ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.03.2009

BEFORE
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No. 13893 of 2009

Smt. Seema Singh and others
...Claimant/Petitioners
Versus
Prescribed Authority/Commissioner Workman Compensation U.P. at Allahabad and others ...Respondents

Counsel for the Petitioners:
Sri Rama Kant Singh Baghel

Counsel for the Respondents:
S.C.

Constitution of India Art.-226-Practice & Procedure-recording reasons-must for fair justice-even administrative authority is bound to record reasons-rejection of application for correction of date of birth without disclosing any reason-order can not sustain.

Held: Para 5

From the perusal of the order dated 3.9.2008, it is apparent that respondent No.1 has not applied his mind and has not recorded any reason as why the application filed by petitioner for amendment of correction of the date of death of the petitioner's husband is liable to be dismissed. As no reasons have been recorded, therefore, it will be presumed that the order passed by respondent No.1 is an order of non-application of mind without assigning any reason.

Case law discussed:
A.I.R. 1990 S.C. 1984, 1991 (2) SCC, 716, AIR 1970, SC, 1302.

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

1. This writ petition has been filed for quashing the order passed by respondent No.1 dated 3.9.2008 by which the amendment application filed by petitioner has been rejected.

2. The petitioner's husband was an employee of respondent No.3 as a driver. In an accident, he was injured. Subsequently, he expired on 1.1.2005. A claim petition under Workman Compensation Act as Case No.71 of 2006 was filed before the Labour Court i.e. respondent No.1 for awarding compensation. During pendency of claim petition, it was revealed that by mistake of the counsel, the date of death instead of 1.1.2005, 30.12.2004 has been mentioned. Then an application for amendment has been filed only amending the date in the application was moved but the respondent No.1 has rejected the same without assigning any reason and without mentioning the fact that why this application filed by petitioner is being rejected.

3. I have heard learned counsel for petitioner and learned Standing Counsel.

4. As the limited question that whether the Commissioner under Workman Compensation Act has applied his mind while rejecting the application and has passed a non-speaking order, as such, in the opinion of the Court, it will be a futile effort to invite counter affidavit or to issue notice to opposite party. If this order is set aside, the opposite party is not going to be affected by the order which is going to be passed by this Court, as such, at this stage, the writ petition is being

disposed of finally with the consent of the parties.

5. From the perusal of the order dated 3.9.2008, it is apparent that respondent No.1 has not applied his mind and has not recorded any reason as why the application filed by petitioner for amendment of correction of the date of death of the petitioner's husband is liable to be dismissed. As no reasons have been recorded, therefore, it will be presumed that the order passed by respondent No.1 is an order of non-application of mind without assigning any reason.

6. Learned Standing Counsel is also not in a position to assail that order passed by respondents is an order in accordance with law. It is well settled that an order having civil consequences, even though passed by administrative authority, must contain reasons so as to enable the aggrieved party to challenge the reasoning of the administrative authority or judicial authority because in the writ jurisdiction it is the reasoning, which has to be decided. In the absence of reasons, no foundation can be laid by petitioner based upon non-application of mind.

7. In case of ***S.N. Mukherjee Vs. Union of India*** reported in A.I.R. 1990 S.C. 1984, the Apex has already held as follows:-

"In view of the expanding horizon of the principles of natural justice, the requirement to record reason an be regarded as one of the principles of natural justice which govern exercise of power by administrative authorities. The rules of natural justice are not embodied rules. The extent of their application depends upon the particular statutory framework where under jurisdiction has been conferred on an administrative authority. With regard to the exercise of a particular power by an administrative authority including exercise of judicial or quasi-judicial functions the legislature, while conferring the said power, may feel that it would not be in the larger public interest that the reasons for the order passed by the administrative authority be recorded in the order and be communicated to the aggrieved party and it may dispense with such a requirement. It may do so by making an express provision to that effect. Such an exclusion can be also arise by necessary implication from the nature of the subject matter, the scheme and the provisions of the enactment. The public interest under lying such a provision would outweigh the salutary purpose served by the requirement to record the reasons. The said requirement cannot, therefore, be insisted upon in such a case. Therefore, except in cases where the requirement has been disposed of with expressly or by necessary implications, an administrative authority exercising judicial or quasi-judicial functions is required to record the reasons for its decision.

The recording of reasons by an administrative authority serves a salutary purpose, namely, it excludes chances of arbitrariness and assures a degree of fairness in the process of decision-making. The said purpose would apply equally to all decisions and its application cannot be confined to decisions which are subject to appeal, revision or judicial review. Therefore, the requirement that reasons be recorded should govern the decisions of an administrative authority exercising quasi-judicial functions irrespective of the fact whether the decision is subject to appeal, revision or

judicial review. It is however not required that the reasons should be as elaborate as in the decision of a Court of law. The extent and nature of the reasons would depend on particular facts and circumstances. What is necessary is that the reasons are clear and explicitly so as to indicate that the authority has been due consideration the points in controversy. The need for recording of reasons is greater in a case where the order is passed at the original stage. The appellate or revisional authority, if it affirms such an order, need not give separate reasons if the appellate or revisional authority agrees with the reasons contained in the order under challenge.

In the case of ***Maharashtra State Board of Secondary and Higher Secondary Education Vs. K.S. Gandhi and others*** *reported in 1991 (2) SCC, 716, the Apex Court has held as under:-*

"The reasons are harbinger between the mind of the maker of the order to the controversy in question and the decision or conclusion arrived at. They also exclude the chances to reach arbitrary, whimsical or capricious decision or conclusion. The reasons assure an Inbuilt support to the conclusion/decision reached. When an order affects the right of a citizen or a person, irrespective of the fact whether it is a quasi-judicial or administrative order, and unless the rule expressly or by necessary implication excludes recording of reasons, it is implicit that the principles of natural justice or fair play require recording of germane and precise relevant reasons as a part of fair procedure. In an administrative decision, its order/decision itself may not contain reasons. It may not be the requirement of the rules, but the least, the record should disclose reasons. It may not be like a judgement. The extent and nature of the reasons would depend on particular facts and circumstances. What is necessary is that the reasons are clear and explicitly so as to indicate that the authority has given due consideration to the points in controversy. The need for recording of reasons is greater in a case where the order is passed at the original stage. The appellate or revisional authority, if it affirms such an order, need not give separate reasons. If the appellate or revisional authority disagrees, the reasons must be contained in the order under challenge. The recording of reasons is also an assurance that the authority concerned consciously applied its mind to the facts on record. It also aids the appellate or revisional authority or the supervisory jurisdiction of the High Court under Article 226 or the appellate jurisdiction of the Supreme Court under Article 136 to see whether the authority concerned acted fairly and justly to mete out justice to the aggrieved person.

In the case of ***M/s Mahabir Prasad Santosh Kumar Vs. State of U.P. & others*** reported in AIR 1970, SC, 1302, the Apex Court has held as under:-

"The High Court in rejecting the petition filed by the appellants has observed that the District Magistrate in considering the explanation of the appellants had "considered all the materials" and also that "the State Government in considering the appeal had considered all the materials". We have, however, nothing on the record to show that materials if any were considered by the District Magistrate and the State Government. The High Court

has also observed that Clause 7 of the Sugar Dealers' Licensing Order does not require "the State Government to pass a reasoned order. All that is required is to give an aggrieved person an opportunity of being heard." We are of the view that the High Court erred in so holding. The appellants have a right not only to have an opportunity to make a representation, but they are entitled to have their representation considered by an Authority unconcerned with the dispute and to be given information which would show the decision was reached on the merits and not on considerations of policy or expency. This is a clear implication of the nature of the jurisdiction exercised by the appellate authority; it is not required to be expressly mentioned in the statute. There is nothing on the record which shows that the representation made by the appellants was even considered. The fact that Clause 7 of the Sugar Dealers' Licensing Order to which the High Court has referred does not "require the State Government to pass a reasoned order" is wholly irrelevant. The nature of the proceeding requires that the State Government must given adequate reasons which disclose that an attempt was made to reach a conclusion according to law and justice."

8. In view of the aforesaid facts, I am of the view that the Appellate Order dated 3.9.2008 (Annexure 4 to writ petition) deserves to be quashed.

9. In the result, the writ petition is allowed. The order dated 3.9.2008 (Annexure 4 to writ petition) is hereby quashed. The matter is remitted back to respondent No.1 to pass an appropriate and detailed order according to law within a period of three months from the date a certified copy of this order is produced before respondent No.1.

10. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.03.2009

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 21068 of 2009

Ram Pratap Singh ...Petitioner
Versus
State of UP and others ...Respondents

Counsel for the Petitioner:
Sri Kaushal Kishore Mishra

Counsel for the Respondents:
S.C.

Constitution of India, Art. 311 (2)- Dismissal from service-petitioner was convicted under Section 302/149/147- can not be ground for dismissal unless the authority concerned applied its mind to form opinion to dispense with enquiry-by providing opportunity of hearing-dismissal order set-aside with direction to consider fresh in light of observation.

Held: Para 14

In the present case the appointing authority has not applied his mind, after reading the judgement of conviction and punishment, in forming an opinion, that the conduct of the petitioner was such which did not require to provide to him an opportunity of hearing before the petitioner was dismissed from service.

Case law discussed:
1985 3 SCC 368:
AIR 1985 SC 1416,
AIR 2007 SC 1003.

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

1. Heard Shri Kaushal Kishore Mishra for the petitioner. Learned Standing Counsel appears for the respondents. The affidavits have been exchanged. With the consent of parties, the writ petition was finally heard and is finally decided at the admission stage.

2. The petitioner was serving as 'Seenchpal' in the office of Executive Engineer, Fatehpur Division, Lower Ganga Canal, Fatehpur. For the purposes of discipline and conduct, his services are governed by the Uttar Pradesh Government Servants (Discipline & Appeal) Rules, 1999, notified under Article 309 of the Constitution of India.

3. In the year 1999, in an incident in which one Raju was murdered, the petitioner, along with other accused namely Chhatrapal; Virendra and Ramanand arrested under Sections 302/149/147 IPC. They were granted bail. The petitioner along with other accused was charge sheeted and was tried in Sessions Trial No. 287 of 2000 in which he was convicted and sentenced to life imprisonment with a fine of Rs. 10,000/- under Section 302/149 IPC, and further with a three year's rigorous imprisonment and a fine of Rs.2000/- under Section 147 IPC. All the sentences were directed by the Additional Sessions Judge, Fast Track Court No. 1, Fatehpur vide his judgement dated 29.11.2007, to run concurrently.

4. The petitioner has preferred an appeal in the High Court being Criminal Appeal No. 8200 of 2007, Ram Pratap Yadav vs. State of UP in which the petitioner has been granted bail on 7.1.2008.

5. In the meantime, the Executive Engineer dismissed petitioner's services on his conviction in Sessions Trial No. 287 of 2000 under Sections 302/149, 147 IPC; for being punished with life imprisonment and also for his detention in jail on 29.11.2007. The petitioner has challenged the order dated 26.12.2007 terminating his services on the ground that though under clause-a of the second proviso to Article 311 (2) of the Constitution of India a person, who is member of the civil service of the union, may be dismissed or removed or reduced in rank on the ground of conduct, which has led to his conviction on a criminal charge, in view of judgements of Supreme Court and specially in **Union of India vs. Tulsi Ram Patel 1985 3 SCC 368: AIR 1985 SC 1416,** the appointing authority is required to look into his conduct, which has led to his conviction on the criminal charge.

6. It is submitted by learned counsel for the petitioner that in the judgement after the trial the Sessions Judge found that the petitioner Ram Pratap Singh was carrying a rifle. He did not fire from the rifle. The Sessions Court has clearly recorded that the rifle was not fired and that there was no fire arm injury on the body of the deceased. The petitioner was convicted only under Section 147 IPC as a member of the unlawful assembly, which led to the death of the deceased Raju. It is contended that the mechanical exercise of powers in dismissing the petitioner from service has caused serious consequence upon the petitioner, who had put in 13 years of service. The termination of his services without looking into his conduct, which led to his conviction, has caused serious prejudice to the petitioner. Learned counsel for the petitioner would

submit that the order dismissing petitioner from service needs to be set aside and that the authority may be directed to consider whether the petitioner's conduct did not entitle him to remain him in service.

7. In the counter affidavit of Shri Nem Singh, Executive Engineer, L.G. Canal Division, Fatehpur, it is stated in paragraph-6 and 13 as follows:-

"6. That in reply to the contents of paragraphs 7 and 8 of the writ petition, it is most respectfully submitted that the petitioner has already been convicted in case crime No. 214 of 1999 under Sections 147/148/149/302 IPC vide order dated 29.11.2007 passed by Sessions Court and as such in view of the said Government Order dated 12.10.1979, the services of the petitioner have been terminated vide order dated 26.12.2007.

13. That in reply to the contents of paragraph-18 of the writ petition, it is most respectfully submitted that in the Government Order dated 12.10.1979, it has been clearly laid down that if any Government employee is convicted in any criminal case by the competent court and in pursuance thereof, he is detained in jail then he will be treated to have been removed from service even if he is released on bail in appeal by the Hon'ble Court and on this ground, no further action is required to be taken on the said application of the petitioner dated 5.2.2008."

8. It is apparent that the appointing authority did not consider the conduct of the petitioner, which led to his conviction. Learned counsel for the petitioner has referred to paragraph-26 of the judgement in which the argument of the counsel of the accused has been referred to by learned Sessions Judge in stating that the accused Ram Pratap was carrying a gun which was not used in the incident and that there was no gun shot injury on the body of the deceased. In the operative portion of the judgement, the Sessions Judge has convicted accused Ram Pratap under Section 147/302/149 IPC as a member of the unlawful assembly carrying a gun and having committed an offence with common object in which a person was done to death.

9. Article 311 of the Constitution of India gives a protection to a member of the civil service to be dismissed, removed or reduced in rank by the authority by which he was appointed, and after an enquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. The second proviso to clause 2 provides for an exception in which clause (a) provides:-

"(a) Where a person is dismissed or removed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge it shall not be necessary to give such person any opportunity of making representation on the penalty proposed."

10. In **Union of India vs. Tulsi Ram Patel (supra)** it was held in paragraph-62 as follows:-

62. Before, however, any clause of the second proviso can come into play the condition laid down in it must be satisfied. The condition for the application of each of these clauses is different. In the case of clause (a) a government servant must be guilty of conduct deserving the penalty of

dismissal, removal or reduction in rank which conduct has led to him being convicted on a criminal charge. In the case of clause (b) the disciplinary authority must be satisfied that it is not reasonably practicable to hold an inquiry. In the case of clause (c) the President or the Governor of a State, as the case may be, must be satisfied that in the interest of the security of the State, it is not expedient to hold an inquiry. When these conditions can be said to be fulfilled will be discussed later while dealing separately with each of the three clauses. ***The paramount thing, however, to bear in mind is that the second proviso will apply only where the conduct of a government servant is such as he deserves the punishment of dismissal, removal or reduction in rank. If the conduct is such as to deserve a punishment different from those mentioned above, the second proviso cannot come into play at all, because Article 311 (2) is itself confined only to these three penalties. Therefore, before denying a government servant his constitutional right to an inquiry, the first consideration would be whether the conduct of the concerned government servant is such as justifies the penalty of dismissal, removal or reduction in rank. Once that conclusion is reached and the condition specified in the relevant clause of the second proviso is satisfied, that proviso becomes applicable and the government servant is not entitled to an inquiry.*** *The extent to which a government servant can be denied his right to an inquiry formed the subject-matter of considerable debate at the Bar and we, therefore, now turn to the question whether under the second proviso to Article 311(2) even though the inquiry is dispensed with some opportunity at least should not be afforded to the government servant so that he is not left wholly without protection, As most of the arguments on this part of the case were common to all the three clauses of the second proviso, it will be convenient at this stage to deal. at one place with all the arguments on this part of the case, leaving aside to be separately dealt with the other arguments pertaining only to a particular clause of the second proviso."*

11. There are various kind of offences for which a person, who is also a civil servant, may be convicted and punished. The civil servant may be punished for a wrongful parking or jumping a red light. He may be punished in a minor scuffle, or for an offence in which, he is gravely provoked. The appointing authority has to go through his conduct, which includes the evidence and findings of the criminal court and considered all the facts and circumstances of the case and the factors, which have led to the conviction and punishment of the person before deciding whether clause (a) of the second proviso of clause (2) of Article 311, will be attracted.

12. In a case under Section 302 IPC, where a person has been killed, the government servant may be a member of the unlawful assembly. He may not have taken any part in killing of the person. There may be circumstances, in which his action of killing, though it cannot be condoned, be considered to be an act of an ordinary person and is not such in which he may be said to be acted in a manner, which deserves the penalty of dismissal, removal or reduction in rank. An act of murder in a state of grave and sudden provocation may fall in such category. In such case a departmental

enquiry may be held to consider his conduct dehorse the conviction and punishment in the criminal trial, and may require a reasonable opportunity to be given to him. Once a conclusion is reached that the conduct is such, which deserves and justifies the penalty of dismissal, removal or reduction in rank, the proviso will become applicable and the disciplinary authority will not be held obliged to conduct departmental enquiry. For example, if a civil servant is in a situation, where he has to save the honour of a member of his family, or an act which may have resulted out of self defence or out of grave and sudden provocation, he acts or uses a weapon, which comes into his hands and which may cause the death of a person, the appointing authority may not find his conduct to be such, which deserves the punishment of dismissal, removal and reduction in rank. It is not possible nor it is prudent for the Court to classify or give guidelines for taking these decisions. It is better to leave it to the discretion of the appointing authority to consider such facts and circumstances and to decide whether it is appropriate to dispense with the departmental enquiry and to allow a person to explain the circumstances, in which his conduct had led to prosecution and conviction.

13. Further there may be circumstances, as have been spelled out in **Navjyot Singh Siddhu vs. State of Punjab AIR 2007 SC 1003,** and in which a person may apply to the appellate court to stay his conviction for allowing the person to continue him in service.

14. In the present case the appointing authority has not applied his mind, after reading the judgement of conviction and punishment, in forming an opinion, that the conduct of the petitioner was such which did not require to provide to him an opportunity of hearing before the petitioner was dismissed from service.

15. The writ petition is **allowed**. The order dated 26.12.2007 passed by respondent no. 2 dismissing petitioner's services only on the ground of his conviction under Section 302, I49 IPC in Sessions Trial No.287 of 2000 dated 29.11.2007 is set aside. A writ of mandamus is issued to the respondents to consider the petitioner's conduct, which led to his conviction and punishment and to pass fresh orders in accordance with the law and the observations made in this judgment.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 12.05.2009

BEFORE
THE HON'BLE VIJAY KUMAR VERMA, J.

Criminal Misc. Bail Application No.21846 of 2008

Pankaj Kashyap ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Yashwant Singh
Sri Pramod Tiwari

Counsel for the Opposite Party:
A.G.A

<u>Code of Criminal Procedure- Section 439</u>- un-natural offence committed with 11 years boy injury on private part reported-plea regarding juvenile justice (Care and Protection of Children Act 2000)-kept open to raise before trail

court-other plea regarding confinement in jail long period-violation of personal liberty held misconceived can not be treated in violation of Art 21 of Constitution bail rejected.

Held: Para 8-

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

Case Law discussed:
2008(63) ACC 115

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

1. Heard Sri Yashwant Singh, Advocate appearing for the applicant and A.G.A. for the State and also perused the entire material on record.

2. An FIR was lodged on 10.07.2007 at P.S. Baradari, Bareilly impleading the applicant as accused. The said FIR was lodged by Mohd. Mian s/o Babban Mian.

3. The allegation made in the FIR, in brief, are that the applicant Pankaj Kashyap committed unnatural offence (sodomy) on Razat @ Mohd. Ali, aged about 10-11 years, son of complainant.

4. It is submitted by learned counsel for the applicant that due to dispute of tenancy, the applicant has been falsely implicated in this case and no such incident as alleged in the FIR had occurred. Next submission is that the applicant was also minor at the time of alleged incident and hence, on the ground of being juvenile, the applicant deserves bail. Last submission made by the learned counsel is that the applicant is in jail since 11.07.2007 and hence on the ground of long incarceration in jail, he deserves bail now, as due to delay in trial, his fundamental right of speedy trial envisaged under Article 21 of the Constitution is being violated.

5. The bail has bee opposed by the learned AGA on the ground that at the time of medical examination of the victim, injuries were found on his private part and the victim has supported the FIR version in his statement recorded under section 161 Cr.P.C. and hence, in this heinous crime, the applicant should not be admitted to bail.

6. So far as the plea of applicant being juvenile is concerned**,** the applicant has not filed any document to show that the age of the applicant was below eighteen years on the date of offence. If the applicant was below eighteen years on the date of offence as contended now then, this plea can be taken in the trial court. If such plea is taken, inquiry may be made by the trial court concerned regarding age of the applicant and if the applicant is found below eighteen years on the date of offence, then he may move fresh bail application on this ground, which shall be considered in accordance with the provisions of the Juvenile justice (Care and Protection of Children) Act 2000.

7. Annexure (2) is the copy of the medical report of the victim, who was

medically examined on 10.07.2007. This report shows that injuries were found on private part (anus) of the victim. In his statement recorded under section 161Cr.P.C, the victim has supported the case of the prosecution. Therefore, having regard to all these facts, but without expressing any opinion of merit, in this heinous crime, the applicant does not deserve bail.

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

9. Consequently, the bail prayer of the applicant Pankaj Kashyap is hereby rejected.

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

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

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.03.2009

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No.17343 of 2009

Shashi Kala Patel ...Petitioner
Versus
Sub Divisional Magistrate, Bindki, District, Fatehpur and others ...Respondents

Counsel for the Petitioner:
Sri Awadhesh Kumar
Sri Manish Goyal

Counsel for the Respondents:
Sri Vishal Tandon
S.C.

Constitution of India Article-226-Election of village Pradhan-by impugned order the S.D.O. directed for recounting by deciding all of 10 issues jointly-without discussion of evidence of parties-held totally unjustified.

Held: Para 6

If the issue are framed in a case, then the same should be decided either individually or two or more any be grouped, if they are inter related. In the present case, all the ten issues have been decided merely in one stroke without discussing the evidence of the parties. The same appears to be totally unjustified. An election petition is to be decided strictly in terms of the rules and even though there may be difference of one vote and the order of recounting has been passed only on the basis of evidence adduced and by a reasoned order, when a case of irregularity in recounting of votes has been made out.

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

1. Considering the urgency in the matter as the recounting of votes has been ordered to be conducted today, which is by the impugned order dated 23.3.2009 passed by the respondent no. 1, the Sub-Divisional Magistrate, this case has been taken up on board today in the presence of the learned counsel for the parties.

2. Heard learned counsel for the petitioner as well as learned Standing Counsel appearing for the respondent no. 1, 6 & 7 and Sri Vishal Tandon for the contesting respondent no. 2, Smt. Sobha Devi. With consent of learned counsel for the parties, this writ petition is being disposed of finally at this stage without calling for a counter affidavit.

3. The brief facts of the present case are that in an election of Gram Pradhan held in the year 2005, the petitioner was declared election as Gram Pradhan. Challenging the said election, the respondent no. 2, Smt. Sobha Devi filed an election petition bearing Election Petition No. 03 of 2005 with the prayer of recounting of votes. By means of the impugned order dated 23.3.2009 passed by the respondent no. 1, the Sub-Divisional Magistrate, the prayer of recounting of votes has been granted. Challenging the said order, this writ petition has been filed.

4. The submission of learned counsel for the petitioner is that the impugned order has been passed without deciding the issues involved in the case and without assigning any reason for directing recounting of votes.

5. From perusal of the record, it is clear that the ten issues have been framed and the same have been decided in one paragraph in the end without considering the evidence adduced by the parties and without deciding each issue individually. All that has been stated in the impugned order is that all the issues are decided accordingly.

6. If the issue are framed in a case, then the same should be decided either individually or two or more any be grouped, if they are inter related. In the present case, all the ten issues have been decided merely in one stroke without discussing the evidence of the parties. The same appears to be totally unjustified. An election petition is to be decided strictly in terms of the rules and even though there may be difference of one vote and the order of recounting has been passed only on the basis of evidence adduced and by a reasoned order, when a case of irregularity in recounting of votes has been made out.

7. Sri Vishal Tandon, learned counsel appearing for the respondent no. 2, Smt. Sobha Devi, has however not been able to justify the order and has also not been able to point out the grounds and reasons on the basis of which the same has been passed. He has however submitted that since there was difference of only one vote, it was perfectly justified for the prescribed authority to have directed for recounting of votes.

8. A full bench of this Court, in the case of **Ram Adhar Singh Vs. District Judge, Ghazipur,** 1985 UPLBEC 317, has held in paragraph 19 as follows:

"19. Applying the principle with regard to inspection of ballot paper enunciated by the Supreme Court in cases arising under the Representation of People Act to the election petition dealt with under the provisions of the U.P. Panchayat Raj Act, there is no escape from the conclusion that before an authority hearing the election under the said Act can be permitted to look into or to direct inspection of the ballot papers, following two condition must co-exist.

(1) that the petition for setting aside an election contains the grounds on which the election on the respondent is being questioned as also summary of the circumstances alleged to justify the election being questioned on such ground; and

(2) the authority is, prima facie, satisfied on the basis of the materials produced before in that there is ground for believing the existence of such ground and that making of such an inspection in imperatively necessary for deciding the dispute for doing complete justice between the parties.

It is, therefore, follows that in the absence of any specification with regard to the ground on which the election of the respondent is being questioned together with summary of the circumstances alleged to justify the election being questioned on such ground, it is not open to the authority dealing with an application under Section 12-C of the U.P. Panchayat Raj Act, either to look into or direct inspection of ballot papers merely on the ground that it feels that it would be in the interest of justice to look into or permit inspection of the ballot papers. In the context, such satisfaction has necessarily to be based on specific averments made in and the materials indicated in the election petition which could, prima facie, satisfy the authority about the existence of the ground on which the election is sought to be questioned.

9. In such view of the matter, since no reasons have been recorded for directing the recounting of votes and the issues framed by the prescribed authority have not been decided properly and all the ten issues have been decided together, in my view, the impugned order dated 23.3.2009 passed by the respondent no. 1 cannot be justified under law.

10. Accordingly, this writ petition stands allowed. The order dated 23.3.2009 passed by the respondent no. 1 is quashed. The prescribed authority is directed to decide the matter afresh, after giving an opportunity of hearing to the parties and pass a reasoned speaking order after considering the evidence adduced by the parties. Since more than three and half years have passed after filing the election petition, it is further directed that the matter may be decided, expeditiously, preferably within a period of four months from the date of filing of a certified copy of this order, without granting any unnecessary adjournment to either of the parties.

There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.05.2009

BEFORE
THE HON'BLE RAVINDRA SINGH, J.
THE HON'BLE NAHEED ARA MOONIS, J.

Criminal Misc. Writ Petition No. 7979 of 2009

Abhishekh Pushkar ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Virendra Bhatia
Sri Vijay Shanker Mishra

Counsel for the Respondents:
A.G.A.

Constitution of India Art. 226-Quashing F.I.R.-offence under Section 306 IPC-from suicide note name of petitioner disclosed- prima facie offence made out-FIR cannot be quashed-however in the light of Supreme Court direction in Smt. Amrawati case-petition disposed of.

Held: Para 6 & 7

The FIR is not Encyclopaedia of the facts and circumstances, the same may be collected by the I.O. during investigation. So far as constitution of the offence under section 306 IPC is concerned, prima facie it is made out on the basis of the allegations made in the impugned FIR, the allegations are disclosing the commission of a cognizable offence and there is no ground for quashing the FIR and its investigation, therefore, the prayer for quashing the FIR and its investigation is refused.

However, considering the facts, circumstances of he case and academic career of the petitioner, it is directed that in case petitioner appears before the court concerned within 30 days from today and applies for bail, the same shall be heard and disposed of

Case law discussed:
2005 Cr.L.J. 755, Lal Kamlendra Pratap Singh Versus State of U.P.

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

1. This writ petition has been filed by the petitioner Abhishekh Pushkar with a prayer to issue a writ, order or direction in the nature of certiorari, quashing the FIR of case crime, No. 217 of 2009 under section 306 IPC, P.S. Link Road, District Ghaziabad and its further investigation. The next prayer is to issue a. writ, order or direction in the nature of mandamus directing the respondents not to arrest the petitioner in the above mentioned case or to pass any order which is deemed fit and proper in the circumstances of the case.

2. The facts in brief of this case are that the FIR, of this case has been lodged by respondent No. 3 Pankaj Kumar Agrahari on 15.4.2009 at 8.15 P.M. in respect of the incident which had occurred on 15.4.2009 after 3.18 P.M. It is alleged in the FIR that the deceased Km. Sarika Agrahari, the niece of the respondent no. 3 was student of B.Tech. IV year (E.C. Branch) of Indraprastha Engineering College, Site-IV, Sahibabad and she was Inmate of-the girl hostel of the college where she was residing in room No. 315. The deceased gave a telephonic message to respondent no.3 on 15.4.2009 at 3.18 P.M. to bring a lock and rupees, thereafter the respondent No. 3 came to the Indraprastha college to meet the deceased and he tried to contact by his mobile, phone, with the deceased from the guard room of the college but calls sent by the Respondent No. 3 of the deceased's mobile' phone were unattended. It was

informed by him to warden and guard of the college, Thereafter Smt. Suman, the warden and guard of the college went to the room of the deceased and carne back who informed that her room was closed from in side. Thereafter the net of the adjoining room was broken from where it was seen that the deceased was in a hanging condition, then her room .was open ed and found the deceased in a hanging condition, a suicide note was kept on her wed, in which it was written that the petitioner Abhishekh Pushkar had played with her, modesty (Izzat). The first informant Respondent No. 3 was informed earlier also by the deceased that the petitioner Abhishekh Pushkar was harassing her unnecessarily, the petitioner Abhishekh Pushkar was student of M.E. of the college. The deceased was unnecessarily harassed by the petitioner due to which she was mentally disturbed and committed suicide. Being aggrieved from the FIR lodged against the petitioner the present writ petition has been filed.

3. Heard Sri Virendra Bhatia, Senior Advocate assisted by, Sri Vijay Shanker Mishra, learned counsel for the petitioner and learned Government Advocate for the State of U. P..

It is contended by learned counsel for the petitioner;

1. that the petitioner has passed B.Tech examination from Indraprastha Engineering College in the year 2008, he was looking for further studies. In view of his brilliance, decency, sincerity he got the job offer from reputed company “WIPRO" when he was student of B. Tech III yea. He is having very good academic career. He belongs to highly reputed family, his father is retired Professor from Chandra Shekhar Azad Agricultural University, Kanpur, his mother is retired lecturer, his two sisters are highly qualified. The petitioner belongs to family of academician and research scholars.
2. The petitioner was having no relationship with the deceased. She was never harassed or tortured by the petitioner. No such complaint was made by her to her parents, college administration or any other authority. The deceased was student of B. Tech IV year, she has committed suicide due to other reasons including the reason that she was, ,very, poor student, her attendance in the college was, only 45% and in internal examination of the college, she had obtained only 10% marks and she was not selected in campus replacement due to which she was depressed such reporting has been made in daily newspaper Dainik Bhasker etc. dated 18.4.2009.
3. After the death of the deceased several news items were published in the newspapers in which it was written that suicide note was containing certain allegations as she was having the suspicion that the camera was fitted, in the bath room of the college, through that camera her photographs would have been obtained by the petitioner but in support of such allegation nothing incriminating was recovered by the police or college administration even no camera etc. was recovered. All these allegations were made on the basis of the doubt and suspicion.
4. The contents of the suicide note were published in daily newspaper "Amar

Ujala" published from New Delhi dated 17.4.2009 which reads as under," Main Sarika, Agrahari (B. Tech IV year) student Main apni maut apni rnarji se kar rahi hoon meri maut ke bad mere pariwar walaon ko koi bhi kutch na kahe meri maut ka jimedar Abhishekh Pushkar {ME passout last year pass hai usne meri ijjat ke sath khilwar kiya hai mere marne ke bad use ceiling ke bathroom main camera lagane tatha ek lakdi nahate hui dekhane ke jurm main fansi (Maut ke) saja ho."

The above mentioned suicide note is not genuine even it was not having the Signature of the deceased. The story of recovery of the suicide note appears to be concocted its genuineness is highly doubtful because the deceased was student of English medium but the suicide note was written in Hindi language.

5. The stories of suicide published in the different newspapers on different dates are contradicting to each other. In such circumstances, no reliance can be placed on the FIR version.
6. The petitioner is innocent, he has not committed any offence and there is no material suggesting his participation in commission of the alleged offence even on the basis of the allegation made in the FIR no offence under section 306 IPC is made out.
7. The petitioner is having a bright career in case he has been sent to jail without having evidence; his, career will be spoiled.
8. Even on the basis of the allegation made in the. FIR no offence under section 306 is made out, therefore, the, FIR and its investigation may be quashed and the petitioner may not be arrested in the present case.

5. In reply of the above contention, it is submitted by learned Government Advocate that it is a case in which-the deceased had committed suicide, she was student of B. Tech IV year, she was living in a room of the college's hostel. According to the suicide note the petitioner has played with the modesty of the deceased, the suicide note discloses the name of the petitioner .as an accused. The detailed evidence relating to contents of the suicide note may be collected during investigation. But it is very clear that the deceased was compelled by the petitioner to commit suicide. The allegation made in the FIR are constituting the offence punishable under section 306 IPC which is cognizable offence. At this stage the news items published in the different newspapers on different dates in respect of the death of' the deceased are having no relevance and there is no ground for quashing the FIR and its investigation. The present petition is devoid of merit, the same may be dismissed.

6. Considering the submissions made by learned counsel for .the petitioner, learned Government Advocate and from the perusal of the record including the FIR it appears that the allegations made in the FIR prima facie discloses the commission of the, cognizable offence. The FIR is not Encyclopedia of the facts and circumstances, the same may be collected by the I.O. during investigation. So far as constitution of the offence under section 306 IPC is concerned, prima facie it is made out on the basis of the allegations

made in the impugned FIR, the allegations are disclosing the commission of a cognizable offence and there is no ground for quashing the FIR and its investigation, therefore, the prayer for quashing the FIR and its investigation is refused.

7. However, considering the facts, circumstances of he case and academic career of the petitioner, it is directed that in case petitioner appears before the court concerned within 30 days from today and applies for bail, the same shall be heard and disposed of in view of **Smt. Amrawati and another Vs. State of U.P, 2005 Cr.L.J. 755** has been specifically approved in this decision. In this regard the Full bench has held in Amrawati:

1. Even if a cognizable offence is disclosed in the FIR or complaint the arrest of the accused is not a must, rather: the police officer should be guided by the the decision, of the Supreme Court in Joginder Kumar Vs. State of U.P. 1994 Cr.L.J. 1981, before deciding whether to make an arrest or not.
2. The High Court should ordinarily not direct any Subordinate Court to decide the bail application the same day as that would be interfering with the judicial discretion of the court hearing the bail application. However, as stated above, when the bail application is under section 437 Cr. P .C. ordinarily the Magistrate should himself decide the bail application the same day, and if he decides in a rare and exceptional case not to decide it on the same day, he must record his reasons in writing. As regards the application under section 439 Cr.P.C. it is in the discretion of the learned sessions judge, considering the facts and circumstances whether to decide the bail application the same day or not, and it is also in his discretion to grant interim bail the same day subject to the final decision on the bail application later.

8. The same has been approved by the Hon'ble Apex Court in **Lal Kamlendra Pratap Singh Versus State of U.P.** on 23.3.2009 in Criminal Appeal No. 538 of 2009.

9. With this direction, this petition is finally disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.05.2009

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 60638 of 2008

Nagesh Katariya ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare
Sri Siddharth Khare

Counsel for the Respondents:
Sri Nipendra Tripathi
S.C.

U.P. Temporary Government Servant (Termination of Service) Rules, 1975- Petitioner-working as warder in jail- appointed on Compassionate -during training period on ground certain - allegation-two show cause notice given duly replied by petitioner- without holding disciplinary enquiry without charge sheeted termination order passed

in the garb of Rules 1975-held- Compassionated appointment always treated regular appointment- termination order wholly illegal.

Held: Para 7

After hearing counsel for the parties, I am of the opinion that the appointment under Dying in Harness Rules of the dependant of a Government Servant, who was working on a permanent post, is permanent appointment as has been held by the Division Bench in the case of *Ravi Karan Singh (supra).* Hence his services could not have been terminated treating his appointment to be on temporary basis. If the petitioner was not performing his duties properly, it was open to the authority to initiate disciplinary proceedings against him for the purpose of terminating his services.

Case Law discussed:

1999(2) AWC 976, [2001 (1) LB. E.S.R. 116 (Alld.)]

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

1. Heard Sri Ashok Khare, learned Senior Counsel appearing for petitioner assisted by Sri Nipendra Tripathi and Standing Counsel who has accepted notice on behalf of the respondent no. 1 to 4.

2. The facts of the case in brief are that Surendra Katariya, father of the petitioner was employed in permanent capacity as Ambulence Driver. He died during service on 5.7.2008. Petitioner thereafter applied for compassionate appointment in place of his father and was appointed as Warder in district Jail, Meerut by Senior Superintendent of Jail, Meerut. While he was undergoing training at Training Institute at Lucknow, a notice dated 2.10.2008 was issued calling for explanation for not performing his duties during training period and reiterating the fact that he was Mess In-charge, he was not serving food properly upto standard. Petitioner replied both the notices. Another show cause notice dated 7.10.2008 was issued to the petitioner again calling for explanation in which he was communicated by the Deputy Director that he was failed in training and was required to undergo further training after availing two days leave.

3. It appears that by the impugned order dated 6/7.11.2008 Senior Superintendent of Jail, Meerut terminated the services of the petitioner, as his services are no longer required, in purported exercise of powers under U.P. Temporary Government Servant (Termination of Services) Rules 1975. Aggrieved, petitioner has filed this writ petition.

4. The contention of counsel for the petitioner is that the compassionate appointment is permanent appointment. However, from the letter of appointment dated 7.7.2008 (Annexure 1 to the writ petition) it appears that the petitioner was appointed on temporary basis, hence his services have been terminated vide letter dated 6/7.11.2008 under U.P. Temporary Government Servant (Termination of Service) Rules, 1975.

5. It is urged by counsel for the petitioner that it is settled law that the compassionate appointment is treated to be permanent appointment if the deceased government servant was employed on permanent basis. He has relied upon a Division Bench decision of this Court rendered in the case of ***Ravi Karan Singh Versus State of U.P. and others*** repoted

in **1999 (2) AWC 976** wherein the Division Bench has held as under:

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

6. He has further relied upon the decision rendered in the case of ***Om Prakash Versus Superintending Engineer, Nalkoop*** reported in **[2001 (1) LB. E.S.R. 116 (Alld.)]** which is also to the same effect.

Learned Standing Counsel submitted that since the appointment of the petitioner was temporary, therefore, his services have rightly been terminated.

7. After hearing counsel for the parties, I am of the opinion that the appointment under Dying in Harness Rules of the dependant of a Government Servant, who was working on a permanent post, is permanent appointment as has been held by the Division Bench in the case of ***Ravi Karan Singh (supra).*** Hence his services could not have been terminated treating his appointment to be on temporary basis. If the petitioner was not performing his duties properly, it was open to the authority to initiate disciplinary proceedings against him for the purpose of terminating his services.

8. In the fact and circumstances of the case, the writ petition deserves to be allowed and is hereby allowed. The impugned order of termination dated 6/7.11.2008 is quashed. However, it is open to the respondent to proceed against the petitioner for termination of his services as permanent employee in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.03.2009

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

Civil Misc. Writ Petition No. 19894 of 2008

Ved Pal Singh Bhati and another
...Petitioners
Versus
The State of U.P. and another
...Respondents

Counsel for the Petitioners:
Sri Radha Kant Ojha.

Counsel for the Respondents:
Sri Shashi Nandan, Sr. Advocate,
Sri D.K. Arora, Addl. Advocate General.
Sri M.C. Chaturvedi, Chief Standing Counsel,
Sri R.B. Pradhan, Standing Counsel.

Constitution of India-Art. 226-Art. 14-Discrimination-petitioner working as member of Bar-tenure of working of member are 2 years while the chairman's tenure is six years-held-amended provisions creation of statute-

considering nature of job and responsibility- can not being held - violation of any fundamental Right or any other provision of the Constitution.

Held: Para 19

However, we are of the view that in the present case promulgation of the Act in question is not an administrative action but a legislative action and no case of lack of legislative competence is available to us. The remaining question is whether the action is violative of any fundamental right guaranteed in Part III of the Constitution or any other constitutional provision or not. Since the right of the petitioners is statutory right and can not be said to be a constitutional right and as such, fixation of tenure of service, which was not interfered with earlier enactment but tenure of Chairman has been increased, can not at all be said to be violative of fundamental rights guaranteed in Part-III of the Constitution or any other constitutional provision, if any, available to the petitioners/Members.

Case law discussed:

1997 (8) SCC 522, 1985 (1) SCC 523, AIR 1958 SC 538, AIR 1967 SC 1305, 2004 (1) SCC 712 : AIR 2004 SC 1295, 2007 (6) SCC 276, 2007 (6) SCC 624, 2008 (5) SCC 1, 1996 (3) SCC 709, 2007 (6) SCC 236, 2008 (2) SCC 254, 2000 All CJ 840, 2003 (4) SCC 104, AIR 1985 SC 1367, 2002 (2) SCC 318, AIR 1985 SC 1041, 1963 SCR (Supp.) 112.

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

1. The petitioners are Members of the Uttar Pradesh Secondary Education Services Selection Board (hereinafter in short called as the 'Board'). The services of the petitioners are contractual in nature for a fixed period as available in the Uttar Pradesh Secondary Education Services Selection Board Act as amended time to time. The petitioners have basically challenged the vires of the Uttar Pradesh Secondary Education Services Selection Board (Third Amendment) Act, 2007 (U.P. Act No. 4 of 2008), in which the tenure of service of the Members remained two years as before in the erstwhile amended Act i.e. Uttar Pradesh Secondary Education Services Selection Board (Second Amendment) Act, 2007 (U.P. Act No. 22 of 2007) but the tenure of the Chairman is enhanced from two years to five years. A plea has been taken by the petitioners that there is no *intelligible differentia* between the nature of service to be rendered by the Chairman and the respective Members of the concerned Board. Therefore, there is no occasion to enhance the tenure of the services of Chairman. The amendment of the Act, even by the legislative body, appears to be colourable exercise of power.

In support of the contentions of the petitioners Mr. Radha Kant Ojha, learned Counsel appearing for the petitioners, has drawn our attention towards the earlier amendments. According to him, by the original Act being the Uttar Pradesh Secondary Education Services Commission and Selection Board Act, 1982 (U.P. Act No. 5 of 1982) the tenure of the Members and Chairman of the Board was fixed for a term of six years. By the Uttar Pradesh Secondary Education Services Commission and Selection Board (Amendment) Act, 1992 (U.P. Act No. 1 of 1993) the tenure was reduced from six years to three years. Further, by the Uttar Pradesh Secondary Education Services Selection Board (Amendment) Act, 1995 (U.P. Act No. 15 of 1995) the tenure of members was increased from three years to four years. By a further amendment, being the Uttar Pradesh Secondary Education Services

Selection Board (Second Amendment) Act, 2006 (U.P. Act No. 40 of 2006) such tenure of four years was extended to six years. The petitioners were appointed on 01st November, 2006 as Members of the Board. In further, by U.P. Act No. 22 of 2007 the tenure of six years was reduced to two years for Chairman and Members both. However, subsequently by the impugned amending Act, being U.P. Act No. 4 of 2008, the tenure of Chairman has been raised to five years from two years when the tenure of the Members for two years remained as it is.

2. Admittedly, the petitioners did not challenge the U.P. Act No. 22 of 2007, by which the tenure of the Members inclusive of Chairman was reduced from six years to two years. As a result whereof, the petitioners had admittedly no case but when various queries have been made by the Court, they sought amendment of the prayer challenging the vires of such Act i.e. U.P. Act No. 22 of 2007 without making any averment in the petition in that regard. Therefore, such amendment, which was allowed initially for the sake of convenience of the parties to argue on merits, is insufficient in nature for the appropriate purpose and outcome of afterthought. It is clear and categorical that all the arguments are poised down to a point that there is no basic difference between the nature of works of the Chairman and the Members of the Board and as such when in the earlier occasion the tenure was reduced to two years for both, there was no necessity to change the tenure of the Chairman and the Members under the impugned amendment. Therefore, the petitioners' case is not for the purpose of reduction of their own tenure but increase of tenure of the Chairman.

3. Mr. Ojha has shown definition of 'Chairman' and 'Member' from the original Act i.e. U.P. Act No. 5 of 1982. The definitions of the Chairman and the Members as under Sections 2(b) and 2(g) therein are quoted hereunder:

"(b). 'Chairman' means the Chairman of the Commission, and includes any other person performing in the absence of the Chairman, for the time being, the functions of the Chairman;"

"(g) 'Member' means a member of the Commission and includes its Chairman;"

4. In further, he placed before us the Uttar Pradesh Secondary Education Services Selection Board (Procedure and Conduct of Business) (First) Regulations, 1998 (hereinafter in short called as the 'Regulations') to establish that there is no basic difference between the nature of service between the Chairman and the Members.

5. We find from the Regulations 11 and 13 of the Regulations what are the powers and duties of the Chairman and Members respectively. Therefore, Regulations 11 and 13 are quoted hereunder:

"11. Powers and duties of Chairman.--(1) Subject to the provisions of the Act, the Chairman shall exercise administrative, disciplinary and financial powers of the Board, and shall—

(a) preside over all the meetings of the committees of which he may be a member;
(b) co-ordinate the working of the Board and its Vice-Chairman and members;

(c) be the controlling officer of the members for the purposes of sanctioning casual leave and passing of travelling allowance bills;
(d) have the power of supervision over the working of the officers and employees of the Board.

(2) If the Chairman, by reason of his absence or any other reason, is unable to perform his duties, he may, by general or special order, authorise Vice-Chairman or any member to perform such duties:

Provided that all the matters in which decisions or actions have been taken during the period of absence of the Chairman, shall be placed before him for information as soon as he resumes his office."

"13. Powers and duties of the members.--Subject to the provisions of the Act and the rules made thereunder and the decisions of the Board, a member shall assist the Chairman in the selection of candidates for different categories of posts and shall discharge such other duties as may be assigned to him by the Chairman."

6. From the statement of objects and reasons of the U.P. Act No. 4 of 2008, which is impugned herein, we find explanation about the duties of the Chairman and the necessity of increasing the tenure of the Chairman, which is as follows:

"The Chairman of Uttar Pradesh Secondary Education Services Selection Board constituted under the Uttar Pradesh Secondary Education Services Selection Board Act, 1982, has to perform all the works regarding the selection of Principals, Headmasters, Lecturers and Trained Graduate Teachers in aided Schools and Intermediate Colleges of Uttar Pradesh. **The present tenure of Chairman is two years, which is not sufficient to maintain the continuity of the selection process. It has, therefore, been decided to amend the said Act to provide for:-**

(a) amending the definitions of the word "member" to exclude the Chairman therefrom;
(b) amending the qualification of member to broaden the field of eligibility;
(c) increasing the term of the Chairman from two years to five years;
(d) increasing the maximum age to hold office of Chairman from sixty two years to sixty eight years;

The Uttar Pradesh Secondary Education Services Selection Board (Third Amendment) Bill, 2007 is introduced accordingly."

7. From the statement of objects and reasons therein we find that the amendment is arising out of a policy decision made by the State of Uttar Pradesh upon observing the nature of the duties and sufficiency of tenure of the Chairman in discharging such duties.

8. According to us, there is no bar for the State in making intelligible differentia between the tenure of the Chairman and the Members in case it is supported by objects and reasons. Sufficiency of reasons is not the domain of the Court to consider. That apart, independently the Court can not enquire about the legislative intent for making different tenure for the Chairman and the Members unless and until the cause is so apparently arbitrary that it shocks the

conscience. Whatever may have been the wisdom that guided the legislature in enacting a provision, it is not for the Court to make surmises about it. A statute is not to be construed according to some notion of what the legislature might have been expected to have said, or what this Court might think it was the duty of the legislature to have said or done. The duty of the Court is to examine the language used, and to give effect to it, whether it approves or disapproves of what the legislature has provided or whether it thinks or not that the legislature might more properly have done or said something else. No Court can, therefore, proceed upon the assumption that the legislature has made a mistake. There is nothing more dangerous and fallacious in interpreting a statute, than first of all to assume that the legislature had a particular intention, and then having made up one's mind what that intention was, to conclude that the intention must necessarily be expressed in the statute, and then proceed to find it. This view has also been taken by the Supreme Court in the judgement reported in **1997 (8) SCC 522 (S.S. Bola and others Vs. B.D. Sardana and others).**

9. The respondents have contended before this Court that it is well settled principle of law that the power of legislature to make amendment is not an executive power but legislative power and as such no restriction can be put on the power of the legislature to amend the law as provided in the Constitution. The Court can strike down such legislation only on the ground of lack of legislative competency or violation of fundamental rights. There is no lack of legislative competency. Further the right of the petitioners, if any, is flowing from the statute not from the Constitution and, therefore, no fundamental right of the Members can be said to be infringed. The petitioners are creature of the statute, therefore, they have only their limited right within the statute. Admittedly, the appointment was contractual appointment and the period of two years has already expired as per the amended Act. Therefore, the controversy is academic in nature.

10. Mr. Ojha relied upon a three Judges' Bench judgement of the Supreme Court reported in **1985 (1) SCC 523 (K. Nagaraj and others Vs. State of Andhra Pradesh and another)** to establish that an age of retirement in public services is widely accepted as reasonable and rational. It has been argued that in reducing the age of retirement scientific investigation, material statistics, hardship and other social and economic consequences are to be taken into account. However, the contention of the petitioners was not accepted by the Supreme Court. On the other hand, it has been held that besides the ordinance-making power being a legislative power, the argument of mala fides is misconceived. **The legislature, as a body, can not be accused of having passed a law for an extraneous purpose**. Its reasons for passing a law are those that are stated in the **objects and reasons**. Even assuming that the executive, in a given case, has an ulterior motive in moving a legislation, that motive can not render the passing of law malafide. This kind of **"transferred malice"** is unknown in the field of legislation.

11. From a five Judges' Bench judgement of the Supreme Court reported

in **AIR 1958 SC 538 (Shri Ram Krishna Dalmia and others Vs. Shri Justice S.R. Tendolkar and others)** we find that it is now well established that while Article 14 of the Constitution forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question.

12. In **AIR 1967 SC 1305 (Dinnapati Sadasiva Reddi, Vice-Chancellor, Osmania University Vs. Chancellor, Osmania University and others)** a five Judges' Bench of the Supreme Court considered the cause that before a provision is accepted as valid, the Court must be satisfied that there is a reasonable basis of classification which appears on the face of the statute itself, or is deducible from the surrounding circumstances or matters of common knowledge. If no such reasonable basis of classification appears on the face of the statute, or is deducible from the surrounding circumstances, the law will have to be struck down as an instance of naked discrimination. This observation was made when the Court found that the Vice-Chancellor, who was appointed under the Act, or the Vice-Chancellor, who was holding that post on the date of commencement of the second amendment of the Act (therein), form one single group or class unlike the factual circumstances herein.

13. In contra to the words 'naked discrimination', is the language of **2004 (1) SCC 712: AIR 2004 SC 1295 (Dharam Dutt Vs. Union of India),** where the Supreme Court has diluted the words 'intelligible differentia' to that extent that laying down of 'intelligible differentia' does not, however, mean that the legislative classification should be scientifically perfect and logically complete.

14. Learned Counsel appearing for the petitioners further submitted on the strength of the judgement reported in **2007 (6) SCC 276 (Union of India and another Vs. Shardindu)** that contractual service of the petitioners for a limited period in the Board can not be said to be purely on deputation basis. According to us, possibly the petitioners suffer from misconception of law. The fact is that the petitioners worked as Members of the Board for a limited period on the basis of the contractual right as per the statute, which can not be held to be a constitutional right to claim relief to the extent of enhancement of the period. In **2007 (6) SCC 624 (Aashirwad Films Vs. Union of India and others)** we find that the test of reasonableness, however, would vary from the statute to statute. The petitioners therein wanted to establish that a classification must not be arbitrary, artificial or evasive and there must be a reasonable, natural and substantial distinction in the nature of the class or classes upon which the law operates. Therefore, when the Court found that there is a difference in the rate of tax held that the same is ex facie arbitrary by saying that the classification is only on the basis of language without anything more than the same. According to us, the judgement itself made a difference

between the taxing statute with others and has no application in the instant case. In the instant case, neither there is any difference of period amongst the members nor there is any scope of interference with objects and reasons of the amended Act, which appears to be logical. The Members are not being affected nor having any discrimination amongst themselves, we can not interfere with the cause of enhancement of the tenure of the other i.e. Chairman, which has been excluded from the definition of members. From **2008 (5) SCC 1 (P. Venugopal Vs. Union of India)** we find that once a person is appointed to a tenure post, his appointment to the said office begins when he joins and it comes to an end on the completion of the tenure unless curtailed on justifiable grounds. Such a person does not superannuate, he only goes out of the office on completion of his tenure. Concept of superannuation, which is well understood in the service jurisprudence, is alien to tenure appointments which have a fixed life span. We have no quarrel with the proposition. In the instant case, the fixation of tenure of the Members is not altered, therefore, the persons, who are not being subjected for curtailing the tenure, can not raise their voice in respect of enhancement of tenure of others for making difference. In further, it has been held by the Supreme Court that **curtailment of tenure on justifiable grounds is not alien** in the subject context. Hence, we do not find any such explanatory cause on the part of the petitioners to uphold. Moreover, it is not an impermissible over classification, through a one-man legislation, which clearly falls foul of Article 14 of the Constitution being an apparent case of **naked discrimination** in this democratic civilised society governed by the rule of law and renders the impugned proviso as void ab initio and unconstitutional in such case. The present case is not regarded as one-man legislation nor an executive action but purely a decision of legislative body which can not be termed as malice.

15. Mr. D.K. Arora, learned Additional Advocate General, contended before this Court that U.P. Act No. 5 of 1982 gives definition about the post of Chairman and Members distinctly as under Sections 2(b) and 2(g) respectively, as aforesaid. Section 4 of such Act gives qualification of Members, as follows:

"4. (1) The Commission shall consist of a Chairman and not less than six and not more than eight other members to be appointed by the State Government.

(2) Of the members—

(a) one shall be a person who occupies or has occupied, in the opinion of the State Government, a position of eminence in Judicial Services;
(b) two shall be persons who occupy or have occupied, in the opinion of such Government, a position of eminence in the State Education Services; and
(c) others shall have teaching experiences as –
(i) Professor of any University established by law in Uttar Pradesh; or
(ii) Principal of any college recognised by or affiliated to any such University for a period of not less than ten years; or
(iii) Principal of any institution recognised under the Intermediate Education Act, 1921 for a period of not less than fifteen years.

(3) Every appointment under this section shall take effect from the date on

which it is notified by the State Government.

16. Thereafter he contended that the petitioners did not challenge the U.P. Act No. 22 of 2007, by which the tenure of the Chairman and the Members were fixed for a period of two years, but challenged the U.P. Act No. 4 of 2008 when the tenure of the Chairman was enhanced without disturbing the tenure of the Members.

17. According to us, sufficiency of the reason is as good as reasonableness of the reasons and as such, the Court can not scrutinize as to what is the necessity of such amendment. A legislative body not being an individual can not be held to have passed a law for an extraneous purpose, as already held by this Court. Fixing of tenure of service is statutory but not fundamental, therefore, the same can not be held to be violative of Article 14 of the Constitution, as contended by the learned Counsel appearing for the petitioners. This point has also been considered by the Court making detailed discussion. From a judgement of the Supreme Court reported in **1996 (3) SCC 709 (State of A.P. and others Vs. McDowell & Co. and others)** we find that in India, the position is similar to the United States of America. The power of Parliament or for that matter, the State Legislature is restricted in two ways. A law made by Parliament or by the legislature can be struck down by the Courts on two grounds and two grounds alone, viz. (i) lack of legislative competency, and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. **An enactment can not be struck down on the ground that the Court thinks it unjustified. Parliament and legislatures, composed as they are representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The Court can not sit in judgement over their wisdom.** In this connection, it should be remembered that even in the case of administrative action, the scope of judicial review is limited to three grounds, viz., (i) unreasonableness, which can more appropriately be called irrationality, (ii) illegality, and (iii) procedural impropriety. This point i.e. the constitutional validity of the Act when can be challenged, has been again reiterated by a three Judges' Bench of the Supreme Court in the judgement reported in **2007 (6) SCC 236 [Greater Bombay Coop. Bank Ltd. Vs. United Yarn Tex (P) Ltd. and others]** following the ratio of McDowell & Co. (supra) and it has been held that it is the duty of the constitutional Courts under our Constitution to declare a law enacted by Parliament or the State Legislature as unconstitutional when Parliament or the State Legislature had assumed to enact a law which is void, either for want of constitutional power to enact it or because the constitutional forms or conditions have not been observed or where the law infringes the fundamental rights enshrined and guaranteed in Part III of the Constitution. For the purpose of sustaining the constitutionality of an Act, a Court may take into consideration matters of common knowledge, reports, preamble, history of the times, objection of the legislation and all other facts which

are relevant. The objects and reasons of the Act impugned in this petition has given sufficient reasons for the purpose of enhancement of tenure of the Chairman without interfering with the tenure of the Members. As such the amendment can not be said to be without any reason whatsoever or infringing any right of the petitioners herein. The Court should not approach the enactment with a view to pick holes or to search for defects of drafting, much less inexactitude of language employed. Indeed, any such defects of drafting should be ignored out as part of the attempt to sustain the validity/constitutionality of the enactment. After all, an Act made by the legislature represents the will of the people and that can not be lightly interfered with. In **2008 (2) SCC 254 (Karnataka Bank Ltd. Vs. State of Andhra Pradesh and others)** the Supreme Court held that there is always a presumption in favour of constitutionality, and a law will not be declared unconstitutional unless the case is so clear as to be free from doubt. Where validity of a statute is questioned and there are two interpretations, one of which would make the **law valid** and the other void, the former must be preferred and validity of law upheld. In pronouncing on the constitutional validity of a statute, the Court is not concerned with the wisdom or unwisdom, justice or injustice of the law. If that which is passed into law is within the scope of power conferred on a legislature and violates no restrictions on that power, the law must be upheld whatever a Court may think of it. A Full Bench of our High Court (Lucknow Bench) in the judgement reported in **2000 All CJ 840 (Public Services Tribunal Bar Association and others Vs. State of U.P. and others)** held that the burden of proof, that the impugned legislation is unconstitutional, is upon the shoulders of the incumbent who challenges it. Such judgement of the Full Bench was also upheld by the Supreme Court in **2003 (4) SCC 104 (Public Services Tribunal Bar Association Vs. State of U.P. and another**).

18. In **AIR 1985 SC 1367 [Dr. (Mrs.) Sushma Sharma etc. etc. Vs. State of Rajasthan and others]** it has been held by the Supreme Court that a certain tenure of service for the purpose of absorption is made with an object to be achieved and this has a rational nexus with the object. Although the observation was made in respect of the Act therein but when we find that in this particular amended Act the objects and reasons are available, it would not be proper for us to interfere with it. In **2002 (2) SCC 318 (State of Maharashtra Vs. Marwanjee F. Desai and others)** it has been held by the Supreme Court that the statute shall have to be considered in its entirety and picking up of one word from one particular provision and thereby analysing it in a manner contrary to the statement of objects and reasons is neither permissible nor warranted. True intent of the legislature shall have to be gathered and deciphered in its proper spirit having due regard to the language used therein. Statement of objects and reasons is undoubtedly an aid to construction but that by itself cannot be termed to be and by itself cannot be interpreted. It is a useful guide, but the interpretation and the intent shall have to be gathered from the entirety of the statute. In **AIR 1985 SC 1041 (M/s. Govind Saran Ganga Saran Vs. Commissioner of Sales Tax and others)** it has been held by the Supreme Court that it is well settled that when the language of the statute is clear and admits

of no ambiguity, recourse to the statement of objects and reasons for the purpose of construing a statutory provision is not permissible. According to us, in the instant case when the tenure of the members, being the petitioners, was unaltered in two consecutive amendments i.e. U.P. Act No. 22 of 2007 and U.P. Act No. 4 of 2008 and initially no challenge was thrown in respect of such fixation of tenure, in the garb of the writ petition the challenge of enhancement of tenure of the Chairman can not be made. In **1963 SCR (Supp.) 112 (The Gujarat University, Ahmedabad Vs. Krishna Ranganath Mudholkar and others)** it has been held by the Supreme Court that the statements of objects and reasons of a statute may and do often furnish valuable historical material in ascertaining the reasons which induced the legislature to enact a statute, but in interpreting the statute they must be ignored.

19. However, we are of the view that in the present case promulgation of the Act in question is not an administrative action but a legislative action and no case of lack of legislative competence is available to us. The remaining question is whether the action is violative of any fundamental right guaranteed in Part III of the Constitution or any other constitutional provision or not. Since the right of the petitioners is statutory right and can not be said to be a constitutional right and as such, fixation of tenure of service, which was not interfered with earlier enactment but tenure of Chairman has been increased, can not at all be said to be violative of fundamental rights guaranteed in Part-III of the Constitution or any other constitutional provision, if any, available to the petitioners/Members.

20. Hence, in totality we do not find any case on the part of the petitioners, therefore, the writ petition is liable to be dismissed and is accordingly dismissed, however, without imposing any cost. Interim order, if any, stands vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.03.2009

BEFORE
THE HON'BLE SABHAJEET YADAV, J.

Civil Misc. Writ Petition No. 10151 of 2009

Shyam Sundar Agarwal ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Anil Kumar Singh

Counsel for the Respondents:
Sri S.K. Mishra
S.C.

U.P. Urban Planning & Development Act, 1973-Section 37-Order passed by the chairman under appeal-final-can not be questioned before civil court-refusal of interim order by Trail Court proper-when suit itself not maintainable-No question of interim order-moreover the Vice Chairman passed demolition order after hearing petitioner-still running-Civil Suit-held-not maintainable.

Held: Para 11

Since I have held that original suit instituted by the petitioner is not maintainable and liable to be dismissed, therefore, the said suit stands dismissed. Accordingly the Registrar General of this Court is directed to communicate this order forthwith to the District Judge, Kanpur Nagar who shall place the order on the record of the suit in question and

concerned court is directed to consign the record of the case to the office.

Case law discussed:

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

With the consent of the learned counsel appearing for the parties the case is heard afresh for disposal. Heard learned counsel for the petitioner and Sri S.K. Mishra learned counsel appearing for the respondent no.1 and perused the record.

2. It is not in dispute that against the order of demolition dated 13.10.2006 and demolition seizure dated 28.11.2006 prepared by the Vice Chairman of Kanpur Development Authority (hereinafter referred to as 'Development Authority') under Section 27 (1) of U.P. Urban Planing and Development Act (herein after referred to as the Act, 1973) the petitioner has instituted suit for permanent injunction and also moved application therein for temporary injunction. The temporary injunction application has been rejected by the Trial Court after hearing the parties on merit and appeal preferred against which by the petitioner has also has been dismissed, hence this petition.

3. While raising preliminary objection against the maintainability of writ petition learned counsel for Development Authority has submitted that against the order of demolition passed by Vice Chairman of Development Authority under Section-27(1) of the Act,1973 , the petitioner has an alternative remedy of statutory appeal under Section-27 (2) of the said Act before the Chairman of Development Authority and under Section 27 (3) of the Act the Chairman of the Development Authority is empowered to stay the execution of an order against which an appeal is preferred before him under Section 27 (2) of the said Act. It is also contended that the decision of Chairman on appeal and subject only to such decision an order under sub-section (1) shall be final and shall not be questioned in any court in view of provisions of sub-section-4 of Section-27 of the said Act. He further submits that not only this but Section-37 of the Act, 1973 also postulates that except as provided in Section-41 of the said Act every decision of Chairman on appeal and subject to any decision on an appeal (if it lies and is preferred), the order of Vice Chairman or other Officer under Section-15 or Section-27 of the Act shall be final and shall not be questioned in any court.

4. On the basis of indisputable facts on record, learned counsel appearing for the Development Authority has submitted that so long as the orders passed by Vice Chairman of Development Authority dated 13.10.2006 and 28.11.2006 which have been passed after affording an opportunity of hearing to the petitioner as transpires from the record, are not set-aside by any competent authority or court of law, the Civil court would not be capable of granting temporary injunction or permanent injunction in favour of the petitioner as the aforesaid orders could not be challenged before the Civil court on account of express bar created by Section-27(4) and Section-37 of the Act,1973 and would ultimately come in the way of Civil court. Therefore, this Court in exercise of supervisory jurisdiction under Article-226-227 of the Constitution of India against refusal of temporary injunction should not grant any relief in favour of the petitioner as in given facts and circumstances of the case both the courts below cannot be held to

have committed any illegality in refusing to grant temporary injunction in favour of the petitioner. In my opinion the submissions of learned counsel for the respondent appears to have some substance.

5. Contrary to it, the learned counsel for the petitioner has submitted that since the repair work undertaken by the petitioner was not required any prior permission or approval or sanction by the officer of Development Authority, therefore, the provisions of the Act,1973 would not be attracted in view of saving clause provided under Section-52 of the Act,1973 thus impugned order passed by Vice Chairman referred above is nullity and nonest, as such can be ignored by Civil court while granting temporary injunction in favour of petitioner. In my opinion the submission of learned counsel for the petitioner appears to be misplaced and has to be rejected.

6. Section-27 of the Act, 1973 deals with the order of demolition of building, which reads as under:

"***Section-27. (1) Where any development has been commenced or is being carried on or has been in contravention of the master plan or zonal development plan or without the permission, approval or sanction referred to in Section 14 or contravention of any conditions subject to which such permission, approval or sanction has been granted, in relation to the development area, then, without prejudice to the provisions of Section 26, the Vice-Chairman or any officer of the Authority empowered by him in that behalf may take an order directing that such development shall be removed by demolition, filling or otherwise by the owner thereof or by the person at whose instance development has been commenced or is being carried out or has been completed, within such period not being less than fifteen days and more than forty days from the date on which a copy of the order of removal, with a brief statement of the reasons therefor, has been delivered to the owner or that person as may be specified in the order and on his failure to comply with the order, the Vice Chairman or such officer may remove or cause to be removed the development, and the expenses of such removal as certified by the Vice Chairman or such officer shall be recoverable from the owner or the person at whose instance the development was commenced or was being carried out or was completed as arrears of land revenue and no suit shall lie in the civil court for recovery of such expenses:***

Provided that no such order shall be made unless the owner or the person concerned has been given a reasonable opportunity to show cause why the order should not be made.

(2) Any person aggrieved by an order under sub-section (1) may appeal to the Chairman against that order within thirty days from the date thereof and the Chairman may after hearing the parties to the appeal either allow or dismiss the appeal or may reverse or vary any part of the order.

(3) The Chairman may stay the execution of an order against which an appeal has been filed before it under sub-section(2).

(4) The decision of the Chairman on the appeal and, subject only to such decision, the order under sub-section (1),

shall be final and shall not be questioned in any court.

(5) The provisions of this section shall be in addition to, not in derogation of, any other provision relating to demolition of building contained in any other law for the time being in force."

7. Section-37 of the Act, 1973 deals with the finality of decision, which reads as under:

"Section-37- Except as provided in Section 41, every decision of the Chairman on appeal, and subject only to any decision on appeal (if it lies and is preferred), the order of the Vice-Chairman or other officer under Section 15, or Section 27, shall be final and shall not be questioned in any court."

8. Section-52 of the Act,1973 deals with the saving of certain activities which exclude the application of the provisions of said Act as under:

"Section-52 -Savings-Nothing in this Act shall apply to-

(a) the carrying out of works for the maintenance, improvement or other alterations of any building, being works which affect only the interior of the building or which do not materially affect the external appearance of the building.

(b) the carrying out by any local authority or by any department of Government of any works for the purpose of inspecting, repairing or renewing any drains, sewers, mains, pipe, cables or other apparatus including the breaking open of any street or other land for that purpose;

(c) the operational construction (including maintenance, development and new construction), by or on behalf of a department of the Central Government.

(d) the erection of a building not being dwelling-house, if such building, is required for the purpose subservient to agriculture;

(e) the excavations (including wells) made in the ordinary course of agricultural operations; and

(f) the construction of unmetalled road intended to give access to land solely for agricultural purposes: "

9. From a plain reading of the provisions of Section-27(2) of the Act it is clear that order passed by Vice Chairman of Development Authority under Section-27(1) of the said Act is appealable before the Chairman of the Development Authority who is Divisional Commissioner i.e. Commissioner, Kanpur Division, Kanpur. Therefore, in case the petitioner have any grievance against impugned order passed by Vice Chairman under Section 27 (1) of the Act he could prefer the appeal before the Chairman under Section 27(2) of the Act and raise his grievances ventilated in the writ petition as well as in the plaint of the suit. In case the petitioner would still remain aggrieved by the order passed by the Chairman, he may challenge the order straight way before this Court but in wake of provisions of Section-27(4) and Section-37 of the Act,1973, which creates a bar and attach finality upon the orders passed under Section-15 or 27 of the Act,1973, it was not open for the petitioner to challenge the aforesaid orders directly or indirectly before the Civil court which could not entertain the suit against the aforesaid orders. Therefore, the Suit No.644 of 2007 (Shyam Sunder Agrawal Vs. Kanpur

Development Authority) giving rise cause of action of writ petition, in my opinion, is not maintainable before the Civil Judge (Senior Division), Kanpur Nagar and is liable to be dismissed. I am of the further view that so long as the aforesaid orders passed by Vice-Chairman of Development Authority under Section-27(1) of the Act,1973 remains intact and is not set-aside by the competent authority, the Civil court would not be able to grant any permanent injunction or temporary injunction in favour of the petitioner in the said suit.

10. So far as, applicability of the provisions of Section-52 of the Act, in respect of the alleged repair and maintenance activities undertaken by the petitioner is concerned, it is to be pointed out that the order of demolition of building of the petitioner was passed by Vice-Chairman of the Development Authority after affording opportunity of hearing to him. Since the impugned order of demolition has been passed holding that the activities undertaken by the petitioner are in contravention of the provisions of Act or that were without approval or sanction of competent authority and said order can not be called in question before the Civil Court in view of Section-27(4) and Section-37 of the Act, therefore, Civil court in civil suit cannot be held to be capable of taking different view in the matter than that of taken by the competent authority, as such, in my considered opinion, despite provisions of Section-52 of the Act, Civil court is not competent to examine correctness or otherwise legality of decision of Vice Chairman of Development Authority taken under Section 27(1) of the Act, 1973 otherwise the object and purpose underlying the said provisions of the Act would be defeated. In my opinion, aforesaid provisions of the Act embodies sound public policy to exclude intervention of the courts in the orders of the officers of Development Authority under Section 15 and 27 of the Act, 1973. In this view of the matter, I am not inclined to examine correctness or otherwise legality of impugned orders passed by the courts below while refusing to grant temporary injunction to the petitioner during the pendency of aforesaid civil suit.

11. Since I have held that original suit instituted by the petitioner is not maintainable and liable to be dismissed, therefore, the said suit stands dismissed. Accordingly the Registrar General of this Court is directed to communicate this order forthwith to the District Judge, Kanpur Nagar who shall place the order on the record of the suit in question and concerned court is directed to consign the record of the case to the office.

12. In view of aforesaid observations and directions, the writ petition stands dismissed on the ground of alternative remedy.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.05.2009

BEFORE
THE HON'BLE SABHAJEET YADAV, J.

Civil Misc. Writ Petition No.6205 of 2008

Virendra Pal Singh ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri V.K. Singh

Sri Shubhranshu Shekhar

Counsel for the Respondents:
Sri H.M.B. Sinha
S.C.

Constitution of India Art. 226-Dismissal from Service-petitioner lost his left eye in accident during election duly-disability assessed 90%-District Magistrate given compensation of Rs.5000/- with assurance to give full composition after receiving grant from Government-suffered physically handicapped pain for a long period-as per estimated cost of standard Knee (A.K.) System applied for medical assistance of Rs.1,85,000/- government sanctioned only 1,38,000/- after collecting balance amount purchased artificial Knee-claimed for medical reimbursement- suspension-even after receiving reply-without holding formal enquiry passed dismissal order-held-illegal-direction for reinstatement with full back wages during suspension period given.

Held: Para 16

Besides aforestated reasons, having humanitarian approach in the matter, I find that once the petitioner has lost his leg in the Government employment due to accident taken place while he was on election duty, he cannot be punished so as to loose his employment itself due to which he had lost his leg, as such the impugned order dated 15.11.2007 passed by respondent no.2, in my considered opinion, for the aforestated reasons cannot be sustained and the same is hereby quashed. The petitioner is reinstated in service with continuity of service from the date of impugned order till the date of reinstatement and he shall be paid his full salary during the aforesaid period, he was out of employment on account of impugned order passed against him. The arrears of salary shall be paid to him within a period of two months from the date of production of certified copy of the order passed by this Court before the concerned respondent.

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

1. By this petition, the petitioner has challenged the order dated 15.11.2007 (Annexure-1 of the writ petition) passed by respondent no.2, whereby the petitioner has been dismissed from service while working on the post of Junior Clerk in Tehsil Mawana, District Meerut and a sum of Rs.1,38,750/- along with interest thereon was directed to be recovered from the petitioner.

2. The brief facts of the case are that while working on the post of Junior Clerk in Tehsil-Mawana, District-Meerut, the petitioner was placed under suspension vide order dated 1.04.2006 on the allegation that he had submitted a forged cash receipt in respect of purchase of artificial limb. Thereafter respondent no.2 served a charge sheet dated 8.06.2006 to the petitioner. On 20.06.2006 the petitioner had submitted his reply, whereby the charges levelled against him were denied. It is stated that inquiry officer conducted the inquiry behind the back of the petitioner without giving him opportunity of personal hearing and without examining the proprietor or authorized person of Endolite India Ltd. and submitted the inquiry report on 5.06.2007. It is stated that after receipt of inquiry report dated 5.06.2007 the respondent no.2 namely District Magistrate, Meerut gave a show cause notice dated 27.06.2007 to the petitioner without enclosing/appending the inquiry report, which has caused grave prejudice to the petitioner and ultimately the order of dismissal was passed against him and a recovery of Rs.1,38,750/- along with

interest thereon was directed to be made from him vide impugned order dated 15.11.2007, hence this petition.

3. The backdrop of the case behind initiation of disciplinary inquiry against the petitioner was that while performing election duty the petitioner met with an accident on 11.11.1995 and got fractured his left leg which was ultimately imputed. The disability caused to the petitioner was assessed at 90% and only a sum of Rs. five thousand (5000/-) was paid to him by the District Magistrate, Meerut as compensation with the assurance that the Government will provide funds for his artificial leg. It is stated that in order to obtain artificial leg the petitioner requested Endolite India Ltd. to give the quotation so that the petitioner may apply to the State Government for the payment of money required for the artificial leg under the provisions of relevant Government order. Thereupon Endolite India Ltd. vide letter dated 16.06.1998 informed the petitioner about the cost of artificial leg, which was quoted to be Rs.1,85,000/- for Standard Knee (A.K.) system. A photostat copy of quotation letter dated 16.06.1998 is on record as Annexure-3 of the writ petition. After receiving the aforesaid quotation the petitioner applied on 14.07.1998 to the respondent no.2 for sanctioning amount of Rs.1,36,250/- for purchasing the artificial limb which is 75% of the total cost i.e. Rs.1,85,000/-. It is stated that the matter was kept pending for about 7 years and the petitioner was compelled to bear the torture of disability as his repeated request could not bring any favorable result till April, 2005. Ultimately vide order dated 1.04.2005 the State Government had sanctioned a sum of Rs.1,38,750/- with certain conditions. The aforesaid order of Government was also communicated to the petitioner and after compliance of requisite formalities a sum of Rs.1,38,750/- was paid to him. Thereafter the petitioner arranged a sum of Rs.46,250/- from his own resources to pay a sum of Rs.1,85,000/- to Endolite India Ltd. for purchasing left artificial leg Standard Knee (A.K.) System Fitting. It is stated that the petitioner paid a sum of Rs.1,85,000/- to Endolite India Ltd. against cash receipt No.9205 dated 17.10.2005 and got the left artificial leg fitted. A photostat copy of cash receipt No.9205 is on record as Annexure-8 of the writ petition. It is stated that after returning back to Meerut the petitioner applied for reimbursement of amount of Rs.46,250/- vide application dated 18.10.2005. Along with the aforesaid application the petitioner submitted original cash receipt issued by Endolite India Ltd. on 17.10.2005 but was surprisingly enough an order of suspension dated 1.04.2006 followed by the aforesaid disciplinary action taken against him.

4. A detail counter affidavit on behalf of State has been filed in the writ petition and assertions made in the writ petition have been disputed and denied and action taken against the petitioner is sought to be justified.

5. Heard Sri V.K. Singh, learned Senior counsel for the petitioner and learned standing counsel for the respondents.

6. The learned counsel for the petitioner has submitted that admittedly the petitioner is Government employee, therefore, the disciplinary inquiry was required to be held in consonance with the

provisions of Article 311 (2) of Constitution of India inasmuch as the relevant provisions of Rule 7, 8 and 9 of U.P. Government Servant (Discipline and Appeal) Rules 1999 and since the aforesaid provisions of Constitution and Government Servant Discipline and Appeal Rules, virtually embodied *audi alteram partem* rules of principles of natural justice, therefore, the disciplinary inquiry was liable to be held in consonance with the aforesaid rules but the said disciplinary inquiry was held in violation of rules of disciplinary inquiry as well as principles of natural justice. While substantiating the contention, learned counsel for the petitioner has submitted that the solitary material i.e. letter of Sri V.K. Bajaj dated 7.02.2006, which is foundation of misconduct alleged against the petitioner, has not been proved before inquiry officer, as neither Sri V.K. Bajaj nor any one else, on behalf of Brigadier V.K. Bajaj from Endolite India Ltd. Company was examined by the department before the enquiry officer nor the petitioner was given opportunity to cross-examine him, and the aforesaid letter was relied upon against the petitioner. The copy of inquiry report was also not supplied to the petitioner along with show cause notice, therefore, the said inquiry report could not be acted upon. Having regard to the facts and circumstances of the case, punishment awarded to the petitioner is also much excessive and highly disproportionate to the gravity of charges levelled against him, therefore, the action taken against him is not sustainable in the eye of law and liable to be struck down.

7. In view of aforesaid submission of learned counsel for the petitioner, the first question which requires consideration is that as to whether the letter dated 7.02.2006 sent by Brigadier V.K. Bajaj, Director Endolite India Ltd., which is sole material and foundation of alleged misconduct against the petitioner has been proved by the department during the disciplinary inquiry or not?

8. In this connection it is necessary to point out that from perusal of charge-sheet issued against the petitioner it appears that all the charges were grounded on the basis of letter dated 7.02.2006 of Brigadier V.K. Bajaj, Director of Endolite India Ltd. Company. By the aforesaid letter it was informed to the Secretary, Government of Uttar Pradesh that cash receipt no.9205 dated 17th October, 2005 purported to be issued by Endolite India Ltd. in favour of petitioner is forged and fake. The company had never issued such a receipt. It was also informed that the petitioner had visited to the Limb Fitting Centre of the company on 27th September, 2001 and made necessary inquiries about the various prosthetic systems. He was fitted with an Atlas Knee System for Rs.30,000/- vide company's invoice no.258 dated 3rd October, 2001. He had cleared the payment by cash. The account of statement was also attached with the aforesaid letter. The petitioner had denied the charges levelled in the charge-sheet and also disputed genuineness of the said letter of Sri V.K. Bajaj in his reply to the charge-sheet (Annexure-11 of the writ petition) and further stated that it is not in dispute that the petitioner's left leg was fractured on account of an accident taken place on 11.11.1995 while he was on election duty which was ultimately imputed. Thereafter he had purchased several artificial limbs and got them fitted at several occasions. In the year 2001 also

he had purchased artificial leg from Endolite India Ltd. Company for Rs.30,000/- by making cash payment from his own pocket without seeking any reimbursement from the Government. However, after obtaining Government aid he had again purchased artificial limb from aforesaid company for Rs.1,85,000/- on 17.10.2005 but by the aforesaid letter dated 7.2.2006, it appears that for the purposes of evading the Trade Tax and Income Tax the company might have written such letter which cannot be said to be genuine letter but the inquiry officer has relied upon the aforesaid letter in support of the charges levelled against the petitioner without examining Sri V.K. Bajaj and without permitting the petitioner to cross-examine him during the said inquiry.

9. From a close analysis of provisions of Article 311(2) of the Constitution and Rule 7 of 1999 rules, it is clear that the aforesaid provisions of Constitution and statutory rules have virtually embodied the *audi alteram partem* rules of principles of natural justice, which means that no person shall be condemned without hearing. The content and import of *audi alteram partem* rule of principles of natural justice has received consideration of Hon'ble Apex Court from time to time in context of disciplinary inquiry. Some of the decisions of Hon'ble Apex Court are referred hereinafter.

10. In ***Meenglas Tea Estate V. The Workmen, AIR 1963 SC 1719*** Hon'ble Apex Court while explaining the content and import of principles of natural justice in domestic enquiry in para-24 of the decision held as under:

"It is an elementary principle that a person who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported. He must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross-examination as he desires. Then he must be given a chance to rebut the evidence led against him. This is the barest requirement of an enquiry of this character and this requirement must be substantially fulfilled before the result of the enquiry can be accepted. A departure from this requirement in effect throws the burden upon the person charged to repel the charge without first making it out against him."

11. In **M/s Bareilly Electricity Supply Company Vs. Workmen and others (1971) 2 SCC 617** while dealing with the standard of proof in disciplinary/domestic inquiry in para 14 of the decision the Hon'ble Apex Court has **held that the application of principle of natural justice in domestic enquiry does not imply that what is not evidence can be acted upon.** For ready reference the relevant portion of para 14 of the judgment is reproduced as under:-

"But the application of principle of natural justice does not imply that what is not evidence can be acted upon. On the other hand what it means is that no materials can be relied upon to establish a contested fact, which are not spoken to by persons who are competent to speak about them and are subjected to cross-examination by the party against whom they are sought to be used. When a document is produced in a Court or a Tribunal the questions that naturally

arise is, is it a genuine document, what are its contents and are the statements contained therein true. When the Appellant produced the balance sheet and profit and loss account of the company, it does not by its mere production amount to a proof of it or of the truth of the entries therein. If these entries are challenged the Appellant must prove each of such entries by producing the books and speaking from the entries made therein. If a letter or other document is produced to establish some fact which is relevant to the enquiry the writer must be produced or his affidavit in respect thereof be filed and opportunity afforded to the opposite party who challenges this fact. This is both in accord with principles of natural justice as also according to the procedure under Order XIX, Civil Procedure Code and the Evidence Act both of which incorporate these general principles."

12. In view of law laid down by Hon'ble Apex Court in **M/s. Bareilly Electricity Supply Company's case (supra),** it is clear that application of principle of natural justice does not imply that what is not evidenced can be acted upon. What it means is that no materials can be relied upon to establish a contested fact, which are not spoken by persons who are competent to speak about them and are subjected to cross-examination by the party against whom they are sought to be used. When a document is produced in a Court or a Tribunal the questions that naturally arise is, is it a genuine document, what are its contents and are the statements contained therein true. If a letter or other document is produced to establish some fact which is relevant to the enquiry the writer must be produced or his affidavit in respect thereof be filed and opportunity afforded to the opposite party who challenges this fact.

13. Now applying the said legal principle in given facts and circumstances of the case, I find that it is not in dispute that the letter of Brigadier V.K. Bajaj dated 7.2.2006 sent to the Government was sole material which was foundation of all the charges of misconduct levelled against the petitioner. Said letter was not proved by writer of the aforesaid letter Brigadier V.K. Bajaj before the inquiry officer despite thereof it was relied upon by inquiry officer against the petitioner, as such the petitioner could not get opportunity to cross-examine Sri V.K. Bajaj about the genuineness and correctness of the contents thereof, though the genuineness and the contents of aforesaid letter had been specifically doubted and disputed by him in reply to the charge sheet filed by him. Therefore, in view of law laid down by Hon'ble Apex Court in **Meenglas Tea Estate's case (supra),** unless the charges are established against the petitioner by department before the inquiry officer, the petitioner could not be asked to repel the charges without first making it out against him. In this view of the matter, I am of considered opinion that the department-respondent has utterly failed to establish the charges levelled against the petitioner, therefore, the disciplinary authority could not act upon the inquiry report submitted by inquiry officer holding the petitioner guilty of charges levelled against him. I am of the considered opinion that in given facts and circumstances of the case, the petitioner was entitled to be exonerated from the charges levelled against him for want of proof of the charges by the department concerned before inquiry

officer during said inquiry, but the inquiry officer instead of exonerating the petitioner from the charges, held him guilty of charges, therefore, such inquiry report could not be acted upon by the Disciplinary Authority and impugned order of punishment could not be passed against him.

14. At this juncture, it is necessary to point out that where disciplinary inquiry held against Government servant is found faulty either on account of infraction of rules of disciplinary inquiry and/or principles of natural justice and/or provisions of Article 311 (2) of the Constitution, normally this Court does not exonerate the delinquent employee from the charges levelled against such employee, instead thereof the Government employee is reinstated in service by setting aside the order of punishment with liberty to the Disciplinary Authority to hold fresh inquiry from the stage at which it was found faulty, but in a case like present, as stated earlier, department has failed to prove the charges levelled against the petitioner for the simple reason that all the charges levelled in the charge-sheet were grounded on the facts disclosed in the letter of Brigadier V.K. Bajaj dated 7.2.2006 and while replying the charge-sheet the petitioner had specifically disputed the genuineness and correctness of the contents of letter of Dr. V.K. Bajaj dated 7.02.2006 with further assertion that his left leg was fractured in election duty on 11.11.1995 which was ultimately imputed. Thereafter he had purchased several artificial limbs and got them fitted at several occasions. In the year 2001 also he had purchased artificial limb from Endolite India Ltd. for Rs.30,000/- from his own pocket but did not seek any reimbursement of the said amount from the Government. However, for purchasing the artificial leg in the year 2005, he made application for sanction of Rs.1,85,000/- and after sanction of the said amount from State Government he had purchased an artificial limb from the said company, by making payment of Rs.1,85000/- against cash receipt No.9205 dated 17.10.2005. But reason best known to the said company, it has informed the Government about the purchase of artificial limb of 2001 by denying the purchase of artificial leg by the petitioner dated 17.10.2005. In this view of the matter, since the petitioner had already doubted the genuineness of the said letter of Dr. V.K. Bajaj about which the Disciplinary Authority as well as inquiry officers were aware, despite thereof, department did not choose to examine Dr. V.K. Bajaj before inquiry officer knowing the legal consequences ensuing therefrom, in such a situation, in my considered opinion, this Court has hardly any legal obligation to advise the Government department, how they would establish the charge against the petitioner in such disciplinary inquiry. Therefore, in in given facts and circumstances of the case it would not be appropriate to permit the Disciplinary Authority to improve the case of department by permitting to hold fresh inquiry against the petitioner.

15. There is yet another reason which has impelled me for not permitting the fresh disciplinary inquiry against the petitioner. It is not in dispute that when the petitioner was met with the said accident in the year 1995 while he was on election duty and he was paid compensation in tune of Rs.5000/- only with assurance that he will be provided artificial limb at Government expenses. In

given facts and circumstances, in case adequate compensation would have been paid to the petitioner due to injuries sustained by him due to which he had lost his leg, he would have been paid much more compensation than the amount of Rs.1,38,750/- sought to be recovered from him, as such it cannot be held that on account of money withdrawn by him from the Government exchequer in the tune of aforesaid amount, the Government has suffered any loss liable to be indemnified by the petitioner. It is not a case where the aforesaid money withdrawn by the petitioner can be connected with the habit of the petitioner for doing same kind of misconduct, even if the alleged misconduct is assumed to be proved against him.

16. Besides aforestated reasons, having humanitarian approach in the matter, I find that once the petitioner has lost his leg in the Government employment due to accident taken place while he was on election duty, he cannot be punished so as to loose his employment itself due to which he had lost his leg, as such the impugned order dated 15.11.2007 passed by respondent no.2, in my considered opinion, for the aforestated reasons cannot be sustained and the same is hereby quashed. The petitioner is reinstated in service with continuity of service from the date of impugned order till the date of reinstatement and he shall be paid his full salary during the aforesaid period, he was out of employment on account of impugned order passed against him. The arrears of salary shall be paid to him within a period of two months from the date of production of certified copy of the order passed by this Court before the concerned respondent.

17. In view of aforesaid discussion it is not necessary to go into other questions involved in the writ petition, as the writ petition stands decided on short point discussed hereinbefore.

18. With the aforesaid observation and direction, writ petition succeeds and is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.03.2009

BEFORE
THE HON'BLE SABHAJEET YADAV, J.

Civil Misc. Writ petition no.459 of 2009

M/s K.G. Plasto Chem (I) Private Limited ...Defendant-Petitioner
Versus
M/s Tulison Industrial (Machines) Pvt. and others ...Respondents

Counsel for the Petitioner:
Sri Bipin Lal Srivastava

Counsel for the Respondents:
Sri G.P. Srivastava
Sri M.M. Khan
Sri M.C. Tiwari
Sri V.P. Mathur
Sri S.A. Imam

Code of Civil Procedure-Order 14 Rule-2 (2)-issue of Resjudicata be decided first as preliminary issue-reason disclosed by Trail Court for deciding this issue-held-misconceived and erroneous.

Held: Para 26

In my opinion, in given facts and circumstances of the case, the issue of res-judicata was liable to be decided as preliminary issue first by postponing the settlement of other issues involved in the said suit. It is immaterial that while

deciding the said issue, the court is required to investigate some facts necessary for its disposal.

Case law discussed:

AIR 1976 S.C. 1569, A.I.R. 1953 S.C. 33, AIR 1996 SC 987, AIR 1968 S.C. 1370, AIR 1971 S.C. 1676, AIR 1986 S.C. 1455, AIR 1961 S.C. 1457, A.I.R. 2003 S.C. 718 (Pr. 21).

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

A short question arises for consideration is that as to whether on a question raised by defendant in suit, that suit is barred by principle of res-judicata and the question should be decided as preliminary issue first, it is obligatory upon the trial court to decide it as preliminary issue first by postponing the settlement of other issues involved in the suit?

2. The brief facts of the case are that originally there was only one plot no.9 at Loni Road Industrial Area, Site 2, Ghaziabad which was allotted to the plaintiffs-respondents in the year 1969, but since the plaintiff did not raise any construction and did not start the industrial unit as such the lease itself was cancelled on 31.01.1972. After cancellation of the lease the original plot no.9 Loni Road Industrial Area, Site 2, Ghaziabad was divided into 2 plots i.e. plot nos. 9 and 9A. The plot no.9 ad-measuring an area of 15965 sq. yards after division of original plot no.9 allotted to M/s Hind Forge Private Limited. It is further stated that plaintiff-respondent was required to enter into a compromise in regard to allotment of said plot with U.P.S.I.D.C. under certain terms and in a meeting of Board of Directors of U.P. S.I.D.C. held on 30.03.1977 a resolution was passed for such allotment of remaining portion of original plot no.9 ad-measuring an area of 24399 sq. yards, but the resolution was never given effect to as the plaintiff-respondent declined to take any interest in effectuating the said compromise, thus the resolution dated 30.03.1977 became only a dead letter.

3. It is stated that after lapse of about 29 years a frivolous writ petition was filed by the plaintiff-respondent before this Court which was numbered as Civil Misc. Writ Petition No. 68650 of 2006. In this writ petition the advertisement dated 08.11.2006 was challenged by means of which U.P. S.I.D.C. had advertised for allotment of plot no.9A, Site 2, Loni Road, Ghaziabad. A further relief was sought for by the plaintiff-respondent in the writ petition that present petitioner/defendant in suit and other respondents of the writ petition be restrained from interfering with the possession of the plaintiff-respondent over plot no.9A, Site 2, Loni Road, Ghaziabad.

4. The aforesaid writ petition was however, dismissed by the Division Bench of this Court vide judgement and order dated 5.1.2007 with finding that the lease of plot no.9A, Site 2, Loni Road, Ghaziabad in favour of plaintiff-respondent was cancelled on 30.01.1972 as the plaintiff-respondent had failed to comply with the terms and conditions of the lease deed and further the compromise dated 30.03.1977 was never given effect to. The order dated 05.01.2007 passed by this Court in aforesaid writ petition is on the record as Annexure no.1 to the writ petition. It is further stated that when the plaintiff-respondent did not succeed in the writ petition then on frivolous grounds the suit in question was instituted on 09.03.2007 in which the precisely the

questions were raised which were earlier raised in the aforesaid writ petition, a copy of the plaint of Original Suit No. 400 of 2007 is on the record as Annexure no.-2 of the writ petition. The defendant-petitioner filed a written statement raising the question of res-judicata alongwith other incidental questions. The copy of same is on record as Annexure no.-3 to the writ petition. It is also stated that petitioner had filed all the relevant documents including copy of Civil Misc. Writ Petition No. 68650 of 2006 and order of Division Bench of this Court dated 05.01.2007 passed in the said writ petition. But the trial court has passed the impugned order dated 17.10.2008 refusing to decide the question of res-judicata as preliminary issue first on the ground that the issue has already been decided against the petitioner while disposing of application for temporary injunction vide order dated 20.11.2007, against the said order F.A.F.O. No. 3390 of 2007 is pending before this court and further the issue shall be decided after taking evidence of the parties, meaning thereby while disposal of suit itself, hence this petition.

5. Heard learned counsel for the parties and perused the records.

6. Learned counsel for the petitioner has contended that Section 11 of CPC embodies the doctrine of res-judicata and issue of res-judicata being a legal issue has to be decided as preliminary issue first under Order 14 Rule 2 C.P.C. before final adjudication of the suit itself, as the question of res-judicata bars the trial of subsequent suit or issue in subsequent suit which has been decided earlier and also relates to the jurisdiction of court. Whereas learned counsel appearing for the respondents has submitted that in given facts and circumstances of the case the impugned order passed by the court below cannot be held to be faulty so as to call for any interference by this Court.

7. In order to appreciate the contention of learned counsel for the petitioner, the relevant portion of the provisions of Section 11 CPC is extracted as under:-

"11, Res-judicata*- No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.*

Explanation VIII:- *An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res-judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised."*

8. From a plain reading of provisions of Section 11 C.P.C. it is clear that a court is prohibited to try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit, between the same parties or between the parties under whom they or any of them claim, litigating under the same title, has been heard and finally decided by a court of competent jurisdiction.

9. In **Syed Mohd. Salie Labbai Vs. Mohd. Hanifa, AIR 1976 S.C. 1569** it was held that before a plea of res-judicata can be given effect, the conditions mentioned herein after must be proved-- *(1) that the litigating parties must be the same, (2) that the subject matter of the suit also must be identical, (3) that the matter must be finally decided between the parties, (4) that the suit must be decided by a court of competent jurisdiction.*

10. In **Smt. Raj Lakshmi Dasi and others Vs. Banamali Sen and others, A.I.R. 1953 S.C. 33,** Hon'ble Apex Court has held that the condition regarding the competency of former Court to try subsequent suit is one of the limitations engrafted on the general rule of res-judicata by Section 11 of the Code and has application to suits alone. When a plea of res-judicata is founded on general principles of law, all that is necessary to establish is that the Court that heard and decided the former case was a Court of competent jurisdiction. It does not seem necessary in such cases to further prove that it has jurisdiction to hear the later suit. The plea of res-judicata on general principles can be successfully taken in respect of judgements of Courts of exclusive jurisdiction, like revenue Courts, land acquisition Courts, administration Courts etc..

11. In **Church of South India Trust Association Vs. Telugu Church Council AIR 1996 SC 987,** it was held that Section 11 (excluding Explanation VIII) envisages that the judgement in a former suit would operate as a res judicata if the Court which decided the said suit was competent to try the same by virtue of its pecuniary jurisdiction and the subject matter to try the subsequent suit and that it is not necessary that the said Court should have had territorial jurisdiction to decide the subsequent suit.

12. From aforesaid legal position, it is clear that the court which has decided former suit or issue, must have had jurisdiction to decide former as well as subsequent suit both, but this rigour of the provisions of Section-11 of the CPC is relaxed by explanation (viii) attached with the said section whereby the applicability of principle of res-judicata is extended to the cases where an issue was heard and finally decided by a court of limited jurisdiction, competent to decide such issue, despite that such court of limited jurisdiction was not competent to try such subsequent suit or suit in which such issue has been subsequently raised.

13. Now next question arises for consideration is that as to whether the decision in writ petition operates as res-judicata in a subsequent suit filed on the same cause of action or matter? This question had been directly under consideration before the Hon'ble Apex Court in **Union of India Vs. Nanak Singh, AIR 1968 S.C. 1370**, wherein it was held that decision on writ petition would operate as res-judicata in a subsequent suit filed on the same matter. In that case, appellant had filed a writ petition challenging the termination of his temporary service on the grounds of infringement of Article 311 of the Constitution and the competence of authority ordering termination. The Single Judge of the Punjab High Court has allowed the writ petition but in appeal before Division Bench the writ petition was dismissed, however, without any observation on the competence of Officer

terminating the service of appellant. Thereafter the appellant filed suit for declaration that his services were terminated by an authority lower in rank than the competent authority and as such he should be deemed to be in service. Hon'ble Apex Court has held that the suit was barred by res-judicata. The pertinent observations made in para 5 of the said decision are extracted as under:-

"5. . . . . There is no good reason to preclude, such decisions on matters in controversy in writ proceedings under Article 226 or Article 32 of the Constitution from operating as res judicata in subsequent regular suits on the same matters in controversy between the same parties and thus to give limited effect to the principle of the finality of decisions after full contest. The Court in Gulabchand's case, AIR 1965 SC 1153 left open the question whether the principle of constructive res judicata may be invoked by a party to the subsequent suit on the ground that a matter which might or ought to have been raised in the earlier proceeding but was not so raised therein, must still be deemed to have been decided."

14. The same view has been reiterated by Hon'ble Apex Court again in **State of Punjab Vs. Bua Das Kaushal, AIR 1971 S.C. 1676**. In **G.K. Dudani and others Vs. S. D. Sharma and others, AIR 1986 S.C. 1455** Hon'ble Apex Court has held that the principle of res-judicata is applicable even though Section 11 C.P.C. in terms does not apply to the writ proceedings. The pertinent observation made by Hon'ble Apex Court in para 18 of the decision is as under:-

"18. In view of this categorical finding in Chauhan's Case, it was not open to the direct recruits to reagitate this point. Although by reason of the Explanation which was inserted in Section 141 of the Code of Civil Procedure, 1908, by the Code of Civil Procedure (Amendment) Act, 1976, Section 11 of the Code does not in terms apply to any proceeding under Article 226 of the Constitution, the principle of res judicata does apply to all writ petitions under Article 226. This point was, therefore, barred by the principle of res judicata and should never have been allowed by the High Court to be reagitated."

15. Earlier to the aforesaid decisions in **Daryao and others Vs. State of U.P. and others, AIR 1961 S.C. 1457** a Constitution Bench of Hon'ble Apex Court has considered the applicability of principle of res-judicata in proceeding under Article 32 in respect of a decision rendered by High Court under Article 226 of the Constitution of India on same issue. The pertinent observations made by Hon'ble Apex Court in para 19 of the decision are extracted as under:-

"19. We must now proceed to state our conclusion on the preliminary objection raised by the respondents. We hold that if a writ petition filed by a party under Art. 226 is considered on the merits as a contested matter and is dismissed the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceeding permissible under the Constitution. It would not be open to a party to ignore the said judgment and move this Court under Art. 32 by an original petition made on the same facts

and for obtaining the same or similar orders or writs. If the petition filed in the High Court under Art. 226 is dismissed not on the merits but because of the latches of the party applying for the writ or because it is held that the party had an alternative remedy available to it, then the dismissal of the writ petition would not constitute a bar to a subsequent petition under Art. 32 except in cases where and if the facts thus found by the High Court may themselves be relevant even under Art. 32 If a writ petition is dismissed in limine and an order is pronounced in that behalf, whether or not the dismissal would constitute a bar would depend up on the nature of the order. If the order is on the merits it would be a bar; if the order shows that the dismissal was for the reason that the petitioner was guilty of laches or that he had an alternative remedy it would not be a bar, except in cases which we have already indicated. If the petition is dismissed in limine without passing a speaking order then such dismissal cannot be treated as creating a bar of res judicata. It is true that, prima facie, dismissal in limine even without passing a speaking order in that behalf may strongly suggest that the Court took the view that there was no substance in the petition at all: but in the absence of a speaking order it would not be easy to decide what factors weighed in the mind of the Court and that makes it difficult and unsafe to hold that such a summary dismissal is a dismissal on merits and as such constitutes a bar of res judicata against a similar petition filed under Art. 32. If the petition is dismissed as withdrawn it cannot be a bar to a subsequent petition under Art. 32. Because in such a case there has been no decision on the merits by the Court. We wish to make it clear that the conclusion thus reached by us are confined only to the point of res judicata which has been argued as a preliminary issue in these writ petitions and no other. It is in the light of this decision that we will now proceed to examine the position in the six petitions before us."

16. In view of aforestated legal position, it is clear that a decision on writ petition under Article 226 of the Constitution in certain circumstances creates a bar of res-judicata but in certain circumstance as indicated herein before, it does not constitute a bar of res-judicata in subsequent proceeding or suit. However it completely depends upon the nature of the order passed in writ petition. For example if the writ is dismissed on merit after full contest by the parties then in respect of same subject matter, the decision on writ petition would operate as res-judicata in subsequent proceeding or suit in respect of same cause of action or matter but if the writ petition is dismissed on the ground of alternative remedy or delay or latches, it does not constitute a bar of res-judicata in subsequent proceedings or suit filed subsequently in respect of the same matter. However, these instances are merely illustrative in nature and cannot be held to be exhaustive on the point in issue. Therefore, the concerned court has to examine the issue from the aforesaid angle while taking decision on any individual case.

17. At this juncture it is also necessary to examine the content and import of Order 14 Rule 2 C.P.C., which is extracted as under:-

"Order XIV Rule 2 - Court to pronounce judgment on all issues:- *(1) Notwithstanding that a case may be*

disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to –
(a) the jurisdiction of the Court, or
(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue."

18. From a plain reading of Order 14 Rule 2 C.P.C. it is clear that sub-rule (1) of said rule postulates a general principle that inspite of fact that a case may be disposed of on a preliminary issue despite thereof the court is obliged to pronounce judgment on all issues but the aforesaid principle is subject to exception carved out by sub-rule (2) of said rule, which provides that where issues both of law and of fact arise in the same suit and the court is of opinion that the case or any part thereof may be disposed of on issue of law alone, it may try that issue of law first if that issue relates to - (a) the jurisdiction of the Court; or (b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue. Therefore, in my opinion, in order to satisfy the essentials of Order 14 Rule 2(2) the issue of law must be related either to the jurisdiction of the court or to a bar to the suit created by any law for time being in force and further the court must be of opinion that the case or any part thereof may be disposed on an issue of law only.

19. Thus the questions which arise for consideration are that as to whether issue of res-judicata is issue of law or not and further as to whether it relates either to the jurisdiction of the court or to a bar to the suit created by any law for time being in force? In order to find out accurate answer to the aforesaid questions, it would be useful to look into the provisions of Order 14 Rule 1 CPC. which deals with the framing of the issues. Order 14 Rule 1(1) CPC speaks about how the issues arise in case and states that issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other. Sub-rule (2) of Order 14 Rule 1 describes that material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence. However, Sub-rule (4) of said Rule further provides that issues are of two kinds: (a) issues of fact, and (b) issues of law. Except the aforesaid kinds of issue, there does not exist any third kind or category of issue like mixed issue of law and fact both, either under the aforesaid provisions of C.P.C, or under any other provision of said Code. Therefore,in my opinion, it is not open for this court to add any other category of the issue by way of interpretation which was not intended to be included in the said Code.

20. Further it is necessary to point out that every issue of law is based or grounded on certain facts as no legal

proposition can be alleged in pleadings in vacuum. Similarly, the principle of res-judicata is such proposition of law which may be pleaded by the defendant in order to constitute his defence, that suit or any issue involved in a suit is barred by the principle of res-judicata. Therefore, merely because the issue of res-judicata requires investigation of facts, in my considered opinion, it cannot be held that issue of res-judicata is mixed issue of law and facts both. It is wrong and mis-conceived notion that the issue of res-judicata is mixed issue of law and fact both.

21. It appears that there are certain provisions in the Code and other enactments creating forum for appeal to the higher court against the decision of trial court or lower appellate court or tribunal wherein phrases are commonly used in such manner which may create some doubt or confusion in the mind of courts, such as Section 96 (4) C.P.C. provides that no appeal shall lie except on **question of law** from a decree in any suit. Section 100 (3) provides that in an appeal under this Section the memorandum of appeal shall **precisely state substantial question of law** involved in the appeal. Section 109 C.P.C. provides that an appeal shall lie to the Supreme Court from any judgment or decree or final order in a civil proceeding of High Court if the High Court certifies that the case involves a **substantial question of law of general importance**. The involvement of "question of law" and "substantial question of law" to create ground for appeal to the higher court or forum used under the aforesaid provisions of the Code indicated herein before, in my considered opinion, should not be confused with the expression "**issue of law**" and issue of fact arise in the suit used under Order 14 Rules 1 and 2 or under other provisions of C.P.C. The **question of law or substantial question of law** connotes quite different things than that of "issue of fact" and "issue of law" used under Order 14 Rules 1 and 2 or at other places in C.P.C., therefore, the meaning of aforesaid expressions should be understood in the context in which such expressions are used. In this view of the matter, in my opinion, involvement of **mixed question of law and fact both** may create a ground of appeal in case statute so provides but mixed issue of law and fact both cannot arise in a suit as held herein before. However, the issue of law and fact both may arise separately and distinctly in a suit.

22. Since another essential ingredient for operation of provisions of Order 14 Rule 2 (2) is that the issue of law must relates either to the jurisdiction of court, or to a bar to the suit created by any law for time being in force, therefore, now next question arises for consideration as to whether issue of res-judicata relates to the jurisdiction of court or to a bar to the suit created by any law for the time being in force? In this connection it is necessary to point out that under the provisions of Order 14 Rule 2 (2) C.P.C. where the issue of law relates to the jurisdiction of the court or to a bar to the suit created by law for instituting the claim, the same shall be tried as preliminary issue. Thus the issue of res-judicata must have some material bearing with the jurisdiction of the court to try subsequent suit or issue in a subsequent suit which has been directly and substantially in issue in former suit and has been heard and finally decided by the court having competence to decide such

suit or issue. Therefore, in this manner, the issue of res-judicata, in my considered opinion, must relates to the jurisdiction of the court and also create a bar by law for time being in force to try a subsequent suit and thus satisfies the essential ingredients of Order 14 Rule 2(2) C.P.C.

23. In this connection a reference can also be made to a decision of Hon'ble Apex Court rendered in **Abdul Rahman Vs. Prasony Bai and another, A.I.R. 2003 S.C. 718 (Pr. 21),** wherein it was held that the issue of res-judicata and constructive res-judicata as also the maintainability of the suit can be adjudicated upon as preliminary issues. The pertinent observations made in para-21 of the decision are extracted as under:

"21. For the purpose of disposal of the suit on the admitted facts, particularly when the suit can be disposed of on preliminary issues, no particular procedure was required to be followed by the High Court. In terms of Order XIV Rule 1 of the Code of Civil Procedure, a Civil Court can dispose of a suit on preliminary issues. It is neither in doubt nor in dispute that the issues of res-judicate and/constructive res judicata as also the maintainability of the suit can be adjudicated upon as preliminary issues. Such issues, in fact, when facts are admitted, ordinarily should be decided as preliminary issues."

24. In view of law laid down by Hon'ble Apex Court and legal position stated herein before, I have no doubt in my mind that the issue of res-judicata should be decided as preliminary issue provided other essential conditions of Order 14 Rule 2 (2), as to whether on a decision upon issue of res-judicata the case or any part thereof may be disposed of finally, is also satisfied.

25. In this connection it is necessary to point out that it is upon the concerned court to examine that on decision upon the issue of res-judicata as preliminary issue, the entire case or any part thereof shall be disposed of finally or not. In my opinion, it will depend upon the facts and circumstances of the each individual case and no hard and fast rules can be laid down in this regard. Therefore, it is necessary for the court concerned to examine as to whether while deciding the issue of res-judicata in a particular suit or case the entire case or any part thereof may be disposed of or not and after such assessment if the concerned court form an opinion that entire case or any part thereof may be disposed of by deciding the issue of res-judicata involved in the case concerned, only in that event of the matter the concerned court is under legal obligation to decide the issue of res-judicata as preliminary issue first by postponing the settlement of other issues otherwise it is not under obligation to decide such issue as preliminary issue first but such opinion of the court should be based on objective material on record and should not be based on mere whims.

26. Now coming to the facts of the case again I find that trial court has deferred the disposal of the issue of res-judicata and declined to decide the same as preliminary issue first for two reasons. First reason was that the court has already decided the issue of res-judicata while deciding the application for temporary injunction against which FAFO is pending before this Court and another reason was that the issue of res-judicata shall be decided after evidence of the

parties which means that the issue shall be decided while disposal of the suit. In my opinion, both the reasons given by the trial court for deferring the disposal of issue of res-judicata are misconceived and erroneous for the reasons that settlement of issues as preliminary issue is a stage in proceeding of the suit whereas disposal of application for temporary injunction is supplemental proceeding different from the proceedings of the suit as described under Section 94 of the Code despite being a proceeding in pending suit. As is clear from the heading of the section itself, that such proceedings are normally resorted to achieve the ends of justice during the pendency of main proceedings of the suit. Therefore, the issue of res-judicata does not necessarily require to be decided by the trial court while disposal of temporary injunction application during the pendency of the suit, which is supplemental proceeding in pending suit, accordingly disposal of issue of res-judicata in the said proceeding, in my opinion, is of no legal consequence. So far as another ground for deferring the disposal of the issue of res-judicata is concerned, I am of the considered opinion that for the reasons given herein before, the view taken by the trial court also appears to be erroneous and misconceived. In my opinion, in given facts and circumstances of the case, the issue of res-judicata was liable to be decided as preliminary issue first by postponing the settlement of other issues involved in the said suit. It is immaterial that while deciding the said issue, the court is required to investigate some facts necessary for its disposal.

27. In view of the aforesaid discussion, I am of the considered opinion that the view taken by court below is wholly erroneous and contrary to the view taken by me, therefore, the impugned order dated 17.10.2.008 can not be sustained and the same is hereby quashed. The trial court is directed to consider the case of the petitioner afresh in the light of observations made herein before and decide the issue of res-judicata raised by the petitioner as preliminary issue first and thereafter proceed with the suit accordingly and shall decide the same within a period of six months from the date of production of certified copy of the order passed by this Court.

28. However, the question of res-judicata shall be decided expeditiously preferably within a period of one month from the date of production of certified copy of this order before the court concerned.

29. With the aforesaid observation and direction, writ petition succeeds and allowed to the extent indicated herein before.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED; ALLAHABAD 02.03.2009

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No. 41 of 2009

Ram Babu Dwivedi ...Petitioner
Versus
State of UP and others ...Respondents

Counsel for the Petitioner:
Sri V.K. Srivastava

Counsel for the Respondents:
Sri R.N. Pandey
S.C.

U.P. Home Guard, Act 1963-Rule-7-petitioner initially working as Home Guard in the year 1979-lastly found fit for promotion on the post of Company Commander-by the screening committee-promotion order withheld on the ground he shifted his native place from one village to other neighboring village-held-circular 23.5.84 can not come in way of promotion of petitioner.

Held: Para 19

The Court does not find that there was any occasion at all, or it was permissible to terminate the petitioner's engagement on the ground that he had shifted his residence from Kanaili to a neighbouring area in Newada for which he had himself made a declaration on the basis of a partition in his family. In this case the question as to whether the circular order dated May 23, 1984 is relevant for the purpose of fresh engagement of Home Guards, Platoon Commanders and Company Commanders is not in issue. The circular however issued after petitioner's engagement as a Home Guard could not be a ground to disengage him after his selections as Company Commander.

Case law discussed:

Writ Petition No. 40505 of 2007 decided on 29.8.2007, AIR 2003 Supreme Court 3569, (2008) 3 SCC 273, (2006) 11 SCC 67; (2006) 3 SCC 276, (2006) 6 SCC 162, (2007) 4 SCC 669.

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

1. Shri V.K. Srivastava, learned counsel appears for the petitioner. Learned standing counsel appears for the respondents. The affidavits have been exchanged. With the consent of parties the matter was heard and is decided at the admission stage.

2. The petitioner was engaged in the Home Guards Organization in the year 1979. He was appointed/promoted as Assistant Company Commander in the year 1983. In the year 1997 he was appointed/promoted by the District Commandant, Home Guards, Allahabad vide order No. 249 dated 29.1.1997 as Company Commander. The petitioner was required to appear before the Screening Committee on 5.9.2008, and was declared successful for appointment as Company Commander. By a notice dated 4.8.2008 the petitioner was required by an order to appear before the Screening Committee on 5.9.2008. The final list of the selectees prepared by the Screening Committee did not include the name of the petitioner on the ground that the petitioner did not belong to block Kanaili, District Kaushambi for which the appointment was to be made.

3. The petitioner was required to produce a domicile certificate that he was a resident of block Kanaili District Kaushambi, to confirm the appointment/promotion. The petitioner submitted a reply on 4.5.1999 stating that at the time of his engagement in Home Guards Organization in 1979, the petitioner was a resident of Village Jugrajpur Block Kanaili District Kaushambi. In the year 1999 by a family settlement in his family the petitioner got his share of properties in Village Bhikharipur Ka Purva @ Rajendra Nagar, Block Newada, District Kaushambi after which he along with his two brothers started living in Block Newada, District Kaushambi.

4. A show cause notice was given to the petitioner on 3.11.2008 to which he submitted his reply. The District Commandant, Home Guards, Allahabad, by his order dated 5.12.2008, dispensed

with/cancelled his appointment as Company Commander on the ground of non-production of the domicile certificate of Block Kanaili, giving rise to this writ petition.

5. The short question, that calls for consideration in this writ petition, is whether the U.P. Home Guards Act 1963 provides for the residence in a particular village/area, as a condition for appointment as Company Commander and whether the Circular Order No. 5/1998 dated May, 23, 1984 to that effect, issued by the Commandant General, Home Guards providing that in rural areas the candidate must belong to the block to be able to attend the work, is a violative of provisions of U.P. Home Guards Act, 1963, and stands the test of reasonableness in appointment/promotions as Company commander.

6. The petitioner submits in paragraph-7 of the writ petition as follows:-

"7. .....At the time of his engagement in Home guard organization in the year 1979 the petitioner was residing at Village Jugrajpur, Block Kanaili, District Kaushambi. In the year 1999 a partition by means of a family settlement took place in the family, as a result whereof the share of the petitioner's family was given in the property situated in village Bhikhari Ka Purwa @ Rajendra Nagar, Block Newada, District Kaushambi and consequently the petitioner along with his other 2 brothers and family started residing at village Bikhari Ka Purwa @ Rajendra Nagar, Block Newada District Kaushambi. The petitioner also informed the respondent no. 3 regarding his change of address on 4.5.99."

7. In the counter affidavit of Shri G. Chaturvedi, District Commandant, Home Guards, Allahabad, it is stated in paragraph-3A that in view of the circular No. 1-331/1977, dated 14.9.1978 and provisions of Section 11 (2) of U.P. Home Guards Act, 1963 as amended in 1972 the Honorary Company Commander, Honorary Assistant Company Commander and Honorary Platoon Commander are appointed for a period of three years, after which their appointment can be renewed by the Screening Committee after considering the work, conduct and physical fitness of the employees. The Screening Board consists of District Magistrate or representative appointed by him; Mandaliya Samadeshta Home Guards; Superintendent of Police or representative appointed by him, and District Samadeshta Home Guards. The District Magistrate and in his absence the Divisional Samadeshtra or the Superintendent of Police with a minimum three members including the Chairman, considers the appointment. On 5.9.2008 a meeting of the Screening Board constituted under the directions/order of Home Guard Headquarters, Lucknow was held in Home Guard office, Allahabad for screening of honorary officers. The petitioner was appointed as a Honorary Company Commander in U.P. Home Guards, Block Kanaili District Kaushambi, purely on voluntary and temporary basis for a period of three years. For rural areas the essential/requisite eligibility of candidates is that they should be the resident of the concerned block and must be residing in the said block. On the date of screening by the high level screening board in the

office of District Home Guards, the work and conduct of the petitioner was considered and it was found that since the petitioner is not resident of concerned block Kanaili and that at the time of consideration it was found that the petitioner is resident of block Newada, District Kaushambi he was not found eligible for consideration as Company Commander.

8. In the same paragraph of the counter affidavit, Shri G. Chaturvedi, the District Commandant has relied upon a circular No.1-32/84 dated 23.5.1984 and has stated that the petitioner does not come under the parameters of the said circular issued by the department and as such the Screening Board did not recommend the renewal of his appointment. In paragraph-6 it is stated that the petitioner was informed by letter dated 6.8.2008 in pursuance to which he appeared before the Screening Committee on 20.8.2008. The meeting was adjourned for some reason. The petitioner appeared before the Screening Committee again on 5.9.2008. He was given an opportunity and was directed to produce the domicile certificate of block Kanaili within 14 days which he failed to produce. For the rural areas it was essential/requisite that he should be resident of the same block.

9. The respondents have relied upon a judgement in **Jitendra Kumar Awasthi vs. State of U.P. And others, Writ Petition No. 40505 of 2007 decided on 29.8.2007,** holding that the honorary post of home guard under the U.P. Home Guards Act, 1963 is not a civil post and that Article 311 (2) of the Constitution of India is not applicable to the post. The extension of a honorary or even regular service is not a matter of right but of discretion of the authority. It is further stated that by circular letter No. 230/1990 dated 7.6.1990 issued by the Home Guards Headquarters, a representation can be filed before the Commandant General, Home Guards, U.P. Lucknow within 90 days. The petitioner has failed to avail the alternative remedy and has filed the writ petition on misconceived facts.

10. In **State of West Bengal and others vs. Pantha Chatterjee and others, AIR 2003 Supreme Court 3569** the Supreme Court held that the State Government with the sanction of the Governor of West Bengal raised the Battalion of Border Wing Home Guards. They were to be paid from the given head of expenditure of the State Government. The Scheme, however, made it clear that the expenditure incurred would be reimbursed by the Central Government. The Central Government should not and cannot get out of this undertaking. The State of West Bengal being in the position of an employer of the part time BWHG owes the primary responsibility of making all the payments on account of salary, allowances and other perquisites to them as admissible to the permanent staff but this burden of expenditure must be ultimately borne by the Central Government. The scheme envisaged, that on being released, after a period of three months, the volunteer Home Guards could go back and resume their vocations and may earn their livelihood and may be called as and when needed again for a shot period where after again they could pursue their vocation. After having put in 14 years of service, patrolling the borders in all weathers without any facilities, it is too much to say that their deployment was of a causal and voluntary nature and the Central Government will not be

concerned with them and that it would be the responsibility of the State Government alone. Once they were made to work for ten to fifteen years or so without break, there hardly remained any chance or scope for them to resume their old vocations. The Central Government must in all fairness accept its responsibility and make the necessary facts available for reimbursement.

11. The petitioner was engaged as a Honorary Home Guard in 1979. He has continued to serve in the organization since thereafter and had earned promotions as Assistant Company Commander and thereafter as Company Commander by order No. 249 dated 29.1.1997. He was originally a resident of Block Kanaili. The family partition in his family made him to shift to village Bhikhari Ka Purwa @ Rajendra Nagar, Block Newada District Kaushambi, which is not stated to be far from Kanaili Block. Immediately after the family partition the petitioner informed respondent no. 3, regarding the change of his address on 4.5.1999. He was serving as Company Commander of Block Kanaili when he was called to appear before the Screening Committee and was told to produce a domicile certificate and was thereafter removed only on the ground that he does not reside in block Kanaili any more after 1999.

12. The protection of Article 311 is not applicable to a Company Commander in Home Guards, as a Home Guard does not hold a civil post. It is an honorary appointment given under the U.P. Home Guards Act established for assisting the police in maintaining the law and order in emergent situations. The Home Guard Organization as a disciplined force is kept in reserved to serve with the police force in the state of emergency. Section 4 of the Act requires the Home Guard to assist the police force for maintaining public order and internal security to provide assistance to the public in case of air raids, fire, floods, epidemics and for all other specific purposes. For convenience and to ensure their availability it is provided in Section 7 that the Home Guards shall be recruited under such conditions, which are provided on making a proper application. If a person is in non-governmental service he may send his application through his employer and if he is serving in a governmental organization, he has to forward his application through his appointing authority to give promotion. The U.P. Home Guards Act does not provide that the Home Guard should be the resident of the same block in case of rural areas and the same locality in urban areas. In fact a Home Guard can be called for duties from any place of the State under Section 8 (b) of U.P. Home Guards Act, 1963.

13. In a meeting of Divisional Commandants on 25.4.1984 at Lucknow a question arose whether the post of Company Commander can be filled up from the persons, who are not resident of the same area. It was decided that in future, whenever recruitments of Company Commanders is made, each post shall be filled up only for the specific company in which the post has fallen vacant. The resolution in the Div. Commanders meeting dated 25.4.1984 communicated to all Div. Commanders, by letter dated May 23, 1984 sent by the U.P. Home Guard Headquarters reads as follows:-

"U.P. HOME GUARD HEADQUARTERS: JAIL ROAD, LUCKNOW

No. 132/1984 Dated Camp Mussoorie, May 23, 1984

CIRCULAR ORDER NO.32/84

To

All Divl. Commandants, Home Guards,
Uttar Pradesh

It has been observed that despite earlier instructions for recruitment to the post of coy. Commanders, they have often been recruited regardless of the area and the Company where the post fell vacant. Such recruitments are in fact against the fundamental principles on which the Home Guards Organisation is based.

2. In the meeting of the Divl. Commandants held on 25.4.84 at Lucknow, it was decided that in future whenever recruitments of Coy. Commanders are made, ***each post shall be filled up only for the specific Company in which the post has fallen vacant. The candidates to be considered must be local persons able to attend and remain with their units.*** *It is, therefore, necessary to keep this point in view when the selections are made. If any Board feels that no local candidate is available, the post may be re-advertised.* ***In the rural areas the candidate must belong to the block and be able to attend the Coy. Work without difficulty. So far as the Coys of the urban areas are concerned where the Coys are not organized on the block basis, the person should reside at a reasonable distance which has been decided as within 5 kms radius from from the ground where the parades are held.***

3. The same principle shall also be applied in respect of the Platoon Commanders.
4. The above decision casts a special responsibility on the Divisional Commandant to review the position as it stands today in each district. A list of all such Coy. Commanders and Platoon Commanders who do not qualify as above but who are serving as Coy. Commanders or Pl. comdrs should be prepared and on the expiry of their term it should not be renewed.
5. If any Coy. Comdr. Or Pl. Comdr. Who has been weeded out or who has resigned has to be re-employed directly or on acceptance of his appeal or petition the case of such person shall also be considered keeping in view the above principle in mind i.e. the person shall be eligible only in respect of his coy. Or Platoon in which he or she was serving and provided there is a vacancy available or whenever a vacancy falls due. In the latter case the merits of the eligible Coy. Comdrs shall be taken into consideration by the Board prescribed for the purpose and the pot offered on merits.

(P.C. KAKKAR)
Commandant General, Home Guards
Copy to:-
1. All Distt. Commandants/Urban Commandants/Commandants, DTCs, Hgs, UP
2. All officers at HGs Hqrs/Commandant, CTI."

14. The circular letter dated May 23, 1984 was not issued nor serves any specific provisions of the U.P. Home Guards Act, 1963. The Divisional

Commanders prepared guidelines for the purposes of convenience. The circular letter did not provide for dispensing with the services of those persons, who are already working. The guidelines were prepared for making home guards readily available. The review in respect of each district did not provide for dispensing with the services of such Company Commanders and Platoon Commanders, who do not qualify the test. It only provided that their term, at its expiry should not be renewed. The honorary engagement of a Home Guard, Assistant Commandant and Company Commander may not give them a right to hold the posts and that Article 311 would not strictly apply to their case, but these persons are citizens of India and are discriminated in engagement or treated unreasonably even on honorary post.

15. In the present case the petitioner is serving as Home Guard since 1979. He was promoted as Assistant Company Commander in 1983 and as a Company Commander in 1997. It was in the review meeting the respondents sought to enforce a circular letter dated May 23, 1984 non-suiting him to hold a post of the Company Commander without making any allegations with regard to his integrity, competence and the fact whether his residence in village Newada will affect his performance and in discharge of the duties. A rule of convenience could not be a ground to subject the petitioner to an arbitrary action to terminate his engagement on a honorary post. He has a right of equality which includes non-arbitrariness and reasonableness in state functions.

16. The principles of judicial review of administrative action, include unreasonableness as a ground on which the administrative action can be struck down. In **State of M.P. Vs. Hazari Lal, (2008) 3 SCC 273** the Supreme Court has held in para 11 that the legal parameters of judicial review have undergone a change. Wednesbury principle of unreasonableness has been replaced by the doctrine of proportionality vide **Indian Airlines Vs. Prabhu D. Kanan, (2006) 11 SCC 67; State of U.P. Vs. Sheo Shanker Lal Srivastava, (2006) 3 SCC 276 and M.P. Gangadharan Vs. State of Kerala, (2006) 6 SCC 162**.

17. "Proportionality" is a principle, where the Court is concerned with the process, method or manner in which the decision maker has ordered his priorities, reach of conclusion or arrived at a decision. The Supreme Court observed in **Coimbator District Central Cooperative Bank Vs. Employees' Association, (2007) 4 SCC 669** that the doctrine of proportionality steps in focus true nature of exercise- the elaboration of rule of permissible priorities. Proportionality involves "Balancing Test" and "Necessity Test". Whereas 'Balancing Test' permits scrutiny of excessive onerous penalties or infringement of rights or interest and a manifest imbalance of relative considerations, the 'Necessity Test,' requires infringement of human rights to the least restrictive alternative. In administering the affairs of the State the Government is expected to honour the statement of policy or intention and treat the citizens with full personal consideration, when abuse of discretion. The Supreme Court held that there can be no "pick and choose" selective applicability of government norms or unfairness, arbitrariness or unreasonableness. Where a paring knife

suffices, it is often stated that battle axe is precluded.

18. While judging the question of reasonableness and fairness, the statutory authority must consider the factual matrix in each case keeping in mind the doctrine of flexibility. Before an action is struck down, the Court must be satisfied that a case has been made out for exercise of power of judicial review. Every order must be founded on rationality, which must be seen in the context of the facts of the case.

19. The Court does not find that there was any occasion at all, or it was permissible to terminate the petitioner's engagement on the ground that he had shifted his residence from Kanaili to a neighbouring area in Newada for which he had himself made a declaration on the basis of a partition in his family. In this case the question as to whether the circular order dated May 23, 1984 is relevant for the purpose of fresh engagement of Home Guards, Platoon Commanders and Company Commanders is not in issue. The circular however issued after petitioner's engagement as a Home Guard could not be a ground to disengage him after his selections as Company Commander.

20. **The writ petition is allowed.** The order No. 8290 dated 5.12.2008 passed by District Commandant, Home Guards, is set aside. The petitioner shall be reinstated and shall be allowed to serve as Company Commander in Home Guards with all consequential benefits. The petitioner will also be entitled Rs. 5000/- as cost of this petition.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.04.2009

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No.4300 of 2009

Anoop Kumar Shukla and others ...Petitioners

Versus

Secretary, Secondary Sanskrit Education Board U.P. Lucknow and others ...Respondents

Counsel for the Petitioners:
Sri R.C. Dwivedi

Counsel for the Respondents:
Sri Anil Tiwari
Sri Ved Vyas Misra
Sri Sudama Ram

Sampurnanad Sanskrit Vishwa Vidyayala Niyamawali-Section 37(8), 49(d) of Article 12.31-ceasure of affiliation -on pertext for last 3 year no student send for examination- Assistant Registrar of University reported regarding continuity officiation- in absence of any restriction in U.P. Secondary Sanskrit education Board-petitioner can not be compelled to pursue their examination as private candidate.

Held: Para 6

After hearing counsel for the parties at length, in the opinion of this Court, in the absence of any provision in the aforesaid Act, the petitioners cannot be directed by the Board or DIOS to appear in the examination as private student also for the reason that respondent university still recognises the institution of petitioners as affiliated to it as is apparent from the record, and therefore the petitioners cannot be denied to appear in the examination as regular

student merely on the basis of some deeming provision in the Act or statute.

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

1. Heard counsel for the petitioner and Sri Ved Vyas Misra for the respondent university.

2. This writ petition has been filed for quashing the order dated 10.12.08 passed by the Secretary, U.P. Madhyamik Sanskrit Shiksha Parishad, Lucknow to the effect that petitioner would be permitted to appear in the examinations as private candidate on the ground that as no student has been sent by the institution for the last three years for appearing in the examination conducted by the aforesaid Board, hence in view of section 37(8) and 49(d) of Article 12.31 of Samputnanand, Sanskrit Vishwavidyalaya Niyamawali, affiliation of the institution has ceased.

3. Contention of the counsel for petitioner is that Assistant Registrar of the University vide his letter dated 25.1.09 appended as annexure no. 2 to the rejoinder affidavit has informed the DIOS that affiliation of the college in question is continuing. It is also stated that there is no provision in U.P. Secondary Sanskrit Education Board Act (U.P. Act No. 32 of 2001) to the effect that if no student is sent for appearing in the examination by the college for three years, affiliation would cease. It is submitted that Assistant registrar of the university has granted affiliation for the year 2007-08 and also for the year 2009 to the institution where the petitioner are studying, as such no direction can be issued by the respondents for appearance of the petitioner in the examination as private candidate.

4. The standing counsel appearing on behalf of the DIOS as well as the Board submits that respondent board has rightly taken a decision for petitioners' appearance in the examination as private student for the reason neither fee has been deposited not they have any legal right to appear in the examination as regular student being barred by provision of section 37 (8) and 49 (d) of Article 12.31 of Sampurnanand Sanskrit Vishwavidyalaya Niyamawali.

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5. In rebuttal, counsel for the petitioner submits that it is apparent from the rejoinder affidavit that petitioners have paid their examination fee etc, and being regular student of the college they cannot be compelled to appear in examination as private students.

6. After hearing counsel for the parties at length, in the opinion of this Court, in the absence of any provision in the aforesaid Act, the petitioners cannot be directed by the Board or DIOS to appear in the examination as private student also for the reason that respondent university still recognises the institution of petitioners as affiliated to it as is apparent from the record, and therefore the petitioners cannot be denied to appear in the examination as regular student merely on the basis of some deeming provision in the Act or statute.

7. For all the reasons stated above, the writ petition is allowed. The petitioner shall be allowed to appear in the examination as regular students and their result will be declared accordingly. No order as to costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.05.2009

BEFORE
THE HON'BLE VIJAY KUMAR VERMA, J.

Criminal Misc. Bail Application No.21955 of 2008

Anis @ General ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri M.P.S. Chauhan
Sri Nasiruzzaman

Counsel for the Opposite Party:
A.G.A

Code of Criminal Procedure- Section 439- Bail application offence under section 380/411 IPC allegation of stoling of one set mobile, licensed revolver with six live cartridges–all goods recovered from the possession of applicant-no case for Bail- direction issued expeditious conclusion of Trial.

Held: Para 10

Having given my thoughtful consideration to the rival submissions of the parties counsel, in this heinous crime, the applicant does not deserves bail, as stolen licenced revolver and mobile sim are said to have been recovered from the applicant's possession, for which there is sufficient prima facie evidence.
Case Law discussed:
2008 (63) ACC 115

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

1. Heard Sri M.P.S. Chauhan Advocate appearing for the applicant and AGA for the State and perused the record.

2. An FIR was lodged on 25.05.2008 at 10.00 a.m., by the complainant Satendra Pal Singh at P.S. Quarsi, District Aligarh, where a case at crime no. 369 of 2008, under section 380/411 was registered against unknown persons. The allegation in the FIR is that one mobile Nokia 2600 having sim card bearing no. 9837036373, licenced revolver 32 bore, bearing No. F.G. 33271 with six live cartridges and Rs.2000/- were stolen from the room of complainant on 25.05.2008 at about 5.30 a.m. The allegation against applicant Anis @ General is that stolen revolver and sim of mobile were recovered from his possession on 02.06.2008.

3. The main submission made by learned counsel for the applicant in support of the bail application is that no such incident as alleged by prosecution had occurred and fabricating a false story of theft and recovery of revolver etc. the applicant has been falsely roped in this case.

4. Next submission is that there is no criminal history against the applicant, who is in jail since 03.06.2008.

5. It is further submitted that at the most offence under section 411 IPC would be made out against the applicant, because he is not named in the FIR of theft and since maximum sentence under section 411 IPC is 3 years imprisonment, hence on this ground the applicant deserves bail now, as he in jail more than 11 months.

6. It is further submitted by learned counsel that the applicant was apprehended by the police from his house and mother of the applicant had sent

telegram, as is evident from the order dated 01.07.2008, passed by the court below in bail application no. 2115 of 2008 (Annexure-3).

7. It is also submitted that the applicant used to sell bangles in Aligarh and police wanted to engage him for *mukhbiri*, for which the applicant was not inclined and hence being annoyed, he has been falsely roped in this case.

8. It is further submitted that the applicant is young boy and he will be ruined in the company of hardened criminals, if detained further in jail.

9. AGA has opposed the bail application contending that stolen licenced revolver and sim card of the complainant have been revered from the possession of applicant and he should not be released in this heinous crime.

10. Having given my thoughtful consideration to the rival submissions of the parties counsel, in this heinous crime, the applicant does not deserves bail, as stolen licenced revolver and mobile sim are said to have been recovered from the applicant's possession, for which there is sufficient prima facie evidence.

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

12. For the reasons mentioned herein-above, the bail application of the applicant Anis @ General is hereby rejected.

13. The trial court concerned is directed to conclude the trial of the applicant within for months, if possible, applying the provisions of section 309 Cr. P.C. and avoiding unnecessary adjournments.

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

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.03.2009

BEFORE
THE HON'BLE S.K. SINGH, J.
THE HON'BLE PANKAJ MITHAL, J.

First Appeal From Order No.794 of 2009

NKC Projects Pvt. Ltd. and another ...Appellants
Versus
Utility Energytech & Engineers Pvt. Ltd. and another ...Respondents

Counsel for the Appellants:
Sri A.K. Gupta
Sri O.P. Lohia

Counsel for the Respondents:

Arbitration Act-Section-42-Jurisdiction of court-arbitration clause 26.4 specifically excluded the jurisdiction of any court- other than courts at Mumbai- cause of action partly are within terrestrial limit of Jhansi Court- held no jurisdiction.

Held: Para 12

In view of the aforesaid facts and circumstances and the reasons given we are of the considered view that the jurisdiction of the court at Jhansi to entertain an application under Section 9 of the Act in relation to a subject matter which is governed by the arbitration clause stand completely ousted by virtue of clause 26.4 of the agreement and the courts at Mumbai alone have the exclusive jurisdiction. Therefore, the courts below has committed no error in passing the impugned order and in relegating the appellant to the jurisdiction of the Mumbai court.

Case Law discussed:
(2006)11 SCC 521

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

1. The short point involved in this First Appeal From Order is whether in view of the arbitration clause 26.4 contained in the agreement providing Mumbai to be the place of arbitration and that arbitration shall be subject to jurisdiction of the courts at Mumbai only, the Jurisdiction of the courts at Jhansi to entertain an appliance for interim measure under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter for short 'Act).

2. The appellant moved an application under Section 9 of the Act before the District Judge, Jhansi seeking interim protection that the respondents be restrained from en-cashing the bank guarantees furnished by the appellant as securities for the purpose of civil contract awarded to be carried out at Jhansi. The said application which was registered as Misc. Case no. 31 of 2009 after notice to the other side was disposed of by the order impugned with the direction than the Court at Jhansi has no jurisdiction in view of the arbitration clause 26.4 of the contract agreement and therefore, the appellant may prefer the application before the principle court at Mumbai.

3. Heard Sri A. K. Gupta and Sri O.P. Lohia, learned counsel in support of this appeal and perused the record.

4. The submission of the learned counsel for the appellant is that irrespective of the jurisdiction conferred upon the Mumbai courts by the agreement, the application for interim protection under Section 9 of the Act is maintainable even at Jhansi where at least part of the cause of action had arisen.

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5. To test the above submission let us first examine the arbitration clause 26.4 of the agreement, the relevant part of which is reproduced below:

"The venue of arbitration shall be Mumbai and the language of arbitration shall be English. The arbitration shall subject to jurisdiction of the courts at Mumbai only."

6. This clause not only provides that Mumbai shall be the place of arbitration but also that the courts at Mumbai alone shall have jurisdiction in respect to arbitration between the parties. Admittedly vide clause 26.4 of the agreement all disputes concerning arbitration between the parties have been subjected to the exclusive jurisdiction of the courts of Mumbai only. It is a recognised principal of law that whenever there is a specific clause in the agreement conferring jurisdiction on particular court to decide the matter then it automatically ousts the jurisdiction on the other court. Therefore, in the instant case the

jurisdiction of any other court other than of courts at Mumbai in respect to arbitration stand excluded and arbitration or any proceedings in relation thereto are supposed to be maintained in the courts at Mumbai only.

7. Now Section 9 of the Act envisages movement of an application for interim measure/protection before a court not only during the arbitral proceedings or after the declaration of the arbitral award but also before the initiation of such arbitral proceeding, which are in contemplation.

8. Learned counsel for the appellant accepts that during the course of the arbitral proceedings and subsequent to the making of the award an application for the interim protection under Section 9 of the Act can be maintained in the Courts at Mumbai only. He also accepts that even an application under Section 11(6) of the Act, if necessary, for the appointment on an arbitrator would lie in the courts at Mumbai i.e. before Bombay High Court. The question therefore is whether an application under Section 9 of the Act for interim protection in contemplation of arbitration proceedings can be maintained before any other court other than the Courts of Mumbai.

9. The answer to the above question is contained in Section 42 of the Act which provides that notwithstanding anything contained elsewhere in law where an application has been made in a court, that court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceeding shall be subject to that court only and in no other court. This clearly means that the intention of the legislature is to confer jurisdiction with regard to the subject matter of arbitration in one particular court and where two or more courts may be having jurisdiction, the court wherein any application is made first shall alone have jurisdiction over the matter. The purpose of enacting Section 42 of the Act is obviously to avoid institution of simultaneous proceedings at two places or in two different courts and to have all matter arising out of a particular arbitration agreement decided by one court. Thus, eventually when during the courses of arbitral proceedings and after making the arbitral award it is accepted that the courts at Mumbai alone have jurisdiction, it does not appeal to reason to confer the same very jurisdiction to any other court particularly to courts at Jhansi to deal with the same subject matter before the commencement of the arbitral proceedings. Therefore, we are of the opinion that in view of the arbitration proceeding clause 26.4 of the agreement, the jurisdiction of courts at Jhansi stand impliedly excluded and it is only the courts at Mumbai that are empowered to take cognizance of the subject matter not only during arbitral proceedings or after the making or arbitral award but even before the initiation of arbitral proceedings so that the uniformity in the forum of adjudication is maintained.

10. The view which we have taken above also finds support from the decision of the Apex Court reported in **(2006) 11 SCC 521 Jindal Vijaynagar Steel (JSW Steel Ltd) Vs. Jindal Praxair Oxygen Co. Ltd.,** wherein it has been observed that the rule of forum convenience is expressly excluded by Section 42 of the Act which mandates that all future actions

be filed only in the court where the first application with regard to an arbitration was filed. The necessary corollary of the same would be that when the court in which future actions in the matter is to be taken is known with certainty before hand then in that case the initial action ought to be confined to the said pre-determined court only. Therefore, where the parties themselves have chosen a particular place to be the place for arbitration and proceedings connected thereto (refer clause 26.4 of the agreement) and the agreement specifically provides for a dispute resolution meeting to be held at a particular place and for the proceedings thereafter to be within the jurisdiction of the courts of that particular place, we are of the view that by virtue of the mandate of section 42 of the Act all proceedings in connection with the arbitration shall lie before that particular court only.

11. Therefore, even in the part of cause of action, covered by arbitration clause, arises at Jhansi as per the definition of the Court contained in Section 2 (e), Section 9 and Section 42 of the Act to make the scheme of the Act workable lead us to hold that the court having jurisdiction to entertain applications under Section 9 of the Act during the arbitral proceedings or after the making of the award alone would have exclusive jurisdiction over such an application even if it is moved before the start of the arbitration proceedings.

12. In view of the aforesaid facts and circumstances and the reasons given we are of the considered view that the jurisdiction of the court at Jhansi to entertain an application under Section 9 of the Act in relation to a subject matter which is governed by the arbitration clause stand completely ousted by virtue of clause 26.4 of the agreement and the courts at Mumbai alone have the exclusive jurisdiction. Therefore, the courts below has committed no error in passing the impugned order and in relegating the appellant to the jurisdiction of the Mumbai court.

13. Accordingly, the appeal lacks merit and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.05.2009

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

Civil Misc. Writ Petition No. 60707 of 2008

Sher Singh and others ...Petitioners
Versus
Dy. Director of Consolidation, Bulandshahar and others ...Respondents

Counsel for the Petitionerst:
Sri Brajesh Kumar Solanki
Sri S.P. Singh

Counsel for the Respondents:
Sri Jai Singh Chandel
Sri V.K. Singh
S.C.

Consolidation of Holding Act 1960-48
Chak allotment at the S.O.C. Stage finalized- petitioner being satisfied not preferred any revision-D.D.C. altered the chak- after knowledge filed recall application denying the institution of revision-nor the order sheet bears his signature rejection-without taking handwriting expert opinion-held-not proper.

Held: Para 7

It is apparent that the real issue is as to whether the petitioner had endorsed his signature or thumb impression on the order-sheet or on the memo of revision as recorded by the Deputy Director of Consolidation. The said issue could only have been decided after verifying the same and the Deputy Director of Consolidation should not have acted as a handwriting expert. Reference may be had to the decision in the case of *Ram Sukh Vs. Sughara and others reported in 2000 R.D. (91) 155 Para 7.* in view of this it was incumbent upon the Deputy Director of Consolidation to have got the signature not done so, the Deputy Director of Consolidation has committed a patent error by recording his conclusions without completing the formalities of evidence in this regard.

Case Law discussed:

2000 R.D. (91) 155

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

1. Heard Sri S.P. Singh and Sri B.K. Solanki learned counsel for the petitioner and Sri Jai Singh Chandel for the contesting respondent no. 2.

2. In view of the order that is proposed to be passed the learned standing counsel and the learned counsel for the Gaon Sabha have not proposed to file any counter affidavit. The parties are agreed that the matter be disposed of at this stage finally without calling for any further affidavits from either of the parties. Accordingly, the matter is being disposed of finally under the rules of the Court.

3. Sri S.P. Singh learned counsel for the petitioner contended that the allotments which had been made at the stage of the Settlement Officer Consolidation in respect of plot no. 87/1, the petitioner was not aggrieved. Learned counsel for the petitioner contends, that in the event there was no grievance on behalf of the petitioner, then there was no occasion for him to have filed any revision against the order of the Settlement Office Consolidation. It is further submitted that when the petitioner came to know of passing of the order dated 18.8.2008 by the Deputy Director of Consolidation he rushed up to this Court and filed Writ Petition No. 5097 of 2008 questioning the said order on the ground that the petitioner had never filed any revision nor had he sought any relief in respect of the plot no. 87/1. The said writ petition was dismissed with liberty to the petitioner to approach the Deputy Director of Consolidation for the redressal of his grievances. Accordingly, the petitioner filed restoration application any copy of affidavit filed in support of the said restoration application is appended as Annexure 7 to the writ petition.

4. Learned counsel for the petitioner contends that a clear stand was taken before the Deputy Director of Consolidation that the petitioner never thereon and the same is forged and having attempted by an imposer. Therefore, the order should be recalled and the revision should be dismissed.

5. The Deputy Director of Consolidation has recorded a finding that according to the order-sheet of the said revision, it appears that the petitioner had endorsed his signature and thumb impression and even otherwise on merits since the order had been passed after making a spot inspection, therefore, the restoration application was not maintainable and it was accordingly rejected. Aggrieved the petitioner filed this writ petition questioning the validity

of the said order on the ground that there was no occasion for the petitioner to file the revision, as he was satisfied with the Consolidation and secondly, there was no occasion for the Deputy Director of Consolidation to have reversed the said position to the detriment of the petitioner and to the complete advantage of the contesting respondent no. 2.

6. Sri J.C. Chandel has urged that the said findings have been recorded by the Deputy Director of Consolidation after perusing the records and they are findings of fact, which should not be interfered with under Article 226 of the Consolidation.

7. It is apparent that the real issue is as to whether the petitioner had endorsed his signature or thumb impression on the order-sheet or on the memo of revision as recorded by the Deputy Director of Consolidation. The said issue could only have been decided after verifying the same and the Deputy Director of Consolidation should not have acted as a handwriting expert. Reference may be had to the decision in the case of ***Ram Sukh Vs. Sughara and others reported in 2000 R.D. (91) 155 Para 7.*** In view of this it was incumbent upon the Deputy Director of Consolidation to have got the signature not done so, the Deputy Director of Consolidation has committed a patent error by recording his conclusions without completing the formalities of evidence in this regard.

8. Accordingly, the order dated 7.11.2008 is unsustainable and is set aside. The matter stands remitted back to the Deputy Director of Consolidation for decision afresh in the light of the observations made here in above. The Writ petition is allowed. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.05.2009

BEFORE
THE HON'BLE VINEET SARAN, J.

Civil Misc. Writ Petition No. 24290 of 2009

Committee of Management of Pandit Ram Dev Mishra Intermediate College Khaptiha, District Allahabad...Petitioners
Versus
State and another ...Respondents

Counsel for the Petitioner:
Sri L.K. Dwivedi

Counsel for the Respondents:
S.C.

U.P. Recognised Basic School (Junior High School Recruitment and Condition of Teachers)Rules 1978–Rule 9-after retirement of one Assistant Teacher-management send information seeking permission to hold selection and to get the nominee of Basic Education Officer – Refusal even after the direction of Court-unfortunate- G.O. relied by the BSA already quashed- can not be defence to BSA- held- to give permission by forthwith along with one nominee-director to call explanation from erring officer.

Held: Para 10-

Since the order has been passed in the teeth of the judgement of this Court passed in the case of *Committee of management of Vishva Nath Vidyalaya Mundera, Allahabad* (supra), which has also been noticed by the Zila Basic Shiksha Adhikari in its order dated 17.02.2009 but he has refused to comply with the direction issued by this Court, it is directed that a copy of this judgment

be sent to the Directorate of Education (Basic) who shall call for an explanation from the Zila Basic Shiksha Adhikari, Allahabad, respondent no. 2 for referring the matter to the State Government despite the directions of this Court having been issued whereby the conditions laid down in the Government Order dated 20.01.2003 for seeking approval of the State Government had been set aside.

Case Law discussed:

(2008) 3 UPLBEC 2876

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

1. Heard Sri L.K. Dwivedi, learned counsel for the petitioner as well as learned Standing Counsel appearing for the respondents and have perused the record. With consent of learned counsel for the parties, this writ petition is being disposed of finally at this stage without calling for a counter affidavit. .

2. The brief facts of this case are that on the retirement of one Assistant Teacher on 30.06.2008, the petitioner-institution approached to the Zila Basic Shiksha Adhikari, respondent no. 2 to grant permission to advertise the post and send a nominee for selection of an Assistant Teacher. The U.P. Recognized Basic School (Junior High School Recruitment and Condition of teachers) Rules, 1978 (hereinafter referred to as the '1978 Rules') provides for appointment of Headmaster and Assistant Teacher. As per Rule 3, it is the responsibility of the Management to fill a Vacancy in the post of Headmaster or Assistant Teacher of a recognized school by 31st July every year. Rule 7 provides for advertisement of vacancy and Rule 9 provides for Selection Committee. For the post of Assistant Teacher in an institution, other than minority institution, the Selection Committee is to comprise of Manager, Headmaster of the recognised school and a nominee of District Basic Education Officer.

3. After the vacancy occurred on 28.08.08, the petitioner wrote to the Zila Basic Shiksha Adhikari, Allahabad, respondent no. 2 for grant of permission to advertise the vacancy for filling up the post of Assistant Teacher, which had fallen vacant and to send a nominee for the Selection Committee. Since the said application was not being decided, the petitioner filed a writ petition bearing Civil Misc. Writ Petition No. 62357 of 2008 (Committee of Management Vs. State of U.P.), which was disposed of on 03.12.2008 with the directions that the representation of the petitioner with regard to the aforesaid grievances may be considered by the Zila Basic Shiksha Adhikari by speaking and reasoned order. Pursuant thereto, the impugned order dated 17.02.2009 has been passed by the Zila Basic Siksha Adhikari, Allahabad has been passed by the Zila Basic Siksha Adhikari, Allahabad, respondent no. 2 denying permission to the petitioner to advertise the post of Assistant Teacher. Aggrieved by the said order, this writ petition has been filed.

4. The sole ground taken in the impugned order for denying such permission is a Government Order dated 20.01.2003 which provides that permission to fill up the vacant post in non-government aided institution should be granted only after prior approval from the State Government. The said Government Order came up for consideration before this Court in the case of *Committee of Management of Vishva Nath Vidyalaya, Mundera, Allahabad Vs.*

State of U.P., (2008) 3 UPLBEC 2876, wherein it has been held that "District Basic Education Officer is enjoined upon to provide nominee in case there exists vacancy and some has to be filled up in terms of 1978 Rules. Government Order dated 21.02.2003 in the fact of the present case is uncalled for inasmuch as 1978 Rules. Government Order dated 20.1.2003 in the fact of the present case is uncalled for inasmuch as 1978 Rules are self contained and said Rule does not envisage for taking any prior approval from the State Government before proceeding to make selection and appointment and as such said Government Order to the extent it directs taking sanction from State Government is ultra vires to the provisions as under 1978 Rules and the same cannot be made foundation and basis for withholding the permission. Thus, respondents are duty bound to provide nominee in case validly elected Managing Committee is proceeding to make selection as per 1978 Rules against duly sanctioned post."

5. After holding the provision for taking prior approval from the State Government in the said Government Order as ultra vires the provision contained under the 1978 Rules, in the aforesaid case, this Court directed the District Basic Education Officer, Allahabad to take appropriate decision on the application moved by the petitioner for sending of its nominee within a month.

6. In the present case, although the Zila Basic Shiksha Adhikari has noticed the aforesaid decision passed in the case of *Committee of Management of Vishva Nath Vidyalaya, Mundera, Allahabad* (supra) but has stated that the Zila Basic Shiksha Adhikari is not competent to interpret the said Government Order and it is only the State Government which can amend the same and thus he has referred the matter of the petitioner to the State Government/Directorate of Education.

7. It is very surprising that even after the provision of obtaining prior approval provided for in Government Order dated 20.1.2003 has been held to be ultra vires by this Court in the case of *Committee of Management of Vishva Nath Vidyalaya, Mundera, Allahabad* (supra), still the Zila Basic Shiksha Adhikari even after noticing the said judgement of this Court, does not honour the same and states that it is the State Government alone which can modify or amend the order, meaning thereby that the order of this High Court is not to be given effect until the same gets the approval of the State Government. Such stand of the Zila Basic Shiksha Adhikari is very unfortunate as it is in total disregard of the directions issued by this Court.

8. In the facts and circumstances of this case since the Zila Basic Shiksha Adhikari is obliged under law (Rule 9 of 1978 Rules) to send a nominee for the selection of Assistant Teacher in non-government aided institution, it is directed that the respondent no. 2, the Zila Basic Shiksha Adhikari shall forthwith grant permission to the petitioner to advertise the post for filling up the vacant post of Assistant Teacher in their college within three weeks from the date of filing of a certified copy of this order and send a nominee for selection of the Assistant Teacher on the dated fixed for such selection. It is, however, provided that at the time of according approval, the Zila Basic Shiksha Adhikari, Allahabad shall

ensure that only such person is appointed as Assistant Teacher, who is eligible as per law.

9. Accordingly, the impugned order dated 17.02.2009 passed by the Zila Basic Shiksha Adhikari, respondent no. 2 is hereby quashed and this writ petition stands allowed with the directions given hereinabove.

10. Since the order has been passed in the teeth of the judgement of this Court passed in the case of *Committee of management of Vishva Nath Vidyalaya Mundera, Allahabad* (supra), which has also been noticed by the Zila Basic Shiksha Adhikari in its order dated 17.02.2009 but he has refused to comply with the direction issued by this Court, it is directed that a copy of this judgement be sent to the Directorate of Education (Basic) who shall call for an explanation from the Zila Basic Shiksha Adhikari, Allahabad, respondent no. 2 for referring the matter to the State Government despite the directions of this Court having been issued whereby the conditions laid down in the Government Order dated 20.01.2003 for seeking approval of the State Government had been set aside.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.05.2009

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No.22335 of 2009
AND
Civil Misc. Writ Petition No. 22368 of 2009

Neeraj Kumar Pandey ...Petitioner
Versus
The High Court of Judicature at Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri Pankaj Kumar Srivastava

Counsel for the Respondents:
Sri Amit Sthalekar

Constitution of India Art. 226- Deputation- petitioner a senior administrative officer- challenged the order passed by district Judge Mathura- refusing consent for appointment on deputation keeping in view of decision of Administrative Committee of High Court- held-deputanist has no right to claim the post on deputation-being subordinate to High Court-District Judge rightly refused to grant permission.

Held: Para 10

In the present case, the petitioner's employer i.e. District Judge, Mathura has refused to accord consent on the basis of policy decision taken by the High Court, and hence in the absence of the consent of his employer, the petitioner cannot claim as of right much less a fundamental right for appointment to a post under Debt Recovery Tribunal, Chandigarh on deputation. The petitioner being an employee of district judgeship subordinate to and under control of the High Court, is bound by the policy decision taken by the High Court in its

Administrative Committee meeting as stated above.

Case Law discussed:

(1994) 4 SCC 659, 2004(3) E.S.C.(Alld.)-1404, (1978) 2 SCC 102.

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

1. The question for consideration being the same, both these petitions are being decided by this common judgement.

2. Heard counsel for the petitioner and Sri Amit Sthalekhar appearing for the respondents.

3. The petitioner, an employee of Mathura judgeship, has prayed for quashing of order dated 1.4.09 appended as annexure no. 10 to the writ petition, by which District Judge, Mathura, on the basis of letter of High Court dated 12.11.08 has refused to relieve him for purpose of joining on deputation in Debt Recovery Tribunal, Chandigarh.

4. The Administrative committee of the High Court vide its resolution dated 17.10.2008, has taken a policy decision not to send any non gazetted employee on deputation. This resolution has been appended as annexure no. C.A.-5 to the counter affidavit. It is on the basis of this policy decision taken by the High Court that impugned order refusing to relieve the petitioner has been passed by the District Judge, Mathura.

5. Contention on the counsel for petitioner is that Administrative Committee of the High Court in its resolution dated 17.10.2008, has not considered letters dated 2.8.2007 and 4.7.2008 written by the District Judge, Mathura concerning petitioner's present selection on deputation, copies of which have beep appended as annexure nos. 4 & 5 to the writ petition. According to him, the letters considered by the Administrative Committee in its resolution dated 17.10.08 pertain to petitioner's earlier selection & deputation in Debt Recovery Tribunal, Chandigarh. It is also contended that policy decision has been taken by the Administrative Committee of the High Court and not by the Full Court.

6. Once a policy decision has been taken and communicated to all concerned for its implementation, it has to be necessarily adhered to so long it is not withdrawn, modified or substituted. Therefore, policy decision having been taken in regard to a particular subject, it is not necessary for the Administrative Committee to consider each & every letter on that subject and the submission made by the counsel for petitioner in this regard has no substance.

7. In **UmapatiChoudhary Vs. State Of Bihar and another** (1994) 4 SCC 659, while considering the question of deputation of an employee of one department to another, the Apex Court in paragraph no. 8 of the aforesaid decision held as under:

"*Deputation can be aptly described as an assignment of an employee (commonly referred to as the deputationist) of one department or cadre or even an organisation (commonly referred to as the parent department or lending authority)to another department or cadre or organisation (commonly referred to as the borrowing authority). The necessity for sending on deputation arises in public interest to meet the exigencies of public service.* ***The concept***

of deputation is consensual and involves a voluntary decision of the employer to lend the services of his employee and a corresponding acceptance of such service by the borrowing employer*. It also involves the consent of the employee to go on deputation.*

8. A Division Bench on this Court in **Civil Accounts Association Through General Secretary and others Vs. Union of India and others** (2004(3) E.S.C. (Alld.)-1404, in paragraph 23 & 24 of the judgement, has also reiterated the same view as in Umapati Choudhary's case (supra).

9. Thus, it is apparent that for the purposed of deputation, consent of the employer, borrowing employer and employee concerned is necessary. In the absence of consent of any of aforesaid three persons, there cannot be any deputation.

10. In the present case, the petitioner's employer i.e. District Judge, Mathura has refused to accord consent on the basis of policy decision taken by the High Court, and hence in the absence of the consent of his employer, the petitioner cannot claim as of right much less a fundamental right for appointment to a post under Debt Recovery Tribunal, Chandigarh on deputation. The petitioner being an employee of district judgeship subordinate to and under control of the High Court, is bound by the policy decision taken by the High Court in its Administrative Committee meeting as stated above.

11. So far as the submission that aforesaid policy decision has been taken by the Administrative Committee and not by the Full Court, is concerned, the same has also no force in view of the observations of the Apex Court in **State of U.P. Vs. Batuk Deo Pati Tripathi and another** (1978) 2 SCC 102, paragraph no. 17, which are as under:

"17.....*The Administrative Judge or the Administrative Committee is a mere instrumentality through which the entire Court acts for the more convenient transaction in its business, the assumed basis of the arrangement being that such instrumentalities will only act in furtherance of the broad policies evolved from time to time by the High Court as a whole. Each Judge of the High Court is an integral limb of the Court. He is its altergo. It is therefore inappropriate to say that a Judge or a Committee of Judges on the High Court authorised by the Court to act on its behalf is a delegate of the Court.*

12. For the reasons stated above, in the considered opinion of this Court, the order impugned dated 1.4.2009 does not suffer from any illegality or infirmity.

13. Consequently, both the writ petitions fail and are accordingly dismissed. No order as to costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.05.2009

BEFORE
THE HON'BLE VIJAY KUMAR VERMA, J.

Criminal Misc. Bail Application No. 19672 of 2008

Muhammad Sabbu ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Ramesh Chandra

Counsel for the Opposite Party:
Sri D.R. Chaudhary
A.G.A

N.D.P.S ACT-Section- 50-Recovery of 160 kg. Ganja from jeep-applicant accepted possession of 50 kg. Ganja-while Commercial quantity should not be more than 20 kg.-argument about non presence of public officer at the time of search not available-heinous anti-social offence committed not entitled for bail even on ground of a long period of confinement in jail-application rejected.

Held: Para 9

Having given my thoughtful consideration to the rival submissions made by the parties counsel, and after carefully going through the entire material on record, in this heinous ante-social crime, the applicant does not deserve bail, because Ganja which is said to have been recovered by the police was more than commercial quantity. According to the table given in NDPS Act commercial quantity of Ganja is 20 kg., whereas on the pointing out of the applicant, 50 kg. *Ganja* was recovered from the jeep.

Case Law discussed:
2004 (49) ACC 473, 2008 (63) ACC 115.

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

1. In this bail application, prayer for bail has been made on behalf of accused-applicant Mohammad Sabbu, s/o Vajeer Miyan, in case Crime No. 447 of 2007, under section 8/20 NDPS Act, P.S. Khadda, District Kushi Nagar.

2. The allegations made in the FIR lodged on 27.12.2007 at P.S. Khadda, District Kushi Nagar by S.O. Shamsher Bahadur Singh, in brief, are that on getting information from informer that some persons are carrying *ganja* in Jeep No. U.P. 52B/ 1741, the said jeep was stopped by the police on 27.12.2007, at about 1.30 p.m. and four persons including the applicant Mohd. Sabbu were apprehended, who were sitting in Jeep. When search of the cabin of jeep was made, than 21 small and big packets were recovered. On inquiry, the applicant Mohd. Sabbu claimed 50 kg. Ganja belonging to him. Other accused also claimed separate quantity of Ganja belonging to them. Total 160 Kg. Ganja was recovered from the jeep, which was seized and the accused persons were arrested.

3. I have heard Sri Rmesh Chandra, Advocate, appearing for the applicant, learned AGA for the State and perused the entire record carefully.

4. Firstly, it was submitted by the learned counsel for the applicant that compliance of Section 50 NDPS Act was not made, as prior to making search of the jeep, option to get to the search made before the Magistrate or gazetted officer was not given to the accused persons and search was made by the arresting officer himself, which is not permissible.

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5. It was further submitted that no persons of public was called to be the witness of search and hence, merely on the basis of the statements of police personnel, the applicant cannot be detained further in jail, it was also submitted in this context that the applicant is in jail since 27.12.2007 and hence, on the basis of long detention period also, the applicant deserves bail now. As his fundamental right of speedy trial

envisaged under Article 21 of the Constitution is being violated.

6. It was also submitted that entire seized Ganja was not sent for examination to Forensic Science Laboratory and hence, on this ground also, the applicant is entitled for bail.

7. The bail has been opposed by the learned AGA contesting that the provisions of Section 50 NDPS Act would not be attracted in present case, because Ganja was not recovered from personal search of the applicant and it was seized from the vehicle. For this submission, my attention was drawn by the learned AGA towards the decision of Hon'ble Apex Court in ***State of Haryana vs Jarnail Singh and others 2004 (49) ACC 473***.

8. It was further submitted by the learned AGA that in the absence of public witnesses, the applicant cannot be released on bail on this ground, as this matter can be considered during trial by the trial judge.

9. Having given my thoughtful consideration to the rival submissions made by the parties counsel, and after carefully going through the entire material on record, in this heinous ante-social crime, the applicant does not deserve bail, because Ganja which is said to have been recovered by the police was more than commercial quantity. According to the table given in NDPS Act commercial quantity of Ganja is 20 kg., whereas on the pointing out of the applicant, 50 kg. *Ganja* was recovered from the jeep.

10. It is well settled law by the catena of decisions of Hon'ble Apex Court and this Court also that Section 50 of NDPS Act is applicable in case of personal search only and where the contraband is recovered from any vehicle and not from personal search of the accused, then provisions of Section 50 NDPS Act would not be applied.

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

12. For the reasons mentioned herein-above, the bail application of the applicant Mohammad Sabbu is hereby rejected.

13. The trial court concerned is directed to conclude the trial of the applicant within six months applying the provisions of section 309 IPC and avoiding unnecessary adjournments.

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

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.05.2009

BEFORE
THE HON'BLE SABHAJEET YADAV, J.

Civil Misc. Writ Petition No. 20841 of 2009

Neena Chaturvedi ...Petitioner
Versus
U.P. Public Service Commission, Allahabad ...Respondent

Counsel for the Petitioner:
Sri Yatindra Dubey
Sri N.L. Pandey

Counsel for the Respondent:
Sri M.A. Qadeer
Sri Pushpendra Singh

Constitution of India Art. 226- Application send through Speed Post- reached at its destination after expiry of the last day of acceptance-whether the addressee responsible to for delay?- held-"No"-post office act as agent of sender and not of addressee-matter referred to larger bench comprising 3 or more judges-interim measure commission directed to accept the application provisionally subject to final decision.

Held: Para 51

Since the postal service constituted under the provisions of Indian Post Office Act 1898 is entrusted public service and stood test of time, therefore, having regard to the facts that the questions involved in the case have wide impact upon the large public interest touching the fundamental rights of the candidates under Articles 16 and 21 of the Constitution of India, an authoritative decision is required to be rendered by Full Bench of this Court comprising of atleast three or more than three judges so that the matter may be set at rest for all the times to come in future. The Hon'ble the Chief Justice is requested to constitute a Full Bench of this Court comprising of at least three or more than three judges for deciding the questions formulated by me in preceding part of this judgment as early as possible.

Case law discussed:
1974 A.L.J. 470 (FB), 1987 U.P.L.B.E.C. 316, W.P. No.57508 of 2005, W.P. No.67808 of 2006, W.P. No.23152 of 2006, AIR 1980 SC 431, AIR 1954 SC 429, AIR 1959 SC 1160, AIR 1966 SC 1466, AIR 1959 SC 1070, AIR 1959 SC 1160, AIR 1966 SC 1466, AIR 1959 SC 1070, AIR 1979 S.C. 1384, AIR 1968 SC 647, (1987) 1 SCC 213, (2003) 2 SCC 111, AIR 1990 SC1782, AIR 1988 SC 1531, AIR 1989 SC 38, (1990) 3 S.C.C. 682, JT 2000 (6) SC 320, JT 1991 (3) SC 268 : 1991 (4) SCC 138, AIR 1954 SC 429, AIR 1980 SC 431, J.T. 2005 (12) S.C. 345, 2000 (4) E.S.C. 2483, AIR 1980 S.C. 431, JT 2005 (12) SC 345, AIR 1989 Orissa 130, AIR 1997 A.P. 79, 1995 (1) Madras LW 351.

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

By this petition, the petitioner has sought relief of mandamus directing the Commission to accept the application form submitted by the petitioner and allow her to participate in process of selection as a candidate for the post of Lecturer in Government Intermediate College by treating her application within time.

2. The relief sought for in this writ petition rests on the facts that the Commission has advertised certain vacancies of Lecturers in Government Intermediate Colleges. The last date for receipt of the application form was 20th February, 2009. According to the conditions stipulated in the advertisement duly filled application form must reach to the office of the Commission till **5.00 p.m. by 20th February, 2009 or before it**

either through registered post or by hand. It was also stipulated in the said advertisement that the application shall not be received through 'FAX'. A photostat copy of the advertisement No. 5/2009-09 dates 31st January, 2009 is on record as Annexure-1 of the writ petition. It is stated that in pursuance of said advertisement the petitioner has sent her application form through Speed Post on 17.2.2009 from Chitrakoot (U.P.) as stated in the supplementary affidavit filed in the writ petition. In writ petition the last date of receipt of application form and date of sending application have been incorrectly mentioned by the petitioner, which are rectified by filing supplementary affidavit. It is stated that since the Commission was hardly at a distance of about 100-120 Km. from the aforesaid place of sending the application form, therefore, in all probabilities it was expected to reach the Commission within 24 hours i.e. by 18th of February, 2009 but it appears that on account of some negligence or inadvertence on the part of post office personnel the envelope containing the application form was reached in the office of the Commission on 21.2.2009 i.e. next day after last date of receipt of the application form, as such it was returned back to the petitioner with an endorsement that it was received after last date of receipt of the application form. A photostat copy of envelope as well as application which are returned back is on record as Annexure-3 of the writ petition. Feeling aggrieved against the aforesaid action of the Commission the petitioner has filed instant writ petition.

3. Heard Sri N.L. Pandey, learned counsel for the petitioner and Sri M.A. Qadeer, learned Senior Counsel for the Commission.

4. It is submitted by learned counsel for the petitioner that since two alternative modes for submission of application form were provided in the advertisement by the Commission; one by registered post and another by hand and the petitioner has opted for submitting her application form to the Commission by sending it through registered post namely speed-post which is speedier mode of delivery system on 17.2.2009, and in all probabilities it was expected to reach the Commission on 18th or 19th February, 2009 before the last date of the receipt of the application form but on account of fault or negligent act of post office personnel which was acting as agent of the Commission, it was reached to the office of the Commission on the next day of last date of receipt of application form, therefore, on account of fault or negligence of post office, the petitioner cannot be made to suffer and she cannot be denied of opportunity to be considered for employment guaranteed under Article-16 of the Constitution of India in respect of the vacancies advertised by the Commission. In support of his submission, learned counsel for the petitioner has placed strong reliance upon a Full Bench decision of this Court rendered in ***Bhikha Lal and others Vs. Munna Lal 1974 A.L.J. 470 (FB),*** wherein this Court has held that on the facts and in circumstances of the case the tenant-respondent could not be said to have committed a default under Section 3 (1) (a) in respect of payment of Rs.35/- which he sent to the plaintiff-landlords by a money order well within time but which had reached the landlords after expiry of thirty days.

5. Contrary to it, Sri M.A. Qadeer learned senior counsel appearing on behalf of the Commission has contended that since the Commission has provided two alternative modes for submission of application form to the desirous candidates; one through registered post and another by hand to the office of Commission and it was made necessary that only duly filled application form reached to the Commission within the prescribed time shall be accepted by the Commission and once the applicant has opted/chose to submit her application form through speed-post (speedier mode of registered post) which could not reach within stipulated time, consequent rejection of application form cannot be faulted with and the Commission cannot be blamed for the same. In justification of action taken by the Commission, Sri Qadeer has placed strong reliance upon several decisions of this Court rendered in ***Ram Autar Singh Vs. Public Service Commission. U.P., Allahabad and others 1987 U.P.L.B.E.C. 316, Anupam Vs. Public Service Commission, U.P. Allahabad and another*** in W.P. No.57508 of 2005 decided on 4.10.2005**,** ***Smt. Pooja Singh Vs. Public Service Commission, Allahabad and others in*** W.P. No.67808 of 2006 decided on 13.12.2006, ***Adil Khan Vs. State of U.P. and others*** in W.P. No.23152 of 2006 decided on 5.05.2006 and a decision of Hon'ble Apex Court rendered in ***Union of India Vs. Mohd. Nazim AIR 1980 SC 431***.

6. It is not in dispute that in the advertisement in question two alternative modes for submission of application form were provided to the candidates by the Commission; one through the registered post and another by hand. It implies that a desirous candidate for such selection were authorised by the Commission to submit their application form either through registered post or by hand to the office of the Commission within prescribed time. The petitioner has elected/opted/chose to send her application form through speed post on 17.2.2009 from Chitrakoot (U.P.), which is at a distance of about 110-120 Kms. from the Commission situated at Allahabad instead of submitting her application form by hand to the office of the Commission but her application form was returned back on account of fact that it was reached to the Commission on 21.2.2009 i.e. on next day after expiry of last date of receipt of application form. It was returned back not on account of fact that it was sent through any other and different mode of transmission, which was not authorised by the Commission but it was returned back on account of fact that it could reach the Commission after expiry of prescribed time. Virtually speed-post is speedier mode of transmission of such articles through registered post that is why no fault could be found by the Commission on that count.

7. Now the questions which arise for consideration before this Court are that as to whether in given facts and circumstances of the case, the post office is agent of the addressee (Commission) or sender and as to whether the petitioner can be made to suffer on account of default of the post office in delivering the application form of the petitioner to the Commission after last date of receipt of application form which was sent by the petitioner within prescribed time?

8. A Full Bench of this Court in **Bhikha Lal and others Vs. Munna Lal**

(supra) had come across with somewhat similar issue. The question for consideration of the Full Bench was that as to whether on facts and in the circumstances of the case the tenant could be said to have committed a default under Section 3 (1)(a) of the U.P. Temporary Control of Rent and Eviction Act in respect of payment of Rs.35/ which he had sent to the landlord by Money Order well within time but which had reached the landlord after expiry of 30 days?

9. After examining several decisions of courts in England and Supreme Court of India, Full Bench of this Court in paras 22 and 23 has observed as under:-

"22. From an analysis of these decisions two principles emerge: The first is that if the creditor and the debtor reside at two different places served by postal system, from the very fact that the creditor makes a demand through the post, an authority to the debtor to meet his obligation through the post is implied.....

23. Another principle that emerges from the two Supreme Court decisions cited above is that if the debtor and the creditor reside in two different places, served by post offices and payments have to be by cheques, then in the absence of anything in the contrary, an implied agreement can be culled out authorising the debtor to despatch the cheques through the post office which will be treated as the creditor's agent. This has come to be recognized as payment according to the course of business usage in general " This principle can be extended to the case of payments made through money orders. If the creditor and the debtor reside at two different places so that the debtor cannot reasonably be expected to make cash payments personally or through a messenger, then in the absence of a stipulation to the contrary it may be assumed that the debtor is impliedly authorised to pay his debt through money orders. In such cases deposit of the cash at a postal money order office will be treated as payment to an agent of the creditor made in accordance with " the ordinary usages of man-kind to borrow the words used by Lord Herschell in Henthorn v. Fraser."

10. Thereafter the reference was answered in para 27 of the decision as under:-

"27. My answer to the question referred to this Bench consequently is that, on the facts and in the circumstances of the case the tenant-respondent could not be said to have committed a default under Section 3 (1) (a) of Rs.35/- which he sent to the plaintiff-landlords by a money order well within time but which had reached the landlords after the expiry of thirty days."

11. Now coming to the decision of Hon'ble Apex Court rendered in ***Commissioner of Income Tax, Bombay Vs. M/s Ogale Glass Works Ltd. AIR 1954 SC 429***, upon which the reliance was placed by Full Bench of this Court in **Bhikha Lal's case (Supra).** The material facts of the case before the Supreme Court were that the assessee was a non-resident company incorporated and carrying on business in the former Aundh State outside British India. In the relevant accounting years the assessee secured some contracts for the supply of goods manufactured by it to the Government of India. Under Cl. 15 of the agreement payments for the delivery of the goods

were to be made on submission of the bills in the prescribed form, by cheques on a branch of the Reserve Bank or Imperial Bank of India transacting Government business. The assessee used to submit the bills in the prescribed form and on the form used to write "kindly remit the amount by cheque in our favour on any Bank in Bombay". All payments for the goods supplied were made by cheques drawn by the Government department at Delhi on the Reserve Bank of India at Bombay and posted from there to the assessee. The question before the Supreme Court was as to whether, on the facts and circumstances of the case the income profits or gains in respect of the sales made to the Government of India were received by the assessee at Delhi in British India within the meaning of Sec. 4(1) (a) of the Income Tax Act, 1922? The Supreme Court held on the facts before it that the posting of the cheque in Delhi in law amounted to payment to the assessee in Delhi. It was a case in which according to the Supreme Court there was an express request by the assessee to the Government of India to remit the cheques through the post office and consequently the post office became an agent of the assessee.

12. The pertinent observation made by Hon'ble Apex Court in paras 15 and 17 of the said decision are as under:-

"15. .....There can be no doubt that as between the sender and the addressee it is the request of the addressee that the cheque be sent by post that makes the post office the agent of the addressee.

After such request the addressee cannot be heard to say that the post office was not his agent and therefore, the loss of the cheque in transit must fall on the sender on the specious plea that the sender having the very limited right to reclaim the cheque under the Post Office Act, 1898, the Post Office was his agent, when in fact there was no such reclaimation. Of course if there be no such request, express or implied, then the delivery of the letter or the cheque to the post office is delivery to the agent of the sender himself.

Apart from this principle of agency there is another principle which makes the delivery of the cheque to the post office at the request of the addressee a delivery to him and that is that by posting the cheque in pursuance of the request of the creditor the debtor performs his obligation in the manner prescribed and sanctioned by the creditor and thereby discharges the contract by such performance (see Section 50 of the Indian Contract Act and illustration (d) thereto).

17. Applying the above principles to the facts found by the Tribunal the position appears to be this. The engagement of the Government was to make payment by cheques. The cheques were drawn in Delhi and received by the assessee in Aundh by post. According to the course of business usage in general to which, as part o the surrounding circumstances, attention has to be paid under the authorities cited above, the parties must have intended that the cheques should be sent by post which is the usual and normal agency for transmission of such articles and according to the Tribunal's findings they were in fact received by the assessee by post.

Apart from the implication of an agreement arising from such business usage the assessee expressly requested the Government to "remit" the amounts of the bills by cheques. This, on the

authorities cited above, clearly amounted in effect to an express request by the assessee to send the cheques by post. The Government did act according to such request and posted the cheques in Delhi. It can scarcely be suggested with any semblance of reasonable plausibility that cheques drawn in Delhi and actually received by post in Aundh would in the normal course of business be posted in some place outside British India.

This posting in Delhi, in law, amounted to payment in Delhi. In this view of the matter the referred question should, with respect, have been answered by the High Court in the affirmative."

13. The view taken in the aforesaid case has been reiterated by Hon'ble Apex Court in subsequent decisions rendered in ***Sri Jagdish Mills Ltd. by its successor Sri Ambica Mills Ltd. Vs. the Commissioner of Income Tax, Bombay North, Kutch and Saurashtra AIR 1959 SC 1160, Indore Malwa United Mills Ltd. Vs. The Commissioner of Income Tax (Central) Bombay AIR 1966 SC 1466***. However in ***Commissioner of Income Tax, Bihar and Orissa Vs. M/s Patney and Company AIR 1959 SC 1070*** the Hon'ble Apex Court had held that in facts of the aforesaid case the principle of ***M/s. Ogale Glass Works'*** case can not be made applicable.

14. In ***Sri Jagdish Mills Ltd. by its successor Sri Ambica Mills Ltd. Vs. the Commissioner of Income Tax, Bombay North, Kutch and Saurashtra Ahmadabad AIR 1959 SC 1160*** the assessee at Baroda entered into an agreement with the Government of India in 1942 to supply goods manufactured by the assessee. In pursuant to the said agreement the orders were accepted by the assessee at Baroda and delivered the goods manufactured by it to the Government of India. **The payment for goods supplied by the assessee to the Government was to be made by cheques but there was no request either express or implied emanating from the assessee for the dispatch of these cheques by post. The question which arose for consideration before Hon'ble Apex Court was that where no such express words were used and the matter rested merely in the stipulation that the payment would be made by cheques, would the mere posting of cheques in Delhi be enough to constitute the post office the agent of the appellant so that the income, profits and gains may be said to have been received by the appellant within a taxable territories?**

15. By placing reliance upon earlier decision rendered by Hon'ble Apex Court in Commissioner of Income Tax Vs. M/s Ogale Glass Works Ltd. Hon'ble Apex Court has held that **according to the course of business usage in general which appears to have been followed in this case, the parties must have intended that the cheques should be sent by post which is the usual and normal agency for transmission of such articles.** The pertinent observation made by Hon'ble Apex Court in para 18 of the decision are extracted as under:-

"18. The stipulation in the contract between the appellant and the Government was that the payment would be made by cheques. The Government of India was located in Delhi and the cheques would be necessarily drawn by it from Delhi. Could it be imagined that in the normal course of affairs the cheques

thus drawn in Delhi would be sent by a messenger in Baroda so that they may be delivered to the appellant in Baroda? Or that the officer concerned would come to Baroda himself and hand the same over to the appellant in Baroda? The only reasonable and proper way of dealing with the situation was that the payment would be made by cheques which the Government would send to the appellant at Baroda by post. ***According to the course of business usage in general which appears to have been followed in this case, the parties must have intended that the cheques should be sent by post which is the usual and normal agency for transmission of such particles. If that were so, there was imported by necessary implication an implied request by the appellant to send the cheques by post from Delhi thus constituting the Post Office its agent for the purposes of receiving those payments****."*

16. In ***Indore Malwa United Mills Ltd. Vs. The Commissioner of Income Tax (Central) Bombay AIR 1966 SC 1466*** similar question as to whether the post office was agent of assessee to receive the cheques representing the sale proceeds and whether the assessee received the sale proceeds in British India where the cheques were posted were again under consideration before Hon'ble Apex Court. By placing reliance upon the abovenoted decisions, the Hon'ble Apex Court in para 8 and 10 of the decision has held as under:-

"8. The next question is whether the post office was the agent of the assessee to receive the cheques representing the sale proceeds and whether the assessee received the sale proceeds in British India where the cheques were posted. Now, if by an agreement, express or implied, between the creditor and the debtor or by a request, express or implied, by the creditor, the debtor is authorised to pay the debt by a cheque and to send the cheque to the creditor by post, the post office is the agent of the creditor to receive the cheque and the creditor receives payment as soon as the cheque is posted to him. See (1955) 1 SCR 185: (AIR 1954 SC 429), Jagdish Mills Ltd. v. Commr. of Income-tax, (1960) 1 SCR 236: (AIR 1959 SC 1160), approving Norman v. Ricketts, (1886) 3 TLR 182, Thairlwall v. Great Northern Rly. Co. (1910) 2 KB 509. In Messrs. Ogale Glass Works' case, 1955-1 SCR 185: (AIR 1954 SC 429), there was an express request by the assessee at Aundh to its debtor in Delhi to remit the amount of the bills by cheques. In Jagdish Mills' case, (1960) 1 SCR 236: (AIR 1959 SC 1160), there was a stipulation between the assessee and its debtor that the debtor in Delhi should pay the assessee in Baroda the amount due to the assessee by cheques, and this Court held that there was by necessary implication a request by the assessee to the debtor to send the cheques by post from Delhi, thus constituting the post office its agent for the purpose of receiving the payments. In the instant case, Cl. 9 of the terms and conditions of the contract read with the prescribed form of the bills and the instructions regarding payment show that the parties had agreed that the assessee would submit to the Government of India, Department of Supply, New Delhi, bills in the prescribed form requesting payment of the price of the supplies by cheques together with signed receipts and the Government of India would pay the price by crossed cheques drawn in favour of the assessee. Having regard to the fact that the

assessee was at Indore and the Supply Department of the Government of India was at New Delhi, the parties must have intended that the Government would send the cheques to the assessee by post from New Delhi, and this inference is supported by the fact that the cheques used to be sent to the assessee by post. In the circumstances, there was an implied agreement between the parties that the Government of India would send the cheques to the assessee by post.

10. Mr. Pathak contended that the assessee and the Government of India had agreed that the sale proceeds would be paid to the assessee in Indore outside British India, and, therefore, the rule in M/s. Ogale Glass Works' case, (1955) 1 SCR 185: (AIR 1954 SC 429), did not apply, having regard to the decision ***in Commr. of Income-tax v. Patney and Co.,*** *(1959) 36 ITR 488: (AIR 1959 SC 1070). We are not inclined to accept this contention. There is nothing on the record to show that there was any express agreement between the parties that the sale proceeds would be paid to the assessee at Indore. We are satisfied that the post office was the agent of the assessee for the purpose of receiving the cheques representing the sale proceeds and the assessee received the sale proceeds in British India where the cheques were posted, and consequently, the profits in respect of the sales were taxable under S. 4 (1) (a). The High Court, therefore, rightly answered the question in the affirmative."*

17. However, in ***Commissioner of Income Tax, Bihar and Orissa Vs. M/s Patney and Company AIR 1959 SC 1070***, in the year of assessment 1945-46 the amount of commission paid to the assessee by cheques were drawn respectively on banks at Madras and Bombay respectively posted from Madura and Bombay. All the cheques whether from Madura or Bombay were sent by two respective firms from Madura or Bombay and were received by the assessee (creditor) at Secunderabad and were treated as payment. In this case there was an express agreement that payment was to be made at Secunderabad. In such circumstances it was held by Hon'ble Apex Court that the income of assessee was not received in British India. The pertinent observation made by Hon'ble Apex Court in paras 4 and 5 of the decision are extracted as under:-

"4. .....In the case of payment by cheques sent by post the determination of the place of payment would depend upon the agreement between the parties or the course of conduct of the parties. If it is shown that the creditor authorised the debtor either expressly or impliedly to send a cheque by post the property in the cheque passes to the creditor as soon as it is posted. Therefore the post office is an agent of the person to whom the cheque is posted if there be an express or implied authority to send it by post. 1955-1 SCR 185: (AIR 1954 SC 429) (supra). In that case there was an express request of the asseesee to remit the amount of the bills outstanding against the debtor, that is, Government of India by means of cheques. But it was observed by this Court that according to the course of business usage in general which has to be considered as a part of the surrounding circumstances the parties must have intended that the cheques should be sent by post which is the usual and normal mode of transmission and therefore the posting of cheques in Delhi amounted to

payment in Delhi to the post office which was constituted the agent of the assessee. But it was argued for the respondents that in the absence of such a request the post office could not be constituted as the agent of the creditor and relied on a passage in Ogale's Case, 1955-1 SCR 185 at p. 204: (AIR 1954 SC 429 at p. 436), where it was observed :

"Of course if there be no such request, express or implied, then the delivery of the letter or the cheque to the post office is delivery to the agent of the sender himself".

It was further contended that in this case there was an express agreement that the payment was to be made at Secunderabad and therefore the matter does not fall within the rule in Ogale Glass Works' case, 1955-1 SCR 185: (AIR 1954 SC 429) (supra) and the following principle laid down in judgment by Das J. (as. he then was) is inapplicable:

"Applying the above principles to the facts found by the Tribunal the position appears to be this. The engagement of the Government was to make payment by chques. The cheques were drawn in Delhi received by the assessee in Aundh by post. According to the course of business usage to which, as part of the surrounding circumstances, attention has to be paid under the authorities cited above, the parties must have intended that the cheques should be sent by post which is the usual and normal agency for transmission of such articles and according to the Tribunal's finding they were in fact received by the assessee by post."

5. In our opinion this contention is well-founded. Whatever may be the position when there is an express or implied request for the cheque for the amount being sent by post or when it can be inferred from the course of conduct of the parties, the appellant in this case expressly required the amount of the commission to be paid at Secunderabad and the rule of Ogale Works' Case, 1955-1 SCR 185: (AIR 1954 SC 429), would be inapplicable."

18. Now, before analysing the aforesaid decisions, it would be useful to look into law relating to the doctrine of precedent. In ***Dalbir Singh and others Vs. State of Punjab, AIR 1979 S.C. 1384,*** it was held that the only thing which is binding in a decision, is principle upon which the case is decided. And for this reason, it is important to analyse a decision and isolate from it the ratio decidendi. The pertinent observations made in this regard in para 22 of the decision are as under:-

"22. ..... According to the well-settled theory of precedents every decision contains three basic ingredients:

(i) findings of material facts, direct and inferential. An inferential finding of facts is the inference which the Judge draws from the direct, or perceptible facts;

(ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and

(iii) judgment based on the combined effect of (i) and (ii) above.

For the purposes of the parties themselves and their privies, ingredient No. (iii) is the material element is the decision for it determines finally their rights and liabilities in relation to the subject-matter of the action. It is the judgment that estops the parties from reopening the dispute. However, for the purposes of the doctrine of precedents, ingredient No. (ii) is the vital element in

the decision. This indeed is the ratio decidendi. It is not every thing said by a Judge when giving judgment that constitutes a precedent. ***The only thing in a Judge's decision binding a party is the Principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. In the leading case of Qualcast (Wolverhampton) Ltd. v. Haynes 1959 AC 743 it was laid down that the ratio decidendi may be defined as a statement of law applied to the legal problems raised by the facts as found, upon which the decision is based.*** *The other two elements in the decision are not precedents. The judgment is not binding (except directly on the parties themselves), nor are the findings of facts. This means that even where the direct facts on an earlier case appear to be identical to those of the case before the Court, the Judge is not bound to draw the same inference as drawn in the earlier case."*

19. In **State of Orissa Vs. Sudhansu Shekhar Misra, AIR 1968 SC 647** Hon'ble Apex Court in para 13 of the decision has held that what is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made. Para 13 of the decision is as under:

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

20. In **Ambica Quarry Works Vs. State of Gujarat and others, (1987) 1 SCC 213** (vide para 18), Hon'ble Apex Court observed:

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

21. In **Bhavnagar University Vs. Palitana Sugar Mills Pvt. Ltd., (2003) 2 SCC 111** (vide para 59), Hon'ble Apex Court observed:

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

22. How can ratio decidendi be ascertained from a decision has been very clearly dealt with in **Krishna Kumar Vs. Union of India, AIR 1990 SC1782.** The observations made by Hon'ble Apex Court in para 18 and 19 of the decision are as under:-

"18. The doctrine of precedent, that is being bound by a previous decision, is limited to the decision itself and as to what is necessarily involved in it. It does not mean that this Court is bound by the various reasons given in support of it, especially when they contain "propositions wider than the case itself required." This was what Lord Selborne said in Caledonian Railway Co. v. Walker's Trustees (1882 (7) AC 259) and Lord Halsbury in Quinn v. Leathem (1901) AC495 (502). Sir Frederick Pollock has also said: "Judicial authority belongs not to the exact words used in this or that judgment, nor even to all the reasons given, but only to the principles

accepted and applied as necessary grounds of the decision.

19. In other words, ***the enunciation of the reason or principle upon which a question before a Court has been decided is alone as a precedent. The ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision. The ratio decidendi has to be ascertained by an analysis of the facts of the case and the process of reasoning involving the major premise consisting of a pre-existing rule of law, either statutory or judge - made, and a minor premise consisting of the material facts of the case under immediate consideration****. If it is not clear, it is not the duty of the Court to spell it out with difficulty in order to be bound by it. In the words of Halsbury, 4th Edn., Vol. 26, para 573:*

"The concrete decision alone is binding between the parties to it but it is the abstract ratio decidendi, as ascertained on a consideration of the judgment in relation to the subject-matter of the decision, which alone has the force of law and which when it is clear it is not part of a tribunal's duty to spell out with difficulty a ratio decidendi in order to be bound by it, and it is always dangerous to take one or two observations out of a long judgement and treat them as if they gave the ratio decidendi of the case. If more reason than one are given by a tribunal for its judgment, all are taken as forming the ratio decidendi."

23. A decision given per-incuriam has no binding force. When a decision can be said to be given "per incuriam" has been dealt with by seven Judges Constitution Bench of Hon'ble Apex Court in **A.R. Antuley Vs. R.S. Nayak and another, AIR 1988 SC 1531,** in para 44 of the decision Hon'ble Apex Court held as under:-

"44. It appears that when this Court gave the aforesaid directions on 16th February, 1984, for the disposal of the case against the appellant by the High Court, the directions were given oblivious of the relevant provisions of law and the decision in Anwar Ali Sarkar's case (AIR 1952 SC 75) (supra). {See Halsbury's Laws of England, 4th Edn. Vol. 26 page 297, para 578 and page 300}, the relevant notes 8, 11 and 15: Dias on Jurisprudence , 5th Edn. Pages 128 and 130: Young Vs. Bristol Aeroplane Co. Ltd., (1944) 2 All ER 203 at P. 300). Also see the observations of Lord Goddard in Moore Vs. Hewitt, (1947) 2 All ER 270 at p. 272-A and Penny Vs. Nicholas, (1950) 2 All ER 89, 92A "Per incuriam" are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account to be demonstrably wrong. {See Morelle Vs. Wakeling, (1955) 1 All ER 708, 718F}. Also see State of Orissa Vs. Titaghur Paper Mills Co. Ltd., (1985) 3 SCR 26: (AIr 1985 SC 1293). We are of the opinion that in view of the clear provisions of Section 7(2) of the Criminal Law Amendment Act, 1952 and Articles 14 and 21 of the Constitution, these directions were legally wrong."

24. In **Municipal Corporation Delhi Vs. Gurman Kaur, AIR 1989 SC 38,** Hon'ble Apex Court has held that a decision should be treated as given per incuriam, when it is given in ignorance in terms of a statute or a rule having force of a statute. In **Punjab Land Development and Reclamation Corporation Ltd. Vs. Presiding Officer, Labour Court, (1990) 3 S.C.C. 682**, Hon'ble Apex Court has held that a decision be said generally to be given per incuriam, when court has acted in ignorance of a previous decision of its own or when High Court has acted in ignorance of a decision of Supreme Court. In **Arnit Das Vs. State of Bihar, JT 2000 (6) SC 320**, Hon'ble Apex Court held that a decision not expressed, not accompanied by reasons and not proceeding on conscious consideration of an issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. That which has escaped in the judgment is not ratio decidendi. This is the Rule of sub-silentio in the technical sense, when a particular point of law was not consciously determined (See State of U.P. Vs. Synthetics and Chemicals Ltd., JT 1991 (3) SC 268 : 1991 (4) SCC 138 Para 41}.

25. From a careful reading and close analysis of the aforesaid decisions of Hon'ble Apex Court, it is clear that in **M/s Ogale Glass Works' case** (AIR 1954 SC 429) there was an express request by assessee at Aundh to its debtor in Delhi to remit/send the amount of bills by cheque. In **Jagdish Mills case** (AIR 1959 SC 1160) there was a stipulation between assessee and its debtor that the debtor in Delhi should pay the assessee at Baroda the amount due to the assessee by cheques and Hon'ble Apex Court has held that there was by necessary implication a request by the assessee to the debtor to send the cheques by post from Delhi, thus, constituting the post office its agent for the purpose of receiving the payments. In **Indore Malwa United Mills Ltd. case (Supra)** Hon'ble Apex Court has held that the terms and conditions of contract read with prescribed form of the bills and instructions regarding payment show that the parties had agreed that assessee would submit to the Government of India, Department of Supply, New Delhi, bills in prescribed form requesting payment of price by cheques and the Government of India would pay the price by crossed cheques drawn in favour of assessee. Having regard to the fact that the assessee was at Indore and supply department of Government of India was at New Delhi the parties must have intended that Government would send the cheques to assessee by post from New Delhi and this inference is supported by the fact that cheques used to be sent to assessee by post. In circumstances there was an implied agreement between the parties that the Government of India would send the cheques to the assessee by post. In this case Hon'ble Apex Court has further held that there is nothing on record to show that there was an express agreement between the parties that the sale proceeds would be paid to the assessee at Indore. In this view of the matter, the Hon'ble Apex Court has held that the post office was the agent of assessee for the purpose of receiving the cheques representing the sale proceeds and the assessee received sale proceeds in British India where cheques were posted and consequently the profits in

respect of sale were taxable under Section 4 (1) (a) of the Income Tax Act. However in Commissioner of Income Tax, Bihar and Orissa Vs. M/s Patney and Company (supra) there was an express agreement between the Government and respondent-company that the payment was to be made at Secunderabad through cheques by post, therefore, Hon'ble Apex Court has held that the matter does not fall within the rule in Ogale Glass Works case and law laid down therein would not be applicable in this case.

26. Thus, from the aforesaid legal position enunciated by the Apex Court, it is clear that where by an agreement express or implied between the creditor and debtor or by a request express or implied by the creditor the debtor is authorised to pay the debt by cheque and to send the cheque to the creditor by post, the post office would be the agent of creditor to receive the cheque and the creditor would receive payment as soon as the cheque is posted to him at a place from where the cheque is posted. Extending the aforesaid proposition of law laid down by Hon'ble Apex Court, in **Bhikha Lal's case** (Supra) a Full Bench of this Court has held that on facts and circumstances of the case, the defendant had an implied authority from the plaintiff to pay the amount to them by means of money order and as soon as the defendant handed over the amount to the post office to be remitted by money order, he was discharged of his obligation in that respect. The defendant had no control over the post office and if there was any delay caused in transit, the defendant cannot be held responsible for it (Para 25). Accordingly, the reference was answered in the terms that the tenant-respondent could not be said to have committed a default under Section 3 (1) (a) of U.P. Temporary Control of Rent and Eviction Act in respect of payment of Rs.35/- which he had sent to landlord by money order well within time but which had reached the landlord after expiry of 30 days.

27. In view of aforesaid discussion, there can be no scope for doubt to hold that vide advertisement in question the Commission has provided two alternative modes to the candidates for submission of application forms to the Commission, thus the Commission has expressly authorised the candidates to send their application forms either through registered post or by hand within prescribed time to the office of the Commission. Therefore, once the desirous candidates have send their application forms to the Commission through registered post within time prescribed by the Commission, in view of law laid down by Hon'ble Apex Court in **M/s Ogale Glass Works case (supra), Jagdish Mills case (supra), Indore Malwa United Mills case (supra)** and **Full Bench of this Court in Bhikha Lal's case (supra), the post office would become an agent of the Commission (addressee) to receive application forms of the candidates (senders)** and the Commission would receive the application form as soon as the applications are posted by the candidates at a place from where the application forms are posted to the Commission and at the time when they are posted and since the candidates have no control over the post office, therefore, any delay caused in the transit by the post office working as agent of

the addressee (Commission), the candidates cannot be held to be responsible for it and as such they cannot be made to suffer on a default of post office. It implies that if the candidates have posted their application form through registered post prior to the last date of receipt of the application form so that it could reasonably reach to the commission within prescribed time, the candidates can not be made to suffer on account of delayed delivery of their application forms by the post office to the commission. It is immaterial that in the said advertisement the Commission has also provided another alternative mode of transmission/submission of application form to the candidates by hand to the office of the Commission for the simple reason that once a candidate opts or elects to send his application form through registered post, simultaneously he is not expected to submit it by hand also to the office of the Commission and if a candidate would have submitted his application form by hand, there would have been no need for sending through registered post. Two alternative modes provided to the candidates in the advertisement for submitting the application form to the Commission does not mean that the candidates are expected to adopt both the modes for submitting their application form simultaneously to the Commission, instead thereof, in my considered opinion, they are expected to exercise their option in sending the application form by electing one of the either modes of submission of application form to the Commission.

28. Now coming to the cases cited by the counsel for the Commission, the first case upon which reliance was placed was ***Ram Autar Singh Vs. Public Service Commission (supra)*** decided by Division Bench of this Court. The facts of the aforesaid case were that the Commission had advertised the vacancies of Munsif, the closing date for receipt of the application in the office of the Commission was 14.7.1986. The advertisement inter alia provided that the application received after that date will not be entertained. The advertisement further provided that applications complete in all respect must reach the Secretary, Public Service Commission, U.P. Allahabad on or before 14th July, 1986. No application received after this date will be accepted. Incomplete application and applications not on prescribed form even if received within time may be summarily rejected. The petitioner, who was an advocate, dispatched his application form by registered post from Bijnor on 4.7.1986 to the Secretary of the Commission at Allahabad. The petitioner's application form was received beyond the closing date on 30.7.1986. He received the form back from the Commission's office with the remark that the application had not been accepted as it was received beyond the closing date. According to the petitioner as he had dispatched the application form ten days before the closing date, the Commission was obliged to accept it. The petitioner has also submitted that the postal authorities being the agent of respondent no.1 he should not be made to suffer on account of negligence of postal authorities. In support of his submission the reliance was placed on a Full Bench decision of this Court rendered in **Bhika Lal's case (supra).**

29. However, while rejecting the contention of petitioner this Court has dismissed the writ petition on the following reasons given in para 7 and 8 of the decision:-

"7. On careful consideration, we are of the opinion, that the principles enunciated in respect of landlord and tenant in the aforesaid Full Bench decision do not have any application to the facts of the present case. In our view the facts and circumstances of the present case do not warrant application of the law of contract. We have already stated that in the present case the Commission had clearly notified that the closing date for receipt of application completed in all respects was 14.7.1986 and that applications received beyond that date were not to be accepted. Therefore, even if we were to hold that the advertisement was to be construed as an offer, as the term is understood in the law of contract, the said offer was clearly notified to lapse owing to the passing of time. Acceptance cannot be said to have been completed on mere despatch. It would have been completed only if it had reached the offer or before the offer had lapsed on expiry of the time prescribed.

8. Learned counsel appearing for the Commission has filed the photostat copy of the judgment of this Court in Writ Petition No. 11224 of 1981, wherein the very same points urged in this case had been advanced before the Court. The question as to the agency of the postal authorities and the legal implications following receipt of an application after expiry of the closing date have been discussed in great detail. The Court finally held that an application received by the Commission after expiry of the closing date was liable to be rejected. With great respect, we agree with the principles enunciated in the said decision which have full application to the facts of this case."

30. In **Ram Autar Singh's case**, it is to be noted that from the advertisement as disclosed in the judgement, there is nothing to indicate as to whether commission had authorized the candidates to send their application form to the commission through registered post or not. It appears that no particular mode of submission of application form was provided, instead thereof It was clearly stipulated therein that applications received beyond the closing date will not be accepted. Therefore, on the facts and circumstances of the aforesaid case, it appears that this Court has taken aforesaid view in the matter, thus the case in hand can be distinguished on facts. However, in the aforesaid decision, nothing has been disclosed as to why the principle of law enunciated by the Full Bench in **Bhikha Lal's case**, which was based on decisions of Supreme Court as referred therein has no application. In my opinion, Division Bench of this Court was bound by the decision of Full Bench of this Court rendered in **Bhikha Lal's case** and decisions of Hon'ble Apex Court referred therein, as indicated herein before. With due respect to the Division Bench in Ram Autar Singh's case, I am of the considered opinion that this Court did not decide the issue as to whether post office is agent of the sender or addressee, consciously after analysing the aforesaid decisions of Supreme Court and Full Bench of this Court. Therefore, it require re-consideration by a larger Bench of this Court.

31. The next decision upon which reliance was placed by learned counsel appearing for the Commission was rendered by Division Bench of this Court in **Smt. Pooja Singh Vs. Public Service Commission, Allahabad Civil Misc. Writ Petition No.67808 of 2006 decided on 13.12.2006**. The facts of the aforesaid case were that an advertisement was issued on 7th October, 2006 by U.P. Public Service Commission inviting applications for the post of U.P. Judicial Service/Civil Judge (Junior Division) and it required that the application form should be received by the Commission before 5.00 p.m. till 3rd November, 2006 by registered post or by hand. It was further provided that after the last date applications shall not be received at any cost. The application through fax shall not be accepted. The petitioner of the aforesaid case claimed that she had sent the application to the Commission by courier service to respondent no.2 and when its agent approached the Commission on 1st November, 2006 to deliver the said application form, the clerk sitting thereon in the office of the Commission refused to accept the same on the ground that it could only be received either by hand or by registered post and no other mode was permissible. The petitioner on not receiving the said application form on 1.11.2006 has filed aforesaid writ petition. A Division Bench of this Court while dismissing the writ petition in concluding part of its judgement held as under:-

"So far as the merit of the case is concerned, admittedly the mode for submitting the application form had been either by the Registered Post or by hand. In such cases, application is to be submitted only by the modes prescribed by the Department/Commission/Authority to receive the same, and the applicant cannot choose any other mode. If he does so he does it at his own risk and exposes himself to the peril of rejection of the application form. In case the application is sent by any mode other than prescribed by the Commission, there is no obligation on its part to receive the same. In case the other modes are enforced, then some applicant may send the application form by E Mail, another by Fax, and there will be no sanctity of the system."

32. In ***Smt. Pooja Singh's case*** (supra) the application form of the candidate was rejected not because of the reason that it was received after closing date but because of the reason that it was not submitted to the Commission according to the prescribed mode instead thereof it was sent through different mode i.e. through courier service, therefore, the facts of the aforesaid case is quite distinguishable from the facts of the instant case.

33. Another decision upon which learned counsel for the Commission has placed reliance was **Anupam Vs. Public Service Commission, U.P. Allahabad and another**, in Civil Misc. Writ Petition No.57508 of 2005 decided by a Division Bench of this Court on 4.10.2005. In the aforesaid case as quoted in the judgement, the advertisement provided that the application complete in all respect must reach the Secretary, Public Service Commission, U.P. Allahabad at the Commission's office either **by registered post or by hand upto 5.00 p.m. On or before 22nd July 2005**. Admittedly the petitioner of the aforesaid case had sent his application form through registered post on 14th July but the Commission

refused to accept the same due to the reason that it was reached to the office on 28th July, 2005 after expiry of last date. The question for consideration before Division Bench was that as to whether the post office is an agent of the Public Service Commission, and if application not received within time prescribed in the advertisement, the responsibility lies with the Commission?

34. This Court in Anupam's case has noticed the decision of Hon'ble Apex Court rendered in ***Union of India Vs. Mohd. Nazim*** AIR 1980 SC 431 and another decision rendered in Civil Appeal No.1619 of 2005 **Unit Trust of India Vs. Ravinder Kumar Shukla, J.T. 2005 (12) S.C. 345 etc**. decided on 19th September, 2005 and after referring two other decisions of Supreme Court rendered in **Indore Malwa Mills case** (AIR 1966 SC 1466) and **M/s Ogale Glass Works Ltd. case** (AIR 1954 SC 429) indicated herein before has finally concluded as under:-

"Therefore, what we get from the above analysis? We get the answer that either in the law or in the contract or in the advertisement or in the necessary document if mode is prescribed, such mode will be the guiding principle in determining the issue as regards service. If the mode is one, one has no other alternative but to follow the same. If the modes is more than one then the alternative mode can be exercised. If one chooses to apply adopting one mode and failed to exercise other mode, the responsibility lies with the sender not with the addressee because the post office is the agent only in respect of one mode. *In the instant case, fault might have been committed by the post office be it agent of either of the parties or be it a public service mechanism. But so far as the Commission is concerned, it is not at fault whenever more than one mode is prescribed in the advertisement. Frankly speaking we are very much sympathetic to the candidate, who lost the opportunity of making application, but we are sorry to say that we cannot render any equitable justice in favour of the petitioner against the Commission in such circumstances.*

Hence, the writ petition stands dismissed."

35. In **Anupam's case**, this Court has also noticed the decision of a Division Bench of this Court in **Shashi Bhushan Kumar Vs. U.P. Higher Education Service Commission and another reported in 2000 (4) E.S.C. 2483** (Allahabad) wherein this Court has distinguished the case of **Ram Autar Singh (supra)** and directed the Higher Education Service Commission to entertain the application which was dispatched by the candidate through registered post within time but had reached to Higher Education Commission after expiry of closing date. But the Division Bench in Anupam's case has distinguished the aforesaid case by holding that in Shashi Bhushan Kumar's case only one mode for submission of application form through registered post was prescribed, therefore, the candidates have had no other option to submit their application forms, as such, no default can be found in the view taken by Division Bench in the aforesaid case. It was further held that the position would be different where options are more, and in such eventuality the post office would not be an agent of the addressee. It would an agent of sender where other option is open to the candidates to submit their application form, and if they opt or

choose to send it through post office, in that event, the post office would be an agent of senders and not of addressee.

36. Another case upon which the reliance was placed by learned counsel for respondent was **Union of India Vs. Mohd. Nazim, AIR 1980 S.C. 431**. The Division Bench of this Court in **Anupam's case (supra)** has also referred the aforesaid case. The facts leading to the aforesaid case were that respondent of the aforesaid case had instituted a suit for recovery of a sum of Rs. 1606-8-0 from Union of India (Postal and Telegraph Department) alleging that during the period from August31, 1949 to September 17, 1949 the plaintiff dispatched from the Moradabad City Post Office thirty value-payable parcels to addressees in Lahore and Rawalpindi in Pakistan, and they received the articles and p;aid the entire amount payable, but the defendant Union of India failed to pay the sum to the plaintiff. The Union of India in their written statement admitted that the aforesaid articles were dispatched by the plaintiff as claimed and that their value was recovered in Pakistan, but the Union of India did not receive the sum from the Pakistan Government as the money order service between India and Pakistan remained suspended from September 19, 1949, and this was the reason why the sum could not be paid to the plaintiff. Reference was made to Section 34 of the Indian Post Office Act, 1898 and it was claimed that said provision absolved the Union of India from liability. In wake of aforesaid facts, the questions for consideration before Apex Court were that **does the Post Office when it accepts a postal article for transmission act as an agent of the sender of the article? And where the postal article is sent from India to an addressee in foreign country, does the Government of that country act as a sub-agent for transmission of the article?**

37. Although in para 8 of the said decision while interpreting certain provisions of Indian Post Office Act, the Apex Court observed that the post office is not a common carrier, it is not an agent of the sender of the postal article for reaching it to the addressee. It is really a branch of the public service, providing postal services subject to the provisions of Indian Post Office Act and Rules made thereunder, but in para 10 of the said judgment it was further observed that **"it is, however, not necessary to examine the circumstances and the sense in which the Post Office or the Railway, in the two aforesaid decisions was held to be an agent or a bailee, because the case before us can be disposed of on a short point."** Thereafter, it was observed that admittedly the Government of Pakistan did not make over the money realised from the addressees in Pakistan to the Union of India. The provisions of Indian Post Office Act did not apply beyond the territorial limits of India except to citizens of India outside India. Postal communication between different countries is established by postal treaties concluded among them. In para 11 of the said decision it was further observed that when two sovereign powers enter into an agreement as above, neither of them can be described as an agent of the other. And that if the Pakistan Administration decided to suspend the V.P. service temporarily and did not make over the money realised from the addressees, it cannot be said that Union of India had received the money but failed to pay. Had the Pakistan Government been really a

sub-agent, payment to them would have been as good as payment to the Union of India, but that is not the case here. Under the arrangement entered into between the two sovereign powers, Union of India and Pakistan, neither could be said to be employed by or acting under the control of the other. That being so, the proviso to Section 34 of the Indian Post Office Act is attracted which absolves the Central Government from any liability in respect of the sum specified for recovery unless and until that sum has been received from the addressee.

38. Thus from careful reading and close analysing of the aforesaid decision of Hon'ble Apex Court, it is clear that the questions formulated were not answered by the Hon'ble Apex Court for the simple reason that case before the Supreme Court could be decided on another point, therefore, with due respect to the Division Bench of this Court in **Anupam's case (supra)** the reliance could not be placed upon the aforesaid decision of Supreme Court for taking the view as taken by Division Bench of this Court.

39. Now coming to another decision of Hon'ble Apex Court rendered in **Unit Trust of India Vs. Ravinder Kumar Shukla, etc. etc.** in Civil Appeal No. 1619 of 2005 connected with other cases decided on 19.9.2005 reported in JT 2005 (12) SC 345 upon which Division Bench of this Court in Anumpam's case has placed reliance. The facts leading to the aforesaid case were that under various schemes from time to time, the appellant issue cheques towards maturity amount of the units purchased and/or towards repurchase value. It appears that the appellant normally draw account payee, non-transferable and not negotiable cheques and send them to the payee by registered post. The appellant started receiving a large number of complaints from unit holders alleging non-receipt of the cheques. In all 1600 unit holders had not received cheques of the value of approximately Rs. 3 crores 35 lacs. All these cheques were intercepted, new accounts opened in banks/post offices in the names of payees of the cheques and thereafter the monies were withdrawn leaving a minimum balance in the accounts. In respect of this colossal fraud, FIRs have been lodged, investigations and prosecution were started. As the unit holders had not received the money, they filed complaints in various District Forums. The District Forums have held that the appellants are bound to pay the amounts to the unit holders. Most of the appeals and/or revision petitions have been dismissed. Against the dismissal of the appeals/revisions by the National Consumer Disputes Redressal Commission, the aforesaid appeals were filed before Hon'ble Apex Court.

40. The question for consideration before Hon'ble Apex Court was whether the loss is to be borne by the unit holder payee and/or by the appellant? It was held that the answer to the aforesaid question is depend on the fact whether the post office was acting as an agent of the unit holder and/or the appellant? After referring the decision of **M/s Ogale Glass Works Ltd. (supra). In H.P. Gupta Vs. Hiralal, (1970) 1 SCC 437** and by placing reliance upon M/s Ogale Glass Works case in para 4 of the decision it was observed that as the assessee had requested that the amounts be sent by post, the post-office became

agent of the assessee and in para 6 of the decision it was held that **in cases where there is no contract or request, either express or implied, the post office would continue to act as the agent of the drawer i.e. sender of the cheques.**

41. From a careful reading and close analysis of decision in **Unit Trust Vs. Ravinder Kumar Shukla (supra),** it is clear that Hon'ble Apex Court has not detracted from the view earlier taken in **M/s. Ogale Glass Works Ltd. case (supra)** wherein it was held that as between the sender and addressee **it is request of addressee that the cheque be sent by post, that makes the post-office the agent of the addressee. In my considered opinion, the view taken in the aforesaid case has been reiterated by Hon'ble Apex Court in Ravinder Kumar Shukla's case with further clarification to the effect that in cases where there is no contract or request, either express or implied by the addressee/payee/creditor authorising the sender or debtor to send the cheque by post the post office would continue to act as an agent of the drawer/sender/debtor and not of payee/addressee**, therefore, in my opinion, the facts of the instant case clearly fits in the facts of **M/s Ogale Glass Works case** and are distinguishable from the facts of **Unit Trust Vs. Ravinder Kumar Shukla's case**. Here in instant case, the **Commission/addressee has expressly authorized the candidates to send their application form through registered post, which makes the post office an agent of addressee(Commission).** With profound respect to the Divisions Bench of this Court in **Anupam's case (supra)** no such principle or proposition of law could be derived as derived by this Court from the aforesaid decision of Supreme Court, as it is well settled **that a decision is only an authority for what it actually decides and not what logically follows from it**. Therefore, in my opinion, merely because of another alternative mode for submission of application form was also provided to the candidates to submit their application forms to the Commission by hand, does not mean that commission or addressee has not expressly or impliedly authorised the candidates to submit their application form through registered post as a result of which the post-office could become agent of senders or candidates instead of addressee/commission.

42. Next case upon which reliance was placed by learned counsel for respondent was **Adil Khan Vs. State of U.P. and 2 others,** in **Writ Petition No. 23152** of 2006 decided on 5.5.2006. The facts of the aforesaid case were that vide office order dated 14.2.2006 issued by the Commission, the last date for submission of application forms was notified as 10.3.2006 till 5 P.M. in the office of U.P. Public Service Commission, Allahabad. Two alternative modes for submission of forms were prescribed, either by registered post or by hand. Admittedly, the petitioner got the aforesaid form collected through one of his friend on 2.3.2006 and sent duly filled form by Speed Post on 8.3.2006 from Delhi. It is said that Commission sent back his application form with remark that it could not be entertained having received in the office of Commission beyond the

prescribed time i.e. 10.3.2006. In this case, this Court has placed reliance upon **Ram Autar Singh's case (supra)** and recent decision of another Division Bench rendered in **Anupam's case (supra).** The decision rendered by earlier Division Bench in **Shashi Bhushan Kumar's case** has been distinguished on facts as indicated earlier and the decision rendered by another Division Bench of this Court in **Akhilesh Chandra Maurya's case** has been held to be per incuriam. Division Bench of this Court has held that where **advertisement published by Commission provides two modes for submission of application form before the Commission i.e. personally or by registered post, in that situation it cannot be held that post office is an agent of the Commission. In such case where the candidates opts to send the application form through agency of post office, the post office would be an agent of the candidate and not the Commission.**

43. Besides this, a Division Bench in Adil Khan's case has also referred a Division Bench decision of ***Orissa High Court rendered in Dr. Annada Prasad Pattnaik Vs. State of Orissa and others AIR 1989 Orissa 130***, wherein the Division Bench of Orissa High Court after placing reliance upon the decision of Hon'ble Apex Court rendered in **M/s Ogale Glass Works Ltd. (supra), Jagdish Mills case (supra) and Indore Malwa Mills case (supra)** has stated the law in para 3 as under:-

"3. .....The principle that can be culled from the decisions may be stated in the following manner. Where delivery can be made in a mode at the option of the sender, the agency through which delivery is made acts as the agent of the sender whereas if delivery is made by way of despatch in the mode stipulated or prescribed by the addressee, the agency through which the article is despatched acts as the agent of the addressee."

44. By applying the aforesaid principle in para 5 of the decision the Orissa High Court has held as under:-

"5. Para 6.3 of the prospectus as well as the admission notice stipulated that the application could only be sent "by registered post only and not by any other manner'. Hence, the petitioner could not have been delivered his application in the office of the Convenor even if he wanted to. He had to post and did post in the post office located inside the campus of the College barely 100 yards away from where the office of the Convenor is located. ***By requiring the applicant to send his application through post, the Convenor nominated the post office as his agent. Therefore, if the application was received in the office of the Convenor on 1-6-88, the petitioner cannot suffer. It should be deemed to have been delivered on 27-5-88."***

45. Although aforesaid decision of the **Orissa High Court rendered in case of Dr. Anand Prasad Pattanaik's case (supra)** is not binding upon this court, but even assuming for the sake of arguments, that it has persuasive value, even then the principle of law enunciated by the Orissa High Court in para 3 of its judgement, in my opinion, with due respect does not emanate from the decisions of Supreme Court

rendered in **M/s Ogale Glass Works Ltd. case (supra), Jadish Mill's case (supra) and Malwa Mill's case (supra).** In my view, **the answer to the question as to whether the post office would be agent of the sender or addressee would not depend upon the fact that the addressee has prescribed two or more alternative modes for sending the articles including one of the mode through post office, rather it would solely depend upon the facts as to whether addressee has expressly or impliedly authorised the senders to send their articles through post office or not, if the addressee authorised the senders expressly or impliedly to send their articles through post office, he nominates the post office to act as his agent. It is immaterial that the addressee has prescribed another mode or more modes for sending such articles to him because of simple reason that by providing another or more alternative mode for sending the articles or application, the addressee does not revoke or withdraw his express authorization for sending the articles through post office.** Therefore, I am unable to agree with the view taken by the Orissa High Court being contrary to the view taken by Supreme Court referred in the judgment of Orissa High Court itself.

46. In Adil Khan's case this Court has also referred a decision of Division Bench of ***Andhra Pradesh High Court rendered in V. Ramesh Vs. Convenor, EAMCET-1995; Jawaharlal Nehru Technological University, Hyderabad AIR 1997 A.P. 79***, wherein it was held that the telegram not delivered to the petitioner was due to lapse of telegraph department, which has to be construed as agent of Principal of the institution and he must take responsibility of lapse of agent. In the above noted case reliance was placed upon a decision of Full Bench of Madras High Court in case of ***Vinod Kumar R. Vs. Secretary Selection Committee, Sabarmati Hostel KMC 1995 (1) Madras LW 351***. The observations made by Full Bench of Madras High Court upon which the reliance was placed are as under:-

"If conditions or stipulations are contained in the prospectus with an option being given to applicants to send the applications either in person or by registered post and if an applicant prefers to send the application by registered post, by handing over the same at a post office some days earlier to the last date of receipt of applications and once such an option is exercised, it goes without saying that as per the principle evolved in the Common Denominator decisions of the Apex Court of this country, as reflected in the decision of the Division Bench of Orissa High Court, such post office must have to be construed to have been constituted as the agent of the sender/ applicant and not the agent of the addressee/ Directorate. Only if the post office is being constituted as the agent of the addressee, the receipt of application by such agent, long prior to the last date of receipt of application by the Principal/addressee/Directorate. In such a situation, the decision arrived at by the latter Division Bench of this Court cannot at all be stated to be in tune with the principle, as evolved by the Supreme Court, as indicated earlier."

47. From careful reading and close analysis of the decision of **V. Ramesh Vs. Convenor** rendered by Andhra Pradesh High Court it appears that reliance was placed upon Full Bench decision of Madras High Court in **Vinod Kumar Vs. Secretary Selection Committee (supra)** in which the statement of law as quoted herein before was made to the effect that *"if the conditions or stipulations are contained in the prospectus with an option being given to the applicants to send the applications either in person or by registered post and if an applicant prefers to send the application by registered post by handing over the same at a post-office some days earlier to the last date of receipt of the applications and once such an option is exercised, it goes without saying that as per principle evolved in the common denominator decisions of the Apex Court of this country as reflected in the decision of Orissa High Court, such post-office must have to be construed to have been constituted as the agent of sender and not the agent of addressee."*

48. In this connection it is to be noted that the decisions of Andhra Pradesh and Madras High Courts are not binding upon this Court. Such decisions have merely a persuasive value, despite thereof, for the reasons stated in preceding part of the judgement, these decisions in my opinion, do not state correct legal position. In my view in **M/s Ogale Glass Works case (supra) while deciding the question as to whether the post office is agent of the sender or addressee, it was held that as between the sender and addressee, it is request of addressee that cheque be sent by post, makes the post office an agent of the addressee and on that finding, law was stated that where by an agreement express or implied between the creditor and debtor or by a request, express or implied by the creditor, the debtor is authorised to pay the debt by cheque and to send the cheque to the creditor by post, the post office would be agent of the creditor to receive the cheque and creditor would receive the payment as soon as the cheque is posted to him at a place from where the cheque is posted.** The same view has been reiterated by Hon'ble Apex Court in subsequent decisions rendered in **Jagdish Mill's case (supra)** and **Indore Malwa United Mill's case (supra).** However, in **Unit Trust Vs. Ravinder Kumar Shukla's case (supra)** the legal position stated in the aforesaid decisions **has been further clarified that where there is no contract or request either express or implied by the addressee/payee/creditor to send the cheque by post, the post office would continue to act as an agent of the drawer/sender/debtor and not of the payee/addressee. Therefore, to my mind it is implied or express request of the addressee to the sender to send the articles by post to the addressee that makes the post office agent of the addressee.**

49. Although I am conscious about the legal proposition that a little difference in the facts or additional facts may make a lot of difference in presidential value of a decision but having regard to the facts and circumstances of the case, I am of considered opinion, that in such cases **the moving factor or decessive factor is not prescription of one mode or**

several modes by the addressee to send the articles to him rather it is express or implied authorisation by the addressee to send the articles to him by post, ultimately decides the issue and makes the post office an agent of the addressee. It is immaterial that the addressee has provided any other or more alternative modes to the sender including through post-office to send the articles to the addressee. In my opinion, prescription of such other alternative mode for sending the articles to addressee would not change the legal position stated herein before. However, in cases where **addressee does not prescribe any modes for sending the articles to him and merely time for receipt of the articles is fixed/prescribed and sender chooses by his own to send the articles to the addressee through registered post, in that eventuality alone the post office would continue to act as agent of the sender and not of addressee and for any delay in transit the addressee would not be responsible for simple reason that in such situation it can not be held that addressee has expressly or impliedly authorised or requested the senders to send the articles through registered post.**

50. In view of aforesaid discussion, in my opinion, the decisions rendered by Division Benches of this Court in ***Ram Autar Singh Vs. Public Service Commission. U.P., Allahabad and others 1987 U.P.L.B.E.C. 316*** (by **Hon'ble Mr. Justice B.N. Misra and Hon'ble Mr. Justice A.P. Misra),** in **Anupam Vs. Public Service Commission, U.P. Allahabad and another** W.P. No.57508 of 2005 decided on 4.10.2005 (by **Hon'ble Mr. Justice Amitava Lala and Hon'ble Mr. Justice Prakash Krishna), in Adil Khan Vs. State of U.P. and others** W.P. No.23152 of 2006 decided on 5.05.2006 (by **Hon'ble Mr. Justice S.R. Alam and Hon'ble Mr. Justice Sudhir Agarwal**) require re-consideration by Larger Bench/Full Bench comprising of atleast three or more than three judges of this Court in the light of decisions rendered by Hon'ble Apex Court in **M/s Ogale Glass Works Ltd. case** (supra), **Jagdish Mill's case** (supra), **Indore Malwa United Mill's case (supra), Unit Trust of India Vs. Ravinder Kumar Shukla's case** (supra) **and in Bhikha Lal's** case (supra) decided by Full Bench of this Court in context of questions formulated by me in preceding part of this judgement.

51. Since the postal service constituted under the provisions of Indian Post Office Act 1898 is entrusted public service and stood test of time, therefore, having regard to the facts that the questions involved in the case have wide impact upon the large public interest touching the fundamental rights of the candidates under Articles 16 and 21 of the Constitution of India, an authoritative decision is required to be rendered by Full Bench of this Court comprising of atleast three or more than three judges so that the matter may be set at rest for all the times to come in future**. The Hon'ble the Chief Justice is requested to constitute a Full Bench** of this Court comprising of at least three or more than three judges for deciding the questions formulated by me in preceding part of this judgment as early as possible.

52. In given facts and circumstances of the case, as interim measure, the Commission is directed to accept the application form of the petitioner on provisional basis within 10 days from today and permit her to participate in the process of selection for the post in question but the result of such selection shall be subject to final decision to be taken in the instant writ petition.

Note- Office is directed to place the record forthwith before Hon'ble The Chief Justice for constitution of larger/Full Bench.
