a writ of Mandamus commanding the respondents not to enforce the impugned notification against the petitioners and other inhabitants/agriculturists of village Gharbara, Pargana Tappal, Tehsil Khair, District Aligarh on any ground and in any manner whatsoever.

8. The facts of the case may be noticed in brief. The petitioners claiming that the present writ petition is for welfare of inhabitants and agriculturists of village Gharbara, Pargana Tappal, Tehsil Khair, District Aligarh, have challenged the validity of the notification issued under section 6 of the Act whereby the earlier notification issued under section 4 of the Act dated 21st of September, 1995 has been withdrawn.

9. In the writ petition, besides impleading the State of U.P., the Consolidation Commissioner and Collector, Aligarh, the petitioners have impleaded Dr. Smt. Gyanwati, President, Mahila Kalyan Nigam, Aligarh and Shri Ajit Singh son of Late Chaudhari Charan Singh, Member Parliament and National President of Indian Lok Dal, New Delhi as respondents. It has been pleaded that consolidation operation was going on peacefully in the village Gharbara. Certain influential persons (Bhoo Mafias) pressurized the Consolidation Authorities to manipulate cancellation of consolidation proceedings in the village. One writ petition No.35709 of 2003 was filed by one Daya Ram for cancellation of the consolidation proceedings, which was decided by this Court on 16th of April, 2004. The Court disposed off the writ petition and while doing so it has been found that no ground for quashing the notification under section 4 (2) of the Consolidation of Holdings Act is made out. It, however, permitted the petitioners therein to make a representation before the Consolidation Commissioner, U.P., Lucknow in respect of the aforesaid grievances. The Consolidation Commissioner as per the allegations made in the present writ petition has issued the impugned notification dated 24th of March, 2005 under section 6 of the Act cancelling the earlier notification arbitrarily and under the influence of the private respondent Nos. 4 and 5. It has been further stated that the impugned notification has been issued in pursuance of the letter of Smt. Gyanwati who happens to be daughter of late Chaudhary Charan Singh and sister of Shri Ajit Singh (M.P.). The Tehsildar in his report dated 28th of August, 2004 somehow manipulated issuance of impugned notification. Similarly, the Sub Divisional Magistrate and the Collector, Aligarh recommenced for- issuance of the impugned notification and the Consolidation Commissioner, consequently, issued the impugned notification which, according to the petitioners, is manifestly erroneous in law, arbitrary, discriminatory, perverse and without jurisdiction. It has failed to

take into consideration the report of the consolidation authorities dated 4th of August, 2004, 5th of August, 2004, 24th of August, 2004 and 28th of August, 2004; the ingredients of Section 6 of the Act were not fulfilled before issuance of the impugned notification. The consolidation operation had started in pursuance of the notification dated 21st of September, 1995 and the allegation with regard to the alluvial and deluvial action in the villages as well as their location near bordering villages of Haryana, are wholly incorrect. Boundary dispute between the State of U.P. and State of Haryana had already been settled by the department of Survey of India and the Dixit Award referred to in the report of the Collector dated 11th February, 2005.

10. A counter affidavit on behalf of the respondent no.3 controverting the allegations made in the writ petition has been filed by the Consolidation Officer wherein the allegation that the impugned notification was issued on extraneous consideration, has been denied. The receipt of letter of Smt. Gyanwati in the Consolidation Office is accepted, but no action was taken in pursuance of the said letter, it has been stated. The impugned notification has been sought to be justified on the basis of the reports of Assistant Consolidation Officer dated 4th of August, 2004, of Upziladhikari dated 4th of January, 2005 and that of the Collector dated 11th February, 2005. The Consolidation Commissioner has issued the impugned notification in pursuance of the aforestated reports of the Officers concerned. It has been further stated that Naib Tehsildari, Khair in his report dated 28th December, 2004 submitted that there is no need of consolidation operation in the village.

11. In paragraph 6 of the counter affidavit it has been stated that River Yamuna is flowing through nearby villages and there is still boundary dispute in between the 'States of U.P. and Haryana and as such, it would not be in the interest of the villagers to carry out the consolidation operation in the village. The impugned notification has been issued in valid exercise of power conferred on the authority concerned. In paragraph 22 of the counter affidavit it has been stated that although the Survey of India demarcated the boundary line in between the States of U.P. and Haryana in the map and also on the spot but presently on the spot the pillars are not in existence. The total area of the village Gharbara is 2,374.96 hectares, out of which land is 1958.78 hectares.

12. Another counter affidavit has been filed by one Jag Veer Singh who is not impleaded as one of the respondents in the writ petition but has applied for his impleadment as respondent no.6. It has been stated that the total area of the village Gharbara was 52, 000 bighas and after the Dixit Award about 6, 000 bighas were included in the State of Haryana. During the rainy season River Yamuna overflows and entire village Gharbara is flooded with water. The most of land due to flood has become barren and its valuation has been reduced from 90 paise to 10 paise. The tenure holders of village Gharbara had moved an application before the Sub Divisional Magistrate, Khair to stay the consolidation proceedings and denotify the village. On the said application a report from the Tehsildar was called for. It has been further stated that the present writ petition could not have been treated as PIL and no pressure was· exercised on the

Consolidation Commissioner to issue the impugned notification. The contention that the impugned notification has been issued on extraneous considerations, has been denied and it has been submitted that the said notification has been issued on correct facts. The reports of the Naib Tehsildari, Sub Divisional Magistrate and Additional District Magistrate, Aligarh contain correct facts. The Consolidation Commissioner issued the impugned notification after taking into account the majority opinion of the agriculturists and inhabitants of village Gharbara.

13. Rejoinder affidavits have been filed reiterating the stand taken in the writ petition.

14. Shri B.B. Paul, the learned, counsel for the petitioners, submits that the impugned notification is liable to be quashed on the ground that it has been issued by the Consolidation Commissioner at the dictate of private respondents no.4 and 5. Elaborating the argument, it was submitted that the writ petition filed earlier, was dismissed by this Court and as such, it was not open to the Consolidation Commissioner to undo the judgement of this Court by issuing the denotification under Section 6 of the Act. He submits that the impugned notification has been issued at the instance of certain influential persons who are none else but Bhoo Mafias i.e. the land grabbers. This Court can judge the validity of the notification on the touch-stone of Section 6 and Rule 17 as framed under the Act. Shri B.D. Mandhyan, learned senior counsel, appearing on behalf of the proposed respondent no.6 submits that in Division Bench judgement in **Agricultural & Industrial Syndicate, Ltd. Vs. State of U.P. 1976 RD 35** it has been held that a writ petition challenging the validity of notification issued under section 6 of the Act is not maintainable as the notification issued under the said section is legislative act and not an administrative act. On merit, he submits that on the facts of the present case, it cannot be said that the impugned notification has been issued on extraneous considerations. The reports of the high officials, such as that of Collector, Sub Divisional Magistrate etc. have been taken into consideration by the authority concerned before issuance of the impugned notification. The allegation that the applicant for impleadment or other persons are influential persons or land grabbers, is totally baseless, there being no material on the record. On the other hand, the petitioners are land grabbers. The learned standing counsel also supports the impugned notification and submits that in view of the authoritative pronouncements by this Court In the aforestated decision of **Agricultural & Industrial Syndicate, Ltd.** (supra), the writ petition is liable to be dismissed.

15. Considered the respective submissions of the learned counsel for the parties and perused the record.

16. The U.P. Consolidation of Holdings Act, 1953 has been passed in connection with the consolidation of agricultural holdings in Uttar Pradesh for development of agriculture. After the enforcement of the U.P. Zamindari Abolition and Land Reforms Act, 1950 there was a pressing demand for the consolidation of holdings in the State, as mentioned in the statement of objects and reasons of the Act.

"Consolidation" means rearrangement of holdings in a unit among several tenure holders in such a way to make their respective holdings more compact vide section 3 (2) of the Act.

"Consolidation Scheme" means the scheme of consolidation in a unit as provided in (3-B) of Section 3 of the Act. Section 4 of the Act provides the declaration and notification regarding the consolidation. This section lays down that the State Government on being of the opinion that a district or part thereof may be brought under the consolidation operation, shall make a declaration to this effect. The publication of this declaration empowers the officer or authority of the consolidation scheme to enter upon and survey and take levels of the land. The officer or authority will thereupon fix pillars 10 connection with the rectangulation or otherwise and will do any other act for ascertaining the suitability of the area for consolidation operations. The validity of section 4 to 9A and 49 of the U.P. Consolidation of Holdings Act has been upheld by this Court in **Shyam Sunder and others Vs. Siya Ram and another, AIR 1973 Alld. 382**. The publication of the declaration has been held to be mandatory in **Tajammul Husain Vs. A.C.O. Jalalabad 1959 ALJ 209**.

17. Coming to the facts of the present case, it may be noticed that the declaration under section 4 of the Act was published on September 21, 1995. It is also not in dispute that the villages in question are situate near Yamuna River and are subject to flood during rainy season. According to the contesting respondents there is a state boundary dispute between the State of Uttar Pradesh and Haryana which according to the petitioners has been settled by Dixit Award. None of the parties has placed on record the said Dixit Award or any other material about existence or settlement of such dispute in the present writ petition, at least.

18. The main thrust of the submission of Shri B.B. Paul, learned counsel for the petitioners, is that notification/declaration issued under section 6 cancelling the earlier notification/declaration issued under section 4 of the Act is without application of mind and malafide. The Consolidation Commissioner has issued the impugned notification ignoring the fact that the ingredients of Rule 17 are not fulfilled.

19. It is desirable to consider the allegations of malafide as pleaded in the writ petition against the respondents, particularly the respondents no.4 and 5 first. In para 6 of the writ petition it has been stated that Smt. Gyanwati, the President of Mahila Kalyan Nigam, sister of Ajit Singh, M.P. and National President of Indian Lok Dal, New Delhi wrote a letter to the Consolidation Commissioner to cancel the notification. The existence of the said letter has not been disputed in the counter affidavit filed on behalf of the respondent No.3. It has been stated that no action in pursuance of the said letter was taken. The impugned notification has been issued on the basis of the reports submitted by the high officials, such as Collector, Aligarh, S.D.M. Khair etc .. No malafide intention can be imputed merely on the ground that the respondent no. 4 wrote a letter to the Consolidation Commissioner. It is not the case of the petitioners that the contents of

the said letter are irrelevant or in any manner are incorrect. She being the representative of the public and had been M.L.A for fiver years, has done no wrong if she has brought to the notice of the Consolidation Commissioner the grievances of the public in general. Being representative of the public, she has acted bonafidely, what is to say malafidely by placing the grievances of public before the Consolidation Commissioner through the letter. Except writing the letter, she has done nothing and I do not see how the said conduct of the respondent no.4 is blameworthy. Nothing .was done by her for personal gains or for illegal gains to her relatives, associates or to anybody. That appears to be the reason why no notice of the writ petition inviting comments from her was issued by this Court while granting the interim relief on 6th of July, 2005. At no stage, notices were issued to either of the private respondents No.4 and 5. Except the allegations made in para 6 of the writ petition which has been sworn on record, there appears to be no other allegation against her. At least, none else was pointed out by the learned counsel for the petitioners during the course of the argument. Similarly, there appears to be no allegation against the respondent no.6 in the entire writ petition. The allegations of malafide, thus, are vague and unfounded and are liable to be ignored. The other aspect of the case is that there were two views of the authorities with regard to the continuance/denotification of the village for consolidation operation. Report of the Assistant Consolidation Officer to the Consolidation Officer, Aligarh dated 5th of August, 2004 (Annexure -3 to the writ petition), report of the Consolidation Officer dated 13th August, 2004 (Annexure -5), report of the Settlement Officer Consolidation dated 24.5.2004 (Annexure-6 to the writ petition) are to the effect that the consolidation operation in the village should be continued. On the other hand, the reports of the Naib Tehsildar dated 28th December, 2004, of the Sub Divisional Magistrate dated 4th January, 2004, of Additional District Magistrate (Admn.) dated 10th February, 2005 and of the District Magistrate dated 11th February, 2005 are to the effect that in the larger public interest, the village Gharbara be denotified under section 6 (l) of the Act. The Consolidation Commissioner taking into consideration these reports has issued the impugned notification/declaration under section 6 of the Act, cancelling the notification issued under section 4 of the Act. Taking one view of the matter by the Consolidation Commissioner, cannot be termed as arbitrary or malafide on the facts of the present case. He was required to take a decision in this regard by this Court under the order dated 16th of April, 2004 delivered in the writ petition No.35709 of 2000.

20. Taking into consideration the entire facts and circumstances of the case, the plea of malafide pressed by the petitioners is devoid of substance and is therefore, rejected.

21. Now, before considering the other aspects of the writ petition, its maintainability at the instance of the petitioners may be considered. The present writ petition has been filed by eight persons. They have been shown residents of Raipur, Mohalla Gharbara, Pargana Tappal, Tehsil Khair, District Aligarh. In paragraph 1 of the writ petition which

is reproduced below, only this much, regarding their interest or locus in the matter has been stated:-

"That this is the first (P.I.L) writ petition for welfare of inhabitants and agriculturist of village Gharbara, Pargana Tappal, Tehsil Khair, District Aligarh for quashing of notification under section 6 of U.P.C.H. Act dated 24.3.2005 in respect of village Gharbara, Pargaruz Tappal, Tehsil Khair, District Aligarh (Annexure -) and proceeding following the same."

22. A bare perusal of the said paragraph would show that the present writ petition has been styled as P.I.L. (Public Interest Litigation) for welfare of inhabitants and agriculturists of the village in question. None of the petitioners have averred anywhere in the writ petition that they are agriculturists or have any piece of the land in village in question. In other words, none of the villagers who could have any grievance have come forward to challenge the notification/declaration issued under section 6 of the Act. The petitioners in my considered view have no interest or locus standi in the matter. The writ petition is liable to be dismissed on the ground of lack of material particulars relating to the interest of the petitioners in the present dispute. It is not the case of the petitioners that the inhabitants and agriculturists of the village in question are so poor that they cannot approach the Court for redressal of their grievance, if any. Apparently, the present litigation is not a bonafide one.

23. Coming to the merit of the case, the contention of the petitioners is that while issuing the notification under section 6 of the Act, the Consolidation Commissioner has ignored Rule 17 of the U.P.CH. Rules, 1954. The said Rule reads as follows:-

"17. Section 6.- The notification (substituted for the word "declaration" by Notification No.437-CH/I-E-256-61-dated March 25, 1964) made under Section 4 of the Act, may among other reasons, be cancelled in respect of the whole or any part of the area on one or more of the following grounds, viz. that -

(a) the area is under a development scheme of such a nature as when completed would render the consolidation operations inequitable to a section of the peasantry;
(b) the holdings of the village are already consolidated for one reason or the other and the tenure-holders are generally satisfied with the present position;
(c) the village is so torn up by party factions as to render proper consolidation proceedings in the villager very difficult;
(d) a co-operative society has been formed for carrying out cultivation in the area after pooling all the land of the area for this purpose."

24. It provides grounds for cancelling the notification issued under section 4 of the Act in respect of whole or part or any part of the area. A bare perusal of the said Rule would show that the said Rule does not provide an exhaustive list of the grounds for cancellation of the notification issued under section 4 of the Act in as much as it uses the words "among other reasons". Meaning thereby the grounds mentioned under the said

Rule are only illustrative and not exhaustive.

25. The **Agricultural & Industrial Syndicate, Ltd.** (supra) is a Division Bench authority of this Court wherein it has been held that where the State Government issues a notification under section 6, it does not exercise any executive power. It has also been held that when the Director of Consolidation issues a notification under section 4 or 6 of the Act, he performs neither the quasi judicial function nor exercises any administrative power, but performs a legislative function. To judge the validity of the notification, the court must apply the same tests as would apply to a piece of legislation. It has been held that it is not at all required to accord reason or afford an opportunity of hearing to the tenure holders concerned by the Consolidation Commissioner before issuing a notification under section 6 of the Act. The exercise of powers under sections 4 and 6 of the Act by the State Government is a conditional legislative power and it cannot be conceivably contended that the High Court can issue a Mandamus to the legislature to legislate on any subject or to apply any law to any area. The High Court cannot pass an order making it obligatory on the State Government to enforce the scheme of consolidation in an area where in its opinion such scheme should not be enforced. It would amount to compel the State Government to exercise its power of conditional legislation. The aforesaid judgement of the Division Bench when was pointed out to the petitioners' counsel, was sought to be distinguished and in reply strong reliance was placed on the following few judgments of the Hon'ble Single Judge:-

1. Jiwan Singh Vs. State of U.P. 1984 R.D. 110.
2. Jagpal Singh Vs. D.D.C. 2000 R.D. 30.
3. Usman Gani Vs. State of U.P. 2001 (3) A.W.C. 2149.
4. Smle Saroj Vs. State of U.P. 2004 RD 454.
5. Suraj Bhan Vs. D.C. 2006 ACJ 2114.
6. Tanseem Bano Vs. State of U.P. 2007 (1) ADJ 630.

26. Further reliance was placed on **State of Bihar Vs. Kishan Singh, 1952 SC 252** and **M/s. Devi Das Vs. State of Punjab AIR 1967 S.C. 1895** etc. for the proposition that where there is violation of guidelines, abuse and misuse of executive delegated power, action can be challenged before court.

27. The decision given in the case of **Jeevan Singh Vs. State of U.P.** (supra), is the star case of the petitioners and therefore, it is desirable to examine the facts of the said case with some detail. In this case, the Hon'ble Single Judge has distinguished the ratio of Division Bench decision in the case of **Agricultural & Industrial Syndicate, Ltd.** (supra). The facts of that case would show that in that case the proceedings under the Act were taken, records were verified, valuation of each plot of tenure holder was fixed, objections under section 9 of the Act were decided, the Chaks were carved out and finally allotted to different Chak holders on 6th of October, 1967 and thereafter, the possession was also delivered to Chak holders on 17th of May, 1968. The Court took the view that the records of the rights were finalized under the provisions of the Act and new rights have been accrued to the respective tenure holders in

connection with their new Chaks. Nothing remained to be decided under the provisions of the Act and the notification under section 52 of the Act was a mere formality. On this factual background of the case the Court after taking into consideration the pronouncements of the Apex Court, has held that the right conferred on tenure holder under section 30 of the Act is not dependent on the notification under section 52 of the Act and therefore, section 6 of the Act has to be interpreted in the way as not to take away the rights which have been conferred on the tenure holders under section 30 of the Act. It took the view that section 6 of the Act does not mention any thing about the new rights conferred on the new Chak holders and is confined only up to the correction of the land records. On this factual background and the legal position, it was held therein that the ratio laid down in **Agricultural & Industrial Syndicate, Ltd.** (supra) has no application to the facts of that case. The relevant portion is reproduced below:-

"The pronouncements of the Supreme Court as well as of this Court lead to the conclusion that if the records of land rights have been finalised under the provisions of the Act and new rights have been accrued to the respective tenure-holders in their new Chaks. Nothing remains to be decided under the provisions of the Act and notification under section 52 of the Act remains a formal act. The postponement of issuance of notification under Section 52 of the Act for any period howsoever long it may be, has got no effect on the title acquired by the tenure-holders in their new Chaks under Section 30 of the Act. Tenure-holders are free to deal with the land in any manner according to law. The rights conferred on the tenure-holders under Section 30 of the Act is not dependent on the notification under Section 52 of the Act and, therefore, Section 6 of the Act has to be interpreted in the way as not to take away the rights which have been conferred on the tenure-holders under Section 30 of the Act. It is significant to note that there is no specific mention of Section 52 of the Act in Section 6 of the Act leads to the conclusion that subsection (2) of Section 6 of the Act puts a limit on issuance of notification under Section 6 (1) of the Act at any time. Section 6(2) of the Act definitely provides that notification under sub-section (1) of Section 6 of the Act shall be subject to final orders relating to correction of land records meaning thereby that the notification could be issued before the finalisation of the new records of land and new map and conferment of new rights under Section 30 of the Act in favour of the tenure-holders in respect of their Chaks. According to Section 30 of the Act tenure-holders' rights in their original holdings disappeared and they got the same rights, title and interest in their Chaks allotted in the consolidation of holdings operations. Therefore, Section 6 of the Act does not mention anything about the new rights conferred on the new Chak-holders and is confined only upto the correction of land records. Therefore, the decision relied upon by the learned counsel for the respondents reported in ***Agricultural & Industrial Syndicate, Ltd.*** *(supra) has no application to the facts of the present case as in that case notification under Section 6 of the Act was issued before the consolidation records and not after the conferment of the new rights on the tenure-holders under Section 30 of the Act."*

28. It has also noticed that the appeals and revisions filed by the tenure-holders were all disposed off and Chaks were carved out in the village and finally allotted. Such is not the position in the case on hand. It was submitted that the consolidation operation is being carried on in the village in question on account of the stay order passed by this Court on 6th of July, 2005 in the present writ petition. The said fact was hotly disputed by the learned counsel for the respondents. They submitted that the consolidation operation is wholly at its primary stage and no adjudication till date has taken place. Be that as it may, there appears to be no material in support of the respective pleas. However, it can be concluded that at any rate the rights of the parties have not been decided finally by the consolidation authorities. Had it been so the petitioners would have been in a position to place relevant records before this Court. There is no material on record to show even remotely that the rights of the tenure-holders have been adjudicated upon or appeals and revisions filed by the tenure-holders have been disposed off. In absence of any such material, the inference can be drawn that the consolidation operation even if is in existence due to interim order passed by this Court, is in its infancy stage. There is no whisper in the writ petition nor was argued by the learned counsel for the petitioners that the rights of the tenure-holders have been finally determined and issuance of a notification under section 52 of the Act is only required to be done. This being so, the ratio laid down in the case of **Jiwan Singh Vs. State of U.P**. (supra) has no application to the facts of the present case; the observations made therein should be understood in the context and the factual background as they exist therein.

29. In Ashwani Kumar Vs. U.P. Public Services Commission AIR 2003 S.C. 2661 (14) the following words of Lord Denning in the matter of applying precedents have come locus classicus:-

"Each Case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not all decisive."

30. In **Jagpal Singh Vs. D.D.C.** (supra) it has been held that notification issued under section 6 of the Act, can be cancelled by the State Government only and the writ petition was held to be non maintainable.

31. The reliance placed by the petitioners on **Usman Gani Vs. State of U.P.** (supra) is misplaced one. It has been held therein that a writ of Mandamus can be issued only in those cases where the authorities are under legal obligation to perform statutory duty, but on the representation they failed to perform the same. Mere filing of representation is not sufficient to issue a writ of Mandamus unless it is further demonstrated that their action is demeanor.

32. In the other decision delivered in **Smt. Saroj Vs. State of U.P.** (supra) attention of the Hon'ble Single Judge was

not brought to the Division Bench decision in **Agricultural & Industrial Syndicate, Ltd.** (supra). Therefore, the said judgement of the Hon'ble Single Judge should be read subject to already existing law as laid down earlier by the aforestated Division Bench. Moreover, the decision was rendered taking into consideration the factual aspects of the case rather the legal principle delineated under section 6 of the Act, which is apparent from the paragraphs-6 and 7 of the report.

33. The decision delivered in **Suraj Bhan Vs. D.C.** (supra) although supports the contention of the petitioners but in view of the Division Bench decision in the case of **Agricultural & Industrial Syndicate, Ltd.** (supra) holding otherwise, the decision of Division Bench should be given preference and in my considered view no such writ petition can be issued. The said view is further fortified by the decisions given in **Deo Nath Kewat Vs. DDC 1990 RD 117; Neelam Chaudhary Vs. State of U.P., 1999 RD 400 and Sazid and others V s. Commissioner of Consolidation 1999 RD 468**.

34. Viewed as above, the preponderance of judicial opinion is that in such matters the writ as claimed by the petitioners for quashing the notification issued under section 6 of the Act, cannot be issued. It is not necessary for me to discuss the other cases referred by the learned counsel for the parties being besides the issue involved.

35. In view of the above discussion, I find no merit in the writ petition, the writ petition is dismissed.

In the result, all the writ petitions are hereby dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.01.2009

BEFORE
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition No. 51691 of 2006

Anoop Kumar Rathore ...Petitioner
Versus
Chief Engineer, Jhansi Zone, P.W.D., Jhansi and others ...Respondents

Counsel for the Petitioner:
Sri Indra Raj Singh

Counsel for the Respondents:
Sri B.P. Singh
Sri Ravi Ranjan
S.C.

Constitution of India Art. 226-Right of appointment-junior clerk posts-petitioner obtained much higher marks in written examination-than other selected candidates appointment denied on lack of Hindi Typing experience-a preferential qualification-comes in picture only when the marks of other candidates are equal-admittedly petitioner obtained 39 marks where as other candidature got only 31, 32, 33 etc.-denial of appointment-held-illegal-consequential direction given.

Held: Para 9

Perusal of the paragraphs 12 and 13 of the writ petition shows that the petitioner has got 39 marks while other selected candidates, namely, Sanjeev Kumar, Umashankar Rakwar, Rajendra Sharan Rakwar, Shishupal, Vishnu Kumar and Santosh Kumar obtained only 37.265, 36.40, 32.265, 32.355, 31.70 and 30.10 marks lower than the petitioner's

marks and, therefore, the denial of the selection of the petitioner by the respondents is wholly unjustified.

Case law discussed:

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

1. Heard Sri Indra Raj Singh, learned counsel for the petitioner and learned Standing Counsel.

2. By means of the present writ petition under Article 226 of the Constitution of India, the petitioner has prayed for quashing the impugned order dated 26.08.2006 passed by the respondent no.1, by which the claim of the petitioner for the selection on the post of Junior Clerk has been denied.

3. Brief facts giving rise to the present writ petition are that in pursuance of the advertisement dated 10.08.1998, petitioner applied for the selection of Junior Clerk, Petitioner appeared in the written examination held on 13.12.1998. By call letter dated 05.02.1999, the petitioner was called to appear in the typing test on 13.02.1999 and the result of the written test was declared by the respondents. However, the petitioner has not been selected on the ground that on a consideration of the marks of the typing test which was considered to be the essential qualification, the petitioner did not qualify. Being aggrieved by the said action, petitioner filed the writ petition no. 7660 of 1999 with the contention that the qualification of the Hindi typing was preferential qualification and not essential qualification and the same could not be considered for the purposes of selection and the question for consideration of the preferential qualification may only come for consideration when the marks of two candidates become equal. This Court vide order dated 09.09.2005 has allowed the writ petition and directed the respondents to permit the petitioner to appear in the interview. The petitioner appeared in the interview and got 6.600 marks. The total marks obtained by the petitioner thus comes to 39.00. However, petitioner has been denied selection by the impugned order on the ground that as per the Government Order Hindi Typing was essential qualification and by mistake in the advertisement it has been shown as preferential qualification and since the marks of nine candidates are higher than the petitioner's marks, therefore, petitioner is not eligible for selection. Being aggrieved by the said order, petitioner filed the present writ petition.

4. Learned counsel for the petitioner contended that this Court in the earlier writ petition has already held that Hindi typing qualification was only preferential qualification and not essential qualification and could be considered only in a situation when the two candidates could get equal marks. He submitted that the order of this Court has become final inasmuch as no appeal has been filed against the said order. He however, referred paragraphs 12 and 13 of the writ petition to show that on exclusion of the typing marks, the marks of the petitioner was higher than the other six candidates, namely, Sanjeev Kumar, Umashankar Rakwar, Rajendra Sharan Rakwar, Shishupal, Vishnu Kumar and Santosh Kumar who obtained only 37.265, 36.40, 32.265, 32.355, 31.70 and 30.10 marks while the petitioner obtained 39.00 marks excluding typing test and therefore, the petitioner was entitled for selection. He further submitted that the averments made in paragraphs] 2 and 13

of the writ petition has not been denied in the counter affidavit which has been replied vide paragraphs 13 and 14 of the counter affidavit.

5. Learned Standing Counsel is not able to dispute the averments made in paragraphs 12 and 13. He however, submitted that in the advertisement dated 10.08.1998 inadvertently the Hindi typing qualification has been shown as preferential qualification while it was the essential qualification and the selection was to be made after taking into account the marks of Hindi typing also and if the marks of the typing could be considered, the position of the petitioner was lower to the other candidates, who have been selected and, therefore, the petitioner has rightly not been selected.

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

7. This Court in Writ Petition No. 7660 of 1999, Anoop Kumar Rathore Versus Superintending Engineer and others decided on 09.09.2005 held as follows:

"In the present case, the advertisement clearly provided for essential qualification and preferential qualification. Therefore, preference would come into play only if other quality marks of different candidates are equal. It is the petitioner's case that on the basis of written examination his name was placed at serial no.6 of the merit list of OBC category candidates therefore, he was required to be called for interview. The respondents have however taken a case that the petitioner did not possess the minimum qualification since he did possess the minimum typing speed therefore, he was not called for interview. It is also their case that Hindi typing was an essential qualification for the posts advertised and also according to the Rules of 1998. Since the advertisement as issued has not been denied and no corrigendum has been issued correcting the qualifications required for such posts this court is of the view that the procedure for selection is governed by the Rules of 1998 and that Hindi typing was only a preferential qualification required for selection only if other marks of different candidates were equal. Therefore, the respondents who had declared the petitioner successful in the written test had to prepare a merit list thereof and invite the successful candidates for interview. It was only at that stage that preferential qualification of Hindi typing would play a part in the selection if marks of different candidates were otherwise equal.

For the aforesaid reasons this writ petition deserves to be allowed. An interim order dated 26.02.1999 was passed in this writ petition wherein it was provided that the selection and appointment on the post of junior clerk pursuant to the advertisement dated 10.08.1998 shall be subject to the result of this writ petition. The respondent no.1 is therefore, directed to permit the petitioner to appear in the interview to be held as per the provisions of the 1998 Rules and the Selection Committee/Interview Board may consider the preferential qualification inter se the successful candidates. Since the interview has already been held therefore, the respondent no.1 shall

make arrangement to interview the petitioner and make available the records of the interview already held before the Board for its due consideration.

This writ petition stands allowed as above. No order is passed as to costs".

8. The aforesaid order has become inasmuch as it has not been shown that it has been challenged. This Court has already held that typing qualification was only preferential qualification and not essential qualification was only relevant when the two candidates get the equal marks. Therefore, it is not open to the respondents to take the plea again that the typing qualification was the essential qualification. In the counter affidavit, paragraphs 12 and 13 of the writ petition has not been disputed.

9. Perusal of the paragraphs 12 and 13 of the writ petition shows that the petitioner has got 39 marks while other selected candidates, namely, Sanjeev Kumar, Umashankar Rakwar, Rajendra Sharan Rakwar, Shishupal, Vishnu Kumar and Santosh Kumar obtained only 37.265, 36.40, 32.265, 32.355, 31.70 and 30.10 marks lower than the petitioner's marks and, therefore, the denial of the selection of the petitioner by the respondents is wholly unjustified.

10. In the result, writ petition is allowed. The impugned order dated 26.08.2006 is set aside and the respondent no. 1 is directed to give the appointment to the petitioner on the post of Junior Clerk in pursuance of the advertisement dated 10.08.1998 forthwith preferably within a period of two weeks. However, having regard to the facts and circumstances, the appointment shall be given with prospective effect and the petitioner may not be entitled to claim any back wages.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.01.2009

BEFORE
THE HON'BLE SHABIHUL HASNAIN, J.

Civil Misc. Writ Petition No.55481 of 2006

Raisul Hassan ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri. Raj Kumar Khanna

Counsel for the Respondents:
Sri. Prem Chandra
S.C.

Constitution of India-Article 226-Pension-petitioner retired from the post of Store Keeper working in Nagar Nigam, Moradabad-more than four years elapsed even representation not decided-held-attitude of employer towards sick, poor infirm employee should be alike guardian-against the Constitution mandate-direction for payment of all dues within three months issued.

Held: Para 15

There is neither any inquiry pending against the petitioner nor any other disciplinary proceedings were ever initiated against him. There is no allegation of any embezzlement nor any recovery for any loss caused to the department. Charge has been handed over to one Dashrath Lal on 28.2.2005 itself. Charge certificate is duly counter-signed by Varishtha Nagar Swasthya Adhikari, Moradabad. No dues certificate have also been submitted, yet not a

single penny has been paid. The petitioner retired in February, 2005 and now we are in January, 2009. Four years have passed while the poor petitioner is running from pillar to post. This situation can not be allowed to be perpetuated by the Court keeping in view the spirit of the constitutional provisions and judgements of the Hon'ble Supreme Court in a socialistic country like India.

Case law discussed:

(1983) 1 SCC 305

(Delivered by Hon'ble Shabihul Hasnain, J.)

1. Heard Sri Raj Kumar Khanna, learned counsel for the petitioner and Sri Prem Chandra, learned counsel for the opposite party No.2.

2. The case of the petitioner is that he was working as Store Keeper in the Health Department of Nagar Nigam, Moradabad from where he retired on 28.2.2005 after attaining the age of superannuation. Since that date he has not even been paid the provisional pension and he has been suffering economically and socially as well. The petitioner has made several representations which did not bring any fruitful result and finally this writ petition has been filed before this Court.

3. It is the case of the petitioner that on his retirement on 28.2.2005, he handed over the charge to one Sri Dashrath Lal Ojha. The charge certificate was countersigned by the Varishtha Nagar Swasthya Adhikari, Nagar Nigam, Moradabad. This document has been. annexed as Annexure No.1 to the writ petition. A no dues certificate duly signed by the Varishtha Nagar Swastya Adhikari, Nagar Nigam, Moradabad has been annexed as Annexure No.2 to the writ petition. A perusal of the said document shows that various other officers/in charges of different sections like library department, go-down and store keeper (Health) have also counter signed the same, giving a complete no dues certificate in favour of the petitioner. The petitioner further submits that he approached the Nagar Ayukta many times for payment of his pension but nothing was done. He has annexed two such representations which have been annexed as Annexures 3 and 4 to the writ petition.

4. Sri Prem Chandra, learned counsel for the opposite party No.2, the Nagar Nigam informed that the counter affidavit has already been filed to the writ petition and a rejoinder to the same has also been filed. The counter and rejoinder affidavits are on record.

5. Learned counsel for the opposite party Sri Prem Chandra has fairly admitted that no pension has been paid to the petitioner but he hastened to add that there are reasons for the same which have been enumerated in the counter affidavit.

6. In para 6 of the counter affidavit the opposite parties have clearly admitted that a proper handing over of the charge was done through a charge certificate duly counter signed by the Varishtha Nagar Swasthya Adhikari, Moradabad on 28.2.2005.

7. In para 7 of the counter affidavit the objection has been raised that the 'No Dues Certificate' submitted by the petitioner (Annexure No.2) is not proper. Although it has been issued by the Varishtha Nagar Swasthya Adhikari and duly countersigned by other Sections Officers but the dates on which these signatures have been made are not

28.2.2005 but a few days prior to this. This according to the counter affidavit is improper hence bad for the purposes of the no dues. The no dues according to the counter affidavit could only be given either on or later than 28.2.2005.

8. Learned counsel for the petitioner submits that this is a normal affair. The process of preparing the pension papers of any employee starts at least six months prior to his retirement. The various Govt. orders have been issued in this regard and various judgements of the Hon'ble Supreme Court have held that delay should not be caused in preparation of pension papers of an employees. Moreover, it is not the case of the opposite parties that any particular item is still in the possession of the petitioner. Neither any inquiry has been done in this regard nor any explanation has been sought from the Varistha Nagar Swasthya Adhikari, Nagar Nigam, Moradabad or other officials who have given the said no dues. No other format is prescribed on which the no dues is supposed to be given. The argument of the petitioner appears to carry some weight. Further the no dues have all been given in the month of February, 2005 hence it can not be said that it was very very early to give a no dues. It is, therefore, clearly established that on 28.2.2005 there was not only a charge certificate but also the necessary no dues certificate duly counter signed by the Varishta Nagar Swasthya Adhikari, Moradabad. No case has been set out in the counter affidavit that any action has been taken against any of the officers issuing the no dues nor any explanation has been sought from the Varishtha Nagar Swasthya Adhikari.

9. In para eight of the counter affidavit further reasons have been shown for not releasing the pension. First ground given is that during 2003-04 certain audit objections were raised which have not been removed by the petitioner. Annexure in the counter affidavit has been annexed stating that on pages 53, 54, 55, 27, 28, 109, 137, 138 and 145 of the audit report, the audit objections have been shown. Strangely enough on perusal of the Annexure CA-1 it transpires that the objections relate to one Sri Raju, Store-Keeper and not the petitioner. This statement by the opposite parties in para 8 of the counter affidavit on oath goes to establish that the opposite parties have tried to mislead the Court by placing reliance on irrelevant document. Hence, this objection deserves to be overlooked. Moreover, if there was any audit objection relatable to 2003-04 then the opposite parties should have initiated some inquiry or disciplinary action against the petitioner. There is no case to this effect in the counter affidavit.

10. Second ground given in the para eight is that the petitioner had not handed over certain files regarding purchase of Fogging Machine, JBC Machine of Safai Godown Gulabbari. The learned counsel for the petitioner submits that the petitioner handed over all the files and documents available within him. The no dues certificate issued by the relevant officers is on record and the person who has taken over charge has not written that he has not been given complete handing over charge. The petitioner is in no position to meet out the allegations of the opposite parties who are acting arbitrarily. Moreover, there is no case of any embezzlement or causing any financial loss to the department. There is no case of

any misconduct also. Hence this cannot be a good ground for withholding the pension of the petitioner.

11. Third ground taken by the petitioner has some force. It has been stated that the petitioner had not deposited the contribution on behalf of the employer i.e. Nagar Nigam in the Provident Fund Account with interest. This has to be done by the petitioner under Regulation 3 of the Moradabad Nagar Nigam Non Centralised Service Retirement Benefit Regulation, 1998. The counter affidavit does not show that any notice/information was given to the petitioner to complete this formality. There is no letter/communication on record to show that any effort has been made by the employer to get the formalities completed for payment of pension. The representation of the petitioner has been pending with the opposite parties without any action or decision. The fact remains that no financial payment is being made to the petitioner for one reason or the other. The petitioner has stated on affidavit that he is a heart patient and is being treated at Vivekanand Hospital Moradabad. The life of the petitioner is dependant on financial viability of the treatment required by him.

12. I have given my anxious consideration to the rival contentions, the claim of the petitioner, his penury position, his old age and failing health and the reasons shown in the counter affidavit by the opposite parties and their attitude, I am reminded of the words used by their Lordships in the case of **D. S. Nakara and others Vs. Union of India (1983) 1 SCC 305** In para 20 their Lordships observed as under:-

"The antequated notion of pension being a bounty, a gratuitous payment depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in Deokinandan Prasad Vs. State of Bihar wherein this Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a government servant coming within those rules is entitled to claim pension. It was further held that the grant, of pension does not depend upon anyone's discretion. It is only for the purpose of quantifying the amount having regard to service and other allied matters that it may be necessary for the authority to pass an order to that effect but the right to receive pension flows to the officer not because of any such order but by virtue of the rules. This view was reaffirmed in State of Punjab Vs. Iqbal Singh. "

Again summing up the discussion in para 29 their Lordships declared as under:-

"Summing up it can be said with confidence that pension is not only compensation for loyal service rendered in the past, but pension also has a broader significance, in that it is a measure of socio-economic justice which inheres economic security in the fall of life when physical and mental prowess is ebbing corresponding to ageing process and, therefore, one is required to fall back on savings. One such saving in kind is when you give your best in the hey-day of life to your employer, in days of invalidity, economic security by way of periodical payment is assured. The term

has been judicially defined as a stated allowance or stipend made in consideration of past service or a surrender of rights or emoluments to one retired from service. Thus the pension payable to a government employee is earned by rendering long and efficient service and therefore can be said to be a deferred portion of the compensation or for service rendered. In one sentence one can say that the most practical raison deter for pension is the inability to provide for oneself due to old age. One may live and avoid unemployment but not senility and penury if there is nothing to fall back upon."

13. In view of what has been discussed above, I have come to the conclusion that the approach and attitude of the opposite parties towards the petitioner who has been their employee for his life time can not be appreciated. The purpose of law in a welfare state can not but be to help the people achieve or get what is due to them and not to use the law to thwart what is coming to a person legally. Moreover, the attitude of he employer towards the old, infirm and sick employee should be that of a guardian, protector and provider and not that of indifferent and casual labour who works in shifts and goes back home after completing eight hours of work without a thought about the factory in which he works. Employer has greater responsibility than the employee and specially when the employer is Government in a democratic society and a country like our India, the responsibility increases manifold. India has had great culture of respecting the retired and old. This is the reason after sixty years we call a person "senior citizen".

14. In the present case the opposite parties have not even decided the representations submitted by the petitioner. No effort has been made to get the formalities completed by the petitioner. In fact the exercise to get the formalities completed by the petitioner and the department should have started six months ago i.e. before the date of retirement of the petitioner.

15. There is neither any inquiry pending against the petitioner nor any other disciplinary proceedings were ever initiated against him. There is no allegation of any embezzlement nor any recovery for any loss caused to the department. Charge has been handed over to one Dashrath Lal on 28.2.2005 itself. Charge certificate is duly counter-signed by Varishtha Nagar Swasthya Adhikari, Moradabad. No dues certificate have also been submitted, yet not a single penny has been paid. The petitioner retired in February, 2005 and now we are in January, 2009. Four years have passed while the poor petitioner is running from pillar to post. This situation can not be allowed to be perpetuated by the Court keeping in view the spirit of the constitutional provisions and judgements of the Hon'ble Supreme Court in a socialistic country like India.

16. The petition is, thus, allowed. The opposite party No.2 is directed to enquire into the matter and get the formalities, if any, completed positively within one month from the date a certified copy of this order is placed before him and make the payment of pension and other post retiral dues payable to the petitioner under the relevant laws for the purpose. This should be done within one month thereafter.

17. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.01.2009

BEFORE
THE HON'BLE SABHAJEET YADAV, J.

Civil Misc. Writ Petition No.55894 of 2005

Merind Limited and another ...Petitioners
Versus
Prescribed Authority (Under Payment of Wages Act) Bijnor and Assistant Labour Commissioner, Bijnor and another ...Respondents

Counsel for the Petitioners:
Sri Yashwant Verma

Counsel for the Respondents:
Sri Arun Kumar Singh
S.C.

Workman Compensation Act 1936-Section 1 (4)-readwith Sales Promotion Employees Condition of Service Act, 1976-Workman-working as Sales promotion drawing more than Rs.1600/- salary-excluded for the provisions of Act-order passed by Assistant Labour Commissioner without jurisdiction-also on the ground respondent/workman transferred from Bijnor to Assam-which remained un challenged-respondent employee remanded absent for long period-No question of salary.

Held: Para 35

In view of the aforesaid categorical statement of law enunciated by Hon'ble Apex Court, there can be no scope for doubt to hold that the respondent no.2 who was admittedly drawing Salary Rs.13,825/- per month is excluded from the operation of provisions of the 1936 Act by virtue of the provisions of Section 1(6) of the said Act, irrespective of fact whether he is workman or not by virtue of Section 6(2) of the 1976 Act, which continues to apply to him and irrespective of fact as to whether he is excluded from Industrial Dispute Act by Section 6(7)(b) of 1976 Act or not, therefore, he is not entitled to invoke the provisions of Section 15 (2) and Section 15(3) of the 1936 Act. As such the claims set up by him under Section 15 (2) and Section 15 (3) of the 1936 Act in my considered opinion is not maintainable before the prescribed authority under the Act 1936. Therefore, the Assistant Labour Commissioner, Bijnor has no jurisdiction to entertain and proceed with PWA Case No.18 of 2005 Ajit Singh Vs. Merind Limited and another pending before him. The entire proceeding is without jurisdiction and is liable to be quashed. Accordingly, the same is hereby quashed. In the result, the writ petition succeeds and is allowed.

Case law discussed:
(2007) 11 S.C.C. 25, AIR 1984 SC, 1022, AIR 1987 SC 579, (2007) 11 SCC, 25

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

Heard Sri Yashwant Verma, learned counsel for the petitioners and Sri Arun Kumar Singh for respondent no.2.

By this petition, the petitioners have sought relief of writ of certiorari for quashing the proceeding of PWA Case No.18 of 2005 Ajit Singh Vs. Merind Ltd. and another pending before the Prescribed Authority (under Payment of Wages Act)/ Assistant Labour Commissioner, Bijnor, Uttar Pradesh. Another relief for writ of prohibition restraining the respondent no.1 from entertaining or adjudicating upon the proceedings in PWA Case No.18 of 2005 has also been sought for. This petition was allowed in open Court on 2.12.2008 with indication that reasons will be given later on, therefore, the same are given hereinafter.

2. The brief facts leading to the case are that respondent no.2 made an application on 6.4.2004 under Section 15 of Payment of Wages Act, 1936 hereinafter referred to as ' the 1936 Act' before respondent no.1/Prescribed Authority under 1936 Act, Bijnor and claimed wages amounting to Rs.1,26,162.50/-. A further sum of Rs.12,61,625/- was claimed as compensation in terms of Section 15 (3) of the said Act. The petitioners filed their written statement on 14.7.2004. Apart from reply on merits the attention of respondent no.1 was also drawn to the jurisdictional issue raised by the petitioners with regard to the applicability of provisions of the 1936 Act, and the authority of respondent no.1 to adjudicate upon the claim laid down by respondent no.2. In the said written statement the petitioners have inter alia stated that the respondent no.2 was employed as a sales representative by the petitioners and was engaged in the work of carrying samples of medicines and other products manufactured by the petitioners to doctors etc. and was enjoined to educate and apprise them of the attributes, functions and advantages of the products of the petitioners. A copy of appointment letter issued to the respondent no.2 dated 15.3.1997 is on record as Annexure-1 of the writ petition. It is stated that the respondent no.2 was transferred from Bijnor to Dimapur (Asam) in the year 2003 where he was to join duties by 18.8.2003. But the respondent no.2 had failed to join duties at Dimapur and remained absent without leave unauthorizedly thereafter and since the respondent no.2 failed to join the place of posting, no salary was paid to him on the principle of no work no pay.

3. Feeling aggrieved against the aforesaid action the respondent no.2 made aforesaid application dated 6.4.2004 purporting to be under Section 15 of the 1936 Act and claimed the wages referred above. It is also stated that the respondent no.2 being a sales promotion employee is neither a workman nor he was employed in any industrial or other establishment as defined under Section 2 (ii) of the said Act. The term and conditions of services of respondent no.2 are governed exclusively by Sales Promotion Employees Condition of Service Act 1976 (hereinafter referred to as '1976 Act') and the provisions of the 1936 Act stand expressly and impliedly excluded. It is also stated that the application upon which the respondent no.1 has taken cognizance is patently without jurisdiction as admittedly the respondent no.2 in his application has claimed to have been employed on monthly salary of Rs.13825/-, thus the respondent no.2 stood excluded from the operation of provisions of the 1936 Act by virtue of provisions of Section 1 (6) of the 1936 Act which places a maximum ceiling limit on the salary of employee at Rs.1600/- per month for applicability of the said 1936 Act but despite request of the petitioners the respondent no.1 has not decided the question of jurisdiction first, instead thereof has proceeded to fix the case for evidence by fixing date 2.11.2004 for final hearing.

4. It is stated that aggrieved by the aforesaid action and apprehending that the respondent no.1 would not decide the issue of jurisdiction, the petitioners preferred Writ Petition No.44452 of 2004 in which an order dated 27.10.2004 was passed by this Court directing the respondent no.1 to first decide the issue of

jurisdiction. Aforesaid order dated 27.10.2004 passed by this court was placed before respondent no.1 but instead of abiding by the direction of this court, the respondent no.1 had fixed 2.11.2004 for evidence by imposing cost of Rs.2000 upon the petitioners. Aggrieved by the aforesaid action, the petitioners filed writ petition no. 48217 of 2004 wherein this court vide order dated 10.11.2004 directed the respondent no.1 to first consider the application of petitioners about the question of jurisdiction thereafter proceed further in the matter. Thereafter vide order dated 21.12.2004 the objections raised by the petitioners were rejected by the respondent no.1 and he proceeded to hear the matter on merit.

5. The aforesaid order was challenged by the petitioners by means of writ petition no. 10794 of 2005 wherein this court on 10.3.2005 was pleased to direct that the proceedings before the respondent no.1 may go on and final order may also be passed but no recovery in pursuance of final order would be made without leave of the court. Subsequent to the aforesaid order being passed, the respondent no.1 by an order dated 24.3.2005 was pleased to allow the claim of respondent no.2 directing payment of Rs.126162=50p. as wages together with compensation amounting to eight times the above and holding the petitioners liable to pay a sum of Rs.11,35,462=50 p. A copy of the order dated 24.3.2005 passed by respondent no.1 is on record as Annexure-9 to this petition. Thereafter the petitioners moved a review application which came to be dismissed on 24.6.2005. The aforesaid two orders have been challenged by the petitioners in writ petition no. 10794 of 2005 by means of amendment application.

6. In the meantime the respondent no.2 has yet again laid a claim before respondent no.1 under Section 15 (2) and (3) of the 1936 Act seeking wage for the period 1.4.2004 to 28.2.2005 amounting to Rs.1,65,900/- together with compensation amounting to Rs.18,24,900/-. The aforesaid application was registered before the respondent no.1 as PWA case No. 18 of 2005 and notices on the same have been issued by respondent no.1 on 15.7.2005 fixing 28.7.2005 as date for hearing. A copy of notice dated 15.7.2005 is on record as Annexure-11 to this petition.

7. The aforesaid proceedings are challenged by means of instant writ petition inter-alia on the ground that respondent no.2 was employed on wages amounting to Rs.13,825/- per month, therefore, the claim of respondent no.2 is clearly excluded by virtue of provisions of Section 1(6) of the 1936 Act. Section 1 (6) of the said Act places ceiling limit on wage of employees drawing Rs.1600/- per month and excluded from the operation of Act all those employees who may be earning wages more than Rs.1600/- per month. It is also submitted that respondent no.2 was not employed in any industrial or other establishment as defined under Section 2 (ii) of the 1936 Act, therefore, the claim laid down by him seeking adjudication under Section 15 of the 1936 Act is without authority of law. Admittedly the respondent no.2 was a sales promotion employee whose terms and conditions of the service were governed by the provisions of the 1976 Act, which impliedly excluded the operation of the 1936 Act, hence respondent no.1 on the admitted facts has committed manifest illegality in assuming the jurisdiction and issuing the notice to

the petitioners in the claim set up by respondent no.2. In support of his submissions learned counsel for the petitioners has placed reliance upon a decision of Hon'ble Apex Court rendered in **Life Insurance Corporation of India Vs. Anwar Khan (since deceased) through Legal Representatives, (2007) 11 S.C.C. 25.**

8. It is submitted that the respondent no.1 is not appropriate authority as contemplated under 1936 Act and to the best of the information of petitioners there is no notification issued by the State Government empowering the Assistant Labour Commissioner, Bijnor to act as Prescribed authority for the purpose of hearing and deciding the claim laid under Section 15 of the 1936 Act. It is further submitted that the claim of respondent no.2 is even otherwise not maintainable inasmuch as he has not complied with the order of transfer and had not joined his place of posting. He was thus not entitled to wages on principle of no work no pay. The respondent no.2 had also not taken any step under law to challenge the order of transfer nor was the operation of same stayed and suspended by any court or tribunal or authority, therefore, on this count also the claim of respondent no.2 for wages is wholly without jurisdiction and not maintainable.

9. A detail counter affidavit has been filed in the writ petition on behalf of respondent no.2 whereby learned counsel for the respondent no.2 has made serious attempt to justify the proceedings undertaken under Section 15 of the 1936 Act by the respondent no.2 before the Prescribed Authority/respondent no.1. In paras 4 and 5 of the counter affidavit it is stated that by notification dated 31.3.1978 issued under Section 22 (F) of the Minimum Wages Act, 1948 (hereinafter referred to as '1948 Act') the provisions of Sections 15 to 25 of the 1936 Act were made applicable to the employees of scheduled employment and respondent no.2 is engaged in scheduled employment under the provisions of 1948 Act, therefore, the provisions of Section 1 (6) of the 1936 Act would not apply in the case of respondent no.2 so as to create any bar in respect of the applicability of the provisions of Section 15 of the 1936 Act. In para 18 of the counter affidavit although it was admitted that the respondent no.2 was employee on wage of Rs.13,825/- per month but it was stated that since the respondent no.2 has made application under Section 15 (2) and Section 15(3) of the 1936 Act, therefore, the bar created by Section 1 (6) of the 1936 Act will not apply in the case of respondent no.2. In paras 19 and 20 of the counter affidavit it is further stated that since the respondent no.2 has been engaged in Pharmaceutical industry and/or notified industry under Section 3 of 1976 Act, therefore, he is workman under Section 6 (2) of 1976 Act and the provisions of Sections 15 to 25 of the 1936 Act are fully applicable in case of respondent no.2, thus the proceedings under Section 15 (2) and Section 15(3) of the Act 1936, initiated by the respondent no.2 before respondent no.1 is well within the ambit of authority under law and cannot be called in question before this Court in instant writ petition.

10. Having considered the rival submissions of learned counsel for the parties, the questions which arise for consideration of this Court are as to whether in the wake of provisions of Section-1 (6) of 1936 Act, the provisions

of the said Act shall apply to employees of scheduled employment by virtue of notification issued under Section 22 (F) of the 1948 Act, who are drawing wage over and above Rs.1600/- per month? and if not, as to whether the application moved by the respondent no.2 under the provisions of Section 15 (2) and 15 (3) of the 1936 Act is maintainable or not?

11. To appreciate the rival contention of the parties and questions in controversy it would be essential to have a survey of relevant provisions of certain Acts having material bearing on the issue hereinafter.

12. Section 1 of the 1936 Act deals with the short title, commencement and extent of applicability of the Act as under:-

"1. Short title, extent, commencement and application.--*(1) This act may be called the Payment of Wages Act, 1936.*
(2) It extends to the whole of India.
(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.
(4) ***It applies in the first instance to the payment of wages to persons employed in any*** *(factory, to persons) employed (otherwise than in a factory) upon any railway by a railway administration or, either directly or through a sub-contractor, by a person fulfilling a contract with a railway administration.* ***(and to persons employed in an industrial or other establishment specified in sub-clauses (a) to (g) of clause (ii) of Section 2).***
(5) ***The State Government may, after giving three months' notice of its intention of so doing, by notification in the Official Gazette, extend the provisions of this Act or any of them to the payment of wages to any class of persons employed in any establishment or class of establishments specified by the Central Government or a State Government under sub-clause (h) of clause (ii) of Section 2:***

{Provided that in relation to any such establishment owned by the Central Government, no such notification shall be issued except with the concurrence of that Government.}

(6) ***Nothing in the Act shall apply to wages payable in respect of a wage-period which, over such wage-period, average {one thousand six hundred rupees} a month or more."***

13. Section 2 of the 1936 Act defines various expressions used or employed under the Act as under:-

"Section 2 Definitions- *In this Act, unless there is anything repugnant in the subject or context,-*
(ii) [***"industrial or other establishment"*** *means] any-*
[(a) tramway service, or motor transport service engaged in carrying passengers or goods or both by road for hire or reward;
(aa) air transport service other than such service belonging to or exclusively employed in the military, naval or air forces of the Union or the Civil Aviation Department of the Government of India;]
(b) dock, wharf or jetty;
(c) inland vessel, mechanically propelled;]
(d) mine, quarry or oil-field;
(e) plantation;

Notes.- *When there is a manger who is entrusted with the affairs of the company, the directors of the Company cannot be said to be employers.*

(f) workshop or other establishment in which articles are produced, adapted or manufactured, with a view to their use, transport or sale;

[(g) establishment in which any work relating to the construction, development or maintenance of buildings, roads, bridges or canals, or relating to operations connected with navigation, irrigation or to the supply or of water, or relating to the generation, transmission and distribution of electricity or any other form of power is being carried on;]

[(h) any other establishment or class of establishment which the Central Government or a State Government may, having regard to the nature thereof, the need for protection of persons employed therein and other relevant circumstances, specify, by notification in the Official Gazette.]"

14. From perusal of provisions of Section 1 of the 1936 Act it appears that by virtue of sub-section 4 of the said Section the provisions of the 1936 Act applies in the first instance to the payment of wages to persons employed, in any factory, to persons employed otherwise than a factory, upon any railway by a Railway Administration either directly or through a sub-contractor and to persons employed in an industrial or other establishment specified in sub-clause (a) to (g) to clause (ii) of Section 2 of the said Act. Besides this, clause (5) of Section 1 of the 1936 Act further authorises the State Government to extend the provisions of said Act or any of them to the payment of wages to any class of persons employed in any establishment or class of establishment specified by Central Government or State Government under sub-clause (h) of clause (ii) of Section 2 of the 1936 Act. However, sub-section (6) of Section 1 prescribes wage limit for applicability of the provisions of the 1936 Act to the employees drawing wages to the extent of Rs.1600/- per month and class of employees referred hereinbefore drawing wages exceeding sixteen hundred rupees per month are excluded from the operation of the provisions of the 1936 Act.

15. Now an incidental question arises for consideration that what would be legal impact and implication of provisions of Section 22 (F) of 1948 Act over the provisions of the 1936 Act? This question can be simplified in a manner as to whether by a notification under Section 22(F) of the 1948 Act, the provisions of the 1936 Act, can be made applicable to the employees of scheduled employment, who are drawing the wages over and above Rs.1600/- per month despite exclusion of such employees from operation of provisions of the 1936 Act by virtue of the provisions of Section 1(6) of the 1936 Act? In this connection, it is necessary to point out that the provisions of Section 22 (F) of the 1948 Act empower the appropriate Government to apply all or any of the provisions of the 1936 Act, by notification in Official Gazette to the wages payable to employees of scheduled employments under the 1948 Act despite anything contained in the 1936 Act.

16. For ready reference the provisions of Section 22 (F) of the Minimum Wages Act, 1948 are extracted as under:-

***"(F) Application of Payment of Wages Act, 1936, to scheduled employments**.--(1) Notwithstanding anything contained in the Payment of Wages Act, 1936 (4 of 1936), the appropriate Government may, by notification in the Official Gazette, direct that, subject to the provisions of sub-section (2), all or any of the provisions of the said Act shall, with such modifications, if any, as may be specified in the notification, apply to wages payable to employees in such scheduled employments as may be specified in the notification."*

17. From a plain reading of the provisions of Section 22(F) of the 1948 Act, it is clear that notwithstanding anything contained in the 1936 Act, the appropriate Government may by notification in the official Gazette direct that all or any of the provisions of said Act shall apply to the wages payable to employees of scheduled employment. A Scheduled employment is defined under Section 2(g) of the 1948 Act to mean, an employment specified in schedule or any process or branch of work forming part of such employment.

18. The opening word of Section 22(F) of 1948 Act, starts with non-obstante clause. A non-obstante clause is usually used in a provision to indicate that provision should prevail despite anything to the contrary in provision mentioned in such non-obstante clause. It implies that in case there is any inconsistency or a departure between non-obstante clause and another provision, one of the object of such a clause is to indicate that it is non-obstante clause which would prevail over the other clause. It does not, however, necessarily mean that there must be repugnancy or inconsistency between the two provisions in all such cases. Normally non-obstante clause operates to remove obstacles contained in relevant existing laws which come in the way of giving effect to the provisions contained in the enactment to which non-obstante clause is attached but non-obstante clause cannot be construed to widen the scope and effect of enactment to which the non-obstante clause is attached nor can non-obstante clause be interpreted to water down the natural scope and effect of the enactment to which it is attached. Non-obstante clause is usually employed to give overriding effect to certain provisions over some contrary provisions that may be found either in the same enactment or some other enactment that is to say to avoid the operation and effect to all contrary provisions as held by Hon'ble Apex Court in ***Union of India Vs. G.M. Kokil AIR 1984 SC, 1022***.

19. In view of aforestated legal position it is clear that despite anything contained in the provisions of the 1936 Act all or any of the provisions of said Act shall apply to the wages payable to the employees of scheduled employments under the 1948 Act, as may be specified in the notification issued by appropriate Government. It implies that despite the provisions of the 1936 Act may not cover the employees of scheduled employment under 1948 Act on its own strength and by authority of their extension to employee of any other establishment under Section 1 (5) of the 1936 Act nevertheless, appropriate Government may extend all or any of the provisions of the 1936 Act to wages payable to employees of scheduled employments under the 1948 Act. As indicated earlier that the provisions of the 1936 Act are

applicable to only those employees who are covered by that Act and employees of any establishment or class of establishments to whom the provisions of the 1936 Act are extended by notification issued by State Government under Section 1(5) of the 1936 Act alone and not employees of other establishments. However, by virtue of provisions of Section 22 F of 1948 Act, it could be extended to the employees of scheduled employment under 1948 Act also. But in my considered opinion, it does not mean that by virtue of a notification issued under the provisions of Section 22 F of the 1948 Act, the class of employees who are expressly excluded from the operation of the provisions of the 1936 Act, may also be included by such notification under the provisions of 1948 Act, which is sub-ordinate legislation.

20. It is for the simple reason that sub-ordinate legislation/delegated legislation cannot transgress the limit of such legislation to which it is sub-ordinate. In this view of the matter even assuming as contended by learned counsel for the respondent no.2 that the provisions of Sections 15 to 25 of the 1936 Act are extended to employees of scheduled employment under 1948 Act by virtue of notification issued by appropriate Government under Section 22 (F) of the said Act, even then since the employees drawing wages over and above Rs.1600/- per month are expressly excluded from the operation of provisions of the 1936 Act, therefore, the employees of scheduled employment under the 1948 Act drawing the salary over and above Rs.1600/- per month cannot be held to be included by such notification However, employees of scheduled employment under the 1948 Act, who are drawing salary below the ceiling limit of Rs.1600/- per month may be entitled to get the benefit of provisions of Sections 15 to 25 of the 1936 Act, if the notification so specifies.

21. There is yet another reason to support the view taken hereinbefore. The provisions of the 1936 Act are intended to regulate the payment of wages payable to the employees covered by the said Act. It is intended to ensure the disbursement of wages to such employees within the prescribed time limit and that no deduction other than those authorised by law are made by the employers. While extending the benefits of the provisions of the said Act, a ceiling limit on the wages of such employees is fixed by the legislature whereby the employees drawing the wage to the extent of Rs.1600/- per month are covered by the said Act, and those, who are drawing the wages over and above Rs.1600/- per month are expressly excluded from the operations of the provisions of the said Act by the competent legislature by virtue of Section 1(6) of the said Act, therefore, in my considered opinion, if the competent legislature itself has expressly excluded the employees drawing the wages over and above Rs.1600/- per month from the operation of the provisions of the 1936 Act, it is very difficult to assume that employees of scheduled employment under the 1948 Act who are drawing wages over and above Rs.1600/- per month can be included to get the benefit of the provisions of the 1936 Act, by a notification issued under Section 22 F of the 1948 Act by appropriate Government, which is subordinate legislation.

22. The aforesaid view further fortified by a decision rendered by Hon'ble Apex Court in ***D.C. Wadhwa Vs. State of Bihar AIR 1987 SC 579***, wherein it was held that a Constitutional authority cannot do indirectly what it is not permitted to do directly. If there is constitutional provision inhibiting the constitutional authority from doing an act, such provision cannot be allowed to be defeated by adoption of any subterfuge. The legislature cannot violate the constitutional prohibitions by employing an indirect method. That would be clearly a fraud on the constitutional provision.

23. In view of the aforesaid discussion, there can be no scope for doubt to hold that since the provisions of Section 1(6) of the 1936 Act provides for ceiling limit as to wages of employees so as to exclude from the purview of the said Act, therefore, persons whose wages exceed such ceiling limit, any provisions of the 1936 Act shall not apply to them. Thus, the sales promotion employees, who are alleged to be the employees of scheduled employment under the 1948 Act drawing wages over and above Rs.1600/- per month stand excluded by virtue of provisions of Section 1(6) of 1936 Act from the purview of the said Act and the provisions of the said Act cannot be held applicable to them. Any other view contrary to it, would defeat the aims and objects of the 1936 Act, as it would be doing a thing indirectly, what cannot be done directly.

24. Now the issue has to be examined in the light of provisions of the 1976 Act. Section 2 of the said Act defines various words and expressions used under the Act as under:-

"2. Definitions.- *In this Act, unless the context otherwise requires-*
(a) ***"establishment"*** *means an establishment engaged in pharmaceutical industry or in any notified industry;*
(b) ***"notified industry"*** *means an industry declared as such under Section 3;*
[(d) ***"sales promotion employee"*** *means any person by whatever name called (including an apprentice) employed or engaged in any establishment for hire or reward to do any work relating to promotion of sales or business, or both, but does not included any such persons-*
(i) ***who, being employed or engaged in a supervisory capacity, draws wages exceeding sixteen hundred rupees per mensem****; or*
(ii) ***who is employed or engaged mainly in a managerial or administrative capacity.***
Explanation:- *For the purpose of this clause, the wages per mensem of a person shall be deemed to be the amount equal to thirty times his total wages (whether or not including, or comprising only of, commission)in respect of the continuous period of his service falling within the period of twelve months immediately preceding the date with reference to which the calculation is to be made, divided by the number of days comprising that period of service;]*
(e) all words and expressions used but not defined in this Act and defined in the Industrial Disputes Act, 1947, shall have the meaning respectively assigned to them in that Act."

25. Section 6 of the 1976 Act has adopted various enactments by reference and applied to the sales promotion employees of pharmaceutical and notified industry as under:-

"6. Application of certain Acts to sales promotion Employees:- *(1) The provisions of the* ***Workmen's Compensation Act, 1923****, as in force for the time being, shall apply to, or in relation to, sales promotion employees as they apply to, or in relation to, workmen within the meaning of that Act.*
(2) *********
(3) The provisions of the ***Minimum Wages Act, 1948****, as in force for the time being, shall apply to, or in relation to, sales promotion employees as they apply to, or in relation to, employees within the meaning of that Act.*
(4) The provisions of the ***Maternity Benefit Act, 1961****, as in force for the time being, shall apply to, or in relation to, sales promotion employees, being women, as they apply to, or in relation to, women employed, whether directly or through any agency, for wages in any establishment within the meaning of that Act.*
(5) The provisions of the ***Payment of Bonus Act, 1965****, as in force for the time being, shall apply to, or in relation to, sales promotion employees as they apply to or in relation to, employees within the meaning of that Act.*
(6) The provisions of ***Payment of Gratuity Act, 1972****, as in force for the time being, shall apply to, or in relation to, sales promotion employees as they apply to, or in relation to, employees within the meaning of that Act.*
(7) Notwithstanding anything contained in the foregoing sub-sections.
(a) in the application of any Act referred to in any of the said sub-sections to sales promotion employees, the wages of a sales promotion employee for the purposes of such Act, shall be deemed to be his wages as computed in accordance with the provisions of this Act;
(b) ***where an Act referred to in any of the said sub-section provides for a ceiling limit as to wages so as to exclude from the purview of the application of such Act persons whose wages exceed such ceiling limit, such Act shall not apply to any sales promotion employee whose wages as computed in accordance with the provisions of this Act exceed such ceiling limit."***

26. From a plain reading of the aforesaid provisions of the 1976 Act it is clear that Section 2 of the 1976 Act defines 'establishment' which means an establishment engaged in "pharmaceutical industry" or "in any notified industry". "Notified industry" defines to mean an industry declared as such under Section 3 of the said Act. Section 2 (d) of 1976 Act defines 'sales promotion employee' means any person by whatever name called, employed or engaged in any establishment for hire or reward to do any work relating to promotion of sales or business or both but does not include any such person (i) who being employed or engaged in a supervisory capacity, draws wages exceeding 1600 rupees per mensem; or (ii) who is employed or engaged mainly in a managerial or administrative capacity.

27. Section 6 of the 1976 Act has adopted and applied various labour laws to the sales promotion employees by reference as they apply to or in relation to employees within the meaning of said Acts. Thus, the provisions of Workmen Compensation Act, 1923, Minimum Wages Act, 1948, Maternity Benefit Act, 1961, Payment of Bonus Act, 1965 and Payment of Gratuity Act, 1972 were made applicable to the sales promotion employees engaged in pharmaceutical

industry or in any notified industries. However, Section 6 (7) of the 1976 Act provides that notwithstanding any thing contained in the foregoing sub-sections where an Act referred to in any of the such sub-sections provides for a ceiling limit as to the wages so as to exclude from the purview of application of said Act, persons whose wages exceed such ceiling limit, such Act shall not apply to any sales promotion employees whose wages as computed in accordance with the provisions of this Act exceed such ceiling limit.

28. It is necessary to point out that medical representative whose main and substantial work is to do canvassing for promoting sales is not 'workman' within the meaning of Section 2 (s) of Industrial Disputes Act, 1947 but that class of persons has been extended the benefit of Industrial Disputes Act by adopting the provisions of the said Act by reference under Section 6 (2) of the 1976 Act. Industrial Disputes Act, 1947 has been amended by Amendment Act (46 of 1982). By virtue of Section 24 of Amendment Act, Section 6 (2) of 1976 Act has been omitted but Central Government has not given effect to said clause as per notification No.S.O.606 (E) dated 21st August, 1984. As logical consequence, it will have to be held that Section 6 (2) of 1976 Act has not been omitted and it continues to be in force as held in 1997 (1) Labour Law Journal, 557. It means that in spite of omission of Section 6 (2) of 1976 Act, the provisions of Industrial Disputes Act continues to apply to the sales promotion employees.

29. But Section 6 (7)(b) of the 1976 Act excludes application of aforesaid labour laws in relation to the sales promotion employees whose wages exceed ceiling limit prescribed by such labour laws. It implies that if particular enactment prescribed any ceiling limit of wages payable to the employees for exclusion of applicability of the provisions of such labour laws, the class of sales promotion employees drawing such wages shall be excluded from applicability of such labour laws, and only those sales promotion employees, who are drawing wages below the ceiling limit prescribed by such labour laws would be entitled to get the benefits of such labour laws. Therefore, it is essential to examine as to whether Industrial Disputes Act, 1947 has prescribed any ceiling limit on the wages to the employees for exclusion of such employees from operation of the provisions of the said Act.

30. In order to examine the aforesaid issue it is necessary to extract the provisions of Section 2 (s) of the Industrial Disputes Act, 1947 which defines the expression 'workman' as under:-

"2 (s) "workman" means any person (including and apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person-

(i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) Who is employed mainly in a managerial or administrative capacity; or

(iv) Who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office of by reason of the powers vested in him, functions mainly of a managerial nature."

31. From perusal of Section 2(s) of Industrial Disputes Act it is clear that a person who is employed in any industry to do any manual unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward whether the term of employment be expressed or implied, would be treated as workman, but a person, who is employed in supervisory capacity draws wages exceeding 1600/- rupees per mensem or exercises either by nature of his duties attached to the office or by reason of powers vested in him functions mainly of a managerial nature would not be treated to be workman. Aforesaid provision of the Industrial Disputes Act, prescribed conditions for exclusion of a person from the definition of workman, one of which is that the person must be employed in supervisory capacity and drawing wages exceeding 1600/- rupees per month and another condition is that person must be exercising power of managerial in nature, but it cannot be held that a person merely drawing wages exceeding Rs.1600/- per month alone, would be excluded from the definition of workman. It implies that for such exclusion he must be working in supervisory capacity besides drawing salary exceeding Rs. 1600/- per month, therefore, a person, who is drawing salary exceeding Rs.1600/- per month is treated to be workman within the meaning of the Industrial Disputes Act, if he is not working in supervisory capacity but since a person drawing wages exceeding Rs. 1600/- per month is excluded from operation of the provisions of the 1936 Act by virtue of provisions of Section 1 (6) of the said Act, therefore, such person cannot be held to get the benefit of provisions of the 1936 Act irrespective of his job and as to whether he is workman or not because of the reason that the provisions of Section 1(6) of the said Act expressly excludes the operation of the 1936 Act in relation to persons who is drawing wages over and above Rs.1600/- per month. Thus, there can be no scope for doubt to hold that sales promotion employees who are drawing wages over and above Rs.1600 per month are not entitled to invoke the provisions of the 1936 Act irrespective of fact that they are workman or not under Industrial Dispute Act, as they are expressly excluded from the purview of the 1936 Act. However, such sales promotion employees, who are drawing wages within the ceiling limit would get benefits of the provisions of the 1936 Act by virtue of the provisions of Section 6(2) and Section 6 (7)(b) of the 1976 Act.

32. The view taken hereinbefore also finds support from a decision of Supreme Court rendered in **Life Insurance Corporation of India Vs. Anwar Khan (2007) 11 SCC, 25**, wherein while dealing with the applicability of provisions of Section 1 (6)

of the 1936 Act the Hon'ble Apex Court has held that if the Act is inapplicable to a person as per provisions of the 1936 Act, mere applicability of a State labour legislation to such person would not bring the person within the purview of the 1936 Act.

33. The pertinent observations made by Hon'ble Apex Court in paras 8, 12 and 13 of the aforesaid decision are extracted as under:-

"8. Section 15 (3) of the Act with the proviso reads as follows:

"15. (3) When any application under sub-section (2) is entertained, the authority shall hear the applicant and the employer or other persons responsible for the payment of wages under Section 3, or give them an opportunity of being heard, and, after such further inquiry (if any) as may be necessary, may, without prejudice to any other penalty to which such employer or other person is liable under this Act, direct the refund to the wages, together with the payment of such compensation as the authority may think fit, not exceeding ten times the amount deducted in the former case and not exceeding twenty-five rupees in the latter, and even if the amount deducted or the delayed wages are paid before the disposal of the application, direct the payment of such compensation, as the authority may think fit, not exceeding twenty-five rupees:

(a) a bona fide error or bona fide dispute as to the amount payable to the employed person, or

(b) the occurrence of an emergency, or the existence of exceptional circumstances, such that the person responsible for the payment of the wages was unable, though exercising reasonable diligence, to make prompt payment, or

(c) the failure of the employed person to apply for or accept payment."

12. . . . . Once Section 1 (6) of the Act applies, the nature of the job is irrelevant. Whether the Field Officers are workmen or not is really of not relevance in view of Section 1 (6) of the Act. Section 15 of the Act is relatable only to claim under the Act. The entitlement for compensation is only under the Act and there is no scope for compensation under the Adhiniyam. The compensation has to be worked out in terms of Section 15 of the Act. There cannot be a claim both under Section 15 of the Act and Section 18 of the Adhiniyam.

13. Learned counsel for the respondent submitted that proviso to Section 15 (3) cannot be pressed into service because the dispute is relatable to amount payable. In this case LIC disputes the entitlement. We find the plea to be without any substance. The question of payability of an amount arises only when somebody is entitled to an amount. The proviso makes it clear that when there is bona fide dispute about the amount payable, compensation cannot be awarded."

34. From perusal of the aforesaid decision it is clear that the Hon'ble Apex Court has held that once Section 1 (6) of the 1936 Act applies to a person, the nature of his job is irrelevant. Whether the field officers are workman or not is really of no relevance in view of Section 1 (6) of the 1936 Act. Section 15 of the Act is relatable only to claim under the Act. The entitlement for compensation is only under the Act and there is no scope for compensation if the Act does not apply, as

the compensation has to be worked out in terms of Section 15 (3) of the 1936 Act.

35. In view of the aforesaid categorical statement of law enunciated by Hon'ble Apex Court, there can be no scope for doubt to hold that the respondent no.2 who was admittedly drawing Salary Rs.13,825/- per month is excluded from the operation of provisions of the 1936 Act by virtue of the provisions of Section 1(6) of the said Act, irrespective of fact whether he is workman or not by virtue of Section 6(2) of the 1976 Act, which continues to apply to him and irrespective of fact as to whether he is excluded from Industrial Dispute Act by Section 6(7)(b) of 1976 Act or not, therefore, he is not entitled to invoke the provisions of Section 15 (2) and Section 15(3) of the 1936 Act. As such the claims set up by him under Section 15 (2) and Section 15 (3) of the 1936 Act in my considered opinion is not maintainable before the prescribed authority under the Act 1936. Therefore, the Assistant Labour Commissioner, Bijnor has no jurisdiction to entertain and proceed with PWA Case No.18 of 2005 Ajit Singh Vs. Merind Limited and another pending before him. The entire proceeding is without jurisdiction and is liable to be quashed. Accordingly, the same is hereby quashed. In the result, the writ petition succeeds and is allowed.

36. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.02.2009

BEFORE
THE HON'BLE R.K. RASTOGI, J.
THE HON'BLE A.K. ROOPANWAL, J.

Criminal Misc. Habeas Corpus Writ Petition No. 56549 of 2008

Khusboo ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Kamal Kishor Mishra

Counsel for the Respondents:
Sri M.C. Joshi
Sri Sudhir Mehrotra

Constitution of India-Art. 226-Habeas Corpus Petition-alleging her age as 19 years-according to her sweet will residing with a man of his choice-illegally detained in Rajkiya Pashchatwarti Dekh Rekh Sansthan-medically examined by C.M.O.-given expert opinion disclosing the age 19 years-in school leaving certificate two different self contradictory dates mentioned-held-C.M.O. certificate more reliable-apparently the petitioner appears major. Free to go anywhere to her choice.

Held: Para 6 & 8

It is to be seen that according to the medical certificate issued by the C.M.O., Gorakhpur, the age of the petitioner-Khusboo was about 19 years on 23.7.2008. The medical report reveals that all the epiphysis of elbow joints and knee joints were fused. In case of wrist, lower ends of ulna and radius were also fused. It may also be mentioned that Khusboo was produced by the police before the C.M.O. for her medical examination and there is no reason to

doubt its veracity regarding ascertainment of the age done by the C.M.O., Gorakhpur, on the basis of fusions of the epiphysis.

We are of the view that when the documentary evidence of date of birth of the petitioner Khusboo is self contradictory, the medical ascertainment of age done by the C.M.O., Gorakhpur, on the basis of x-ray report is more reliable, and according to that ascertainment of age, the petitioner is apparently major and so she cannot be kept in Rajkiya Paschatyavarti Dekhrekh Sanrakshan, Varanasi, against her wishes.

(Delivered by Hon'ble R. K. Rastogi, J.)

1. This Habeas Corpus Writ Petition has been filed by the petitioner, Khusboo, for quashing the order dated 12.10.2008 passed by the S.D.M., Sadar, Gorakhpur, in Misc. Case No. 3 of 2008 and for issuing a direction to the respondents to produce her corpus before this Court and for other suitable directions.

2. The petitioner's case is that she is major and her date of birth is 5.2.1989. She has filed a photocopy of the School Leaving Certificate issued by the Headmaster, Primary School, Khorabar, Gorakhpur. She has alleged that she performed marriage with Ram Dayal out of her own choice but her parents were not satisfied with this marriage. She also moved an application before the S.D.M., Sadar, Gorakhpur, on 12.2.2008 asserting that she wanted to go with her husband. It was registered as Misc. Case No. 3 of 2008. The petitioner Khushboo was produced before the C.M.O., Gorakhpur, by the police and the C.M.O. after obtaining x-ray report ascertained her age to be about 19 years. A photocopy of the medical certificate issued by the C.M.O., Gorakhpur, has been annexed as Annexure no. 3 to the petition. Even then the S.D.M., Sadar, Gorakhpur, did not permit her to go to her nuptial home and passed order for keeping her at the Rajkiya Paschatyavarti Dekhrekh Sanrakshan, Varanasi, (respondent no. 2). She alleged that since she is major, she has the right to live with a man of her choice and so she filed this petition challenging the above order. She has also alleged that her parents are not ready to keep her with them.

3. The State filed a counter affidavit of Devendra Prasad Tiwari, Sub Inspector of Police, Police Station Khorabar, District Gorakhpur, in which he stated that on the basis of the information given by Rajendra Prasad, respondent no. 3, Case Crime No. 1498 of 2008, u/s 376, 506 I.P.C. was registered at Police Station Khorabar, District Gorakhpur, on 19.7.2008, and in this case Ram Dayal, so called husband of the petitioner, is an accused. The case was investigated and after investigation the charge sheet has already been submitted against Ram Dayal. It was also alleged that Khusboo is still minor. Her date of birth according to her School Leaving Certificate (Annexure no. CA1) is 5.2.1995. It was on the basis of the above School Leaving Certificate in which the date of birth of Khusboo was mentioned as 5.2.1995, that the S.D.M., Sadar, Gorakhpur, held that she was still a minor and so she should not be permitted to reside according to her wishes and he passed an order that she should be kept at Rajkiya Paschatyavarti Dekhrekh Sanrakshan, Varanasi.

4. A rejoinder affidavit has been filed by Ram Dayal disputing the allegation of minority of Khusboo mentioned in the counter affidavit.

5. We have heard learned counsel for the petitioner as well as learned AGA for the State and perused the record.

6. It is to be seen that according to the medical certificate issued by the C.M.O., Gorakhpur, the age of the petitioner- Khusboo was about 19 years on 23.7.2008. The medical report reveals that all the epiphysis of elbow joints and knee joints were fused. In case of wrist, lower ends of ulna and radius were also fused. It may also be mentioned that Khusboo was produced by the police before the C.M.O. for her medical examination and there is no reason to doubt its veracity regarding ascertainment of the age done by the C.M.O., Gorakhpur, on the basis of fusions of the epiphysis.

7. As regards the dates of births mentioned in the School Leaving Certificates, the petitioner has filed a photocopy of the certificate issued by the Headmaster of the School in which she had studied and in which her date of birth was mentioned as 5.2.1989, but in another certificate issued by the same school her date of birth has been mentioned as 5.2.1995. Both the certificates are self contradictory and there is contradiction regarding her age in the school record.

8. We are of the view that when the documentary evidence of date of birth of the petitioner Khusboo is self contradictory, the medical ascertainment of age done by the C.M.O., Gorakhpur, on the basis of x-ray report is more reliable, and according to that ascertainment of age, the petitioner is apparently major and so she cannot be kept in Rajkiya Paschatyavarti Dekhrekh Sanrakshan, Varanasi, against her wishes.

9. This Habeas Corpus Writ Petition is, therefore, allowed, the order of the S.D.M., Sadar, Gorakhpur dated 12.10.2008 (Annexure no. 4 to the petition) is quashed and the petitioner Khusboo is ordered to be released from Rajkiya Paschatyavarti Dekhrekh Sanrakshan, Varanasi.

10. Since the petitioner Khusboo has been produced in this court by CP 1386 Smt. Maya Devi and CP 261 Sri Anil Kumar Mishra, Constables, Police Lines, Varanasi, she is permitted to be released in the court and she is at liberty to go anywhere she likes. Petition allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.01.2009

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No.66968 of 2008

Kumari Sonika ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Rajeev Sisodia
Sri Atul Sisodia

Counsel for the Respondents:
S.C.

Constitution of India Art. 226-Education-evaluation of works-on the ground of lessor marks awarded even after better performens-unless the answer sheet of the candidates summoned the process of awarding marks and the allegation can not be verified-under writ jurisdiction court can not interfere-petitioner may institute civil suit.

Held: Para 5

This Court cannot permit revaluation of copies by the candidate. Even otherwise the marks given to the petitioner cannot be said to be incorrectly given unless copies of all other candidates appearing alongwith the petitioner are seen for the purpose of evaluation of her copy viz a viz others. This is not possible in writ jurisdiction. The High Court can also not call for copies of thousands of candidates just to satisfy an examinee; with any concrete basis made out on the facts of the case. In the opinion of the Court obtaining less mark in a subject is not a ground for calling of copy of that paper.

Case law discussed:
AIR 1984 SC-1543

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

1. Heard counsel for the petitioner and the standing counsel.

2. By this petition, the petitioner seeks a writ in the nature of mandamus commanding the respondents to produce his answer sheets of Mathematics Ist and Chemistry IInd papers of Intermediate examination.

3. The purpose of the writ petition appears to be that the candidate wants to satisfy herself that answers given by her have been correctly evaluated or not.

4. The Apex Court in AIR 1984 SC-1543, **Maharashtra State Board of Secondary and Higher Secondary Education Vs. Paritosh Bhupesh Kurmarsheth**, has held as follows:

"The process of evaluation of answer papers or of subsequent verification of marks does not attract the principles of natural justice since no decision making process which brings about adverse evil consequences to the examinees is involved. The principle of natural justice cannot be extended beyond reasonable and rational limits and cannot be carried to such absurd lengths as to make it necessary that candidates who have taken a public examination should be allowed to participate in the process of evaluation of their performances or to verify the correctness of the evaluation make by the examiners by themselves conducting an inspection of the answer books and determining whether there has been a proper and fair valuation of the answers by the examiners."

5. This Court cannot permit revaluation of copies by the candidate. Even otherwise the marks given to the petitioner cannot be said to be incorrectly given unless copies of all other candidates appearing alongwith the petitioner are seen for the purpose of evaluation of her copy viz a viz others. This is not possible in writ jurisdiction. The High Court can also not call for copies of thousands of candidates just to satisfy an examinee; with any concrete basis made out on the facts of the case. In the opinion of the Court obtaining less mark in a subject is not a ground for calling of copy of that paper.

6. In view of settled legal position, this Court is not inclined to interfere in its discretionary powers under Art. 226 of the Constitution.

7. The writ petition is accordingly dismissed with this observation that petitioner if aggrieved may file a suit for redressal of his grievance. No order as to costs.
