APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.07.2010

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Second Appeal No. 38 of 2005

Dr. Vinod Kumar Gupta ...Appellant
Versus
Smt. Deepa Gupta ...Respondents

Counsel for the Appellant:
Sri Ratnesh Kumar Pandey
Sri P.K. Singh
Sri S.S. Shukla

Counsel for the Opposite Party:
Sri A.K. Sharma

Code of Civil Procedure-Section-100-Second Appeal-Hindu Marriage Act-Section 13(1)(a)-Divorce Petition- on ground of cruelty-spouse living separately for the last 17 years without any valid reason-Trial Court rightly granted decree for divorce-1st Appellate Court committed great illegality by reversing the same and totally ignored the guideline of Apex Court-set-a-side-Appeal Allowed.

Held: Para 13

For all the reasons stated above, the second appeal is allowed and the judgment and order of the lower appellate court is set aside and that of the trial court is confirmed. No order as to costs.

Case law discussed:
AIR 2005, SC-3297; (2002) (48) ALR-485; (2007) 4 SCC-511.

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

1. The case peremptorily listed today. List has been revised. Heard learned counsel for the appellant and perused the record. Sri A.K. Sharma, learned counsel for the respondent is not present.

2. The appellant filed Original Suit No. 447 of 1995, Dr.Vinod Kumar Gupta versus Smt. Deepa Gupta, under Section 13 of Hindu Marriage Act for divorce against the respondent. The suit was decreed vide judgment and order dated 29.8.1998 passed by the Ist Additional Civil Judge (Senior Division), Muzaffarnagar.

3. Aggrieved by the judgment and order dated 29.8.1998 the respondent filed Civil Appeal No. 333 of 1998, Smt. Deepa Gupta versus Dr. Vinod Kumar Gupta before first lower appellate Court which was allowed vide judgment and order dated 25.10.2000.

4. It appears from the order-sheet dated 9.9.2009 that the Court had granted opportunity to the learned counsel for the parties as to whether there is any possibility of husband and wife stay and live together. Thereafter, the case was listed on 22.2.2010 when it was directed to be listed in the next cause list on the prayer of learned counsel for the parties. Since then, learned counsel for the respondent has not appeared before this Court. On 11.5.2010, learned counsel for the respondent was also not present and on 26.5.2010 he sought adjournment of the case on the ground of illness slip. Learned counsel for the appellant states that the matter may be decided as the adjournments sought are deliberate. The case has been directed to be listed peremptorily. Today also, learned counsel for the respondent is not present. It appears from the order sheet that continuously for the last 3 days the case is

being adjourned at the behest of learned counsel for the respondent.

5. The contention of learned counsel for the appellant is that the appellant is posted as Doctor in Madhya Pradesh. However, the wife is employed as teacher in Government Girls College, Kichha, Nainital, Uttarakhand.

6. It appears that husband and wife are not living together since 1993. The suit for divorce had been granted and the decree for divorce had been reversed in appeal.

7. Learned counsel for the appellant states that the wife is not ready to live with husband at his place of posting despite several attempts by him and his relatives. The judgment and decree of the first lower appellate Court is assailed on the ground that it has acted with material irregularity of law and jurisdiction in setting aside the judgment and decree of the trial Court without reversing the findings recorded by it on individual issues. He submits that the behaviour of the wife with the appellant amounts to cruelty and that the lower appellate court has committed an error in holding that her not living with the husband in the facts and circumstances of the case, did not amount to cruelty within the meaning of term as defined under Section 13(1)(1a) of the Hindu Marriage Act. It is stated that from the facts and circumstances of the case as available from the pleading and evidence on record it is established from conduct of the wife that marriage had broken irretrievably due to cruelty which was a valid ground for dissolution of marriage under the Act and that the decree for divorce ought to have been passed on basis of record as the husband and wife have been living separately for the last so many years as such the judgment of the lower appellate Court being against the evidence on record and misinterpretation of the provisions of law can not be sustained and is liable to be quashed.

8. In support of his submission, learned counsel for the appellant has relied upon the judgment rendered in **AIR 2005,SC-3297, Durga Prasanna Tripathy versus Arundhati Tripathy** in which it has been held that where the spouses had been living separately for almost 14 years and wife was not prepared to lead conjugal life with husband and in that backdrop an attempt was made by husband and his relatives in getting back wife to matrimonial home failed. It was found to be a fit case for decree of divorce on the ground desertion as record showed that there was no chances of reconciliation and was irretrievable breakdown of marriage.

9. He has also placed reliance upon paragraphs 21 and 22 of the judgment rendered in **(2002)(48) ALR-485, Praveen Mehta versus Inderjit Mehta** wherein the Court considered the definition of 'cruelty' within the meaning of section 13(1)(1a) of the Act. It was held that mental cruelty is a state of mind. In this case also the court came to the conclusion that despite several attempts by relatives and well-wishers no conciliation between husband and wife was possible, the petition for the dissolution of the marriage was filed in the year 1996. In the mean time, so many years have elapsed since the spouses parted company as such it can reasonably be inferred that the marriage between the parties has broken down irretrievably

without any fault on the part of the husband, hence the decree for divorce was not liable to be repaired.

10. He then submits that in the instant case the husband and wife are living separately since 1993. There is no plausible reason for the wife not to live with the husband, who is a Doctor in Madhya Pradesh and her insistence to leave service for living along with her at Nainital, Uttarakhand was unreasonable and amounts to desertion. The trial Court has rightly granted decree for divorce which has been reversed by the lower appellate court on irrelevant consideration.

11. After perusal of the judgment it is noted that the parties are not cohabiting together for almost 17 years. Since there has been a long period of continuous separation, it may fairly be concluded that in the facts and circumstances of this case that the matrimonial bond is beyond repair and the marriage has become a fiction as has been held by the Apex Court in **(2007) 4 SCC-511, Samar Ghosh versus Jaya Ghosh.** The Court in that case held that-

"The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases does not serve the sanctity of marriage; on the contrary it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty. In present case, trial Court had rightly concluded that the various instances in their matrimonial life, and led to grave mental cruelty to the appellant husband. Further, the High Court failed to take into consideration the most important aspect of the case that the parties had admittedly been living separately for more than 16-1/2 years. The entire substratum of marriage had already disappeared."

12. The law laid down by the Apex Court in the aforesaid cases squarely applies to the facts and circumstances of this case where the spouses have been living separately for a long long period of time. It appears that their bond of marriage can not be repaired which has been extensively damaged by passage of separation. The parties are in their mid's 40. The wife is not ready to cohabit and inspite repeated efforts made by him and their relatives. Every person has a right to live healthy sexual life; hence love and affection from his or her partner in the marriage which has completely vanished in the instant case. It appears that the lower appellate Court has lost sight of this important factor and the guide lines laid down by the Apex Court from time to time through their Lordships' judgments. The marriage in the instant case cannot continue. Ground realities have to be considered before allowing the parties to continue their relationship of married couple till they become too old to have any biological need. Parties are already in their med forty's and if a new lease to their life is to be granted then matter has to be settled now.

13. For all the reasons stated above, the second appeal is allowed and the judgment and order of the lower appellate court is set aside and that of the trial court is confirmed. No order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.07.2010

BEFORE
THE HON'BLE FERDINO INACIO REBELLO, C.J.
THE HON'BLE RAJIV SHARMA, J.

Special Appeal No.64 of 2006

State of U.P. and others ...Petitioners
Versus
Prabhu Narain Sharma and others ...Respondents

Constitution of India Art.226-Dearness allowance-whether the work charge employee working on consolidated Pay entitled benefit of Dearness Allowance With same rate as per regular employee?-held- 'No'-state can classify its-employee considering nature of appointment-consolidate pay consist basic Pay, Dearness Allowance, special Pay and leave encashment-state government not bound to treat all employees alike for purpose of wages-order passed by single judge modified-not to recover excess amount of Dearness Allowance Already paid-these retiring within 5 years-50% amount be deducted from in easy instalment-those who have not been paid arrears of Dearness Allowance Be paid in revise pay in 6th pay commission report within 3 month.

Held: Para 21 & 23

The principle, therefore, is well settled that the State need not, in exercise of its executive power or otherwise, treat all employees alike merely because they are in its employment. The State can classify the employees, based on the nature of employment, and pay them differently. If so done, it can not be said to be arbitrary. In the case in hand, after going into the issue, the State Government fixed a consolidated pay for work charged employees. This, therefore, cannot be said to be arbitrary. This principle has also been referred to in a Constitution Bench judgment of the Supreme Court in Secretary, State of Karnataka & Ors. Vs. Uma Devi (3) & Ors., (2006) 4 SCC 1.

In view of the above discussion, it is not possible to hold that the action of respondents was arbitrary and/or that the work charged employees are entitled to be treated alike, like regular employees for the purpose of dearness allowance. The Judgment of the learned Single Judge, therefore, is liable to be set aside and is, accordingly set aside.

At this stage, learned Chief Standing Counsel submitted that as this Court has set-aside the judgment of the learned Single Judge and as such, liberty may be granted to recover the amount of arrears and difference of wages from the respondents-employees. Counsel for the respondents-petitioners submitted that it will be too harsh to recover the amount which has already been paid to them pursuant to the judgment of this Court. They further added that it is not the case of the appellants that they have been paid the amount on account of misrepresentation of facts. Moreover, there are large number of employees who have already attained the age of superannuation or going to attain the age of superannuation very soon and recovery of amount, which has already paid to them, will cause serious prejudice apart from adverse affect on the family. Considering the peculiar facts and circumstances of the case, we with the consent of the parties' counsel evolved a formula in respect of recovering the amount, which should be adopted by the appellants. The formula so evolved with the consensus of the parties, is as follows:-

(i) There will be no recovery from the persons who have already superannuated or are going to attain the age of superannuation within five years from today

(ii) In respect of the employees, who will be superannuating after five years, from such employees, 50 % arrears paid as dearness allowance less component of fixed pay can be recovered.

(iii) The amount of arrears, which can be recovered from the employees, shall be in easy installments spread over a period of five years.

(iv) In respect of the employees working in the U.P. State Bridge Corporation or other governmental bodies, who have not yet been paid arrears and in respect of whom the recommendations of the Sixth Pay Commission are still pending though made applicable to regular employees, the respondents, whether it be the Government or the Corporation, are directed to complete the process within a period of three months from today and make applicable the revised pay from the date the work charged employees in the State are being paid.

Case law discussed:

[(1998) 8 SCC 473]; [(1979) 4 SCC 440]; [AIR 1997 SC 693]; [AIR 1997 SC 2129]; [(2003) 1 SCC 250]; [(2003) AIR SCW 3382]; [(1998) 8 SCC 433];.[2006 (6) ALJ 549]; [AIR 2004 SC 2449]; [(1996) 7 SCC 256]; [AIR 1990 SC 311]; [(2004) 6 SCC 661]; [(2003) 4 SCC 59]; [AIR 2000 SC 1005]; [(1996) 11 SCC 77]; 1980 SCC [L & S] 36; [(1998) 1 UPLBEC 313; [(2002) 2 UPLBEC 1595; (3) & Ors., (2006) 4 SCC 1.

(Delivered by Hon'ble F.I. Rebello, C.J.)

1. Heard Sri D. K. Upadhya, Chief Standing Counsel assisted by Sri Alok Sinha, Additional Chief Standing Counsel, Sri Ajai Kumar Singh alongwith Sri Shishir Jain for the appellants and Sri A.M. Tripathi, Sri D. K. Tripathi and Sri V. K. Shukla, Counsel for the respondents.

At the out-set it may be mentioned that in few appeals, there was a delay in filing the Special Appeal and as the sufficient cause has been shown, the delay is hereby condoned.

2. Feeling aggrieved, Prabhu Narain Sharma and 52 others, respondents/writ petitioners filed a Writ Petition No. 5505 (SS) of 1999 inter alia praying for quashing of the Government Order dated 26.8.1999. Several other writ petitions with the same relief were also filed. All these identical writ petitions were clubbed together and were allowed by the judgment and order dated 6.5.2005 and the G.O. Dated 26.8.1999 whereby the fixed amount of amount of Dearness Allowance payable to work-charge employees was quashed. A number of other writ petitions claiming benefit of the aforesaid judgment and order dated 6.5.2005 were also filed and the same were disposed of in terms of the aforesaid judgment and order.

The State Government as well as the Corporation being dissatisfied with the aforesaid judgment and order dated 6.5.2005 passed in Writ Petition No. 5505 (SS) of 1999:Prabhu Narain Sharma and 52 others vs. State of U.P. and others as also in other identical writ petitions, preferred Special Appeals. Similarly, Bridge Corporation has also filed Special Appeals, assailing the order of learned Single Judge extending the benefits of judgment and order dated 6.5.2005 to the work-charge employees of the Corporation.

3. As a common question, is involved in all these appeals and as such these appeals have been clubbed together and are being decided by a common order.

4. The question "Are work charged employees entitled to dearness allowance on par with regular employees on the

ground that they are performing the same work and duties, which are being performed by regular employees and, as such, entitled to 'equal pay for equal work' and consequently is the Government Order dated 26.08.1999 illegal?

5. Draped in brevity, the facts of the case are that Respondents-petitioners are the work-charge employees of Public Works Department, Irrigation Department and U. P. State Bridge Corporation Ltd. Feeling aggrieved by the Government Order dated 26.8.1999, they preferred writ petitions before this Court alleging therein that they are performing same work and duties, which are being performed by regular employees and as such, they are entitled for equal pay and other benefits. According to them, denial of benefit which is available to the regular employees when they are performing identical work and treating them differently is arbitrary and discriminatory. It has also been alleged that they are also entitled for dearness allowance at par with the regular employees, but by the Government Order dated 26.8.1999, a ceiling has been imposed upon dearness allowance to the work-charge employees, which action of the State Government is highly arbitrary and discriminatory as the dearness allowance is paid on the basis of consumer price index and therefore, there should not be any ceiling on dearness allowance in respect of the work-charge employees only. It is relevant to point out that the provisions of the Government Order dated 26.8.1999 were also applicable to the work charge employees of the U.P. State Bridge Corporation as the same were duly adopted by the Board of Directors.

6. Aforesaid writ petitions were seriously contested by the appellants and it was argued before the learned Single Judge that the work-charge employees are governed by paragraphs 667 to 669 of Financial Handbook Volume 6 which has been enacted in exercise of powers conferred under the Government of India Act. The work charge employees are engaged purely on temporary basis against particular project/ work on consolidated wages. They are not entitled for any pension or leave salary or allowances, except the allowances relating to traveling and daily allowances. It was also argued that the principle of 'equal pay for equal work' shall not be attracted in respect of work charge employees, in view of the fact they form a distinct and separate class as per their nature of engagement and qualifications. It is on account of classification, that the work-charge employees are paid fixed dearness allowance alongwith the consolidated pay, which is a reasonable classification and cannot be said to be violative of Article 14 of the Constitution of India.

7. The learned Single Judge while quashing the Government Order dated 26.8.1999 by the impugned judgment and order dated 6.5.2005 came to the conclusions that ceiling on the payment of dearness allowance to the workcharge employees is violative of Articles 14 and 21 of the Constitution of India, apart from being arbitrary and unjust. It has also been observed that once the Government had taken decision for payment of dearness allowance and provisions contained in financial handbook Vol.6 from paragraphs 667 to 669 having been repealed or deleted, there was no justification on the part of the State Government to provide any ceiling on payment of dearness allowance.

8. Learned Counsel for the appellants has contended that the learned Single Judge while making aforesaid observations failed to appreciate the very vital fact that work charge establishment differs from regular establishment. The former is a temporary one, depending upon the project or a scheme in hand and availability of funds, whereas the latter is a permanent establishment. Work-charge employees are being paid consolidated pay which are fixed on the basis of the recommendations made by the Expert Committee right from 1929. As the services of work charge employees were not regularised though they have served for decades and as such petitions were filed which went upto the Apex Court and in order to bring the work-charge employees on regular establishment the scheme was framed by the State Government having approval of the Apex Court in the case of Raj Narain Prasad v. State of U.P. [(1998) 8 SCC 473]. It has also been argued that the engagement of workcharge employees against the temporary work/project on consolidated pay is in existence since 1929 and they formed a separate class since then. To give strength to his aforesaid arguments, reliance has been placed upon Jaswant Singh and others v. Union of India and others [(1979) 4 SCC 440], State of Rajasthan v, Kunji Raman [AIR 1997 SC 693], State of Haryana v. Surinder Kumar [AIR 1997 SC 2129], State of Orissa and others v. Balram Sahu and others [(2003) 1 SCC 250], State of Haryana v. Tilak Raj and others [(2003) AIR SCW 3382] and suresh Kumar Tiwari and others v. State of U.P. and others [(1990) 1 UPLBEC 596].

9. Elaborating his arguments, it has been submitted by the Chief Standing Counsel that work-charge employees may be entitled to benefits, admissible to regular employees only when they are regularized as per scheme framed by the State Government, in view of the observations of Division Bench in its Judgment and order dated 30.8.1999 in the case of Barkat Ali versus State of U.P. and others but so far as they remain on work-charge establishment, in no circumstance, they can be equated with the regular employees. The Scheme of regularization of work-charged Employees of Irrigation Department has been upheld by the Apex Court in Writ Petition No. 140 of 1989 Raj Narain Prasad and others v. State of U.P. and others reported in [(1998) 8 SCC 433]. Similar scheme in respect of workcharged employees of Public Works Department has been framed vide office memo of State Government dated 15.10.1997. In support of his submissions, reliance has been placed upon Bans Gopal versus State of U.P. and others [2006 (6) ALJ 549].

10. His next contention is that as the source and mode of engagement/recruitment of two categories of employees is different and as such, their pay and conditions of services are also different and as such, the consolidated wages and the corresponding pay-scale of work-charge employees has been fixed/ revised on the recommendations of the pay commission. The pay anomaly committee under the Chairmanship of the Chief Secretary on consideration of employees' representation did not find any justification for abolition of the practice for payment of fixed Dearness Allowance. Any interference by this Court on the fixation of consolidated wages to the work-charge employees would amount to interference on the recommendations of the pay commission or in other way it will amount to substituting the wage structure fixed on the recommendations by the Pay

Commission, which is an expert body. Fixation of pay/wages of work-charge employees is the sole domain of the State Government and any interference by this Court, without there being any legal right in favour of the respondents would be unsustainable. Merely because, the pay scale of workcharge employees is equivalent to the pay-scale admissible to the regular employees, it would not entitle the former to claim dearness allowance at par with the regular employees. To strengthen his arguments, reliance has been placed upon the cases of State of Haryana v. Jasmeer Singh (supra), Union of India and another v. Manu Dev Arya [AIR 2004 SC 2449], Joint Action Council of Service Doctors Organizations and others v. Union of India and others [(1996) 7 SCC 256], Dr. Ms. O.Z. Hussain v. Union of India and others [AIR 1990 SC 311], P. M. Bhargava v. University Grants Commission and another [(2004) 6 SCC 661], Jugal Chandra Saikia versus State of Assam and another [(2003) 4 SCC 59], Indira Theremal Power Ltd. v. State of M.P. and others [AIR 2000 SC 1005], Dr. Shivarao Shantaran Wagle and Union of India and others [(1998) 2 SCC 115] and Punjab State Electricity Board and others v. Jagjiwan Ram and others [(2009) 4 SCC 661].

11. Clarifying the position, it has been submitted that the consolidated wages, which are paid to the employees of work-charge establishment, is constituted of four components, i.e. basic pay, dearness allowance, special pay and leave encashment, if any, but the learned Single Judge has only dealt with the dearness allowances and lost sight of the fact that it is not only the dearness allowance, which is only payable to an employee of the work-charge establishment, though they are entitled for other three components also. Therefore, it can be said that the learned Single Judge misread the provisions of Government Order dated 26.8.1999. It has been brought to our notice that while fixing the consolidated pay/minimum wages, various factors are taken into account by the expert bodies, such as, three consumption units for one earner, minimum food requirement of 2077 calories per average for one adult, clothing requirements of 72 yards per annum per family and other factors like, miscellaneous expenses and conditions influencing the wage rate. Initially, the consolidated pay which was being paid to work-charge establishment after the recommendations of the 4th Pay Commission was Rs.1200/- which was enhanced to Rs.1700/- and later on to Rs.3200/-. All these enhancements were made by the State Government on the basis of recommendations of the Pay Commission and Pay Anomaly Committee.

12. Sri Ajay Kumar Singh along with Sri Shishir Jain, appearing for the U.P. State Bridge Corporation while assailing the judgment of learned Single Judge, stated that they do not want to add anything further and adopts the arguments so advanced by the State Counsel.

13. While defending the judgment of the learned Single Judge, learned Counsel for the respondents/writ petitioners submitted that the learned Single Judge after scrutinizing the materials on record, had come to the conclusion that there was an imposition of ceiling on payment of Dearness Allowance in respect of the employees of work-charge establishment which is discriminatory in nature as dearness allowance is paid to protect

wages against inflation. They further submitted that during pendency of the Special Appeals, the recommendations of the Sixth Pay Commission were accepted by the State Government and Government Orders dated 14.1.2010 and 18.1.2010 have been issued by the State Government whereby the employees working on the work-charge establishment have been placed in the corresponding pay scale of regular employees by the State Government itself and the system of consolidated wages has been abaodoned. Therefore, the assertions of the appellants are not legally sustainable and the Special Appeals are liable to be dismissed. On a quarry, learned Chief Standing Counsel has informed us that the aforesaid Government Order dated 18.1.2010 has been implemented. A copy of the said Government Order has been produced before us and has been taken on record.

14. The work-charge establishment, as pointed out by the Apex Court in the case of Jaswant Singh, (supra) means an establishment of which the expenses including the wages and allowance of the staff are chargeable to "works". The pay and allowances of employees who are borne on a work-charged establishment are generally shown as a separate sub-head of the estimated cost of the works. The work-charged employees are engaged on a temporary basis and their appointment are made for the execution of the specified work. This principle was followed in the State of Rajasthan v. Kunji Raman (supra) and it was observed that a work-charge establishment is a distinct establishment from the regular establishment, which is permanent in nature. Setting up and continuance of work-charge establishment is dependent upon the Government projects or a work and availability of funds for executing it. So far as employees engaged on work-charge employees are concerned, not only their recruitment and service conditions, but the nature of work and duties to be performed by them are not the same as those of employees of the regular establishment. Thus, the Apex Court held in unambiguous words that a regular establishment and a workcharge establishment are two separate types of establishments and the persons employed on those establishments thus form two separate distinct classes.

15. In the State of Haryana and others v. Jasmer Singh [(1996) 11 SCC 77], the question before the Apex Court was with regard to the payment of equal pay for equal work. The Apex Court while holding that the person working on daily wages cannot be treated at par with the persons in regular service observed that the daily rated works are not required to possess the qualifications prescribed for regular workers nor do they have fulfill the requirements relating to age at the time of recruitment. They are not selected in the manner in which regular employees are selected. Furthermore, the employees working on consolidated pay are not subjected to the disciplinary jurisdiction, whereas it is applicable in respect of regular employees.

16. In Jaswant Singh Vs. Union Bank of India: 1980 SCC [L & S] 36, the Apex Court has made observations that the work charge establishment means such establishments which expenses are chargeable to work. Their wages and allowances are drawn from separate heads. The work charge employees are engaged on work establishment and, therefore, is different from regular work charge employees. The law is also very well

settled that once the employees are employed for the purpose of Scheme, they do not acquire any vested right when the project is over. It may be added that the respondent-petitioners when were engaged, were fully aware of the fact, that their status and conditions of service are altogether different than those of regular employees.

17. It is relevant to mention that in umpteen cases, the Apex Court has held that if the persons engaged on daily wages, consolidated pay or under the work-charged establishment are not appointed in terms of the provisions of the statute, they cannot be equated with the regular employees and thus it cannot be said that there is any violation of Article 14 of the Constitution of India. This can be exemplified from the fact that when a regular employee reaches on the maximum of the pay scale, addition of annual increments automatically stops and in that situation, as per settled principle of law, it is not open for him to agitate the matter on the ground of it being arbitrary or unjustified as it is relative incidence of the service. Furthermore, when services of such persons are not regularized and they continued on consolidated pay, without having undergone the process of regular appointment, they are also not entitled for regular pay-scale or any other benefit admissible to a regular employee.

In view of the aforesaid legal proposition, we are of the considered opinion that the work-charge employees engaged under paragraphs 667 to 669 of Financial Handbook Volume 6 on consolidated wages, form a distinct and separate class, from a regular establishment. Their terms of engagement is altogether different. The work-charge employees are not required to undergo any selection process whereas the regular employees are always required to undergo a rigorous selection process. By the impugned judgment, in our opinion, their term of engagement has indirectly been changed, which is not in the domain of the Court insofar as the benefit of the variable dearness allowance was extended and made equivalent to the regular employees. The same is also in violation of the terms and conditions of service as the employees in the work-charge establishment are engaged on the consolidated pay wages which includes the wages in the pay-scale, fixed dearness allowance special pay, leave encashment (if any). In other words, the work charge employees (engaged against a work without adhering to the due procedure and qualifications etc.) cannot claim equality with the regular employees (appointed against sanctioned post as per due procedure).

18. There is no doubt that the State is fully competent to prescribe the conditions of service of regular as well as work-charge employees and Article 14 does permit reasonable classification on intelligible differentia. Furthermore, the pay of regular employees is charged against the post, while the wages of work charge employees are charged against the estimate of work. Therefore, the fixing of Dearness Allowance to be payable in respect of Work-charge employees, who form a separate class, is neither capricious nor arbitrary but is based on reasonable classification. Thus, the learned Single Judge recorded reasonings without taking into consideration all these important factors.

19. It is significant to point out that a scheme of regularization of work-charge

employees was formulated by the State Government, which was approved by the Apex Court while delivering the judgment in Raj Narain Prasad's case. The work-charge employees, who have not yet been regularized, pursuant to the aforesaid Scheme, have admittedly been engaged under Vol. 6 of Paragraphs 667 to 669 of the Financial Handbook. We find force in the submissions of the State Council that deletion of Vol. 6 of Paragraphs 667 to 669 of the Financial Handbook will not affect the terms and conditions of work-charge employees engaged prior to the date of deletion. Their engagement will continue to be govern as per provisions of Paragraphs 667 to 669. At this juncture, it may be added that Paragraphs 667 to 669 of the Financial Hand Book were deleted w.e.f. 1.1.2000 and no person has been engaged on work-charge establishment thereafter as informed by the Chief Standing Counsel. In our view, this fact has not been considered by the learned Single Judge in its correct perspective.

20. The learned Judge has traced the history of dearness allowance and its payment to employees. The learned Judge, however, failed to take into consideration that the pay fixed for work charged employees, included as a component, dearness allowance. The D.A. included in the consolidated pay, in labour law, is known as Fixed Dearness Allowance (F.D.A.) vis-a-vis Variable Dearness Allowance (V.D.A.) which is based on the increase or decrease in the Consumer Price Index. At what point, neutralization should be effected for a component of dearness allowance to be treated as F.D.A. is within the realm of the State authorities based on the recommendations received from the bodies assigned to do the work of fixation of pay. What the employees on work charged establishment were denied was the V.D.A. The learned Judge, without taking into consideration this aspect, came to the conclusion that the Government Order dated 26.08.1999 is discriminatory and there should not be any restriction on payment of dearness allowance, overlooking the vital fact that the consolidated pay consists of four components, i.e. basic pay, dearness allowance, special pay and leave encashment, if any, and undisputedly, the employees working on work charged establishment form a separate class, as has been held by the Supreme Court in the judgments, earlier referred to including the judgment in the case of Jaswant Singh (supra). Once work charged employees constitute a different class from regular employees, the employer is not bound to treat all employees alike for the purpose of wages. This principle has been enunciated by the Apex Court in several cases. This Court was also seized of that issue in respect of daily rated employees/employees on work charged establishment in the case of State of U.P. & Ors. Vs. Putti Lal, [(1998) 1 UPLBEC 313. The matter ultimately was heard and decided by the Supreme Court in State of U.P. & Ors. Vs. Putti Lal [(2002) 2 UPLBEC 1595, wherein the Hon'ble Supreme Court, in paragraph 5, had observed as under:-

"5. In several cases this Court applying the principle of equal pay for equal work has held that a daily wager, if he is discharging the similar duties as these in the regular employment of the Government, should at least be entitled to receive the minimum of the pay scale though he might not be entitled to any increment or any other allowance that is permissible to his counter part, in the

Government. In our opinion that would be the correct position and was therefore, direct that these daily-wagers would be entitled to draw at the minimum of the pay scale being received by their counterpart in the Government and would not be entitled to any other allowances or increment so long as they continue on daily wager. The question of their regular absorption will obviously be dealt with in accordance with the statutory rule already referred to."

21. The principle, therefore, is well settled that the State need not, in exercise of its executive power or otherwise, treat all employees alike merely because they are in its employment. The State can classify the employees, based on the nature of employment, and pay them differently. If so done, it can not be said to be arbitrary. In the case in hand, after going into the issue, the State Government fixed a consolidated pay for work charged employees. This, therefore, cannot be said to be arbitrary. This principle has also been referred to in a Constitution Bench judgment of the Supreme Court in Secretary, State of Karnataka & Ors. Vs. Uma Devi (3) & Ors., (2006) 4 SCC 1.

In view of the above discussion, it is not possible to hold that the action of respondents was arbitrary and/or that the work charged employees are entitled to be treated alike, like regular employees for the purpose of dearness allowance. The Judgment of the learned Single Judge, therefore, is liable to be set aside and is, accordingly set aside.

22. However, in the course of argument, and as noted earlier, the State Government by its notifications dated 14.01.2010 and 18.01.2010 has in respect of employees working in work charged establishment placed them in the corresponding pay scale of regular employees and also the system of consolidated wage has been abandoned. This was permissible for the State to do and it has so done, but that would only be from the date from which the notification has been given effect to, in the instant case, 01.01.2006. The judgment of the learned Single Judge was delivered on 06.05.2005. It is in that context that we shall have to consider and mould the relief.

23. At this stage, learned Chief Standing Counsel submitted that as this Court has set-aside the judgment of the learned Single Judge and as such, liberty may be granted to recover the amount of arrears and difference of wages from the respondents-employees. Counsel for the respondents-petitioners submitted that it will be too harsh to recover the amount which has already been paid to them pursuant to the judgment of this Court. They further added that it is not the case of the appellants that they have been paid the amount on account of misrepresentation of facts. Moreover, there are large number of employees who have already attained the age of superannuation or going to attain the age of superannuation very soon and recovery of amount, which has already paid to them, will cause serious prejudice apart from adverse affect on the family. Considering the peculiar facts and circumstances of the case, we with the consent of the parties' counsel evolved a formula in respect of recovering the amount, which should be adopted by the appellants. The formula so evolved with the consensus of the parties, is as follows:-

(i) There will be no recovery from the persons who have already superannuated or are going to attain the age of superannuation within five years from today.

(ii) In respect of the employees, who will be superannuating after five years, from such employees, 50 % arrears paid as dearness allowance less component of fixed pay can be recovered.

(iii) The amount of arrears, which can be recovered from the employees, shall be in easy installments spread over a period of five years.

(iv) In respect of the employees working in the U.P. State Bridge Corporation or other governmental bodies, who have not yet been paid arrears and in respect of whom the recommendations of the Sixth Pay Commission are still pending though made applicable to regular employees, the respondents, whether it be the Government or the Corporation, are directed to complete the process within a period of three months from today and make applicable the revised pay from the date the work charged employees in the State are being paid.

Appeal Allowed

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.07.2010

BEFORE
THE HON'BLE FERDINO I. REBELLO, C.J.
THE HON'BLE A.P. SAHI, J.

Special Appeal No. 79 of 2010

Ravindra Singh ...Appellant
Versus
State of U.P. and others ...Respondents

Counsel for the Appellant:
Sri Ashwani K. Misra, Adv.
Sri Atul Khaneja

Counsel for the Respondents:
Dr. Y.K. Srivastava,
C.S.C.

U.P. Intermediate Act, 1921 or Subsequent Amendments by various difficulties removal order-The question whether the appointment of the Appellant was against a temporary vacancy or as Short Term Vacancy and whether the procedure for appointment as was existing at the time the vacancy followed?

After examining the various difficulties removal order-and the Act it is clear-no requirement of notifying the vacancy or publication in 2 news papers as held by the Full Bench "Kumari Radha Raizada" (1994 ALJ 1077). Nothing has been placed before the court by the State showing the manner and the conditions of appointment prescribed for filing in the Temporary Vacancies-other than that followed by the Management-the Management as is apparent from the facts or record, has advertised the post in question cannot be said-procedure for appointment on Temporary/Short Term Vacancy without authority of law

Held Para 14

Considering these aspects of the matter, we are clearly of the opinion that under the Act 1921 and/or Amendment Act 1975, and/or various Orders passed to remove the difficulties, there was no requirement that the vacancy should be notified by publication in two newspapers. Nothing has been placed before us by the State showing the manner and the conditions of appointment prescribed for filling in the temporary vacancies other than that followed by the Management. The Management, as is apparent from the facts on record, had advertised the post in question. In our opinion, therefore, it cannot be said that the procedure for appointment on temporary vacancy/short-term vacancy was without authority of law

Case Law Discussed:

1994 ALJ 1077

(Delivered by Hon'ble Ferdino I. Rebello, C.J.)

1. The appellant was petitioner no.1 in Writ Petition No. 39090 of 2007, which came to be disposed of along with other petitions by common order dated 04.12.2009. The appellant was initially appointed as L.T. Grade Teacher against a short-term vacancy (temporary vacancy). The appellant along with others filed Writ Petition No. 39090 of 2007 for quashing the order dated 27.07.2007 and for a writ, order or direction in the nature of mandamus commanding the respondents not to stop their salary. This appeal will be restricted to the claim of the appellant. The learned Single Judge in the impugned order has noted the claim of the appellant that he was appointed as an ad hoc L.T. Grade Teacher against a vacancy caused due to promotion of one Lallan Prasad Shukla, who was working in Mahatma Gandhi Inter College, Sakhwania, Kushinagar, from L.T. Grade Teacher to Lecturers Grade, which was approved on 24.02.1981. The learned Judge has further noted the case of the appellant that his appointment was made after following the procedure prescribed under the Second Removal of Difficulties Order, 1981.The District Inspector of Schools refused to accord approval to the appointment of the appellant. Against the said decision, a writ petition came to be filed, which was disposed of by requiring the District Inspector of Schools to examine the matter. The District Inspector of Schools passed an order approving the appointment of the appellant. However, by a subsequent order dated 09.11.1999, the District Inspector of Schools withheld the salary of the appellant. Another writ petition was filed by the appellant wherein an interim order was granted on 09.11.2000. Thereafter, an order was passed by the District Magistrate for payment of salary on 15.02.2001. The Secretary, Secondary Education by order dated 19.02.2001 held that the District Magistrate had no power to issue any direction qua teachers of Intermediate Colleges. The matter was referred to the State Government. A report was submitted by the authorities and it was pointed out that the appointment of the appellant was not in accordance with law. The State Government, however, issued an order sanctioning salary to the appellant, and by order dated 17.02.2004 directed the absorption of the appellant in other institution. Vide order dated 27.02.2007, the State Government recalled its order dated 17.02.2004. The stand of the State had been that the appointment of the appellant along with others was not in accordance with law and, therefore, he was not entitled to salary.

2. A supplementary affidavit was filed on behalf of the appellant and others. As regards the appellant, it was pointed out that the vacancy was advertised on 30.10.1980 in a local newspaper, namely, 'Hindustan Ka Swaroop' published from Deoria, and that the quality point marks had been awarded and the appellant was selected. The learned Single Judge proceeded on the footing that the advertisement of the vacancy did not satisfy the requirement of law as laid down by a Full Bench of this Court in the case of **Kumari Radha Raizada & Ors. Vs. Committee of Management, Vidyawati Darbari Girls Inter College & Ors., 1994 All. L.J. 1077**. Hence, the present appeal.

3. At the hearing of the appeal, on behalf of the appellant, learned counsel submits that the learned Judge misdirected himself in law inasmuch as the judgment in Km. Radha Raizada (supra) relied upon had no application, as the appointment of the appellant was made in the year 1980, whereas the amendment, which was considered in the case of Km. Radha Raizada (supra), namely, the Uttar Pradesh Secondary Education Services Commission and Selection Board Act, 1982 (hereinafter referred to as the 'Act 1982'), came into force with effect from 14th July, 1981. It is, therefore, submitted that the procedure laid down in Km. Radha Raizada (supra) for publication of vacancy in two newspapers was not there when the appellant was appointed and the appellant's appointment was in terms of the law then in force, namely, the Intermediate Education Act, 1921 (hereinafter referred to as the 'Act 1921'), as amended by the U.P. Secondary Education Laws (Amendment) Act, 1975 (hereinafter referred to as the 'Amendment Act 1975').

4. To consider the question, we may first reproduce Section 16E (11) of the Act 1921, as substituted by the Amendment Act, 1975, which reads as under:-

"**16-E.** Procedure for selection of teachers and head of institutions. - (1)

....

(11). Notwithstanding anything contained in the foregoing sub-sections, appointments in the case of a temporary vacancy caused by the grant of leave to an incumbent for a period not exceeding six months or by death or retirement of an incumbent occurring during an educational session, may be made by direct recruitment or promotion without reference to the Selection Committee in such manner and subject to such conditions as may be prescribed."

5. It would, thus, be clear that the appointment in the case of a temporary vacancy caused by grant of leave to an incumbent for a period not exceeding six months or by death or retirement of an incumbent occurring during an educational session, could be made by direct recruitment or promotion without reference to the Selection Committee in such manner and subject to such conditions as may be prescribed. The Amendment Act 1975 also contained Section 22, which provided for removal of difficulties and conferred powers on the State Government to remove the difficulties by an order not inconsistent with the provisions of the Act. Thereafter, various Orders came to be issued. The first Order was the U.P. Secondary

Education (Removal of Difficulties) Order, 1975. Order 2 (a) to 2 (g) of the said Order read as under:-

"**2.**(a) Notwithstanding anything contained in Section 14 of the aforesaid Act, any substantive or leave vacancy or any vacancy existing or occurring during the current academic session of the Head of Institution or, a teacher of an institution may be filled in by the Committee of Management, on ad hoc basis in the manner provided hereunder till such period, not exceeding six months in any case, as a person duly selected in accordance with Section 14 aforesaid is appointed against such vacancy.

(b) The vacancy of the Head of Institution shall be filled-

i) in case of Intermediate College, by the seniormost teacher of the institution in the Lecturer's grade;

(ii) in case of High School raised to the level of Intermediate College, or a Junior High School raised to the level of High School, during the current academic session, by the Headmaster of such High School or Junior High School, as the case may be:

Provided that the seniormost teacher or the Headmaster, as the case may be, possesses a good record of service and administrative ability.

(c) The vacancy of, a teacher in the Lecturer's grade of L.T. Grade or C.T. Grade, shall be filled in by the seniormost teacher of the institution in the L.T. Grade, C.T. Grade and J.T.C./B.T.C. grade respectively.

(d) Where any vacancy cannot be filled in the manner laid down in the preceding clauses, the same vacancy be filled in on ad hoc basis for the same maximum period as laid down in Clause (a), by appointment of outsiders after selection by a Selection Committee consisting of three members, which may be constituted for the purpose on an ad hoc basis by the Committee of Management.

(e) Any person to be eligible for being appointed under Clauses (b), (c) and (d) shall possess the minimum qualifications prescribed in Appendix 'A' referred to in Regulation 1 of Chapter II of the calendar of the Board of High School and Intermediate Education.

f) Where an account of difference or dispute or for any other reason, there is no Committee of Management in effective control of the affairs of an institution or has not been recognized as such by the Inspector and no Authorised Controller has been appointed by the State Government in respect of such institution, the powers of the Committee of Management in the foregoing clauses shall in the case of appointment of the Head of institution be exercised by the Inspector and in the case of appointment of, a teacher be exercised by the Head of the Institution concerned.

(g) All appointments made under the foregoing clauses shall as soon as may be reported to the Inspector giving particulars of qualifications and experience in respect of each person and the Inspector shall have the power to disapprove any appointment made in contravention of the foregoing provisions upon which the appointment in question

shall cease. The decision of the Inspector in this regard shall be final."

6. By the U.P. Secondary Education (Removal of Difficulties) Second Order, 1976, the period of ad hoc appointment was extended. Subsequent Orders were also issued. This continued to be a law till the Act 1982 came into force.

7. On behalf of the State respondents, learned counsel submits that the concept of short-term appointment came, for the first time, in view of the Act 1982 and the question, therefore, for payment of salary to the appellant appointed against a short-term vacancy would not arise. It is also submitted that there is no material on record to show that there was a short-term vacancy and, as such, the appointment of the appellant, being not against a regular vacancy, is illegal.

8. The question that we have been called upon to answer would be, whether the Appellant was appointed against a temporary vacancy, now described as Short Term Vacancy, and the procedure for appointment, as was existing at the time the vacancy was advertised, was followed?

9. The appellant, in the writ petition filed along with others, in paragraph 3 has clearly set out that he was appointed as Assistant Teacher on 26.12.1980 on a short-term vacancy that arose due to promotion of Sri Lallan Prasad Shukla to the Lecturers Grade in Mahatma Gandhi Inter College, Sakhwania, Kushinagar. In answer to that, the District Inspector of Schools in the affidavit has merely set out that the contents of paragraph 3 of the writ petition need no comments. Apart from that, the appellant had, along with others, relied on a document issued by the Additional Director of Education, which mentions, at serial no.2, the name of the appellant and that his appointment has been shown against a short-term vacancy. A supplementary affidavit was also filed by the appellant, wherein it was pointed out that one Dasratha Nand Sahai, who was posted as Lecturer of Hindi got appointed as Lecturer in a Degree College at Barhaj, Deoria and, therefore, he resigned from the post of Lecturer from the Mahatma Gandhi Inter College and, as such, a vacancy arose and on the said vacancy, the Committee of Management recommended the name of Shri Lallan Prasad Shukla for promotion as Lecturer on ad hoc basis, who was duly qualified. Financial approval to his appointment was granted on 24.02.1981. Consequent to the vacancy caused by ad hoc promotion of Lallan Prasad Shukla, the post of L.T. Grade Teacher was advertised. Five candidates applied and the appellant's name was proposed for appointment, as he had secured highest marks. All this material clearly establishes that the Appellant was appointed against a temporary vacancy and continued in the short term vacancy. These aspects, it appears, have not been considered by the learned Single Judge.

10. It has also been brought to our notice that the order dated 27.07.2007, impugned in the writ petition, also considered the order passed in Writ Petition No. 61288 of 2006. That was a petition filed by one Veer Bahadur Singh, who was appointed on the post of Assistant Clerk in Sri Krishn Intermediate College, Semara, Kushinagar. The grievance of the petitioner in the said writ petition was against the decision of the

District Inspector of Schools, that there was no post. He had prayed in the said petition to direct the respondents to permit him to continue in service. The issue involved in this appeal, therefore, has no connection with the order in Writ Petition No. 61288 of 2006. To that extent, the impugned order based on irrelevant material, is also liable to be quashed and set aside on that count.

11. The question, then, for our consideration is, whether the judgment of the Full Bench in Km. Radha Raizada (supra) would apply to the facts of the present case. The Full Bench framed four questions for consideration, which read as under:-

"(a) Whether S. 33 of the U.P. Act No. 5 of 1982 suffers from vice of excessive delegation of legislative power and as such it is void?

(b) If the answer to question No. (a) is in negative, whether Removal of Difficulties Orders published on 31st July, 1981, removal of Difficulties (Second) Order published on 11th September, 1981, and Removal of Difficulties (Third) Order published on 30th January, 1982 issued by the Government tend to amend, scheme and essential features of the Act and as such are ultra vires the provisions of Section 33 of the Act?

(c) What would be the criteria and procedure for ad hoc appointment of a teacher or Principal either under the Removal of Difficulties Order or under S. 18 of the U.P. Act No. 5 of 1982?

(d) Whether any approval of prior approval of the District Inspector of Schools or Regional Inspectress of Girls Schools, as the case may be, is necessary for making ad hoc appointment of a teacher or Principal either under the Removal of Difficulties Order or under S. 18 of the Act?

12. The learned Full Bench was pleased to answer questions (c) and (d) together which are relevant for our case. The learned Bench noted that the Act, which replaced the U.P. Ordinance No. 8 of 1981, came into force with effect from 14th July, 1981. It is in that context, as there were difficulties, the First Removal of Difficulties Order was issued by notification dated 31st July, 1981. Therefore, the issue considered and answered had no connection either with the Amendment Act 1975 or with the Act 1921, and the judgment would, therefore, clearly be not applicable to the facts of the present case.

13. The Full Bench judgement in Km. Radha Raizada (supra) came up for consideration in the case of **Ashika Prasad Shukla Vs. The District Inspector of Schools, Allahabad & Anr., [(1998) 3 ESC 2006 (All)].** But, however, again it was in respect of an appointment made after coming into force of the Act 1982. The learned Full Bench in Km. Radha Raizada (supra) noted that the procedure of advertisement, which had been followed by putting a notice on the notice board of the institution did not give equal opportunity to all eligible candidates of the District, Region or the State to apply for consideration for appointment against the said short-term vacancy and, therefore, directed that the Management, after intimating such vacancies to the District Inspector of Schools, should notify the same at least in two newspapers having adequate

circulation in Uttar Pradesh, in addition to notifying the same on the notice board of the institution. Thus, it is by judicial interpretation, in order to meet the test of Article 16 of the Constitution of India, the requirement was put for advertising the vacancy in two newspapers having circulation in the State. If at the relevant time the Management had followed the procedure for advertising a temporary vacancy, in the absence of a challenge to that procedure, that procedure cannot be faulted.

14. Considering these aspects of the matter, we are clearly of the opinion that under the Act 1921 and/or Amendment Act 1975, and/or various Orders passed to remove the difficulties, there was no requirement that the vacancy should be notified by publication in two newspapers. Nothing has been placed before us by the State showing the manner and the conditions of appointment prescribed for filling in the temporary vacancies other than that followed by the Management. The Management, as is apparent from the facts on record, had advertised the post in question. In our opinion, therefore, it cannot be said that the procedure for appointment on temporary vacancy/short-term vacancy was without authority of law.

15. Accordingly, the impugned order of the learned Single Judge dated 04.12.2009 in Writ Petition No. 39090 of 2007, insofar as it relates to the appellant, is set aside. Consequently, rule made absolute in the following terms:-

"The order dated 27.07.2007 is quashed insofar as the appellant herein, petitioner no.1 in Writ Petition No. 39090 of 2007, is concerned. The State respondents are directed to pay the appellant the arrears of past salary and continue to pay him salary till the time he continues to occupy the post."

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.07.2010

BEFORE
THE HON'BLE UMA NATH SINGH, J.
THE HON'BLE DEVENDRA KUMAR ARORA, J.

Writ Petition No. 134 (S/B) of 2002

State of U.P and another ...Petitioner
Versus
Narendra Singh ...Respondents

U.P. Govt. Servant(Disposal of Representation against the Annual Confidential Reports of Allied matters) Rules 1995 Rule-5-Delay in disposal of Representation against adverse entry-shall be deem no disqualification for consideration crossing efficiency bar and other service matter-service tribunal committed no illegality by quashing the order-passed beyond statuary period-petition dismissed-without considering individual case of employees.

Held Para 26

Accordingly, all the writ petitions are hereby dismissed with the observation that in the cases where the representation against the adverse entry has not been disposed of in accordance with provisions of Rule 4 of U.P. Government Servants (Disposal of Representation against Annual Confidential Reports and allied Matters) Rule, 1995, such report shall not be treated as adverse for the purposes of promotion, crossing of efficiency bar and other service matters of the government servant concerned as per the mandate of Rule 5 of Rules, 1995.

Case Law Discussed:

AIR 1954 SC 322, AIR 1961 SC 1527, (1999)3 SCC 422, (1959) 359 US 535: 3 L Ed 2d 1012,

(1975) 3 SCR 82, (1975) 3 SCR 619, 540-542 (1989 Reprint)

(Delivered by Hon'ble D K Arora, J.)

1. This bunch of writ petitions have been filed on behalf of the State of U.P. for quashing of the judgement & order, passed by the learned U. P. Public Services Tribunal, Lucknow in different claim petitions.

Since, the common question of law is involved in these writ petitions, accordingly they are being heard and decided by means of a common judgment.

2. Writ Petition No. 134 (S/B) of 2002, State of U.P. and another Vs. Narendra Singh will be leading case in this judgment.

Brief facts of the case are that during the different years the private respondents were awarded adverse entries against which they preferred representations which were decided by the authorities concerned beyond the time prescribed in the Rules. The private respondents against the said adverse entries preferred various claim petitions before the State Public Services Tribunal, Lucknow and challenged the adverse entries on the ground that the representations were decided beyond the time, prescribed in the U.P. Government Servants (disposal of representation against the adverse annual confidential reports and allied matters) Rules- 1995 (here-in-after referred to as Rules, 1995) and prayed for quashment of the said adverse entries. The learned Tribunal allowed claim petitions basically on the ground of delayed disposal of the representations. The learned Tribunal also observed that the representations have also been decided by means of a non-speaking orders, which is also violation of the Rules 1995 and held that the claim petitioners are entitled to get the benefit of Rule 5 of the Rules, 1995. The learned Tribunal further directed that the impugned adverse entry shall not be treated adverse against the claimants (herein private respondents) for the purposes of promotion, crossing of efficiency bar and other service matters. Being aggrieved with the said judgment and orders, passed by the learned Tribunal, the petitioner, State of U. P. has approached this Court.

3. The main contention of learned Additional Chief Standing Counsel, appearing on behalf of the Petitioners/ State, is that the adverse entries have been provided to the private respondents by the competent authorities in order to bring qualitative improvement in public work. The adverse entries were speaking one and were also conveyed to the concerned private respondents. Further, the representations, so moved by the private respondents against their adverse entries, were also considered and decided and communicated to the concerned private respondents.

4. It is further submitted that in order to bring clarity in matters of communication of adverse entries and for disposal of representation expeditiously, so that the government servant may not get deprived of service benefits because of non-disposal of representation, in the year 1995, the State Government in exercise of powers conferred under the proviso to Article 309 of the Constitution of India, framed Rules known as "Uttar Pradesh Government Servants (Disposal of Representation against Annual

Confidential Reports and allied Matters) Rules, 1995. The Rules, 1995 have overriding effect over all existing Rules and orders on the subject relating to disposal of representation against Annual Confidential Reports.

Rule 4 of Rules, 1995 reads as under:

"4. Communication of adverse report and procedure for disposal of representation .- (1) Where a report in respect of a Government Servant is adverse or critical, wholly or in part, hereinafter referred to as adverse report, the whole of the report shall be communicated in writing to the Government Servant concerned by the accepting authority or by an officer not below the rank of reporting authority nominated in this behalf by the accepting authority, within a period of 45 days from the date of recording the report and a certificate to this effect shall be recorded in the report.

(2) A Government Servant may, within a period of 45 days from the date of communication of adverse report under sub-rule (1), represent in writing directly and also through proper channel to the authority, one rank above the accepting authority, hereinafter referred to as the competent authority, and if there is no competent authority, to the accepting authority itself, against the adverse report so communicated:-

Provided that if the competent authority or the accepting authority, as the case may be, is satisfied that the Government Servant concerned had sufficient cause for not submitting the representation within the said period, he may allow a further period of 45 days for submission of such representation.

(3) The competent authority or accepting authority as the case may be, shall, within a period not exceeding one week from the date of receipt of the representation under sub-rule (2), transmit the representation to the appropriate authority, who has recorded the adverse report, for his comments who shall, within a period not exceeding 45 days from the date of receipt of the representation, furnish his comments to the competent authority or the accepting authority, as the case may be-

Provided that no such comments shall be required if the appropriate authority has ceased to be in, or has retired from, the service or is under suspension before sending his comments.

(4) The competent authority or the accepting authority, as the case may be, shall within a period of 120 days from the date of expiry of 45 days specified in sub-rule (3), consider the representation alongwith the comments of the appropriate authority, and if no comments have been received without waiting for the comments, and pass speaking orders-

(a) rejecting the representation; or

b) expunging the adverse report wholly or partly as he considers proper.

(5) Where the competent authority due to any administrative reasons, is unable to dispose of the representation within the period specified in sub-rule (4), he shall report in this regard to his higher authority, who shall pass such orders as he considers proper for ensuring disposal

of the representation within the specified period.

(6) An order passed under sub-rule (4) shall be communicated in writing to the Government servant concerned.

(7) Where an order expunging the adverse report is passed under sub-rule (4), the competent authority or the accepting authority, as the case may be, shall omit the report so expunged.

(8) The order passed under sub-rule (4) shall be final.

(9) Where any matter for -

(i) communication of an adverse report ;

(ii) representation against an adverse report ;

(iii) transmission of representation to the appropriate authority for his comments ;

(iv) comments of the appropriate authority ;

or

(v) disposal of representation against an adverse report : is pending on the date of the commencement of these rules, such matters shall be dealt with and disposal if within the period prescribed therefore under this rule.

Explanation- In computing the period prescribed under this rule for any matters specified in this sub-rule, the period already expired on the date of the commencement of these rules shall not be taken into account."

Rule 5 of Rules, 1995 provide that wherein the adverse reports were not communicated to the incumbent or where a representation against an adverse entry had not been disposed of in accordance with Rule 4, such report/entry would not be treated as adverse for the purposes of promotion, crossing of efficiency bar and other service matters of the government servant.

Rule 5 reads as under:

"5. Report not to be treated adverse:- Except as provided in Rule 56 of the Uttar Pradesh Fundamental Rules contained in Financial Handbook Volume II, Part-I to IV, where an adverse report is not communicated or a representation against an adverse report has not been disposed of in accordance with Rule 4, such report shall not be treated adverse for the purpose of promotion, crossing of efficiency-bar and other service matters of the Government Servant concerned."

Rule 7 of Rules, 1995 provides for penalty in the event of failure to communicate adverse report or wilfully fails to dispose of the representation within the prescribed period and for willful default in placing the report before the competent authority by a Section Officer in the Secretariat and for treating such a default to be a misconduct punishable in accordance with the punishment rules applicable to the incumbent.

Rule 7 is being quoted below:

"7. Penalty: - (1) Where an officer legally bound to communicate an adverse report to the Government servant concerned or where an officer legally

competent to dispose of a representation against an adverse report under these rules, wilfully fails to do so, within the period prescribed therefore, shall be guilty of misconduct and be punishable in accordance with the punishment rules applicable to him.

(2) A Section Officer in the Secretariat and an officer or official incharge of an office, other than the Secretariat, shall place the representation, comments of the appropriate authority thereon and other relevant records, if any, before the competent authority or the accepting authority, as the case may be, immediately after their receipt. Any wilful default, in this behalf, on his part shall be a misconduct and he shall be punishable in accordance with the punishment rules applicable to him."

5. After coming into force of the Rules, 1995, a number of employees challenged their adverse reports before the Tribunal on the ground that the representations against the same had either not at all been disposed of or not been disposed of within the time schedule provided in Rule 4 of Rules, 1995. The learned Tribunal without entering into merits of the case, merely on the ground that the representation against Annual Confidential Reports had not been disposed of within the time schedule mentioned in Rules, 1995, passed orders for treating the adverse confidential reports as not adverse for the purpose of promotion, crossing of efficiency bar and other service matters.

6. Learned Additional Chief Standing Counsel also submitted that Rule 4 lays down the procedure for considering and deciding the representation made by a government servant against the Annual Confidential Reports in which the time prescribed with respect to various stages in the procedure is not mandatory but is only directory. Learned counsel further argued that delay in disposal of representation, as long as representation is not disposed of, cannot be construed to mean that the adverse material gets wiped off altogether from the service record of the government servant concerned. Further, the benefit of Rule 5 inasmuch as the Annual Confidential Reports would not be treated as adverse for the purpose of promotion, crossing of efficiency bar and other service matters of a government servant only upto a point of time till the representation is not decided and not beyond that. Once representation has been decided by the competent authority after adopting the substantive procedure as laid down in Rule 4, it gives a fresh cause of action and such an order disposing of the representation in judicial review has to be tested on its own strength independent of the delay.

Rule 5 comes into play in two contingencies only:

(I)Where the adverse report has not been communicated (a provision thereof is made in Rule 4 (1))

(II)Where a representation against the adverse entry has not been disposed of in accordance with Rule 4.

It is only these two contingencies that the report is not to be treated as adverse for the purpose of promotion, crossing of efficiency bar and other service matters. Had it been the intention of the legislature to give the benefit where the representation has been disposed of though beyond the prescribed time schedule, it would have

been specifically provided for such third contingency in Rule 5 but the same is not so.

7. Further submission of learned counsel appearing on behalf of the State is that mere delay of couple of days to a few months or even more cannot be used by the incumbent to his advantage. The effect of such interpretation would actually mean that an incumbent himself may indulge in causing hindrance and ultimately reap the benefit of his disposal of representation by a delay of a day or two. Consequently, a provision is to be construed in such a manner so as to make it workable and effective and with intent, not to defeat the purpose of incorporation of the Rules, 1995. From the point of time of disposal of representation onwards where the schedule expires up till the time of decision, Government Servant cannot be given the benefit of Rule 5 beyond the date of disposal of representation.

Another submission of learned counsel for State is that the time schedule provided for in Rule 4 is only directory and not mandatory and for proving home this point, he referred to Order VIII Rule 1 C.P.C. which in sum and substance provides that -

"the defendant shall on or before first hearing or within such time as the court may fix, which shall not be beyond 30 days from the date of service of summons on the defendant, present a written submission of his defence."

8. It is further submitted that in the provision though a negative language has been used yet in number of judgments Hon'ble the Supreme Court interpreted it to conclude that despite use of negative "shall not be beyond 30 days" has held that it is not mandatory in character but it is only directory in nature.

A perusal of sub-rule (4) of Rule 4 would reveal that it does not make use of any negative language nor does it limit the period of 120 days by use of any such words like 'not exceeding' etc. while clothing the competent authority to dispose of representation.

As such, where representation has been disposed of though beyond the time frame yet from that point onwards the government servant cannot be any longer held entitled to benefit of Rule 5. Moreso, since such disposal of representation gives a fresh cause of action quite capable to standing on its own legs in judicial scrutiny since it is a speaking order having been passed after due deliberation and consideration of all aspects in consonance with principles of natural justice provided for as safeguards as substantive provision in Rule 4 of the Rules, 1995.

9. We have considered the submission of learned counsel for the petitioners and gone through the record of writ petitions.

A century ago in Taylor vs. Taylor (1875) 1 Ch D 426 Jessel Mr. Adopted the rule that "where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and that the other methods of performance are necessarily forbidden". The rule was followed by Privy Council in Nazir Ahmad vs. King Emperor (Lord Roche) AIR 1936 Privy Council 253 (2), para-18 of the same reads as under:-

"18..... The rule which applies is a different and not less well recognised rule, namely, that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden....."

This rule has since been approved by Hon'ble Supreme Court in Rao Shiv Bahadur Singh vs. State of V.P. AIR 1954 SC 322 : again in Deep Chand vs. State of Rajasthan AIR 1961 SC 1527: State of U.P. vs. Singhara Singh, AIR 1964 ASC 358, in Babu Verghese & others vs. Bar Council of Kerala and others (1999) 3 SCC 422.

10. It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. This rule was enunciated by Mr. Justice Frankfurter in Vitarelli v. Seaton (1959) 359 US 535: 3 L Ed 2d 1012 where the learned Judge observed:

"An executive agency must be rigorously held to the standards by which it professes its action to be judged. Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed..... This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword."

"The Hon'ble Supreme Court accepted the rule as valid and applied in India in A.S. Ahluwalia vs. State of Punjab (1975) 3 SCR 82 and in subsequent decision given in Sukhdev vs. Bhagatram, (1975) 3 SCR 619; The Hon'ble Supreme Court in Ramana Dayaram Shetty vs. The International Airport Authority of India & others AIR 1979 SC 1628, while appreciating the said rule pleased to observe in para-10 as under:-

"It may be noted that this rule, though supportable also as emanating from Article 14, does not rest merely on that article. It has an independent existence apart from Article 14. It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority. If we turn to the judgment of Mr. Justice Frankfurter and examine it, we find that he has not sought to draw support for the rule from the equality clause of the United States Constitution but evolved it purely as a rule of administrative law. Even in England, the recent trend in administrative law is in that direction as is evident from what it stated at pages 540-41 in Prof. Wade's Administrative Law 4th Edition. There is no reason why we should hesitate to adopt this rule as a part of our continually expanding administrative law. Today with tremendous expansion of welfare and social service functions increasing control of material and economic resources and large scale assumption of industrial and commercial activities by the State, the power of the executive Government to affect the lives of the people is steadily growing. The attainment of socio-economic justice being a conscious end of State policy, there is a vast and inevitable increase in the frequency with which ordinary citizens come into relationship of

direct encounter with State power-holders. This renders it necessary to structure and restrict the power of the executive Government so as to prevent its arbitrary application or exercise. Whatever be the concept of the rule of law whether it be the meaning given by Dicey in his "the Law of the Constitution" or the definition given by Hayek in his "Road to Serfdom" and "Constitution of liberty" or the exposition set forth by Herry Jones in his "The Rule of Law and the Welfare State", there is, as pointed out by Mathew, J., in his article on "The Welfare State, Rule of Law and Natural Justice" in Democracy, Equality and Freedom "substantial agreement in juristic thought that the great purpose of the rule of law notion is the protection of the individual against arbitrary exercise of power, wherever it is found". It is indeed unthinkable that in democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affection of some right or denial of some privilege."

"The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other". "For ascertaining the real intention of the Legislature, the nature and design of the statute, and the consequences which would follow from construing it the one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered." If object of the enactment will be defeated by holding the same directory, it will be construed as mandatory. Whenever a statute requires a particular act to be done in a particular manner and also lays down that failure to comply with the said requirement leads to a specific consequence, it would be difficult to accept the argument that the failure to comply with the said requirement should lead to any other consequence.

11. Maxwell on interpretation of statute, 12th edition, while analyzing the cases in which statutory requirement have been held to be mandatory observed that where the whole aim and object of the legislature would be plainly defeated if the command to do the things in a particular manner did not imply a prohibition on doing it in any other. It is further opined that if the benefit be for the protection of an individual in his private capacity the same can be waived. To illustrate, reference has been made about waiver of the benefit of the Limitation Act on the maxim of law "Quilibet potest renunciare juri pro se introducto", meaning "an individual may renounce a law made for

his special benefit". Maxwell further says that if the benefit be one which has been imposed in public interest there can be no waiver of the same.

Craies in his Statute Law has opined the same, as would appear from what has been stated at page 269 of 7th Edn. By drawing attention to the aforesaid maxim, it has been observed that if the object of a statute is "not one of general policy, or if the thing which is being done will benefit only a particular person or class of persons, then the conditions prescribed by the statute are not considered as being indispensable". To illustrate this principle, it has been stated that if the statutory condition be imposed simply for the security or the benefit of the parties to the action themselves, such condition will not be considered as indispensable and either party may waive it.

12. Crawford in his Interpretation of Laws takes the same view as would appear from pages 540-542 (1989 Reprint). The learned author while quoting the aforesaid maxim states at page 542 that requirement like giving of notice may be waived as the same is intended for the benefit of the person concerned.

Francis Bennion in his Statutory Interpretation (1984), at pages 27 et seq stated that if the performance of statutory duty be one which would come within the aforesaid maxim, the person entitled to the performance can effectively waive performance of the duty by the person bound. As an illustration mention has been made (at page 29) of decision in Toronto Corpn. v. Russell and Stylo Shoes Ltd. v. Prices Tailors Ltd. wherein it was held that a duty to give notice of certain matters can be waived by the person entitled to notice, if there is no express or implied indication that absence of notice would be fatal.

13. H.W.R. Wade has dealt with this aspect at page 267 of the 6th Edn. of his treatise wherein he has quoted what Lord Denning, MR said in Wells v. Minister of Housing and Local Government, which reads as under:

"I take the law to be that a defect in procedure can be cured, and an irregularity can be waived, even by a public authority, so as to render valid that which would otherwise be invalid."

In "words and Phrases" (Permanent Edition), the meaning of words "irregularity" and "nullity" has been analyzed at page 469 of Vol. 22A and at pages 772 and 773 Vol. 28A respectively. "Irregularity" is want of adherence to some prescribed rule or mode of proceeding"; whereas "nullity" is "a void act or an act having no legal force or validity" as stated at page 772. At page 773 it has been mentioned that the safest rule of distinction between an "irregularity" and a "nullity" is to see whether "a party can waive the objection: if he can waive, it amounts to irregularity and if he cannot, it is a nullity."

14. The analysis of Rule 1995 reveals that the whole adverse report has to be communicated in writing to the Government Servant by the concerned accepting authority or by an officer not below the rank of reporting authority nominated in this behalf by the accepting authority, within a period of 45 days from the date of recording the report and a certificate to the said effect has to be recorded in the report.

15. The sub-rule (2) of Rule 4 gives an option to a Government Servant to

represent in writing directly and also through proper channel within a period of 45 days to the authority, one rank above the accepting authority, and if there is no such authority then to the accepting authority itself. If government servant concerned shows sufficient cause for not submitting the representation within the prescribed period, the competent authority or the accepting authority may grant a further time of 45 days for submission of such representation.

16. The sub-rule (3) of Rule 4 further mandates that the competent authority within the period not exceeding one week from the date of receipt of the representation under sub-rule (2), transmit the representation to the appropriate authority, who has recorded the adverse report, for his comments and the said authority shall within a period not exceeding 45 days from the date of the receipt of representation has to furnish his comments to the competent authority and no comments shall be required if the appropriate authority has ceased to be in, or has retired from, the service or is under suspension before sending his comments.

Sub-rule (4) mandates a competent authority to consider the representation alongwith comments of appropriate authority, and if no comments have been received without waiting for comments, and pass speaking orders (a) rejecting the representation; or (b) expunging the adverse report wholly or partly as he considers proper within a period of 120 days from the date of expiry of 45 days specified in sub-rule (3).

17. The sub-rule (5) provides where the competent authority due to any administrative reasons, is unable to dispose of the representation within a period specified in sub-rule (4), he shall report in this regard to his higher authority, and in such situation the higher authority shall pass orders as he considers proper for ensuring disposal of the representation within the specified period.

18. The Rule 5 provides that except as provided in Rule 56 of the Uttar Pradesh Fundamental Rules contained in Financial Handbook Volume-II, Parts II to IV, where an adverse report is not communicated or a representation against an adverse report has not been disposed of in accordance with Rule 4, such report shall not treated adverse for the purpose of promotion, crossing of efficiency-bar and other service matters of the Government Servant concerned.

19. The examination of rule further reveals that Rule 6 provides that the competent authority has to maintain a register in such form as may be specified by the government from time to time and shall make appropriate entries therein.

20. The sub-rule (1) of Rule 7 provides for penalty by treating it as a misconduct and punishable in accordance with the applicable punishment rules. If an officer legally bond to communicate an adverse report to the concerned government servant or where an officer legally competent to dispose of a representation against an adverse report under these rules, willfully fails to do so, within the period prescribed therefor.

Sub-rule (2) of Rule 7 cast a duty upon section officer in Secretariat and officer or official incharge of an office, other than the Secretariat, of placing the representation, comments of appropriate

authority thereon and other relevant records, if any, before the competent authority or the accepting authority, immediately after their receipt and any wilful default, in this behalf, on the part of the said officer has to be treated as a misconduct and the officer concerned is liable for punishment in accordance with the applicable punishment rules.

21. The analysis of the provisions of rules 1995 makes it crystal clear that there is a prescribed time schedule for disposal of the representation and the time starts from the stage of communication of the adverse reports in writing to a government servant. The authorities have been given discretion to allow further time of 45 days to the government servant, where government servant fails to submit his representation against the adverse report within the time of 45 days from the date of communication, on showing sufficient cause for not submitting the representation within the prescribed period of 45 days. The rule further mandates that if the comments of the authority, who has recorded the adverse report are not received within the time prescribed, the competent authority has to proceed further without waiting for the comments and pass speaking orders within a period of 120 days from the date of expiry of 45 days specified in sub-rule (3).

22. Sub-rule 5 of Rule 4 further take care of a situation where a competent authority due to any administrative reason is unable to dispose of the representation within the period specified in sub-rule 4 then the competent authority has to inform his higher authorities and the duty has been cast upon the said higher authority for passing such orders as he considers proper for ensuring disposal of the representation within the specified period.

Under Rule 6, the competent authority is required to maintain register and make appropriate entries therein for achieving the object prescribed under Rules, 1995.

23. The Legislature even has taken care for making compliance of Rule 4 by incorporating penal clause in Rule 7 in the event of failure to communicate adverse report or dispose of the representation willfully within the prescribed period by competent authority or in default in placing the representation, comments of the appropriate authority with other relevant record before the competent authority, by the concerned officer.

A holistic view of the provisions of the Disposal of Representation Rules, 1995 reflects that the same have been incorporated with zeal and pious intention of ensuring disposal of representation of government servant made against adverse entry awarded to him and on examining the provisions of Rules, 1995, it is absolutely clear that a time frame schedule has been prescribed with the panel provisions against the defaulting officers. The rule further prescribes the mode which is required to be strictly observed and failure of disposal of the representation in accordance with rule 4, entitles a government servant of the benefit of not treating such report as adverse for the purposes of promotion, crossing of efficiency bar and other service matters.

24. In view of the above, we are of the considered view that Rules 1995, no where provides the situation, where the representation of a government servant has been decided by the competent authority

beyond/ after the expiry of time schedule prescribed under rule 4 will remain in operation except for the period upto the disposal of the representation.

25. On the basis of aforesaid analysis, we are of the considered view that all these writ petition lack merits and do not warrant any interference by this Court.

26. Accordingly, all the writ petitions are hereby dismissed with the observation that in the cases where the representation against the adverse entry has not been disposed of in accordance with provisions of Rule 4 of U.P. Government Servants (Disposal of Representation against Annual Confidential Reports and allied Matters) Rule, 1995, such report shall not be treated as adverse for the purposes of promotion, crossing of efficiency bar and other service matters of the government servant concerned as per the mandate of Rule 5 of Rules, 1995.

27. As we are deciding these writ petitions only on legal issues without entering into the factual disputes, therefore, the concerned authorities are hereby directed to examine the individual case in pursuance to the provisions of Rule 5 of Rules, 1995.

28. With the aforesaid observations and directions, all these writ petitions are dismissed.

There shall be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.08.2010

BEFORE
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE KASHI NATH PANDEY, J.

Special Appeal No. 143 OF 2008

Committee of Management Adarsh Shishu Sadan ...Applicant
Versus
State of UP & others ...Opposite Parties

Counsel for the Petitioner
Sri Siddharth Khare
Sri Awadh Narain Rai

Counsel for the Respondents
Sri Y.K.Yadav
C.S.C.

Constitution of India Art.21 A and Art.45-read with Right of Children to Free and Compulsory Education Act 2009 Section 12-Private management having reorganization under Section 4 of U.P. Recognized Basic School Rules (Appointment and Conditions of service of teacher) Rules 1975-with condition to arrange finance from its own sources-running primary schools-whether can claim recurring-grant as a matter of Right? Held-'No'-only the responsibility of giving free education cast upon the State Govt.-which is being successfully discharged under "Sarv Shiksha Abhiyan"-No duty cast upon Private Management-not entitled for any kind of aid or recurring grant

Held Para 27

The fundamental rights under Article 21A given to the children of the age of 6 to 14 years and the corresponding duty of the State to provide free and compulsory education by law, now provided by the Right of Children to Free and Compulsory

Education Act, 2009 w.e.f. 26.8.2009 does not give any right to the managements of the existing unaided schools to receive any kind of aid or recurring grant to meet its expenses from the appropriate government or the local authority.

Case Law Discussed:

AIR 1992 SC 1858, AIR 1993 SC 2178, (2007) 7 SCC 701, (2008) 3 SCC 315

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

1. The petitioners-appellants' are Committees of Management of primary schools in Districts Maharajganj and Kushinagar. In these intra-court appeals they are aggrieved by the judgement of learned Single Judge dated 13.12.2007 in Writ Petition No. 62181 of 2005 filed by Committee of Management Adarsh Shishu Sadan Basahiya Khurd Paratawal, District Maharajganj; and Writ Petition No. 61435 of 2006 filed by Committees of Managements of six primary schools, by which he has dismissed the writ petitions, for directions to the State-respondents to provide recurring grant-in-aid to the primary schools run by them, owned and controlled by private societies, recognised by the Social Welfare Department of the State Government.

2. We have heard Shri Awadh Narain Rai and Shri Siddharth Khare, for the petitioner-appellants. Learned Standing Counsel appears for the State respondents.

3. The petitioners are the management bodies of the primary schools recognised by the Basic Education Officers of their respective districts, and also by the Social Welfare Department of Government of Uttar Pradesh. All these school, running primary classes claim that up to half of the number of their students belong to Scheduled Castes. It is alleged that they have been arbitrarily denied recurring-grant under the Circular Letter issued by the Special Secretary, Department of Social Welfare, Government of UP dated 31.3.1994, and thereafter under another Circular Letter dated 20.4.1998 issued by the Special Secretary, Department of Social Welfare, Government of U.P.

4. By a Government Order dated 21.5.1999, a one time grant was provided to be given by the State Government to only those schools, which were ten years old as on 31.3.1998, with 50% students from Scheduled Caste/Scheduled Tribe categories subject to certain conditions. Condition No. 2 (4) provided for giving an undertaking and affidavit that grant will be accepted with no further claims in future.

5. This Court in Writ Petition No. 36719/1999, set aside the condition No. 2 (4). The State respondents were required to consider the claims of the qualifying schools, for recurring grant-in-aid dehorse the restriction. The State Government considered and rejected their claim on 26.2.2002, on the ground that the responsibility of primary education under the 73rd and 74th Constitutional Amendments, has been given to local bodies/panchayats. The State Government also pleaded financial difficulty in funding these schools.

6. In Writ Petition No. 16529/2003 once again, the decision of the State Government was successfully challenged. By the judgement dated 3.3.2004, Government Order dated 31.3.2003 was set aside and the State Government was

required to take a fresh decision in the light of the observations made in the judgment and also keeping the constitutional mandate under Article 41 of the Constitution of India.

7. The State Government once again rejected the claim for recurring grant on 26.2.2004, and once again a Writ Petition No. 77659/2005 was filed by these schools. The writ petition was again allowed on 23.3.2006 (for the third time), and while quashing the order dated 14.1.2005 the Court observed that the directions given by this Court for adjudicating the dispute has not been considered in positive perspective. The matter was dealt with only with a negative note. The State Government was required to re-consider the matter.

8. By the order dated 23.10.2006, the Principal Secretary, Government of UP, in pursuance to the directions issued by the Court on 23.3.2006 (under challenge in these two writ petitions) has observed that the State Government does not have a policy or scheme to give recurring grant to every primary school. There is a primary school run by the Basic Education Board almost in every village. Up to the year 2008, there will be one school, at a standard distance of one kilometre under the 'Sarva Shiksha Abhiyan' run by the State Government to fulfil the mandate of Article 21A and 41 of the Constitution of India, to provide free and compulsory education to the children upto the age of 14 years. The scheme provides for one primary school on a population of 300, in one kilometre area and one junior high school on the population of 800 in two kilometre area. The Principal Secretary observed that at the relevant time and upto the year 1994, the State Government had prepared a scheme for primary education to the children belonging to the Scheduled Caste and to give them grants through the Social Welfare Department. Thereafter the Government did not have any policy to give recurring grant to the privately managed primary schools.

9. In the impugned order dated 23.10.2006, the Principal Secretary, Government of U.P., further observed in deciding the representation, that he had taken advice of the Legal Department, Basic Education Department, Finance Department; the Advocate General, after which the matter was placed before the State Cabinet. The State Cabinet rejected the claim for grant of recurring grant to these private schools. The management of the recognised schools were given recognition with the condition that under Rule 4 of the U.P. Recognized Basic Schools (Appointment and Conditions of Service of Teachers) Rules, 1975, were required to arrange for finances from its own sources. The Social Welfare Department did not undertake nor gave any assurance for giving recurring financial aid to these schools. The Government is fulfilling its responsibility of providing free and compulsory education under the 'Sarv Shiksha Abhiyan' and is not responsible, nor has committed to give financial aid to the private primary schools.

10. Learned Judge held that the petitioners' schools were given recognition with a specific condition under the Rules of 1975, to run the schools through their own financial resources. The State Government is fulfilling its obligation to provide primary education through the schools run and

managed by local bodies and Zila Panchayat. The 'Sarv Shiksha Abhiyan' has fulfilled the obligation of the State to provide free and compulsory education for children upto the age of 14 years. The management of the schools do not have a right to claim recurring grant both under the policy of the State Government as well as under Article 21A and 41 of the Constitution of India.

11. Learned counsels for the petitioner-appellants submit that the State is under constitutional mandate to provide free and compulsory education to the children upto the age of 14 years, vide **Mohini Jain** and **Unni Krishnan's** case and that in view of the constitutional mandate, the petitioners' institutions, established with the object of providing primary education to children belonging to the Scheduled Castes, recognised by the Social Welfare Department, have a right to be given recurring grant-in-aid.

12. The petitioners have established the primary school and were recognised by the Social Welfare Department of the State to provide primary education with no commitment of financial aid. Under Rule 4 of the U.P. Basic Schools (Appointment and Conditions of Service of Teachers) Rules, 1975 the financial arrangement of the costs to run the school was to be made by the management from its own sources. The State Government, in order to fulfil its aim to provide free education to primary schools recognized by the Social Welfare Department in which there are 50% students belonging to scheduled caste, provided for one time grant only by Government Order dated 21.5.1999 with the condition that they will not claim any further grant in future from the Government. The condition No. 2 (4), for giving undertaking and affidavit to that effect was set aside by this Court. Thereafter the matter was under consideration of the State Government in terms of the various directions issued by the Court concerned with fulfilling the fundamental right of the children upto the age of 14 years under the constitutional mandate.

13. Article 41 falling in Part IV Directive Principles of the State Policy provided for guidelines for securing right to work, education and to public assistance in cases of unemployment, old age sickness and disablement and in other cases of undeserved want. In **Mohini Jain vs. State of Karnataka AIR 1992 SC 1858** the Supreme Court held that the State is under duty not only to establish educational institutions but also to effectively secure the right to education by admitting students to the seats available at such institutions by admitting candidates found eligible according to some rationale principle. Even though it was not a fundamental right and is not judicially enforceable, once the State provides facilities for education, its action must conform to the standard of equality and rationality under Article 14. In **Unni Krishnan J.P. Vs. State of A.P. AIR 1993 SC 2178** the Supreme Court found that though right to education is not stated expressly as a fundamental right, it is implicit in and flows from the right to life guaranteed under Article 21, having regard to the broad and expansive interpretation given by the Court. The right to education, it was held, has been treated as one of the transcendental importance. It has fundamental significance to the life of an individual and the nation. Without education being provided to the citizen of the country the

objectives set forth in the preamble to the Constitution, cannot be achieved. The Supreme Court shifted the obligations under Article 41, 45 and 46 to be included as a fundamental right to education under Article 21. It was held that it was not correct to contend that Mohini Jain, was wrong in so far as it declared that right to education flows directly from right to life. It is, however, not an absolute right. It means in the context of Articles 41 and 45 that every child/children of the country has a right to free education until he completes the age of 14 years. After the child completes 14 years, his right to education is circumscribed by the limits of the economic capacity of the State and its development.

14. The Supreme Court thereafter held in **Unni Krishnan's** case that the obligations under Articles 41, 45 and 46 of the Constitution can be discharged by the State either by establishing the institutions of its own, or by aiding, recognising and/granting affiliation to privately educational institutions. It went on to hold that by declaring education as a fundamental right upto the age of 14, years the Court was not determining the priorities and was only reminding the State of its solemn endeavour, within a prescribed time.

15. The 86th Amendment Act, 2002 amending the Constitution w.e.f. 12.12.2002, substituted Article 45 providing for free and compulsory education for children to be provided by the State within ten years from the date of commencement of the Constitution, until they complete the age of 14 years. Article 45, as it stood prior to its amendment, was transposed by the same amendment under Article 21A in Part III Constitution of India. The newly inserted Article 21A and the substituted Article 45 by the 86th Amendment Act, 2002 provides:-

"Article 21A- The State shall provide free and compulsory education to all children of the age of 6 to 14 years in such manner as the State may by law determine.

Article 45- The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years."

16. The law as contemplated under Article 21A was enacted by the Parliament, after seven years. The Right of Children to Free and Compulsory Education Act, 2009 (Act No. 35/2009) received the assent of the President on August 26th 2009, and was published in the Gazette of India on 27.8.2009. The prefatory note giving 'statements of objects and reasons' of the Act provides that over the years there has been significant spatial and numerical expansion of elementary schools in the country, yet the goal of universal elementary education continues to elude us. The number of children, particularly children from disadvantaged groups and weaker sections, who drop out of school before completing elementary education, remains very large. Moreover, the quality of learning achievement is not always entirely satisfactory even in the case of children, who complete elementary education. Consequently in pursuance to the fundamental right inserted in the Constitution by 86th Amendment Act, 2002 as Article 21A the right of children to free and compulsory education was enacted to provide:-

"3. Consequently, the Right of Children to Free and Compulsory Education Bill, 2008, is proposed to be enacted which seeks to provide:-

(a) that every child has a right to be provided full time elementary education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards;

(b) 'compulsory education' casts an obligation on the appropriate Government to provide and ensure admission, attendance and completion of elementary education;

(c) 'free education' means that no child, other than a child who has been admitted by his or her parents to a school which is not supported by the appropriate Government, shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing elementary education;

(d) the duties and responsibilities of the appropriate Governments, local authorities, parents, schools and teachers in providing free and compulsory education; and

(e) a system for protection of the right of children and a decentralized grievance redressal mechanism.

4. The proposed legislation is anchored in the belief that the values of equality, social justice and democracy and the creation of a just and humane society can be achieved only through provision of inclusive elementary education to all. Provision of free and compulsory education of satisfactory quality to children from disadvantaged and weaker sections is, therefore, not merely the responsibility of schools run or supported by the appropriate Governments, but also of schools which are not dependent on Government funds.

5. It is, therefore, expedient and necessary to enact a suitable legislation as envisaged in Article 21-A of the Constitution."

17. The Parliament has finally fulfilled the mandate of Article 45 by including the duty imposed by the Constitution on the State, as a fundamental right under Article 21-A to the children of the age of 6 to 18 years to free and compulsory education. The 86th Amendment to the Constitution, in our opinion, is most significant constitutional amendment made after the Constitution was enacted, for the development of the Country. It serves the goals set forth in the preamble. The fundamental right, given to the children and the corresponding obligation of the State to provide free and compulsory education to the children of the age of 6 to 14 years is now a real and achievable right. The Courts now have an additional constitutional duty to enforce the fundamental right of free and compulsory education for the children of the age 6 to 14, and the obligation of the State, to give it full purpose and meaning.

18. Does this right and the obligation of the State gives any right to the primary schools for establishing schools, claim exemption from municipal laws and secure financial aid from the State?

19. Section 6 of the Right of Children to Free and Compulsory

Education Act, 2009 provides for the appropriate government and local authority to establish within such area or limits of neighbourhood as may be prescribed a school where it is not so established within a period of three years from the date of commencement of the Act. The Central Government and the State Government have to share, under Section 7, concurrent responsibility for providing funds to carry out the provisions of the Act. The duty of compulsory elementary education to every child is placed upon the appropriate government defined under Section 2 (a) of the Act, which in relation to school established, owned and controlled by the Central Government, means the Central Government and other than the schools referred to as above, the State Government or the Union Territory as the case may be.

20. The Act of 2009 defines in Section 2 (f) 'elementary education' to mean the education from 1st class to 8th class. The duty of local authority under Section 9, is to provide free and compulsory education to every child, provided that where a child is admitted by his or her parents or guardian, as the case may, in a school other than a school established, owned, controlled or substantially financed by funds provided directly or indirectly by the appropriate Government or a local authority, such child or his or her parents or guardians, shall not be entitled to make a claim for reimbursement of expenditure incurred on elementary education of the child in such other school. Section 8 (b) ensure availability of a neighbourhood school in respect of children belonging to weaker section and the child belonging to disadvantaged group. Section 8 (c) and Section 9 (c) in respect of appropriate government and local authority responsible provide liability to ensure that they are not discriminated and prevented from pursuing and completing elementary education on any grounds. The appropriate government and the local authority are also under duty under Sections 8 and 9 to provide infrastructure including school building, teaching staff, learning equipment; and to ensure good quality elementary education in such neighbourhood school. The Act also gives a corresponding liability under Section 10 on the parents and guardians to admit or cause to be admitted his or her child or ward, as the case may be, to an elementary education in the neighbourhod school.

21. Chapter IV of the Act provides for responsibilities of the school to provide free and compulsory education. The school under Section 2 (n) means, (i) a school established, owned or controlled by the appropriate government or a local authority; (ii) an aided school receiving aid or grants to meet whole or part of its expenses from the appropriate government or the local authority; (iii) a school belonging to specified category; and (iv) an aided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority. The school, which does not receive aid and grants under Section 12 (2), is required to provide free education. Section 12 is quoted as below:-

"12. **Extent of School's responsibility for free and compulsory education-**(1) For the purposes of this Act, a school,-

(a) specified in sub-clause (i) of clause (n) of Section 2 shall provide free and compulsory elementary education to all children admitted therein;

(b) specified in sub-clause (ii) of clause (n) of Section 2 shall provide free and compulsory elementary education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum of twenty-five per cent;

(c) specified in sub-clauses (iii) and (iv) of clause (n) of Section 2 shall admit in Class I, to the extent of at least twenty-five per cent of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion;

Provided further that where a school specified in clause (n) of Section 2 imparts pre-school education, the provisions of clauses (a) to (c) shall apply for admission to such pre-school education.

(2) The school specified in sub-clause (iv) of clause (n) of Section 2 providing free and compulsory elementary education as specified in clause (c) of sub-section (1) shall be reimbursed expenditure so incurred by it to the extent of per-child-expenditure incurred by the State, or the actual amount charged from the child, whichever is less, in such manner as may be prescribed:

Provided that such reimbursement shall not exceed per-child-expenditure incurred by a school specified in sub-clause (i) of clause (n) of Section 2:

Provided further that where such school is already under obligation to provide free education to a specified number of children on account of if having received any land, building, equipment or other facilities, either free of cost or at a concessional rate, such school shall not be entitled for reimbursement to the extent of such obligation."

22. In the present case the schools were recognised by the Social Welfare Department and were given only one time grant. There was no assurance given by the State Government for giving recurring grants to the schools. The salary of the teachers and other expenses were required to be met by the management from its own funds. The obligation of the State to provide free and compulsory education, now enacted as fundamental right, is not to be enforced through such schools for giving recurring grants to meet the expenses of the salary of teachers and other incidental expenses.

23. The right given under Article 21A to the children for free and compulsory education and the obligation of the State cannot be taken as a fundamental right of the private unaided school. In **City and Industrial Development Corporation of Maharashtra vs. Ekta Mahila Mandal and others (2007) 7 SCC 701** the Supreme Court did not find any such right under Article 21A to regularize the encroachment of an area earmarked in the development plan as green belt on the ground that some children were taught in the school.

24. In **Superstar Educational Society vs. State of Maharashtra and others (2008) 3 SCC 315** the Supreme

Court held that it is the duty of the State Government to provide access to education. Unless new schools in the private sector are permitted, it will not be possible for the State to discharge its constitutional obligation. The permission was granted by the High Court to 1495 new schools under the order dated 16.5.2006 on permanent no grant basis without any financial commitment or liability on the part of the State Government, even in future and at the same time ensuring that the schools follow the parameters and conditions prescribed by the Education Code giving liberty to the authorities to take action, if there is any violation. The Apex Court did not find it appropriate for the High Court to quash the permission granted to these schools without impleading or hearing them and without even noticing that many of the schools were English medium or non-Marathi schools run by religious and linguistic minority not entitled to be covered by the proposed master plan.

25. We do not find any right either under the Government orders issued from time to time or under the Act No. 35 of 2010, enacted to fulfill the rights under Article 21A, to any school for claiming recurring grant-in-aid. The State Government is conscious of its obligation and is making efforts to provide atleast one primary school on a population of 300 within one kilometer area and a junior high school on a population of 800 within two kilometers area under the 'Sarv Shiksha Abhiyan'. Nothing has been brought on record to show, that the area in which the petitioners' schools are being run do not have any school as is defined in Section 2 (n) (i), (ii) and (iii), for education of the children between the age of 6 to 14, in the neighbourhood.

26. Section 12 (2) of the Act of 2009, provides for reimbursement to the extent of per-child-expenditure incurred by the State, to those schools, which are un-aided and are not receiving any kind of aid including land, building, equipment or other facilities recognised for imparting elementary education and are providing free and compulsory education to the children. The reimbursement is to be made in a manner, in which it may be prescribed. The State shall, if there is an established school by the appropriate government or by a local authority, as a neighbourhood school provide free and compulsory education to the children of the area through such schools. It is only when there is no school in the neighborhood that the State Government may provide for a reimbursement per child to the school, which is required for such services by the State, in accordance with the rules as may be prescribed.

27. The fundamental rights under Article 21A given to the children of the age of 6 to 14 years and the corresponding duty of the State to provide free and compulsory education by law, now provided by the Right of Children to Free and Compulsory Education Act, 2009 w.e.f. 26.8.2009 does not give any right to the managements of the existing unaided schools to receive any kind of aid or recurring grant to meet its expenses from the appropriate government or the local authority.

28. The Special Appeals are **dismissed.**

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.07.2010

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE VIRENDRA SINGH, J.

Special Appeal No. 1034 (defective) of 2009.

State of U.P. and others ...Appellants
Versus
Sunil Kumar Verma and others
...Respondents.

Counsel for the Petitioners:
Sri M.C. Chaturvedi
C.S.C.

Counsel for the Respondents:
Sri K.C. Vishwakarma
Sri Devesh Vikram

U.P. Absorption of Retrenched Employees of the Government or Public Corporation in Government Service Rules 1991, Rule 3-U.P. Absorption of Retrenched Employees of State Government or Public Corporation in Government Service (recession) Rules 2003, Rule 3(ii)-Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service (Rescission of Rules) Act 2009, Sec 3(2)-Allahabad High Court Rules 1952 Chapter VIII, Rule 5-Absorption of retrenched employees as per 1991 Rules-Effect of Rescission Rules of 2003-Retrenched employees of U.P.State Cement Corporation Sought quashing of order dated 24/05/2006 by which their claim for absorption in a Government department was rejected-impugned order quashed in writ petition-Special Appeal right of retrenched employees covered by the 1991 Rules who could not be absorbed upto 08/04/2003 considered-Held, no mandamus can be issues for enforcing the rights of appellants,since Act of 2009 and 2003 Rules expressly provide for terminating the right of consideration of retrenched employees as accrued under the 1991 Rules-However, appellants entitled for benefit as contemplated under Rule 3(2) of 2003 Rules.

Held Para 91

We also endorse the above view of the learned Single Judge. We having found that the right of consideration for absorption under the 1991 Rules having come to an end after the Rescission Rules 2003, no mandamus can be issued for enforcing the said right. However, it is relevant to note that under the Rescission Rules 2003 as well as under the 2009 Act certain benefits have been provided to the retrenched employees even after 8th April, 2003. The retrenched employees, i.e. writ petitioners are fully entitled to take the benefit of the aforesaid Rule 3(ii) of the Rescission Rules 2003 and Section 3 (2) of the 2009 Act.

Case Law Discussed:
2007 (2) UPLBEC 1307; AIR 1955 SC 84; 1989 (2) SCC 557; 1996 (5) SCC 60; 2000 (2) SCC 536; 2006 (3) SCC 354; AIR 1980 SC 77; AIR 1979 SC 1977; 2009(7) SCC 658; 1997 SCC 132; 2007 (8) SCC 338; AIR 1957 SC 912; 1999 (3) AWC 1956: 2003 (2) SCC 111; 2002 (7) SCC 222; CMWP No. 36644 OF 2003; CMWP No. 36007 OF 2004

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

1. These appeal raise similar issues and have been heard together. Special Appeal No.1034 (defective) of 2009 (State of U.P. and others vs. Sunil Kumar Verma and others) has been treated as leading appeal in which submissions in detail have been addressed by the learned counsel for the parties.

2. Special Appeal No.1034 (defective) of 2009 has been filed by the State of U.P. challenging the judgment and order of learned Single Judge dated 4th February, 2009 by which order the writ petition filed by respondents No.1 to 9 (Sunil Kumar

Verma and 8 others), retrenched employees of the U.P. State Cement Corporation, praying for quashing the order dated 24th May, 2006 by which their claim for absorption in a Government department was rejected, has been allowed. The writ petitioners in the writ petition had further prayed for a direction to absorb them in accordance with the Uttar Pradesh Absorption of Retrenched Employees of the State Government or Public Corporation in Government Service Rules, 1991 (hereinafter referred to as the 1991 Rules). The writ petition was allowed by the learned Single Judge quashing the order whereby the claim of the writ petitioners for absorption was rejected and further a direction was issued directing the State Government to absorb the writ petitioners in some department of the State Government in terms of the 1991 Rules.

3. The other special appeals also raise almost similar issue.

4. The special appeals filed by the State of U.P. were barred by time. In some of the appeals delay condonation applications have already been allowed by this Court and in some of the appeals including Special Appeal No.1034 (defective) of 2009 the delay condonation applications are pending consideration. There is delay of 171 days in filing Special Appeal No.1034 (defective) of 2009. The grounds for condonation of delay in the appeals filed by the State are almost similar. In Special Appeal No.1034 (defective) of 2009, the judgment was delivered by the learned Single Judge on 4th February, 2009. The copy of the judgment was received in the office of the State Government on 16th February, 2009. The matter was referred to the Law Department. The Law Department gave permission for filing special appeal on 3rd July, 2009. Thereafter instructions were issued to the competent authority, who contacted the office of the Chief Standing Counsel and in preparation of the appeal some time was taken. Thereafter appeal has been filed. Similar plea for condonation of delay has been taken in other time barred appeals of the State Government. In several appeals, e.g. in Special Appeal No.170 of 2010 (State of U.P. and others vs. Amar Nath and 82 others) there was delay of 246 days and similar ground was taken for condonation of delay, this Court vide its order dated 27th January, 2010 has already allowed the delay condonation application. We are of the view that sufficient grounds have been made out for condonation of delay in the appeals in which delay condonation applications are still pending. The delay condonation applications, which are pending consideration, are allowed.

5. This bunch of special appeals can be divided in four groups. The first group of appeals are the appeals filed by the State of U.P. challenging the judgment and orders of learned Single Judge by which the writ petitions filed by the respondent-employees praying for direction for absorption in government service have been allowed, which group of appeals are represented by Special Appeal No.1034 (defective) of 2009. The second group of appeals are Appeal No.219 of 2008 and other appeals in which appeals the employees have come up challenging the order of learned Single Judge by which the writ petitions claiming direction for absorption in government service have been dismissed. The third group of appeals are the appeals arising out of judgments of learned Single Judge by which judgment the writ petitions filed by the retrenched employees of Bhadohi Woollen Mills praying for a direction to absorb them on equivalent post in the department of the

State Government pursuant to the order dated 11th November, 2002 of the State Government has been allowed. The said group of appeals are represented by Special Appeal No.1113 (defective) of 2009. The fourth group of the appeals are the appeals filed by the State of U.P. through Secretary, Sugar Cane Development challenging the judgment and order of the learned Single Judge dated 12th December, 2003 by which the writ petitions filed by the retrenched employees of various Sugar Mills run by the U.P. State Sugar Corporation, were allowed insofar as the employees who were appointed prior to 1st October, 1986 were concerned by issuing a direction for their consideration for absorption under the 1991 Rules, if they accept the retrenchment compensation and obtain a certified in this regard from the Corporation. The said group of appeals are represented by Special Appeal No.165 of 2010.

6. For appreciating the issues raised in these appeals, it is sufficient to note the facts in detail of Special Appeal No.1034 (defective) of 2009 and some relevant facts of other appeals.

7. The facts giving rise to Special Appeal No.1034 (defective) of 2009 are as follows:

The respondents No.1 to 9 were employees of U.P. State Cement Corporation (hereinafter referred to as the Corporation), which was earlier a government company under Section 617 of the Companies Act, 1956. The respondents claimed to have been appointed on different dates between 1978 to 1983 on the post of Clerk/Steno-Typist in the Corporation. The High Court passed an order dated 8th December, 1999 for winding up of the Corporation. Notice for discharge was issued to the employees of the Corporation. The respondent-employees claimed to have been retrenched with effect from 31st July, 2001. The respondent-employees praying for their absorption in accordance with the 1991 Rules submitted representation dated 16th November, 2001 to the State Government. The respondent-employees filed Writ Petition No.42550 of 2001 claiming that they are entitled to be absorbed in accordance with the 1991 Rules. Learned Single Judge by order dated 26th November, 2002 issued an interim mandamus to absorb the respondent-employees in accordance with 1991 Rules or to show cause. No order for absorption was passed by the State Government and the writ petition was ultimately disposed of on 12th April, 2006 with a direction that in case the respondent-employees file a fresh comprehensive representation before the Secretary, Department of Industrial Development, the same shall be considered and decided in accordance with law. The order of the High Court dated 12th April, 2006 was submitted by the respondents before the State Government. The State Government passed an order on 24th May, 2006 rejecting the claim of the respondent-employees for their absorption. Writ Petition No.51252 of 2006 was filed by the respondent-employees praying for quashing the order dated 24th May, 2006 as well as for a direction in the nature of mandamus to declare Rule 3(1)(i) of the U.P. Absorption of Retrenched Employees of State Government or Public Corporation in Government Service (Rescission) Rules, 2003 as ultra vires and further a mandamus commanding the respondents to absorb the respondent-employees against Class-III post of the State Government or undertaking in accordance with the 1991 Rules. The writ petition was heard by the learned Single Judge. The respondent-employees before the learned Single Judge placed reliance on an order

dated 6th January, 2004 passed by this Court in Writ Petition No.36644 of 2003 ***(Shailendra Kumar Pandey and others vs. State of U.P. and others)*** and another order passed in Writ Petition No.36007 of 2004 ***(Vinod Kumar Kushwaha and another vs. State of U.P. and others)*** decided on 30th June, 2008. Learned Single Judge vide impugned judgment dated 4th February, 2009 quashed the order dated 24th May, 2006 and directed the Principal Secretary, Department of Industrial Development to absorb the respondent-employees in some department of the State Government in terms of 1991 Rules within a period of three months. Special Appeal No.1034 (defective) of 2009 has been filed challenging the said order dated 4th February, 2009.

8. Brief facts of other appeals are also need to be noted.

Special Appeal No.1158 (defective) of 2009 has been filed against the judgment and order dated 30th June, 2008 of learned Single Judge by which the writ petition filed by the respondent-employees has been allowed. The respondent No.1 was appointed on 15th May, 1986 and respondent No.2 was appointed on 24th May, 1986 in the Corporation. The respondent-employees claimed to have submitted representation. A writ petition being Writ Petition No.28405 of 1999 is claimed to have been filed by respondent No.2 styled as Association of Cement Corporation through Members Ajeet Kumar and others, which was disposed of on 29th July, 1999 directing the Chief Secretary to pass appropriate order. In pursuance of the said order, the State Government by order dated 3rd April, 2000 decided the representation taking the stand that the employees of three units of the Corporation have not yet been declared retrenched employee, hence no steps for absorption could be taken. The respondent-employees again claim to have submitted some representation on 14th February, 2003. It appears that a writ petition being Writ Petition No.11488 of 2004 was filed by respondent No.1 which was disposed of on 22nd March, 2004 permitting the respondent-employees to file fresh representation. The said representation was decided on 21st July, 2004 rejecting the representation against which order Writ Petition No.36007 of 2004 has been filed praying for quashing the order dated 21st July, 2004 and further for a mandamus directing the respondents to absorb the writ petitioners. The said writ petition has been allowed on 30th June, 2008 quashing the order dated 21st July, 2004 and direction was issued to the State Government to absorb the respondent-employees in some department of the State Government in terms of the 1991 Rules. Against the said order Special Appeal No.1158 (defective) of 2009 has been filed by the State of U.P.

9. Special Appeal No.1068 (defective) of 2009 has been filed against the judgment and order dated 19th May, 2009 by which order the writ petition filed by the respondent-employees was allowed quashing the order dated 7th June, 2006 passed by the State Government rejecting the representation of the respondent-employees claiming absorption. Claiming absorption the respondent-employees had filed Writ Petition No.7415 of 2005, which was disposed of by order dated 21st February, 2006 directing the Secretary, Department of Industries to decide the representation of the respondent-employees. The said representation was rejected on 7th June, 2006 against which writ petition was filed and allowed vide judgment and order dated 19th May, 2009.

10. Special Appeal No.1108 (defective) of 2009 has been filed against the judgment and order dated 20th October, 2008 by which order the writ petition filed by respondents No.1 to 7 was allowed directing the State Government to consider the case of the respondent-employees for absorption in accordance with 1991 Rules. The respondent-employees claim to have filed Writ Petition No.15074 of 2006 (Sankatha Prasad Singh and others vs. State of U.P. and others), Writ Petition No.19235 of 2006 (Rajendra Prasad and others vs. State of U.P. and others) and Writ Petition No.15076 of 2006 (Vijay Pal Singh and others vs. State of U.P. and others), which were disposed of by this Court directing the State-appellants to consider the representation. The State Government in pursuance of the orders passed in the aforesaid writ petitions rejected the representation by orders dated 7th August, 2006, 7th June, 2006 and 11th May, 2006 respectively. Challenging the said orders, Writ Petition No.53276 of 2008 (Ram Pyare and others vs. State of U.P. and others) has been filed which was allowed vide judgment and order dated 20th October, 2008.

11. Special Appeal No.1055 (defective) of 2009 has been filed challenging the order dated 4th March, 2009 by which order Writ Petition No.28002 of 2006 (Amaresh Chand Dubey vs. State of U.P. and others) has been allowed. By Writ Petition No.28002 of 2006, the respondent-employees had prayed for quashing the order dated 23rd March, 2006 by which order the representation of the respondent-employees claiming absorption was rejected. The said decision was taken by the State Government in pursuance of the order dated 21st February, 2006 passed in Writ Petition No.34438 of 1999.

12. Special Appeal No.90 (defective) of 2010 has been filed against the judgment and order of learned Single Judge dated 11th August, 2008 by which order the writ petition was disposed of in terms of the order dated 17th January, 2007 passed in Writ Petition No.22728 of 2006 (Vikramaditya Pandey and others vs. State of U.P. and others). The respondent-employees claimed to be employees of the Corporation. They claimed absorption and aggrieved by the inaction filed Writ Petition No.19235 of 2006 (Rajendra Prasad and others vs. State of U.P. and others) and Writ Petition No.38940 of 2008 (Ram Iqbal Singh and others vs. State of U.P. and others), which were disposed of directing for taking decision on the claim of the respondent-employees. By orders dated 10th June, 2009 and 6th July, 2006 the representations for absorption were rejected by the State Government against which writ petitions were filed which were disposed of on 11th August, 2008.

13. Special Appeal No.114 (defective) of 2010 has been filed against the judgment and order dated 20th October, 2008 passed in Writ Petition No.53429 of 2008 (Gyan Shanker vs. State of U.P. and others). The respondent-employees claimed to have submitted a representation on 16th June, 2008, which according to them was not decided, hence a writ of mandamus was sought commanding the State-appellants to absorb the respondent-employees as Law Officer in the department of the State Government or any Corporation or Nagar Nigam, which writ petition has been allowed on 20th October, 2008.

14. Special Appeal No.602 of 2010 has been filed against the judgment and order dated 24th July, 2009 passed in Writ Petition No.36899 of 2009 by which order the writ petition was allowed, the order dated 22nd

July, 2004 was quashed and a direction was issued to absorb the respondent-employees in accordance with the 1991 Rules. The respondent-employees claimed to have filed Writ Petition No.28405 of 1999 which was disposed of on 22nd March, 2004 directing the State-appellants to decide the matter afresh in pursuance of which an order was passed on 21st July, 2004 rejecting the claim of the respondent-employees. By the writ petition direction was sought for absorbing the respondent-employees in any department of the Government or in any corporation or Nagar Nigam.

15. Special Appeal No.603 of 2010 has been filed against the judgment and order dated 4th August, 2009 passed in Writ Petition No.35599 of 2005 allowing the writ petition by issuing a direction to the State-appellants to absorb the respondent-employees under the 1991 Rules. The respondent-employees claimed to be appointed on Group-C/Group-D posts. They claimed to have made a representation on 9th January, 2005 claiming absorption and thereafter filed a writ petition seeking direction. The writ petition having been allowed on 4th August, 2009 relying on the judgment and order dated 6th January, 2004 passed in Writ Petition No.36644 of 2003 (Shailendra Kumar Pandey and others vs. State of U.P. and others), this special appeal has been filed.

16. Special Appeal No.195 (defective) of 2010 has been filed against the judgment and order dated 11th August, 2009 passed in Writ Petition No.41058 of 2009 by which order the writ petition was disposed of in terms of the judgment and order dated 17th January, 2007 passed in Writ Petition No.22728 of 2006 (Vikramditya Pandey and others vs. State of U.P. and others).

Group-II

17. Special Appeal No.219 (defective) of 2008 has been filed against the judgment and order dated 9th January, 2007 passed in Writ Petition No.1473 of 2006 (Prabhu Nath Prasad and others vs. State of U.P. and others). The facts in detail of this case, which is second group of appeals where the writ petition claiming absorption has been dismissed, are need to be noted. Writ Petition No.1473 of 2006 has been filed by Prabhu Nath Prasad and six others praying for a writ of mandamus directing the respondents to decide the representation filed by the appellant-employees by speaking order. The case of the appellant-employees in the writ petition was that they were employees of Chunar Cement Corporation, which was closed. They had earlier filed Writ Petition No.26888 of 2000, which was disposed of on 18th January 2005 permitting the petitioners to submit a detailed representation enclosing copy of various judgments regarding providing of alternate appointment and the State of U.P. was directed to pass a detailed reasoned order. The appellant-employees in the writ petition had relied on various orders passed by this Court. The appellant-employees had also relied on various orders of the State Government by which certain employees were absorbed. Learned Single Judge after hearing the parties took a view that 1991 Rules having been rescinded by 2003 Rules, the right of the retrenched employees to be considered for absorption under the 1991 Rules stands terminated, hence the writ petition is devoid of any substance and dismissed. The appellant-employees has filed by the appeal challenging the order of learned Single Judge.

18. Special Appeal No.130 (defective) of 2010 has been filed by Prabhat Narain Singh challenging the judgment and order dated 17th January, 2007 by which order Writ Petition No.25040 of 2006 filed by the appellant-employee has been dismissed in view of the judgment and order of the date in Writ Petition No.25037 of 2006 (Suresh Chand Vaishya vs. State of U.P. and others). Writ Petition No.25037 of 2006 was filed challenging the order dated 23rd March, 2006 passed by the State Government by which the claim of the petitioner of that writ petition for absorption was rejected.

19. Special Appeal No.131 (defective) of 2010 has been filed against the judgment and order dated 17th January, 2007 passed in Writ Petition No.37325 of 2006 by which the writ petition was dismissed following the earlier order passed in Writ Petition No.25037 of 2006 (Suresh Chand Vaishya vs. State of U.P. and others). By the writ petition, the appellant-employees had prayed for quashing the order dated 29th March, 2006 by which the claim of the appellant-employees for absorption was rejected.

20. Special Appeal No.132 (defective) of 2010 has been filed against the judgment and order dated 17th January, 2007 by which the writ petition filed by the appellant-employee challenging the order dated 23rd March, 2006 passed by the State Government rejecting the claim of the appellant-employees for absorption was dismissed. Learned Single Judge took the view that there is nothing on record to show that appellant-employees were appointed against any post in the Corporation. It was held that they are not entitled to the benefit of absorption under the 1991 Rules. In view of the above, learned Single Judge refused to exercise discretion in favour of the appellant-employees.

21. Special Appeal No.133 (defective) of 2010 has been filed against the judgment and order dated 17th January, 2007 passed in Writ Petition No.26390 of 2006 (Ashok vs. State of U.P. and others) dismissing the writ petition following the judgment and order of the date passed in Writ Petition No.25037 of 2006. The appellant-employee in the writ petition had challenged the order dated 6th January, 2006 by which the claim of the appellant-employee for absorption was rejected.

22. Special Appeal No.134 (defective) of 2010 has been filed against the judgment and order dated 17th January, 2007 passed in Writ Petition No.25039 of 2006 (Kesh Raj Singh vs. State of U.P. and others) dismissing the writ petition following the judgment and order of the date passed in Writ Petition No.25037 of 2006 (Suresh Chand Vaishya vs. State of U.P. and others). The appellant-employee had filed the writ petition challenging the order dated 23rd March, 2006 by which the claim of the appellant-employee for absorption was rejected.

Group-III

23. Special Appeal No.1113 (defective) of 2009 has been filed against the judgment and order dated 11th September, 2008 passed in Writ Petition No.45102 of 2008 allowing the writ petition directing the respondent-authorities to absorb the writ petitioners in any vacancy of Group-C post in accordance with the 1991 Rules. The appellant-employees by the said writ petition had prayed for a direction to consider and issue order of absorption in their favour in the State Government department pursuant to

the order dated 11th November, 2002 issued by the State Government. The order dated 11th November, 2002 was an order issued by the State Government by which the employees of Bhadohi Woollen Mill were to be considered on the conditions as enumerated therein. The writ petition was disposed of on 11th September, 2008 against which appeal has been filed.

24. Special Appeal No.954 of 2009 has been filed against the judgment and order dated 4th August, 2008 passed in Writ Petition No.40510 of 2005. The said writ petition was filed by 66 petitioners praying for a writ of mandamus commanding the respondents to consider and issue order of absorption in favour of the petitioners in various State Government departments pursuant to the order dated 11th November, 2002 issued by the State Government and the judgments given by the Courts. The order dated 11th November, 2002 was an order of the State Government laying down criteria for considering absorption of the employees of Bhadohi Wollen Mill. The writ petition was allowed directing to consider the case of the writ petitioners for absorption on Group-C posts in accordance with the 1991 Rules against which order the appeal has been filed.

25. Special Appeal No.1896 of 2009 has been filed against the judgement and order dated 21st October, 2008 passed in Writ Petition No.54537 of 2008 by which the writ petition was allowed and a mandamus was issued to absorb the petitioners in any vacancy on Group-C post in accordance with 1991 Rules.

Group-IV

26. Special Appeal No.165 of 2010 [Special Appeal (defective) No.1061 of 2004] has been filed by the State of U.P., Secretary Karmik Anubhag, U.P. State Sugar Corporation Ltd. and General Manager, Rampur Unit, U.P. State Sugar Corporation Ltd., Rampur challenging the judgment and order of the learned Single Judge dated 12th December, 2003 passed in Writ Petition No.15459 of 2002 (Lalit Kumar Bammi and others vs. State of U.P. and others). Brief facts giving rise to this appeal are; the U.P. State Sugar Corporation Limited is owned and controlled by the State Government. The Corporation has been running and managing various sugar mills in the State of Uttar Pradesh. The Corporation suffered huge losses. The Corporation was declared as sick industry. The B.I.F.R. sanctioned a rehabilitation scheme for rehabilitating its units. It was proposed that 11 closed units shall be transferred to newly created subsidiary company of the Corporation and the same shall be privatised in phased manner. The employees of the closed units were given an invitation to retire voluntarily. The 11 units were closed down finally in phased manner (vide Government orders dated 8.9.1998 and 12.11.1999). Apart from 11 units of the Corporation 8 more units were declared unviable in the year 2003. Writ Petition No.15459 of 2002 (Lalit Kumar Bammi and 69 others vs. State of U.P. and others) was filed by permanent and seasonal employees of the Meerut Unit of the Corporation as the unit was closed by order dated 12.11.1999. The retrenchment notice dated 15th March, 2002 was served individually on 95 employees and they were retrenched with effect from 15.4.2002. The case of the writ petitioners was that the Chairman of the Corporation represented to the Government that employees of the Mills, which have been closed down, be not terminated and instead they shall be allowed to continue in service and absorbed in other functional units of the Corporation. The

validity of the retrenchment notice was also challenged on the ground of contravention of Section 6-N of the U.P. Industrial Disputes Act, 1947. The writ petitioners claimed that they had right to be absorbed in accordance with the 1991 Rules. The learned Single Judge held that the employees have no right to be absorbed in the running units of the Corporation and insofar as challenge to the retrenchment notice is concerned, which involved determination of question of fact, the remedy under the industrial law was directed by the availed by the workmen. The learned Single Judge, however, in respect of the employees, who were appointed before 1st October, 1986, directed consideration of their claim for absorption under the 1991 Rules, if they accept the retrenchment compensation and obtain a certificate in this regard from the Corporation. Certain writ petitioners, who had filed second writ petition, were not granted any relief and their writ petitions were dismissed. By common judgment and order dated 12th December, 2003 the learned Single Judge disposed of several writ petitions including Writ Petition No.15459 of 2002.

27. Against the judgment and order dated 12th December, 2003 deciding bunch of writ petitions other special appeals, being Special Appeal No.170 of 2010 has been filed challenging the judgment and order insofar as Writ Petition No.17847 of 2002 (Amar Nath and 82 others vs. State of U.P.) is concerned, which writ petition had been filed by permanent and seasonal employees of the Rampur Unit of the Corporation, which was closed down with effect from 17th November, 1999; Special Appeal No.169 of 2010 has been filed challenging the judgment and order insofar as Writ Petition No.15781 of 2002 (Rohtas Kumar and 14 others vs. State of U.P. and others) is concerned, which writ petition was filed by permanent and seasonal employees of the Meerut Unit of the Corporation praying for similar relief; Special Appeal No.168 of 2010 has been filed challenging the same judgment and order insofar as Writ Petition No.15125 of 2002 is concerned, which writ petition was filed by the permanent and seasonal employees of the Rampur Unit of the Corporation praying for the similar relief and Special Appeal No.167 of 2010 has been filed challenging the same judgment and order insofar as Writ Petition No.19043 of 2002 (Qumar Khan and others vs. State of U.P. and others) is concerned, which writ petition was filed by the permanent and seasonal employees of the Rampur Unit of the Corporation praying for the similar relief.

28. The issues, which have been raised in all above special appeals, are almost similar. The appeals filed by the State of U.P. challenge the judgment of the learned Single Judge directing the State Government to absorb the writ petitioners in accordance with the 1991 Rules. The special appeals, which have been filed by the retrenched employees (appeals relating to Group-II) are the appeals which challenge the judgment and order of learned Single Judge by which the writ petition of the retrenched employees praying for similar relief has been dismissed. In the last group of appeals, which relate to seasonal and permanent employees of the units of U.P. State Sugar Corporation, all reliefs have been refused except a direction to the State of U.P. to consider the claim of the writ petitioners for absorption in accordance with the 1991 Rules provided the employees accept the retrenchment compensation and obtain retrenchment certificate.

29 We have heard Sri M.C. Chaturvedi, learned Chief Standing Counsel, Sri M.S. Pipersenia, learned Additional Chief

Standing Counsel appearing for the appellants in the appeals filed by the State, assisted by Dr. Y.K. Srivastava, Standing Counsel. Dr. Y.K. Srivastava has also been heard in the appeals arising out of writ petitions filed by the permanent and seasonal employees of the U.P. State Sugar Corporation. Learned counsel for the writ petitioner-appellants, Sri K.C. Vishwakarma, has appeared in Special Appeal No.219 (defective) of 2008 (Prabhu Nath Prasad and others vs. State of U.P. and others). Sri Vishwakarma has also appeared on behalf of the respondent-writ petitioners in some of the appeals, other learned counsels appearing on behalf of the respondent-writ petitioners have also been heard. Sri Ashok Mehta has appeared for official liquidator.

30. Learned Chief Standing Counsel appearing on behalf of the State-appellants has contended that Rule 3 of he 1991 Rules did not confer any right on the retrenched employees to claim absorption in government service, rather it was a provision enabling the Government to consider such retrenched employees for absorption on terms and conditions as provided for in the notified orders issued under Rule 3 of the 1991 Rules. He contends that the right for consideration for absorption can be claimed only when a notified order is issued under Rule 3 of the 1991 Rules. He submits that no notified order having been issued by the Government with regard to retrenched employees of U.P. State Cement Corporation or U.P. State Sugar Corporation, their employees have no right to claim absorption. He further contends that the right of consideration, if any, came to an end after enforcement of the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporation in Government Service (Rescission) Rules, 2003 (hereinafter referred to as the Rescission Rules 2003) with effect from 8th April, 2003. It is submitted that after the Rescission Rules 2003, no right of absorption can be claimed by any of the retrenched employees and only benefit available to such retrenched employees is relaxation in upper age limit for direct recruitment to such Group-C and Group-D posts as provided in Rule 3(2) of the Rescission Rules 2003. Reliance has also been placed on the provisions of the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporation in Government Service (Rescission of Rules) Act, 2009 under which Act the 1991 Rules have been rescinded with effect from 9th May, 1991 retrospective taking away the right of consideration, if any, and saving only those employees who were absorbed during the period 9th May, 1991 to 8th April, 2003.

31. Learned Chief Standing Counsel submits that the writ petitions have been allowed by the learned Single Judge without considering the effect of Rescission Rules 2003. He contends that judgment of learned Single Judge in ***Shailendra Kumar Pandey vs. State of U.P. and others*** (Writ Petition No.36644 of 2003, decided on 6.1.2004) could not have been relied by the writ petitioners due to two reasons, firstly the said judgment was based on its own fact and secondly the effect of the Rescission Rules 2003 was not correctly appreciated in the said judgment. He further contends that Division Bench judgments relied by learned counsel for the writ petitioners in ***State of U.P. vs. Shailendra Kumar Pandey and others*** (Special Appeal No.618 of 2004, decided on 20th November, 2004) as well as in ***State of U.P. vs. Mukund Lal*** (Special Appeal No.(869) of 2004, decided on 14th October, 2004) at best laid down that the direction for absorption of the employees issued by the learned Single Judge is to be

given effect to strictly in accordance with Rule 3(1) of the 1991 Rules. He further contends that the Division Bench in the aforesaid cases did not enter into consideration of the consequence of Rescission Rules 2003, hence no ratio can be read in those judgments that despite Rescission Rules 2003 employees were entitled for consideration for absorption. Referring to the judgment of the Apex Court in Civil Appeal No.788 of 2006 (State of U.P. and another vs. Mukund Lal Singh, decided on 31st January, 2008), it is contended that Apex Court also laid down that absorption has to be made strictly in accordance with Rule 3(1) of the 1991 Rules. Learned Chief Standing Counsel submitted that the learned Single Judge after consideration of consequence of the Rescission Rules 2003 in ***Prabhu Nath Prasad's*** case (2007(2) UPLBEC 1307) has rightly laid down that right of consideration has been terminated and in view of the Rescission Rules 2003 writ petitions could not have been allowed. He submits that special appeal filed against the judgment of ***Prabhu Nath Prasad's*** case deserves to be dismissed affirming the view taken by the learned Single Judge.

32. Learned Chief Standing Counsel has further contended that even in some cases pertaining to cement corporation and other corporations an order for absorption has been passed by the State Government that cannot be made basis for issuing direction in favour of the writ petitioners since orders for absorption of certain employees of U.P. State Cement Corporation were issued by the State under the orders passed by this Court and Apex Court including the orders passed by the contempt court. It is submitted that there is no question of discrimination with the writ petitioners as compared to some employees who have been absorbed under the orders issued by the State Government in obedience to various directions issued by this Court and the Apex Court. It is further contended that the word "may" used in Rule 3(1) of the 1991 Rules cannot be read as "shall" and word "may" is only permissive enabling the State Government to consider the case of the retrenched employees for absorption under Rule 3(1) of the 1991 Rules. It is submitted that the rights, if any, as per Rule 3 of the 1991 Rules came to an end after enforcement of the Rescission Rules 2003 as well as the 2009 Act. Reliance has also been placed on the principles as laid down under Section 6 of the General Clauses Act.

33. Learned counsel for the writ petitioners, refuting the above submissions of learned Chief Standing Counsel, has contended that the directions issued by the learned Single Judge directing the State Government to absorb the retrenched employees is perfectly in accordance with law. It is submitted that the Rescission Rules 2003 can have no effect on the accrued rights of the writ petitioners under the 1991 Rules. It is contended that the Rescission Rules 2003 were not retrospective in nature and all the writ petitioners having been retrenched prior to issuance of the Rescission Rules 2003, the rights acquired under the 1991 Rules were subsisting despite the Rescission Rules 2003.

34. Learned counsel appearing for the writ petitioners has submitted that in ***Shailendra Kumar Pandey's*** case (supra) learned Single Judge after considering the Rescission Rules 2003 has laid down that the right which accrued to the retrenched employees under the 1991 Rules could not be taken away by the State Government by

not considering the cases of the employees and by delaying the consideration for such a long time. It is submitted that against the judgment of learned Single Judge in ***Shailendra Kumar Pandey's*** case Special Appeal No.(618) of 2004 was filed which was dismissed by the Division Bench of this Court vide judgment and order dated 20th November, 2004 relying on the judgment and order dated 14th October, 2004 passed in Special Appeal No.(869) of 2004 (State of U.P. and another vs. Mukund Lal Singh). It is submitted that against the judgment of the Division Bench in the case of State of U.P. and another vs. Mukund Lal Singh, civil appeal was filed by the State of U.P. before the Supreme Court, which was dismissed on 31st January, 2008, hence the State cannot be heard in contending that writ petitioners are not entitled for absorption in accordance with the 1991 Rules. It is submitted that several similarly situated retrenched employees of the U.P. State Cement Corporation and Bhadohi Woollen Mills have already been absorbed by passing different orders by the State Government and offering employment to them in various departments of the State Government. It is not open for the State to deny same right to the writ petitioners and the action of the State is discriminatory and violative of rights guaranteed under Articles 14 and 16 of the Constitution of India. It is submitted that in the special leave petition as well as in the review application filed in ***Mukund Lal Singh's*** case (supra), the State has taken the plea based on the Rescission Rules 2003 but still the special leave petition as well as the review application have been rejected by the Apex Court.

35. Learned counsel for the appellant-employees appearing in the special appeal of ***Prabhu Nath Prasad*** and others (special appeals of Group-II), has contended that the judgment of learned Single Judge dismissing the writ petition in ***Prabhu Nath Pradad's*** case (supra) deserves to be set-aside. It is contended that in the said case the writ petitioners were appointed in the year 1989 by special derive and they were not covered by the 1991 Rules nor the Rescission Rules 2003 were applicable on them, hence there was no occasion for learned Single Judge to adjudicate the issue as has been done in the said case. It is submitted that against the same order of the Government dated 16th May, 2005 other writ petitions were filed in which the order was set-aside and the matter was remanded to the State Government for reconsideration.

36. Learned counsel for the parties have referred to and relied on various judgments of this Court and the Apex Court, which shall be referred to while considering the respective submissions in detail.

37. We have considered the respective submissions of the learned counsel for the parties and have perused the records.

38. Following issues emerge for consideration in these appeals from the submissions of learned counsel for the parties and their respective pleadings:-

(i) Whether after issuance of the Rescission Rules 2003 the right of absorption/consideration for absorption of the retrenched employees as per the 1991 Rules still survives or came to an end?

(ii) Whether those employees who were covered by the 1991 Rules and were retrenched employees of the Corporation waiting for their consideration could claim

for absorption/consideration after the Rescission Rules 2003 since the 1991 Rules gave them right for consideration for absorption, which cannot be denied, the Rescission Rules 2003 being not retrospective in nature?

(iii) What are the consequences of the 2009 Act on the right of the retrenched employees covered by the 1991 Rules, who could not be absorbed up to 8th April, 2003?

(iv) Whether word "may" used in Rule 3 of the 1991 Rules is to be read as "shall" casting obligation on the State to absorb all the retrenched employees?

(v) Whether in view of the judgment of the learned Single Judge in ***Shailendra Kumar Pandey's*** case (supra) against which special appeal as well as the special leave petition in the Apex Court have been dismissed, the writ petitioners were entitled for direction by this Court for absorbing them as per the 1991 Rules?

(vi) Whether the action of the State in absorbing some of the similarly situated employees of the U.P. State Cement Corporation and Bhadohi Woollen Mills and not absorbing the writ petitioners is discriminatory and violative of Articles 14 and 16 of the Constitutions of India?

39. Before considering the above issues, it is necessary to refer to relevant statutory rules governing the field with reference to purpose and object for which such statutory provisions were made. The State of U.P. had constituted various public corporations and the Government companies undertaking various activities within its fold since before several decades. Large number of public sector corporations run by the State suffered losses resulting in their closure. The U.P. Chalchitra Nigam was one of such corporations which was decided to be closed by the State. The State Government taking into consideration the hardship of employees of Chalchitra Nigam issued a Government order on 6th March, 1990 (Annexure-3 to the counter affidavit of the Official Liquidator in Writ Petition No.22728 of 2006). The State Government decided that only those employees shall be eligible who have been appointed prior to 1st October, 1986. The Government order provided that names of the retrenched employees shall be registered in respective employment offices of the districts according to their seniority and on requisition from employer, their names be forwarded accordingly. It was also provided that the provisions for upper age limit in Government service shall not be applicable to the retrenched employees. Similar Government order was issued on 26th April, 1991 with regard to employees of the U.P. State Horticulture Produce Marketing and Processing Corporation Limited. Similar clause was incorporated in the Government order that the names of retrenched employees shall be kept in separate pool according to seniority and their names shall be forwarded as and when requisitioned by the employers. It is the case of the State Government that service conditions of various Government services were governed by the rule framed under proviso to Article 309 of the Constitution and feeling difficulty in the absorption of employees in the Government service, the 1991 Rules were framed giving overriding effect to the rules enabling the State Government to issue orders laying down terms and conditions for absorption of retrenched employees of various public corporation. The 1991 Rules were framed under proviso to Article 309 of the

Constitution to provide for absorption of the retrenched employees of the Government or public corporation in the government service. The 1991 Rules contain only three rules, which are quoted for ready reference as under:-

"1. (1) These rules may be called the Uttar Pradesh Absorption of Retrenched Employees of Government of Public Corporations in Government Service Rules, 1991.

(2) They shall come into force at once.

(3) They shall apply to the posts under the rule making power of the Governor of Uttar Pradesh under the proviso to Article 309 of the constitution.

2. Unless there is anything repugnant in the subject or context, the expression -

(2) appointing authority" in relation to any post for which an employee was retrenched means the authority empowered to make appointment to such post:

(a) "Public Corporation" means a body corporate established or constituted by or under any Uttar Pradesh Act except a University or local authority constituted for the purpose of Local Self Government and includes a Government Company within the meaning of Section 617 of the Companies Act, 1956 in which the State Government has prepondering interest:

(b) "retrenched employee" means a person who was appointed on a post under the Government or a public Corporation on or before October 1, 1986 in accordance with recruitment to the post and was continuously working in any post under the Government or such Corporation upto the date of his retrenchment due to reduction in or winding up of, any establishment of Government or the public Corporation, as the case may be, and in respect of whom a certificate of being a retrenched employee has been issued by the appointing authority.

(c) "service rules" means the rules made under the proviso to Article 309 of the Constitution, and where there are no such rules, the executive instructions issued by the Government, regulating the recruitment and conditions of service of persons appointed to the relevant service.

3. (1) Notwithstanding anything to the contrary contained in any other service rules for the time being in force, the State Government may be notified order require the absorption of the retrenched employees in any post or service under the Government and may prescribe the procedure for such absorption including relaxation in various terms and conditions of recruitment in respect of such retrenched employees.

(2) The provisions contained in relevant service rules shall be deemed to have been modified to the extent of their inconsistency with the provisions made in the notified order referred to in Sub-rule (1)."

40. Reference of Government order dated 11th November, 1993 issued by the State Government has also been made, which was issued in reference to closure of Regional Development Corporations. The Government order dated 11th November, 1993 provided that names of Class "C' and Class "D' employees whose services have come to and end, shall be registered in the respective employment offices in accordance with the seniority and their

names be forwarded after requisition is received from the employers. It is the case of the State that absorption of the retrenched employees was having negative impact on the efficiency in the government departments and was proving counter productive to the aims and object for which aforesaid orders were issued, the State Government had come up with Government order dated 27th May, 1993 stating that there is no justification in future to absorb the employees of the Corporation in the government service since the retrenched employees of the Government companies and Corporation falling within the purview of labour legislation are entitled to certain benefits and certain clarifications were issued thereafter. The Bhadohi Woollen Mills Limited was closed whose employees filed Writ Petition No.17195 of 1998 (Bageshwari Prasad Srivastava and others vs. State of U.P. and others), which was decided on 27th April, 1999 directing the State Government to absorb the employees of Bhadohi Woollen Mills as per the 1991 Rules. The Government order dated 11th November, 2002 was issued providing for procedure for consideration of absorption of the employees of Bhadohi Woollen Mills (Annexure-11 to Writ Petition No.45102 of 2008. Clause 8 of the said Government order provided that those employees, who were working in Group-C and Group-D post and whose services have come to an end, shall be registered in employment office in separate pool and on requisition from employers their names shall be forwarded accordingly. It was also provided that upper age limit shall not be applicable for such employees for government service. Certain other conditions were also mentioned in the Government order dated 11th November, 2002. Thereafter came the Rescission Rule 2003 with effect from 8th April, 2003 rescinding the 1991 Rules. Rule 3 of the Rescission Rules 2003 provides as under:-

"3 (1) Uttar Pradesh Absorption of Retrenched Employees of Government Rescission and Public Corporation in Government Service Rules, 1991 are hereby rescinded and as a consequence of such rescission-

(i) the right of a retrenched employee to be considered for absorption accrued under the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporation in Government Service Rules, 1991 but who has not been absorbed till the date of the commencement of the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service (Rescission) Rules, 2003 shall stand terminated from such date,

(ii) the orders of the Government issued from time to time prescribing the norms of absorption for retrenched employees of a particular Government department or Public Corporation in Government Service and granting of consequential benefits including pay protection, shall stand abrogated from the date of the commencement of the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service (Rescission) Rules, 2003

*(2) Notwithstanding such rescission_*

(i) the benefit of pay protection granted to an absorbed retrenched employee prior to the date of the commencement of the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in

Government Service (Rescission) Rules, 2003 shall not be withdrawn,

(ii)a retrenched employee covered by the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporation in Government Service Rules, 1991 prior to the date of the commencement of the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service (Rescission) Rules, 2003, but who has not been absorbed till such date shall be entitled to get relaxation in upper age limit for direct recruitment to such Group "C" and Group 'D' posts which are out aside the purview of the Uttar Pradesh Public Service Commission to the extent he has rendered his continuous services in substantive capacity in the concerned Government Department or Public Corporation in completed years."

41. The State Legislature thereafter enacted the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service (Rescission of Rules) Act, 2009, which was published in the U.P. Gazette Extra dated 27th August, 2009. The said 2009 Act was enacted to provide for rescission ab initio of the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service Rules, 1991. The statement of object and reasons of the 2009 Act are as under:-

"Statement of Objects and Reasons.-

For the absorption of retrenched employees of Government or Public Corporations the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service Rules, 1991 was framed. Many employees of the Government or Public Corporations who had not been declared as retrenched employees filed writ petitions for their absorption under the said rules in Group "A' and Group "B' posts. According to the Government policy, such retrenched employees were not eligible to be absorbed in posts falling within the purview of the Uttar Pradesh Public Service Commission. During the course of time the problem of absorption of such employees under the aforesaid rules on posts falling within the purview of the Uttar Pradesh Public Service Commission grew acute. The Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service Rules, 1991 were, therefore, rescinded vide the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service (Rescission) Rules, 2003.

The State Government did not get relief in the writ petitions in the court even after publication of the aforesaid rules of 2003. Since it has become necessary to replace the provisions of the aforesaid rules of 2003 by an Act of the State Legislature, it has been decided to enact a law to provide for the rescission ab initio of the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service Rules, 1991.

The Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service (Rescission of Rules) Bill, 2009 is introduced accordingly."

42. The Rescission Act, 2009 contains only four sections, which are as under:-

"1. Short title.- *This Act may be called the* ***Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service (Rescission of Rules) Act, 2009.***

2. Definitions.- In this Act, unless the context otherwise requires,-

(a) "Absorption Rules" means the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service Rules, 1991 published in Government Notification No.3/4/90Karmik-2-91, dated May 9, 1991.

(b) "Public Corporation" means a body corporate established or constituted by or under any Uttar Pradesh Act except a university or local authority constituted for the purpose of local self Government and includes a Government company within the meaning of Section 617 of the Companies Act, 1956 in which the State Government has preponderating interest.

(c) "Rescission Rules" means the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service (Rescission) Rules, 2003 published in Government Notification No.874/Ka-3-2003-3/18-98, dated April 8, 2003.

(d) "retrenched employee" means a person who was appointed to a post under the Government or a public corporation on or before October 1, 1986 in accordance with the procedure laid down for recruitment to the post and was continuously working in any post under the Government or such corporation up to the date of his retirement due to reduction in, or winding up of, any establishment of the Government or the public corporation, as the case may be, and in respect of whom a certificate of being a retrenched employee has been issued by his appointing authority.

3. Rescission and savings.- *(1) The Absorption Rules which was rescinded with effect from April 8, 2003 by the Rescission Rules shall be rescinded and be deemed to have been rescinded on May 9, 1991 and consequent upon such rescission,-*

(a) the retrenched employees except those who were absorbed during the period from May 9, 1991 to April 8, 2003 shall have no claim with regard to their absorption under the said absorption rules or under any Government orders issued in regard thereto and their right regarding absorption accrued under the Absorption Rules shall be deemed terminated.

(b) the orders of the Government issued from time to time prescribing the norms of absorption for retrenched employees of a particular Government Department or Public Corporation in Government Service and granting of consequential benefits including pay protection shall stand revoked ab initio.

(2) Notwithstanding such rescission,-

(a) the benefit of absorption provided to the retrenched employees absorbed before April 8, 2003 under the provisions of the Absorption Rules, shall not be withdrawn;

(b) the benefit of pay protection granted to the retrenched employees absorbed prior to April 8, 2003 shall also be maintained;

(c) a retrenched employee covered by the Absorption Rules, but who has not been

absorbed till April 8, 2003 shall be entitled to get relaxation in upper age limit for direct recruitment to such Group "C' and Group "D' posts which are outside the purview of the Uttar Pradesh Public Service Commission to the extent he has rendered his continuous service in substantive capacity in the concerned Government department or the Public Corporation in completed years.

***4**. The Rescission Rules, shall be rescinded and be deemed to have been rescinded on April 8, 2003."*

43. It is relevant to note that in some of the writ petitions vires of Rule 3 of the Rescission Rules 2003 was challenged but it appears that no submissions either were raised or pressed before the learned Single Judge when writ petitions were decided. During the course of oral submissions also learned counsel appearing for the writ petitioners did not raise any submission challenging the vires of Rule 3 of the Rescission Rules 2003. The 2009 Act was enacted after the writ petitions were decided by the learned Single Judge but in the appeal learned Chief Standing Counsel has relied on the provisions of the 2009 Act and placed reliance on various provisions of the said Act.

44. Issues No.1, 2 and 3, being interrelated, are taken up for consideration together.

45. The submission, which has been pressed on forefront by the learned Chief Standing Counsel appearing for the State-appellants, is that after enforcement of the Rescission Rules, 2003 the right of the writ petitioners for absorption as per the 1991 Rules, if any, stood terminated and after 8th April, 2003 no direction could be issued for absorption of the employees in accordance with the 1991 Rules. It is submitted that Rule 3(1) of the 1991 Rules did not provide for automatic absorption of the employees nor any indefeasible right to be absorbed in government service, rather it provided for enabling power with the State Government to lay down terms and conditions for absorption of retrenched employees of any Government Company or Government corporation.

46. Rule 3 of the Rescission Rules 2003 and Section 3 of the 2009 Act are pari materia. Rule 3(1) of the Rescission Rules 2003 provides that the 1991 Rules are rescinded and consequence of such rescission is also provided in Rule 3(1)(i) and (ii). According to Rule 3(1)(i) right of retrenched employees to be considered for absorption accrued under the 1991 Rules but who has not been absorbed till the date of commencement of the Rescission Rules 2003 shall stand terminated with effect from 8th April, 2003.

47. By virtue of sub-rule (ii) of Rule 3(1) of the Rescission Rules 2003 the orders of the Government issued from time to time prescribing the norms for absorption of retrenched employees of a particular Government department or Public Corporation in Government Service and granting of consequential benefits including pay protection shall stand abrogated from the date of commencement of the Rescission Rules, 2003. However, Rule 3(2) of the Rescission Rules 2003 provides that notwithstanding such rescission the benefit of pay protection granted to an absorbed retrenched employee prior to the date of commencement of the Rescission Rules 2003 shall not be withdrawn. Rule 3(2)(ii) further provides that a retrenched employee covered by the 1991 Rules prior to the date

of the commencement of the Rescission Rules 2003, but who has not been absorbed till such date, shall be entitled to get relaxation in upper age limit for direct recruitment to such Group 'C' and Group 'D' posts which are outside the purview of the Public Service Commission to the extent he has rendered his continuous service in substantive capacity in the concerned Government Department or Public Corporation in completed years. For appreciating the consequence of repeal of the 1991 Rules and provisions as contained in Rule 3 of the Rescission Rules 2003 as well as Section 3 of the 2009 Act, it is relevant to look into principles laid down providing for consequences of the repeal of a statute.

48. Section 6 of the General Clauses Act, 1897 provides for effect of repeal. The U.P. General Clauses Act, 1904 also contain a provision to similar effect in Section 6, which is quoted below:-

*"**6. Effect of repeal.**- Where any [Uttar Pradesh] Act repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not-*

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d) affect any remedy, or any investigation or legal proceeding commenced before the repealing Act shall have come into operation in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such remedy may be enforced and any such investigation or legal, proceedings may be continued and concluded, and any such penalty, forfeiture or punishment imposed as if the repealing Act had not been passed."

49. The Apex Court had considered the effect of repeal in the case of ***State of Punjab vs. Mohar Singh Pratap Singh*** reported in A.I.R. 1955 S.C. 84. Following was laid down in paragraph 8 of the said judgment:-

*"**8**. ..... Whenever there is a repeal of an enactment; the consequences laid down in Section 6 of the General Causes Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject we would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention.*

The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an inention to destroy them. We cannot therefore subscribe to the broad proposition that Section 6 of the General Clauses Act is ruled out when there is report of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section. Such

incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new law and the mere absence of a saving clause is by itself not material. It is in the light of these principles that we now proceed to examine the facts of the present case."

50. A Constitution Bench of the Apex Court in the case of ***Bansidhar andothers vs. State of Rajasthan and others,*** reported in (1989)2 S.C.C. 557, considered similar provisions contained in Section 6 of the Rajasthan General Clauses Act, 1955. Following was laid down in paragraph 21 and 30 of the said judgment:-

*"**21**. When there is a repeal of a statute accompanied by r e- enactment of a law on the same subject, the provisions of the new enactment would have to be looked into not for the purpose of ascertaining whether the consequences envisaged by Sec. 6 of the General Clauses Act ensued or not--Sec. 6 would indeed be attracted unless the new legislation man ifests a contrary intention--but only for the purpose of determining whether the provisions in the new statute indicate a different intention. Referring to the way in which such incompatibility with the preservation of old rights and liabilities is to be ascertained this Court in State of Punjab v. Mohar Singh, [1955] 1 SCR 893 said:*

"..... Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new Law and the mere absence of a saving clause is by itself not material. The provision of Sec. 6 of the General Clauses Act will apply to a case of repeal even if there is simultaneous enactment unless a contrary intention can be gathered from the new enactment. Of course, t he consequences laid down in Section 6 of the Act will apply only when a statute or regulation having the force of a statute is actually repealed"

***30**. For purposes of these clauses the "right" must be "accrued" and not merely an inchoate one. The distinction between what is and what is not a right preserved by Section 6 of the General Clauses Act, it is said, is often one of great fineness. What is unaffected by the repeal is a rig ht 'acquired' or 'accrued' under the repealed statute and not "a mere hope or expectation" of acquiring a right or liberty to apply for a right."*

51. In the case of ***State of Rajasthan vs. Mangilal Pindwal*** reported in (1996)5 S.C.C. 60, the Apex Court had occasion to consider repeal of a rule framed under proviso to Article 309 of the Constitution of India. Following was laid down in paragraphs 9, 10 and 11 of the said judgment:-

*"**9.** As pointed out by this Court, the process of a substitution of statutory provision consists of two steps; first, the old rule is made to cease to exist and, next, the new rule is brought into existence in its place. [See : Koteshwar Vittal Kamath v. K. Rangappa, (1969) 3 SCR 40, at p. 48 : (AIR 1969 SC 504 at p. 509, Para 6)]. In other words, the substitution of a provision results in repeal of the earlier provision and its replacement by the new provision. As regards repeal of a statute the law is thus stated in Sutherland on Statutory Construction:*

"The effect of the repeal of a stature where neither a saving clause nor a general saving statute exists to prescribed the governing rule for the effect of the repeal, is to destroy the effectiveness of the repealed

Act in futuro and to divest the right to proceed under the statute, which, except as to proceedings past and closed, is considered as if it had never existed". [Vol.1, para 2042, pp. 522-523]

***10**. Similarly in Crawford's Interpretation of Laws it has been said :*

"Effect of Repeal, Generally. In the first place, an outright repeal will destroy the effectiveness of the repealed Act in futuro and operate to destroy inchoate rights dependent on it, as a general rule. In many cases, however, where statutes are repealed, they continue to be the law of the period during which they were in force with reference to numerous matters". [pp. 640-641]

***11**. The observations of Lord Tenterden and Tindal C.J. referred in the abovementioned passages in Craies on Statute Law also indicate that the principle that on repeal a statute is obliterated is subject to the exception that it exists in respect of transactions past and closed. To the same effect is the law laid down by this Court. [See: Qudrat Ullah v. Municipal Board, Bareilly, (1974) 2 SCR 530, at p. 539] : (AIR 1974 SC 396 at p. 401)."*

52. Section 6 of the U.P. General Clauses Act, 1904 although is not available with regard to repeal of rule framed under proviso to Article 309 of the Constitution of India as laid down by the Apex Court in the case of ***Kolhapur Canesugar Works Ltd. and another vs. Union of India*** and others, reported in (2000)2 S.C.C. 536 but while considering the consequence of repeal of a Rule, the principles enunciated for effect of repeal under Section 6 has to be kept in mind.

53. The Apex Court again in the case of ***Gammon India Ltd. vs. Special Chief Secretary and others,*** reported in (2006)3 S.C.C. 354, after considering various earlier judgments of the Apex Court, laid down following in paragraphs 52, 53 and 73 of the said judgment:-

"52. The Court examined the ambit and scope of Section 6 of the General Clauses Act, 1897 in Tulloch's case. According to the ratio of the said judgment, the principal underlying Section 6 of the General Clauses Act, 1897 is that every later enactment which supersedes an earlier one or puts an end to an earlier state of the law is presumed to intend the continuance of rights accrued and liabilities incurred under the superseded enactment unless there were sufficient indications expressed or implied in the later enactment designed to completely obliterate the earlier state of the law.

53. In view of the interpretation what follows is absolutely clear that unless a different intention appears in the repealing Act, any legal proceeding can be instituted and continued in respect of any matter pending under the repealed Act as if that Act was in force at the time of repeal. In other words, whenever there is a repeal of an enactment the consequences laid down in Section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears in the repealing statute.

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54. The Apex Court in A.I.R. 1980 S.C. 77, ***M.S. Shivananda vs. the Karnataka State Road Transport Corporation and others,*** had occasion to consider the consequence of repeal in context of absorption of employees. In the aforesaid case the Karnataka Contract Carriages (Acquisition) Ordinance, 1976 was promulgated with the object of acquiring contract carriages operating in the State. Sub-clause (3) of Clause 20 of the Ordinance provided for absorption of certain categories of employees of contract carriage operators in the service of the Corporation. It also provided the ratio for absorption for different categories of employees that were entitled to be absorbed in the service of Corporation. The Ordinance was repealed by the Act and it re-enacted the provisions of the repealed Ordinance with a saving clause in sub-section (2) of Section 31 for preservation of anything done or action taken. The Act was substantially in similar terms except for the difference that the ratio prescribed by proviso to sub-clause (3) of Clause 20 of the Ordinance, which laid down the categories of persons who could be absorbed in the service of the corporation, was substantially altered and a new ratio was inserted in the proviso to sub-section (3) of Section 19 of the Act. The conductors, who were entitled to be absorbed under the Ordinance, were deleted from the Act. Clause 20(3) of the Ordinance as well as Section 19(3) of Section 31(2) of the Act are quoted below:-

"20 (3). Every person who is a workman within the meaning of the Industrial Disputes Act, 1947 (Central Act 14 of 1947) and has been immediately before the commencement of this Ordinance exclusively employed in connection with the acquired property, shall, on and from the notified date, become an employee of the corporation on the same terms and conditions applicable to the employees holding corresponding posts in the corporation. Any person not willing to become such an employee of the corporation shall be entitled to retrenchment compensation as provided in the Industrial Disputes Act.

Provided that the number of workmen that shall become employees of the Corporation under this sub-section shall not exceed the following scale, the junior-most being excluded :-

Scale per vehicle

1. Drivers ... 1.5
2. Conductors ... 2.65
*3. Supervision ... 0.125**
4. Higher Supervision Staff and Managers.. 0.075
5. Ministerial and Secretariat staff ... 0.8

6. Technical staff including Foreman ... 2.75"

** Line staff and checking Inspectors."*

55. It was contended before the Apex Court that the employees of contract carriage operators were automatically absorbed by virtue of Ordinance and the repeal of the Ordinance and re-enactment does not have effect any effect on their right to be absorbed. Following was laid down in paragraphs 12, 13, 14 and 15 of the said judgment:-

*"**12.** In considering the effect of an expiration of a temporary Act, it would be unsafe to lay down any inflexible rule. It certainly requires very clear and unmistakable language in a subsequent Act of the legislature to revive or re-create an expired right. If, however, the right created by the statute is of an enduring character and has vested in the person, that right cannot be taken away because the statute by which it was created has expired. In order to ascertain whether the rights and liabilities under the repealed Ordinance have been put an end to by the Act, 'the line of enquiry would be not whether', in the words of Mukherjea J. in State of Punjab v. Mohar Singh, (1955) 1 SCR 893, 'the new Act' expressly keeps alive old rights and liabilities under the repealed Ordinance but whether it manifests an intention to destroy them'. Another line of approach may be to see as to how far the new Act is retrospective in operation.*

***13**. It is settled both on principle and authority, that the mere right existing under the repealed Ordinance, to take advantage of the provisions of the repealed Ordinance, is not a right accrued. Sub-section (2) of S. 31 of the Act was not intended to preserve abstract rights conferred by the repealed Ordinance. The legislature had the competence to so re-structure the Ordinance as to meet the exigencies of the situation obtaining after the taking over of the contract carriage services. It could re-enact the Ordinance according to its original terms, or amend or alter its provisions.*

***14.** What were the 'things done' or 'action taken' under the repealed Ordinance ? The High Court rightly observes that there was neither anything done nor action taken and, therefore, the petitioners did not acquire any right to absorption under sub-cl. (3) to Cl. 20. The employees of the former contract carriage operators in normal course filled in the pro forma giving their service particulars and reported to duty. This was in the mere 'hope or expectation' of acquiring a right. The submission of these 'call reports' by the employees did not subject the Corporation to a corresponding statutory obligation to absorb them in service. As a matter of fact, nothing was done while the Ordinance was in force. The Act was published on March 12, 1976. On May 29, 1976, the Corporation sent up proposals for equation of posts to be filled in by the employees of the former contract carriage operators. The meeting of the Committee set up by the Government for laying down the principles for equation of posts and for determination of inter se seniority, met on June 2, 1976. The Committee decided that even in the case of helpers-cleaners, there should be a 'trade test' and the staff cleared by the Committee for the post of helper 'B', helper 'A' and assistant artisans should be on the basis of their technical competence, experience, ability etc. The Committee also decided that all other employees of contract carriage operators, who were eligible for*

absorption, should be interviewed by that Committee for the purpose of absorption on the basis of experience, ability, duties and responsibilities. These norms were not laid down till June 2, 1976. Till their actual absorption, the employees of the erstwhile contract carriage operators had only an inchoate right.

***15**. The distinction between what is, and what is not a right preserved by the provisions of S. 6 of the General Clauses Act is often one of great fineness. What is unaffected by the repeal of a statute is a right acquired or accrued under it and not a mere 'hope or expectation of', or liberty to apply for, acquiring a right. In Director of Public Works v. Ho Po Sang, (1961) 2 All ER 721 (PC) Lord Morris speaking for the Privy Council, observed:*

"It may be, therefore, that under some repealed enactment, a right has been given, but that, in respect of it, some investigation or legal proceeding is necessary. The right is then unaffected and preserved. It will be preserved even if a process of quantification is necessary. But there is a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should be or should not be given. On a repeal the former is preserved by the Interpretation Act. The latter is not." (Emphasis supplied).

It must be mentioned that the object of S.31 (2) (i) is to preserve only the things done and action taken under the repealed Ordinance, and not the rights and privileges acquired and accrued on the one side and the corresponding obligation or liability incurred on the both side, so that if no right acquired under the repealed Ordinance was preserved, there is no question of any liability being enforced."

56. One more contention that employees of the contract carriage operator acquired vested right for absorption by virtue of sub-clause (3) of Clause 20 of the Ordinance, which cannot be taken away by proviso to sub-clause 3 of Section 19, was considered and rejected in paragraph 21 of the said judgment, which is as under:-

*"**21**. This is, in our judgment, sufficient for the determination of the appeal. But, as we have formed a clear opinion on the other aspect, we do not hesitate to express that opinion. That contention is of this nature. It is pointed out that the employees of the erstwhile contract carriage operators acquired vested right to absorption in the service of the Corporation by virtue of sub-cl. (3) to Cl. 20 of the repealed Ordinance with effect from January 30, 1976, which cannot be taken away by the proviso to sub-sec. (3) of S. 19. Even if contrary to the decision reached by us, it were possible to hold that they had some kind of such right, that right is expressly taken away by the legislature. The contention does not take note of the fact that by sub-sec. (1) of S.1 the Act was brought into force with effect from January 30, 1976, i.e., the date on which the Ordinance was promulgated. The Act substitutes a 'new' proviso in sub-sec. (3) of S. 19 in place of the old proviso to sub-cl. (3) to Cl. 20 of the Ordinance, altering the whole basis of absorption. The new proviso is given a retrospective effect, and it now holds the field from the notified date i.e., January 30, 1976. The proviso in sub-cl. (3) to Cl. 20 laying down a particular ratio of absorption, is pro tanto avoided by an express enactment of a 'new' proviso to sub-sec. (3) of S. 19 which is entirely inconsistent with it. When an Ordinance is*

replaced by an Act which is made retrospective in operation, anything done or any action taken under the Ordinance stand wholly effaced."

57. It is relevant to note that provisions of sub-clause 3 of Clause 20 of the Ordinance was obligatory in nature, which provided that every person employed in connection with the acquired property from the notified date shall become an employee of the Corporation, still the Apex Court held that the right for absorption shall be subject to various steps and there is no automatic absorption and such a right given under sub-clause (3) of Clause 20 was only an inchoate right.

58. The case of the writ petitioners in the present appeals cannot be on higher footing as to those employees of the contract carriage operator as considered by the Apex Court in the said judgment.

59. provisions of Rule 3 of the Rescission Rules 2003 as well as Section 3 of the 2009 Act have to be considered in the light of the principles as enunciated by the Apex Court in the aforesaid cases.

60. Present is a case where the 1991 Rules have been repealed by the Rescission Rules 2003 and side by side new provisions have been enforced. When repeal is followed by fresh legislation on the same subject, the Court has to look into the provisions of the new enactment for the purposes of determining whether they indicate a different intention. The question is not whether the new Act expressly keeps alive old right and liabilities but whether it manifests an intention to destroy them. A perusal of Rule 3 of the Rescission Rules 2003 provides for rescission of the 1991 Rules and consequences of such rescission. Rule 3(1)(i) of the Rescission Rules 2003 expressly provides that the right of retrenched employees to be considered for absorption accrued under the 1991 Rules stands terminated for those who have not been absorbed till the date of commencement of the Rescission Rules 2003. Thus the right for consideration for absorption under the 1991 Rules accrued to a retrenched employee stands specifically terminated by Rule 3(1)(i) of the Rescission Rules 2003.

61. In view of the above, we are unable to accept the submission of learned counsel for the writ petitioners that even after the rescission of the 1991 Rules by the Rescission Rules 2003 the right of consideration which was acquired before rescission of the 1991 Rules continues and even after the Rescission Rules 2003 the employees are entitled for absorption since they had acquired the right prior to the Rescission Rules 2003. The said submission is specifically nullified by the express intendment of the Rescission Rules 2003 as manifested by Rule 3(1)(i).

62. The provisions of Section 3 of the 2009 Act is to the same effect. By the 2009 Act, the 1991 Rules have been rescinded with effect from 9th May, 1991, i.e., retrospectively. Section 3(a) of the 2009 Act specifically provides that retrenched employees except those who were absorbed during the period May 9, 1991 to April 8, 2003 shall have no claim with regard to their absorption under the said absorption rules or under any Government orders issued in regard thereto and their right regarding absorption accrued under the Absorption Rules shall be deemed terminated.

63. In view of Rule 3 of the Rescission Rules 2003 and Section 3 of the 2009 Act making express provisions for terminating the right of consideration of retrenched employees accrued under the 1991 Rules, there is no enforceable right in the retrenched employees to seek mandamus directing the State Government to consider their case for absorption.

64. In view of the foregoing discussions, we are of the considered opinion that after the Rescission Rules 2003 with effect from 8th April, 2003, the right of retrenched employees for absorption acquired under the 1991 rules stands terminated with effect from 8th April, 2003 and no such right could have been enforced by retrenched employees after expressly terminating their above right with effect from 8th April, 2003. The Rescission Rules 2003 has no retrospective operation but it terminated the right of consideration for absorption acquired under the 1991 Rules with effect from 8th April, 2003, the date of enforcement of the Rescission Rules, 2003. Those retrenched employees, who were absorbed between the period 9th May, 1991 to 8th April, 2003 were clearly saved.

65. Now comes the submissions of learned counsel for the writ petitioners that word "may" used in Rule 3 of the 1991 Rules is mandatory in nature and has to be read as "shall" and it was obligatory for the State Government to issue notified order with regard to employees of the U.P. State Cement Corporation as well as the U.P. State Sugar Corporation and the obligation being mandatory in nature, the State can be commanded to absorb all retrenched employees. Learned counsels for the writ petitioners in support of their submission, have placed reliance on the judgments of the Apex Court in the cases of ***State (Delhi Admn.) vs. I.K. Nangia and another,*** reported in A.I.R. 1979 S.C. 1977, ***Sarla Goel and others vs. Kishan Chand,*** reported in (2009)7 S.C.C. 658 and ***State of U.P. vs. Jogendra Singh,*** reported in A.I.R. 1963 S.C. 1618.

66. Learned Chief Standing Counsel refuting the above submission, has contended that the word "may" used in Rule 3 of the 1991 Rules was only an enabling provision and cannot be read as "shall". It is contended that Rule 3 of the 1991 Rules cannot be interpreted to mean that retrenched employees have right to be absorbed in the Government department and it was obligatory for the State to absorb each and every employee. It is contended that the 1991 Rules were enforced enabling the State to issue notified orders for absorption, overriding the service rules of the Government department, which did not provide for absorption. Reliance has been placed on the judgments of the Apex Court in the cases of ***Mohan Singh and others vs. International Airport Authority of India and others,*** reported in (1997) S.C.C. 132 and ***Dhampur Sugar Mills Ltd. vs. State of U.P. and others*****,** reported in (2007)8 S.C.C. 338.

67. The use of word "may" or "shall" in a particular statute does not invariably mean that wherever word "may" has been used it is directory and wherever word "shall" has been used it is mandatory. The language alone is not decisive and for finding out true meaning and purpose of the word regard must be had to the context, subject matter and object of the statutory provision in question. Following was laid down by the Apex Court in the case of ***State of U.P. vs. Manbodhan Lal Srivastava***, reported in A.I.R. 1957 S.C. 912:-

"... The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other."

68. The submission of learned Chief Standing Counsel that the 1991 Rules were framed enabling the State to issue notified orders for absorption of the retrenched employees cannot be read to mean that State with regard to each retrenched employee of the Government Corporation or Public Corporation was obliged to issue notified orders for their absorption. No such intendment can be read in Rule 3(1) of the 1991 Rules.

69. In ***State (Delhi Admn.) vs. I.K. Nangia*** (supra), the Apex Court was considering the provisions of Prevention of Food Adulteration Act, 1954. The Apex Court was considering the explanation to Section 17(2) which contained permissive language. It was held that such permissive words imposes a duty upon such a company to nominate a person in relation to different establishments or branches or units. While considering the said provision, following was laid down in paragraph 15 of the said judgment:-

"The Explanation lays down the mode in which the requirements of s. 17 (2) should be complied with. Normally, the word 'may' implies what is optional, but for the reasons stated, it should in the context in which it appears, mean 'must'. There is an element of compulsion. It is power coupled with a duty. In Maxwell on Interpretation of Statutes, 11th Edn. at p. 231, the principle is stated thus:

"Statutes which authorise persons to do acts For the benefit of others, or, as it is sometimes said, for the public good or the advancement of justice, have often given rise to controversy when conferring the authority in terms simply enabling and not mandatory. In enacting that they "may" or "shall, if they think fit", or, "shall have power", or that "it shall be lawful" for them to do such acts, a statute appears to use the language of mere permission, but it has been so often decided as to have become an axiom that in such cases such expressions may have-to say the least-a compulsory force, and so could seem to be modified by judicial exposition." (Emphasis supplied). Though the company is not a body or authority, there is no reason why the same principle should not apply. It is thus wrong to suggest that the Explanation is only an enabling provision, when its breach entails in the consequences indicated above. It is not left to one's choice, but the law makes it imperative. Admittedly, M/s. Ahmed Oomer Bhoy had not at the material time nominated any person, in relation to their Delhi branch. The matter is, therefore, squarely covered by s. 17 (1) (a) (ii)."

70. The Apex Court in the aforesaid case has laid down that when breach entails the consequences, it is not left to one's choice, but the law makes it imperative. Rule 3(1) of the Rescission Rules 2003 does not provide for any consequence of non absorption of a particular employee.

71. The judgement in ***Sarla Goel's*** case (supra) was considering the provisions of Section 27 of the Delhi Rent Control Act, 1958, which provided that where the

landlord does not accept any rent tendered by the tenant within the time referred to in Section 26 or refuses or neglects to deliver a receipt referred to therein or there is bona fide doubt as to the person or persons to whom the rent is payable, the tenant may deposit such rent with the Controller in the prescribed manner. Considering the scheme of the Act and specially the scheme of Section 27, the Apex Court laid down following in paragraphs 28 and 29 of the said judgment:-

"From a conjoint reading of this provision referred to hereinabove and particularly Section 27 of the Act, in our view, it cannot be doubted that the procedure having been made by the Legislature how the rent can be deposited if it was refused to have been received or to grant receipt for the same. If that be the position, if such protection has been given to the tenant, the said procedure has to be strictly followed in the matter of taking steps in the event of refusal of the landlord to receive the rent or to grant receipt to the tenant. It is well settled that whether the word "may" shall be used as "shall", would depend upon the intention of the Legislature. It is not to be taken that once the word "may" is used by the Legislature in Section 27 of the Act, would not mean that the intention of the Legislature was only to show that the provisions under Section 27 of the Act was directory but not mandatory.

29. In other words, taking into consideration the object of the Act and the intention of the Legislature and in view of the discussions made herein earlier, we are of the view that the word "may" occurring in Section 27 of the Act must be construed as a mandatory provision and not a directory provision as the word "may" , in our view, was used by the Legislature to mean that the procedure given in those provisions must be strictly followed as the special protection has been given to the tenant from eviction. Such a cannon of construction is certainly warranted because otherwise intention of the Legislature would be defeated and the class of landlords, for whom also, the beneficial provisions have been made for recovery of possession from the tenants on certain grounds, will stand deprived of them."

The aforesaid judgment was on the provisions and the scheme of the Delhi Rent Control Act, 1958 and the interpretation put by the Apex Court was in the aforesaid context.

72. In ***State of U.P. vs. Jogendra Singh's case*** (supra), the Apex Court laid down rules of statutory interpretation with regard to words "may" and "shall". Following was laid down in paragraph 8 of the said judgment:-

*"**8**. Rule 4(2) deals with the class of gazetted government servants and gives them the right to make a request to the governor that their cases should be referred to the Tribunal in respect of matters specified in cls. (a) to (d) of sub-r (1). The question for our decision is whether like the word "may" in R. 4(1) which confers the discretion on the Governor, the word "may" in sub-r. (2) confers the discretion on him, or does the word "may" in sub-rule (2) really mean "shall" or "must"? There is no doubt that the word "may" generally does not mean "must" or "shall". But it is well-settled that the word "may" is capable of meant, "must" or "shall" in the light of the context. It is also clear that where a discretion is conferred upon a public authority coupled with an obligation, the word "may" which denotes discretion*

should be construed to mean a command. Sometimes, the Legislature uses the word "may" out of deference to the high status of the authority on whom the power and the obligation are intended to be conferred and imposed. In the present case, it is the context which is decisive. The whole purpose of R. 4 (2) would be frustrated if the word "may" in the said rule receives the same construction as in sub-r. (1). It is because in regard to gazetted government servants the discretion had already been given to the Governor to refer their cases to the Tribunal that the rule-making authority wanted to make a special provision in respect of them as distinguished from other government servants falling under R. 4(1) and R. 4(2) has been prescribed, otherwise R. 4(2) would be wholly redundant. In other words, the plain and an ambiguous object of enacting R. 4 2) is to provide an option to the gazetted government servants to request the Governor that their cases should be tried by a Tribunal and not otherwise. The rule-making authority presumably thought that having regard to the status of the gazetted government servants, it would be legitimate to give such an option to them. Therefore, we feel no difficulty in acceptance the view taken by the High Court that R. 4(2) imposes an obligation on the Governor to grant a request made by the gazetted government servant that his case should be referred to the Tribunal under the Rules. Such a request was admittedly made by the respondent and has not been granted. Therefore, we are satisfied that the High Court was right in quashing the proceedings proposed to be taken by the appellant against the respondent otherwise than by referring his case to the Tribunal under the Rules."

73. In ***Mohan Singh's*** case (supra) the Apex Court had occasion to consider the provisions of the Land Acquisition Act, 1894. The Apex Court held that use of word "shall" or "may" is not always decisive, the statutory remedy for violation makes it mandatory. The principles were laid down in paragraphs 17 of the said judgment, which are quoted below:-

"17. The distinction of mandatory compliance or directory effect of the language depends upon the language couched in the statute under consideration and its object, purpose and effect. The distinction reflected in the use of the word "shall" or "may" depends on conferment of power. In the present context, "may" does not always mean may. May is a must for enabling compliance of provision but there are cases in which, for various reasons, as soon as a person who is within the statute is entrusted with power, it becomes duty to exercise. Where the language of statute creates a duty, the special remedy is prescribed for non-performance of the duty. In "Craies on Statute Law" (7th Edn.), it is stated that the Court will, as a general rule, presume that the appropriate remedy by common law or mandamus for action was intended to apply. General rule of law is that where a general obligation is created by statute and statutory remedy is provided for violation, statutory remedy is provided for violation, statutory remedy is mandatory. The scope and language of the statute and consideration of policy at times may, however, create exception showing that legislature did not intend a remedy (generality) to be exclusive. Words are the skin of the language. The language is the medium of expressing the intention and the object that particular provision or the Act seeks to achieve. Therefore, it is necessary to ascertain the intention. The word "shall" is not always decisive. Regard must be had to the context, subject matter and object of

the statutory provision in question in determining whether the same is mandatory or directory. No universal principle of law could be laid in that behalf as to whether a particular provision or enactment shall be considered mandatory or directory. It is the duty of the Court to try to get at the real intention of the legislature by carefully analysing the whole scope of the statute or section or a phrase under Consideration. As stated earlier, the question as to whether the statute is mandatory or directory depends upon the language in which the intent is couched. The meaning and purpose the Act seeks to achieve. In "Suhtherland Statutory Construction" (3rd Edn.) Volume 1 at page 81 in paragraph 316, it is stated that although the problem of mandatory and directory legislation is a hazard to all governmental activity, it is peculiarly hazardous to administrative agencies because the validity of their action depends upon exercise of authority in accordance with their charter of existence the statute. If the directions of the statute are mandatory, then strict compliance with the statutory terms is essential to the validity of administrative action. But if the language of the statute is directory only, then variation from its direction does not invalidate the administrative action. Conversely, if the statutory direction is discretionary only, it may not provide an adequate standard for legislative action and the delegation. In "Crawford on the Construction of Statutes" at page 516, it is stated that :

"The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other ...."

74. In ***Dhampur Sugar Mills'*** case (supra), the Apex Court was considering the provisions of U.P. Seera Niyantran Adhiniyam, 1964. Following was laid down in paragraph 36 of the said judgment:-

*"**36**. We are unable to subscribe to the above view. In our judgment, mere use of word 'may' or 'shall' is not conclusive. The question whether a particular provision of a statute is directory or mandatory cannot be resolved by laying down any general rule of universal application. Such controversy has to be decided by ascertaining the intention of the Legislature and not by looking at the language in which the provision is clothed. And for finding out the legislative intent, the Court must examine the scheme of the Act, purpose and object underlying the provision, consequences likely to ensue or inconvenience likely to result if the provision is read one way or the other and many more considerations relevant to the issue."*

75. In view of the principles laid down by the Apex Court in the aforesaid cases, we are of the view that the word "may" used in Rule 3 of the 1991 Rules cannot be read as word "shall" but we hasten to add that Rule 3 which gave enabling power to the State to consider for absorption also intended a corresponding right in the employee that his case for consideration for absorption be considered by the State till the 1991 Rules were in force.

76. Now comes the submissions of learned counsel for the writ petitioners that judgments of this Court in ***Shailendra Kumar Pandey's*** case (supra) and

Bageshwari Prasad Srivastava's case (supra) are holding the field and against both the above judgments rendered by the learned Single Judges the special appeals before the Division Bench of this Court and special leave petition before the Apex Court having been dismissed, the State is bound to follow the ratio of the aforesaid judgments and it is not open for the State to contend in these appeals that writ petitioners are not entitled for any direction for absorption in the Government department. It is relevant to refer to some judgments of this Court and the Apex Court in which issue of absorption of retrenched employees was involved.

77. The first judgment relied by learned counsel for the writ petitioner is the judgment in the case of ***Bageshwari Prasad Srivastava vs. State of U.P. and others*** reported in 1999(3) AWC 1956. In the said case, the writ petition was filed by the employees of Bhadohi Woollen Mills, which was declared as a sick company on 27th November, 1995 and subsequently the company was wound up. The Managing Director of the Company has written a letter dated 18th May, 1996 to the Principal Secretary, Industrial Development that there were 323 employees of the Company who, in consequence of winding up, are entitled to be absorbed in accordance with the Government orders. They had come earlier to this Court by filing writ petitions which were disposed of on 15th January, 1998 directing the respondents to consider the claim for absorption of the writ petitioners by a speaking order. The claim of the writ petitioners was rejected on 28th April, 1998. It was said by the Government with regard to Class-III and Class-IV employees that they could be given preference in direct recruitment provided they had been issued retrenchment certificate, but since no retrenchment certificate was issued by the appointing authority, they cannot be absorbed. The writ petition was allowed by this Court on 29th April, 1999 issuing direction to absorb the writ petitioners/retrenched employees of the Bhadohi Woollen Mills Limited in Government service in accordance with their qualification on Class-III and Class-IV posts. Against the said judgment Special Appeal No.540 of 1999 was filed, which was dismissed on 19th November, 2001 taking the view that the order of the learned Single Judge does not call for any interference except that such absorption shall be in accordance with Rule 3(1) of the 1991 Rules. A special leave petition being S.L.P. No.5379 of 2002 against the said judgment was also dismissed on 18th March, 2002. The aforesaid judgments were rendered at the time when the Rescission rules, 2003 were not enforced. There was no occasion for consideration of the effect of the Rescission Rules 2003 in the aforesaid judgments and as held above after the Rescission Rules 2003 the right of consideration for absorption and Government orders issued providing for absorption were abrogated. Thus the above judgments does not help the writ petitioners in support of their submission that even after issuance of the Rescission Rules 2003 they are entitled for direction for their absorption.

78. It is to be noted that in pursuance of the order of this Court in Bhadohi Wollen Mills case, the State Government had come up with a Government order dated 11th November, 2002 providing for modalities and conditions of recruitment of retrenched employees in the Government department which only provided for registering the name of retrenched employees in the respective Employment Offices in a separate pool and those names

were to be forwarded after receiving request from the employers.

79. The judgment, which has been relied by the learned counsels for the writ petitioners as well as by the learned Single Judges in allowing the writ petitions filed by the retrenched employees, is the judgment of this Court dated 6th January, 2004 passed in Writ Petition No.36644 of 2003 ***(Shailendra Kumar Pandey and others vs. State of U.P. and others)***. Shailendra Kumar Pandey and two other employees were retrenched employees of the U.P. State Cement Corporation, which was wound up on 8th December, 1999. Earlier the writ petitioners had filed Writ Petition No.38534 of 2001 relying on the judgment of this Court in ***Bageshwari Prasad Srivastava's*** case (supra). The said writ petition was disposed of by this Court on 20th September, 2002 directing the State Government to take appropriate decision in respect of the claim of the writ petitioners, which was already submitted by letter dated 10th September, 2001 within a period of two months. After the aforesaid order of this Court, the claim of the writ petitioners was considered and rejected by order dated 30th June, 2003 on several grounds. One of the grounds for rejecting the claim was that the 1991 Rules have been rescinded by the Rescission Rules 2003 dated 8th April, 2003. Challenging the order dated 30th June, 2003 the writ petition was filed. The learned Single Judge allowed the writ petition. The learned Single Judge in its judgment had also considered the Rescission Rules, 2003. Following observations were made by the learned Single Judge in the said judgment:-

"The Absorption Rules, 1991 were rescinded on 8th April, 2003. Petitioners were not only fell within the category of retrenched employees, they had represented and that the respondents were required to consider their rights for absorption within two months, i.e. before the rules were rescinded. Petitioners' right, therefore, crystalised much before the rules were rescinded. The respondents cannot take the benefit of the delay caused by them in considering petitioners' application. The two months' period granted by this Court on 20.9.2002, expired on 20.11.2002. The delay made by the Secretary (Karmik) Anubhag-2, Government of U.P. in deciding the matter, cannot be a ground to refuse the due consideration, required to be made by this Court before the rescission of the rules. The rescission of rules will, therefore, not come in the way of the petitioners in claiming the absorption."

80. Against the above judgment of the learned Single Judge dated 6th January, 2004, Special Appeal No.618 of 2004 (State of U.P. and others vs. Shailendra Kumar Pandey and others) was filed. The said special appeal was dismissed on 20th November, 2004 by following order:-

"This Special Appeal stands dismissed in view of our order dated 14.10.2004 passed in Special Appeal No.(869) of 2004 (State of U.P. and another vs. Mukund Lal Singh)."

81. Mukund Lal Singh and others filed Writ Petition No.2786 of 2004 for absorption which was allowed on 27th May, 2004. The State of U.P. filed Special Appeal No.869 of 2004 challenging the order of learned Single Judge issuing direction for considering the writ petitioners for absorption under the 1991 Rules. The Division Bench dismissed the appeal on 14th October, 2004 by following order:-

"In view of the averments made in Ground Nos.12 and 13 of the Special Appeal, the appeal is bound to be dismissed as the decision of this Court in Writ Petition No.17195 of 1998 was challenged not only before the Division Bench in Special Appeal but also before Hon'ble Apex Court and the judgment remained intact.

In view of the above, considering the averments made in the affidavit filed in support of the application under section 5 of the Limitation Act for condonation of delay, we condone the delay in filing the appeal but dismiss the Special Appeal on merit.

Mst. Kirtika Singh appears for the respondent.

However, the judgment and order of the learned Single Judge shall be given effect to strictly in accordance with Rule 3(1) of the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service Rules, 1991."

82. Against the Division Bench judgment of this Court in ***Mukund Lal Singh's*** case (supra), special leave petition was filed in the Supreme Court which was converted into Civil Appeal No.782 of 2006 (State of U.P. and another vs. Mukund Lal Singh) and was dismissed by following order on 31st January, 2008:-

"Heard learned counsel for the parties.

In the facts and circumstances of the case, we are not inclined to interfere with the impugned orders.

It is made clear that the directions in the order dated 14th October, 2004, passed in Special Appeal No.869 of 2004 that the order of the learned Single Judge shall be given effect to strictly in accordance with Rule 3(1) of the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service Rules, 1991, shall apply in all these appeals.

I.A. No.7 is permitted to be withdrawn to take such remedy as is available to the applicant under law. I.A. No.5 is permitted to be withdrawn."

83. With regard to judgment of the learned Single Judges, which have been affirmed by the Division Bench of this Court in different special appeals and also by the Apex Court, there cannot be any dispute that the said judgments are binding between the parties and the State has to implement the aforesaid judgments. The special appeal and special leave petition have already been dismissed, thus finality has been attached insofar as parties of the aforesaid cases are concerned. It has also come on the record that several contempt petitions were filed for non compliance of the judgments of this Court, which had become final, and the State has issued various orders for absorption of some of the retrenched employees in obedience of the judgments of this Court and the orders passed in contempt proceedings.

84. The question still remains as to what is the ratio of ***Shailendra Kumar Pandey's*** case (supra), which was decided by the learned Single Judge of this Court vide its judgment and order dated 6th January, 2004 and affirmed in special appeal by Division Bench of this Court and in civil appeal by the Apex Court.

85. As noticed above, the learned Single Judge in its judgment dated 6th

January, 2004 in ***Shailendra Kumar Pandey's*** case (supra) noticed that the 1991 Rules were rescinded on 8th April, 2003 but a view was taken that since the retrenched employees fell within the category of the 1991 Rules and the respondents were required to consider their rights for absorption within two months under the orders of this Court passed on 20th September, 2002, the respondents cannot take the benefit of delay caused by them in considering the claim of the writ petitioners. It was also held that their rights crystalised much before the rules were rescinded. The learned Single Judge further held that two months period expired on 20th November, 2002 and the delay caused by Secretary (Karmik), Government of U.P. cannot be a ground to refuse due consideration required to be made by this Court before the rescission of the rules. The above observation of the learned Single Judge makes it clear that basis of the direction by the Court was non compliance of the earlier direction dated 20th September, 2002 within the time allowed and that was the reason for direction to the State Government to consider the case for absorption. The said directions of the learned Single Judge dated 6th January, 2004 were issued on the special facts of that case.

86. As noted above, the special appeal filed against the judgment and order dated 6th January, 2004 was dismissed following earlier decision of the Division Bench in Special Appeal No.(869) of 2004. The order passed by the Division Bench of this Court in Special Appeal No.(869) of 2004 has also been quoted above by which decision the special appeal was dismissed with direction that the judgment of learned Single Judge be given effect to strictly in accordance with Rule 3 of the 1991 Rules. While dismissing the special appeal on 14th October, 2004, the Division Bench had not adverted to the consequence of the Rescission Rules 2003. The Division Bench in the aforesaid judgment having not considered or expressed any opinion with regard to the Rescission Rules, 2003, no such ratio can be read in the aforesaid judgment that despite Rescission Rules 2003 the right of retrenched employees, who could not be absorbed till 8th April, 2003, still subsists and can be enforced by a writ petition. In this regard it is useful to refer to the judgment of the Apex Court in the case of ***Bhavnagar University vs. Palitana Sugar Mill (P) Ltd. and others,*** reported in (2003)2 S.C.C. 111. Following was laid down in paragraph 59 of the said judgment:-

"59. .A decision, as is well known, is an authority for which it is decided and not what can logically be deduced therefrom. It is also well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. See Smt. Ram Rakhi v. Union of India and others (AIR 2002 Delhi 458); Delhi Administration (NCT of Delhi) v. Manoharlal (AIR 2002 SC 3088); Haryana Financial Corporation and another v. M/s. Jagdamba Oil Mills and another (2002 (1) JT (SC) 482) and Dr. Nalini Mahajan etc. v. Director of Income-tax (Investigation) and others ((2002) 257 ITR 123)."

87. The Apex Court in the case of ***Delhi Administration (Now Act of Delhi) vs. Manohar Lal,*** reported (2002)7 S.C.C. 222 has laid down that High Court and all other Courts in the country are ordained to follow and apply law declared by the Apex Court, but that does not absolve them of the obligation and responsibility to find out the ratio of the decision and ascertain the law, if

any, so declared from a careful reading of the decision concerned and only thereafter proceed to apply it appropriately to the cases before them. Following was laid down in paragraph 5 of the said judgment:-

*"**5**. We have carefully considered the submissions of the learned counsel appearing on either side. Apparently, the learned Judge in the High Court was merely swayed by considerations of judicial comity and propriety and failed to see that merely because this Court has issued directions in some other cases, to deal with the fact situation in those other cases, in the purported exercise of its undoubted inherent and plenary powers to do complete justice, keeping aside even technicalities, the High Court, exercising statutory powers under the Criminal Laws of the land, could not afford to assume to itself the powers or jurisdiction to do the same or similar things. The High Court and all other courts in the country were no doubt ordained to follow and apply the law declared by this Court, but that does not absolve them of the obligation and responsibility to find out the ratio of the decision and ascertain the law, if any, so declared from a careful reading of the decision concerned and only thereafter proceed to apply it appropriately, to the cases before them. Considered in that context, we could not find from the decisions reported in 1997 (9) SCC 101 (supra) and 2000 (9) SCC 151 (supra) any law having been declared or any principle or question of law having been decided or laid down therein and that in those cases this Court merely proceeded to give certain directions to dispose of the matter in the special circumstances noticed by it and the need felt, in those cases, by this Court to give such a disposal. The same could not have been mechanically adopted as a general formula to dispose of, as a matter of routine, all cases coming before any or all the courts as a universal and invariable solution in all such future cases also. The High Court had no justifying reason to disturb the conclusion of the first appellate court, in this regard."*

88. A Division Bench of this Court in Special Appeal No. 233 of 2007 (Subhash Prasad vs. the State of U.P. and others, decided on 15.3.2007) had considered the similar issues pertaining to right under the 1991 Rules and the effect of the Rescission Rules 2003. The appellant in the aforesaid case had filed a writ petition for a direction for absorption under the 1991 Rules. The writ petition was dismissed by the learned Single Judge against which special appeal was filed. In paragraphs 8 and 9 of the said judgment the Division Bench noted Rule 3(1) of the Rescission Rules 2003. The argument of the learned Counsel for the State that after the Rescission Rules 2003 came into force the right under the 1991 Rules came to an end was also noticed. The Division Bench held that at the highest the applicant has to be considered like any other employee but the said right came to an end when the rules were rescinded in 2003. Paragraphs 8 to 17 of the said judgment are quoted below:-

"8. In any case, this scheme, which was created under the 1991 rules, was rescinded in 2003 by promulgation of rules known as U.P. Absorption of Retrenchment Employees of Government or Public Corporations in Government Service (Rescission) Rules, 2003.

9. By those rules, the rights under the earlier 1991 rules were specifically rescinded. Rule 3 (1) (i) of this 2003 rules reads as follows:

*"3 (1) Uttar Pradesh Absorption of Retrenched Employees of Government Rescission and Public Corporation in Government Service Rules, 1991 are hereby rescinded and as a consequence of such rescission_*

(i) the right of a retrenched employee to be considered for absorption accrued under the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporation in Government Services Rules, 1991 but who has not been absorbed till the date of the commencement of the Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Services (Rescission) Rules, 2003 shall stand terminated from such date,"

10. Mr. Upadhyay, therefore, submits that when rules of 2003 came up into force, the petitioner's right under the 1991 rules came to an end. There is no provision to absorb the petitioner once 2003 rules came into force.

11. The case of the petitioner is that some others were absorbed from time to time under the earlier rules. He has drawn our attention to the absorption of one Vijay Kumar Pandey by Government order dated 7.7.2001 and some persons belonging to the backlog by a further order dated 27.1.2005. He submits that on a parity, the petitioner must get an absorption similarly.

12. We have considered the submissions of the appellant and as well as of the respondents.

13. For seeking any such parity or any such right, firstly the appellant must fall within the definition of retrenched employee. The petitioner does not fall under that definition.

14. That apart, rule 3 (1) of the earlier rules meant that the persons concerned were to be considered for absorption. It could not be said that each and every one of them must be absorbed. Rule 3 (1) 1991 rules for ready reference is quoted below:

"3 (1) Notwithstanding anything to the contrary contained in any other service rules for the time being in force the State Government may by notified order require the absorption of the retrenched employee in any post or service under the Government and may prescribe the procedure for such absorption including relaxation in various terms and conditions of recruitment in respect of such retrenched employees.

15. This being the position, at the highest, the appellant had to be considered like any other employee. That right came to an end when the rules were rescinded in 2003 rules. Subsequently, there cannot be any specific performance of any such right under the earlier rules which no longer prevail. The appeal is dismissed.

16. The Counsel for the appellant had contended that certain right has crystallized under the earlier rules.

17. As pointed out above, the appellant did not fall within the category of retrenched employee which was covered under the 1991 rules. That apart, the only right under 1991 rules was for being considered for an employment. That being so, such submission can not be accepted."

89. The above Division Bench in which one of us (Justice Ashok Bhushan)

was a member, after considering the Rescission Rules 2003, clearly held that right of consideration, if any, came to an end after the Rescission Rules 2003. The above Division Bench judgment is fully applicable in facts of the present case and we see no reason to take a different view.

90. Now comes the submission of the writ petitioners that there is violation of their rights guaranteed under Articles 14 and 16 of the Constitutions of India since several similarly situated retrenched employees have been absorbed by the State Government relating to Bhadohi Woollen Mills and U.P. State Cement Corporation. The State has come with the clear stand that absorption orders passed with regard to retrenched employees have been in obedience of various orders of this Court which had become final and consequent to the contempt proceedings. Copies of certain orders issued in obedience of direction of this Court and the contempt proceedings have been filed as Annexure 11, 12, 13 and 13 in Writ Petition No.51252 of 2006 which are on the record in Special Appeal No. 1034 (defective) 2009. On the strength of the said orders, the writ petitioners cannot claim any discrimination since the said orders were passed in obedience of the orders of this Court. The learned Single Judge in Prabhu Nath Prasad's case has taken following view:-

*"**20**. Here in pith and substance, notwithstanding the existence of rescission Rules 2003, petitioners are claiming that they be absorbed in similar manner as others have been done. Writ jurisdiction is meant to enforce the rule of law and not to violate the law. Once right of retrenched employee to be considered for absorption has been taken away, by framing statutory rules, and validity of said rules have not at all been questioned, then the mandate/ intention/spirit of the said rules has to be given due respect, and no directives can be issued to violate the Rules. Merely because some incumbents have been offered appointment, under the cover of the orders passed by this Court, will not improve the case of petitioners as two wrongs will not make a thing right, and equality in illegality , is totally against the rule of fair play and demand of petitioner if accepted would be clearly violative of Article 14 and 21 of Constitution of India"*

91. We also endorse the above view of the learned Single Judge. We having found that the right of consideration for absorption under the 1991 Rules having come to an end after the Rescission Rules 2003, no mandamus can be issued for enforcing the said right. However, it is relevant to note that under the Rescission Rules 2003 as well as under the 2009 Act certain benefits have been provided to the retrenched employees even after 8th April, 2003. The retrenched employees, i.e. writ petitioners are fully entitled to take the benefit of the aforesaid Rule 3(ii) of the Rescission Rules 2003 and Section 3 (2) of the 2009 Act.

92. The appeals filed by the retrenched employees challenging the order of the learned Single Judge in Prabhu Nath Prasad's case deserves to be and are hereby dismissed in view of the foregoing discussions. Thus all the appeals of Group-I, Group-III and Group-IV are partly allowed setting aside the directions issued by the learned Single Judge for absorbing the writ petitioners. However, it is directed that retrenched employees of U.P. Cement Corporation, Bhadohi Woollen Mills and U.P. State Sugar Corporation shall be entitled for the benefits as contemplated under Rule 3(ii) of the Rescission Rules

2003 and saved under Section 3(2) of the 2009 Act on Group "C' and Group "D' posts.

93. Orders accordingly.

94. Parties shall bear their own costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.07.2010

BEFORE
THE HON'BLE R.K. AGRAWAL, J.
THE HON'BLE ABHINAVA UPADHYA, J.

Special Appeal No - 1430 of 2007

Sushil Kumar Pandey ...Petitioner
Versus
State Of U.P. and Others ...Respondent

Counsel for the Petitioner:
Sri Jitendra Bahadur Singh
Sri Bhupendra Nath Singh

Counsel for the Respondents:
C.S.C.

Constitution of India Art 23-termination of Compassionate Appointment-obtained by concealing true facts-availing benefit of presumed/civil death under Section 108 Evidence Act-Appointment cancelled after ten years followed by show cause notice and reply considered-after scrutiny of original records-petition challenging termination order-held, order of Single Judge does not call for interference-however the part of order directing recovery of salary modified keeping in view the work-but authorities permitted to recover amount paid to him as service benefits

Held Para 23

Be that as it may, we can also not shut our eyes to the fact that the salary and other service benefits extended to the appellant was result of a fraud committed by him as held by the learned Single Judge. Therefore, being in respectful agreement with the judgement of the Hon'ble Judge, but keeping in view the provisions of Article 23 of the Constitution of India, we are of the view that it would meet the ends of justice if the order of the learned Single Judge is modified to the extent that instead of recovering entire salary paid to the appellant, it is directed that the authorities concerned will be entitled to recover all the amount paid to the appellant from the public exchequer during the period that he was in service except the minimum of the pay scale admissible to the post held by the appellant. It is further directed that the authorities are also at liberty to proceed against the appellant or any other person or employee found to have been involved in the commission of the aforesaid fraud in any manner as may be permissible in law.

Case Law Discussed:
AIR 1971 Kerela 85; 1998 (7) SCC 569; 1969 (3) SCC 28; 2005 (11) SCC 525; AIR 1978 SC 851; 2004 (2) SCC 105; 1993 (6) SC 331

(Delivered by Hon'ble Abhinava Upadhya, J.)

1. Special Appeal No. 1470 of 2007(Sushil Kumar Pandey Vs. State Of U.P. & Others) and Special Appeal No. 1557 of 2007(Smt. Saroja Pandey Vs. The State Of U.P. & Others) which are before us for consideration, have been filed challenging the common judgment of the learned Single Judge by which Civil Misc.Writ Petition Nos. 29050 of 2006 and 29029 of 2004 were decided together and both the writ petitions filed by the appellants were dismissed.

2. The appellants are son and mother respectively.

3. The brief facts giving rise to these appeals are that the appellant of Special Appeal No. 1470 of 2007 Sushil Kumar Pandey was appointed on compassionate ground on assuming the civil death of his father, namely, Jyoti Bhushan Pandey, who was working in temporary capacity as Seechpal in the Irrigation Department and was reported not to have been seen or heard of from 1.8.1981. The said appointment was granted to the appellant Sushil Kumar Pandey upon his attaining the age of majority on 30.11.1994. On 22.12.2004 the appellant was served with a show cause notice that why his services should not be terminated as per the terms of appointment letter on the ground that his father did not dis appear in the year 1981 as alleged by the appellant but he himself abandoned his temporary service which after notice dated 6.4.1983 and 20.4.1983 led to his termination vide order dated 7.6.1983. Further in response to the said termination he had sent his representation which was received in the office on 10.6.1983 stating therein his inability to perform his official duties due to physical and domestic reasons. Therefore, the very appointment of the appellant on compassionate ground is invalid. The appellant submitted his reply to the said notice and thereafter his services was terminated vide order dated 25.4.2006 which was challenged before the Writ Court which rejected the claim of the appellant and dismissed the writ petition. Hence, this special appeal.

4. The appellant of Special Appeal No. 1557 of 2007 Smt. Saroj Pandey is the mother of Sushil Kumar Pandey and widow of Jyoti Bhushan Pandey. She filed the writ petition on the ground that her claim for family pension after presumed/civil death of her husband has been rejected by the authority concerned on the ground that the story regarding the legal death of her husband was untrue and in fact Jyoti Bhushan Pandey was temporary employee and was terminated from service and, therefore, there was no question of grant of family pension which was in fact claimed after an inordinate delay, that is to say, after more than 10 years, i.e., in the year 2004.

5. We have heard Sri Bhupendra Nath Singh, learned counsel for the appellant and the learned Standing Counsel appearing for the State-authorities and have perused the ground of appeal mentioned in the memo of appeal along with the annexures filed therein.

6. The case set up by both the appellants is that the father and husband of the appellants' respectively was a permanent employee in the Irrigation Department holding the post of Seenchpal. The appellants claimed that from 1.8.1981 Jyoti Bhushan Pandey was neither seen nor heard of by them and in accordance with Section 108 of the Indian Evidence Act after lapse of 7 years he was presumed dead and upon the son attaining the age of majority applied for appointment on compassionate ground under the provisions of Uttar Pradesh Recruitment of Dependants of U.P. Government Servants Dying in Harness Rules, 1974 (in short the Rules) and was given appointment in the year 1994. It seems that Smt. Saroj Pandey the wife of Jyoti Bhushan Pandey suddenly woke up and decided to put forward a claim for family pension etc. on the ground of the alleged legal death of her husband Jyoti Bhushan Pandey.

7. According to the respondents, upon such an application being made in the year 2004 the records were dug out which revealed that the story made up by both the

appellants was false, inasmuch as, Jyoti Bhushan Pandey, who was a temporary employee could not have been presumed to be legally dead for the purposes of benefits to his dependents upon the fact that he was terminated from service after due notice etc. on 7.6.1983. It is also contended that Jyoti Bhushan Pandey in fact wrote a letter which was received in the department on 10.6.1983 wherein he had shown his inability to continue to work any further on account of his physical condition and domestic reasons, therefore, the claim set up by both the appellants that Jyoti Bhushan Pandey disappeared and was not seen or heard of from 1.8.1981 was incorrect. The father of the appellant as claimed by him disappeared on 1.8.1981 but FIR regarding his disappearance was lodged after 12 years on 14.12.1993 with an insidious design to illegally obtain appointment upon furnishing incorrect information and, therefore, a show cause notice was issued to him on 22.12.2004 as to why upon submission of false information his appointment be not cancelled as per the conditions laid down in his letter of appointment. In response to the aforesaid show cause notice the appellant Sushil Kumar Pandey submitted his reply dated 18.1.2005 alleging therein that he has not concealed any information with the department and in fact his father has not been heard or seen from 1.8.1981 and specifically denied the factum of termination of his father from service as well as the alleged letter dated 10.6.1983 which has been claimed by the respondents that they received from the father of the appellant.

8. Considering the reply dated 18.1.2005 of the appellant the order of termination dated 25.4.2006 was passed on the ground that the appointment of the appellant under the Dying-in-Harness Rules was illegal since the father of the appellant Sushil Kumar Pandey did not die in harness and was in fact terminated from service vide order No. 13/83-84 (Rajasva) dated 7.6.1983 and also on the ground that the appellant's claim that his father was not seen or heard of since 1.8.1981 was also proved false and incorrect because of the letter dated 10.6.1983 which is said to be representation against termination of the father of the appellant Suhshil Kumar Pandey.

9. The appellants are now claiming that having been appointed under the Dying-in-Harness Rules in the year 1994, suddenly in the year 2004, i.e., after lapse of more than 10 years the appellant Sushil Kumar Pandey could not have been terminated merely upon a show cause notice. It is also claimed by the appellant that the order of termination dated 7.6.1983 was never served upon his father, therefore the same could not have been relied upon by the learned Single Judge. The learned Single Judge, therefore, was not justified in dismissing the writ petition. The appellant Smt. Saroj Pandey in Special Appeal No.1557 of 2007 on the other hand, claims that once having been given appointment to her son under the Dying-in Harness Provisions the authorities accepted the legal death of her husband and, therefore, was entitled to the family pension and other benefits that are admissible to the widow after death of permanent employee and the learned Single Judge in dismissing the writ petition has erred in law and, therefore, the judgment and order of the learned Single Judge dated 27.9.2007 should be set-aside.

10. We have considered the rival submissions made by the learned counsel for the parties.

In our considered opinion, the controversy now revolves around the order of termination dated 7.6.1983 and the letter dated 10.6.1983 said to have been written by Jyoti Bhushan Pandey, the father and the husband of the appellants and the said letter as claimed by the authorities if found correct then the case set up by the appellants will have no legs to stand as then it cannot be believed that both the appellants are in any way entitled for any benefit on the ground of presumed civil death of Jyoti Bhushan Pandey, who as claimed by the respondents, was a temporary employee and was in fact terminated from service on 7.6.1983.

11. Learned Single Judge in order to satisfy himself regarding the genuineness of the claims and counter claims made by the parties summoned the original record and after carefully scrutinizing them held as under:

"Assuming that a compassionate appointee is a regular appointee but on the facts of this case, he was not entitled for departmental enquiry because his very appointment is based on fraud and fraud vitiates all actions at its very inception. There is no denial that there was no declaration of legal death of the father of the petitioner by any competent court. The court had summoned the entire record and after examining it the only conclusion which could be drawn is that the petitioner and his mother both have practised fraud upon the department and one was able to obtain appointment and other was in the process of obtaining undue benefit on its basis.

The contention that the termination order could not operate without being served, is without any pleadings. There is absolutely no averment that the termination order was never served on his father. To the contrary, a perusal of the record shows that after receipt of the termination order, his father has sent a letter dated 10.6.1983. The termination order and the letter of the father of the petitioner were closely examined and it is obvious that both, paper and the writing thereon is very old and therefore the further contention that the petitioner has been framed is incorrect. There is no averment attaching any motive or bias on any of the officials of the department."

12. Sri B.N.Singh, learned counsel for the appellants has relied upon a Full Bench decision of Kerala High Court in the case of **Appula Vadhyar Narayana Vadhyar Vs. Venkateswara Vadhyar and others, reported in AIR 1971 Kerala 85** wherein the question involved for the purpose of determination of limitation for filing a suit in the case of legal death as contemplated under Sections 107 and 108 of the Indian Evidence Act. The Full Bench while tracing the history of Section 108 from English Law which states " If a person has not been heard of for seven years, there is a presumption of law that he is dead: but at what time within that period he died is not a matter of presumption but of evidence, and the onus of proving that the death took place at any particular time within the seven years lies upon a person who claims a right ....." The facts of the present case are distinguishable from the facts of the aforesaid decision. However, no presumption of death can be drawn, if by some material on record, it appears that the said material was of a date after the date of disappearance as claimed by the appellant.

13. Sri B.N.Singh, learned counsel has then placed reliance upon the decision of

the Hon'ble Supreme Court in the cases of **Union of India and others Vs. Dinanath Shantaram Karekar and others, reported in (1998) 7 SCC 569 and State of Punjab Vs. Khemi Ram, reported in 1969(3) SCC 28**, in order to assert that any order not communicated to the affected person cannot be relied upon. But in the facts of the present case, the aforesaid decisions are not applicable, inasmuch as, the order of termination dated 7.6.1983 was communicated to the father of the appellant and in response thereto he tendered his representation dated 10.6.1983 and since no such averment has been made in the writ petition, the same cannot be raised at this stage.

14. Similarly, Sri Singh, learned counsel has also relied upon the decision of the Hon'ble Supreme Court in the cases of **Sudesh Kumar Vs. State of Haryana and others, reported in (2005) 11 SCC 525 and Mohinder Singh Gill and another Vs. The Chief Election Commissioner, New Delhi and others reported in AIR 1978 SC 851. In the case of Sudesh Kumar (Supra)** the Hon'ble Supreme Court was dealing with Article 311(2)(b) of the Constitution of India wherein without affording any opportunity, dismissal order was passed. But in the present case, opportunity by way of show cause notice was given to the appellant and after consideration of his reply his appointment has been cancelled.

15. In the case of **Mohinder Singh Gill (supra)** the Hon'ble Supreme Court has held that the validity of an order must be judged by the reasons so mentioned in that order which cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. There is no quarrel with the aforesaid proposition but the said principle has no application in the facts of the case at hand.

16. We have carefully gone through the averments made by the respective counsels and the affidavits filed by them as well as the decisions relied upon and also the reasoning of the learned Single Judge in dismissing the writ petition and in the facts of the present case, we are of the view that the learned Single Judge was justified in dismissing the writ petition on the basis of fraud played for obtaining the appointment by the appellant.

17. The appellant had claimed that the father, who was a permanent employee, went missing from 1.8.1981 and, therefore, he was presumed dead under Section 108 of the Indian Evidence Act and thus claimed benefit of appointment under the Dying-in-Harness Rules, 1974 whereas the record proved that subsequent to the date as claimed by the appellant the father of the appellant a temporary employee had himself represented before the authorities vide letter dated 10.6.1983 against his termination order dated 7.6.1983 and the learned Single Judge, having found the aforesaid document to be true and genuine, was quite justified in dismissing the writ petition. Secondly, in any case the order terminating the services of the father of the appellant dated 7.6.1983 became final and binding as the same has not been challenged before any authority or Court of Law. Thirdly and most importantly, we are of the view that once a High Court Judge himself summons the record and scrutinizes the same and enquires into the matter and comes to the conclusion that a fraud has been played, unless some very strong material is shown to rebut the aforesaid finding it has to be taken as correct.

18. In the present case, no such material has been brought on record to contradict the findings recorded by the learned Single Judge. The argument of the learned counsel for the appellants that principles of natural justice have been violated and that non holding of a detailed enquiry has caused irreparable injury to the appellant is also misconceived, inasmuch as, the learned Single Judge issuing writ of certiorari had called for the record and examined the same and enquired into the matter himself and the parties were given full opportunity to put forward their claim and counter claims and after due deliberation the learned Judge has recorded a finding of fraud being committed. The settled principles of law is that fraud vitiates everything. Once the factum of fraud having been found true by the learned Judge the appellant now cannot insist upon departmental enquiry being held especially in view of the fact that at the time of very inception into service if an order of appointment is procured by playing fraud such an appointee cannot be held to be a holder of a civil post in order to seek protection of Article 311 of the Constitution of India.

19. It may also be noted that the Hon'ble Supreme Court in the case of **R.Vishwanatha Pillai Vs. State of Kerala & others, reported in (2004) 2 SCC 105** in paragraph 15 held as under:

"This apart, the appellant obtained the appointment in the service on the basis that he belonged to a Scheduled Caste community. When it was found by the Scrutiny Committee that he did not belong to the Scheduled Caste Community, then the very basis of his appointment was taken away. His appointment was no appointment in the eye of the law. He cannot claim a right to the post as he had usurped the post meant for a reserved candidate by playing a fraud and producing a false caste certificate. Unless the appellant can lay a claim to the post on the basis of his appointment he cannot claim the constitutional guarantee given under Article 311 of the Constitution. As he had obtained the appointment on the basis of a false caste certificate he cannot be considered to be a person who holds a post within the meaning of Article 311 of the Constitution of India....."

20. Similarly, in the present case, the appointment was granted to the appellant on compassionate ground in view of the fact that the father of the appellant had died in harness but since the record reveals otherwise, the very basis of granting appointment to the appellant is gone and as such, the appointment is void ab initio.

21. In the case of **S.P.Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. & others, reported in JT 1993 (6) SC 331** the Hon'ble Supreme Court in paragraphs 7 and 8 held as under:

7."We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-

process a convenient lever to retain the illegal- gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.

8. ..... A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage....."

22. Therefore, upon the aforesaid discussions, we are of the view that the judgment of the learned Single Judge does not call for any interference. However, we have our reservation regarding the portion of the order by which the learned Single Judge has directed for recovery of salary that was paid to the appellant. Considering the facts and circumstances of the case, it is undeniably true that fraud has been played in obtaining the appointment by the appellant and it is also true that the said fraud would have remained undetected if the mother of the appellant had not applied for family pension. During this period more than 10 years had elapsed and the authorities continued to take work from the appellant and for the services rendered he was remunerated by salary. Now after 10 years of service as the appellant has been dismissed, in such a case, the recovery of entire salary from the person would be too severe for the acts and omission on his part but also the omission and negligence on the part of the authorities in granting appointment to the appellant, which in the facts of the case can not be ruled out. Even otherwise Article 23 of the Constitution of India prohibits taking of 'Begar'. The State-respondents having taken work from the appellant (Sushil Kumar Pandey) for more then 10 years before the fraud was detected, cannot be permitted to ask for refund of the entire salary paid to him as it would amount to taking of 'Begar' which the Constitution of India strictly prohibits.

23. Be that as it may, we can also not shut our eyes to the fact that the salary and other service benefits extended to the appellant was result of a fraud committed by him as held by the learned Single Judge. Therefore, being in respectful agreement with the judgment of the Hon'ble Judge, but keeping in view the provisions of Article 23 of the Constitution of India, we are of the view that it would meet the ends of justice if the order of the learned Single Judge is modified to the extent that instead of recovering entire salary paid to the appellant, it is directed that the authorities concerned will be entitled to recover all the amount paid to the appellant from the public exchequer during the period that he was in service except the minimum of the pay scale admissible to the post held by the appellant. It is further directed that the authorities are also at liberty to proceed against the appellant or any other person or employee found to have been involved in the commission of the aforesaid fraud in any manner as may be permissible in law.

24. Both the appeals are, thus, devoid of merit and are, accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED LUCKNOW 22.07.2010

BEFORE
THE HON'BLE DEVENDRA KUMAR ARORA, J.

Writ Petition No.1596 (S/S) of 2010

Mala Kumari ...Petitioner
Versus
State of U.P. & others ...Opposite Parties.

Constitution of India-Art 226-Promotion-Right of consideration-when D.P.C. Held-entire service record not placed-committee deferred the case on that ground when D.P.C. Met-confidential report of certain period not available-held-if no adverse entry given as per rule 1995-shall be presumed no adverse entry-promotion can not be denied-necessary direction given.

Held Para 13

This Court after considering the issue in its entirety is of the view that an employee cannot be made to suffer on account of non-communication of entries on the part of the authorities. The timely recording of the annual entries and maintenance of the record is the responsibility of the administrative department and it is incumbent upon the administrative department to procure all the informations and provide the same in the prescribed proforma to the Departmental Promotion Committee. The State Government has taken care of the situation where such an entry of an employee is not available then as per the Government Order dated 20.08.1993 the said entries have to be reported as blank and evaluation of the employee is to be done on the basis of available entries and the blank entries / unavailable entries is to be assessed as average of the available entries. In view of this back ground there was no occasion for the Departmental Promotion Committee to defer the promotion of the petitioner on account of non-availability of the annual entries of a particular year. Even otherwise, if there is non-communication of any adverse entry in the prescribed time or the representation of an employee is not disposed of in the time scheduled prescribed under Rule 4 of the Rules, 1995 the said entries cannot be read adverse against an employee for the purposes of promotion, crossing of efficiency-bar and other service matters.

(Delivered by Hon'ble D. K. Arora, J.)

1. Heard Sri Sudhir Pandey assisted by Sri Rajendra Pandey, Advocate for the petitioner and the learned Standing Counsel for the opposite parties.

2. By means of present writ petition, the petitioner is seeking a writ of mandamus commanding the opposite parties to give all consequential service benefits like promotion with effect from the date of her juniors have been given promotion, by opening the sealed cover containing recommendations of Departmental Promotion Committee for the post of Senior Supply Inspector, in the light of Government Order dated 28.05.1997, contained in Annexure-9 to the writ petition.

3. The brief facts of the case as culled out from the pleadings of the writ petition are as under:-

The petitioner was appointed as Supply Inspector on 11.05.2001 on the basis of recommendation of Public Service Commission, U.P., Allahabad and submitted her first joining in the office of District Supply Officer, Mirzapur. The petitioner was transferred from Mirzapur to Lucknow and functioned in the office of District Supply Office Lucknow till 06.09.2003. The petitioner was posted at various places as Supply Inspector under Area Rationing Officer and the District Supply Officer,

Lucknow and lastly she was posted at Bakshi-ka-Talab, Lucknow. The petitioner was placed under suspension by the Commissioner, Food & Civil Supplies, U.P. Jawahar Bhawan, Lucknow vide order dated 29.04.2009 in contemplation of departmental enquiry relating to petitioner's posting as Supply Inspector, Hazaratganj, Lucknow w.e.f. 17.12.2005 to 29.06.2007 and the Deputy Commissioner (Food), Lucknow Region, Lucknow was appointed as Enquiry Officer. The validity of the suspension order was challenged by the petitioner by means of Writ Petition No.2809 (S/S) of 2009; Km. Mala Vs. State of U.P. & others. This Court by means of order dated 19.05.2009 stayed the implementation and operation of the suspension order dated 29.04.2009 with the observation that enquiry may proceed in accordance with law. In compliance of interim order dated 19.05.2009 the petitioner was reinstated in service but till date no charge-sheet has been served on the petitioner.

4. The submission of learned counsel for the petitioner is that the disciplinary proceedings were also initiated against Sri Devmani Mishra and Sri S.N. Pandey Supply Inspectors vide order dated 27.05.2008 and the Deputy Commissioner (Food), Basti Mandal Basti was appointed as enquiry officer. Similarly, the disciplinary proceeding was initiated against one Sri Uma Nath Bajpai vide order dated 14.09.2009 and the Deputy Commissioner (Food), Lucknow Mandal, Lucknow was appointed as enquiry officer. Vide order dated 26.02.2010, 84 persons were promoted by the opposite parties on the post of Senior Supply Inspector in the pay scale of Rs.9300-34800 with grade pay of Rs.4200. The promotion order, contained in Annexure-1, reveals that S/Sri Devmani Mishra, S.N. Pandey and Uma Nath Bajpai against whom disciplinary proceedings were initiated vide orders dated 27.05.2008 and 14.09.2009 respectively have also been promoted on the post of Senior Supply Inspector.

5. The further submission of learned counsel for the petitioner is that before making promotion on the post of Senior Supply Inspector a detail of pending proceeding was prepared by the opposite parties under the signature of Deputy Commissioner (Food), Lucknow Mandal, Lucknow in the month of February, 2010 (Annexure-6 to the writ petition) and perusal of the same reveals that the name of S/Sri Devmani Mishra, S.N. Pandey and Uma Nath Bajpai as well as of the petitioner shown at serial no.5,6, 7 and 10. It further reveals that all these persons have not been served with the charge-sheet. The opposite parties issued promotion order to S/Sri Devmani Mishra, S.N. Pandey and Uma Nath Bajpai but deprived the petitioner and in a most arbitrary and illegal manner kept the recommendations in sealed cover due to pendency of the disciplinary proceedings.

6. Learned counsel for the petitioner further submitted that this is a settled position that a sealed cover procedure can be resorted only after the charge-sheet/ charge memo is issued or the employee is running under suspension but in the present case the petitioner is neither under suspension nor any charge-sheet has been issued to her till date. Hence, the recommendation of the petitioner cannot be kept in sealed cover. The counsel for the petitioner also placed reliance on the office memo dated 28.05.1997 (Annexure-9 to the writ petition) which has been issued in pursuance to the judgment passed by Hon'ble Supreme Court in the matter of Union of India and others vs. Janki Raman and others dated 28.08.1991. The para-2 of the said office memorandum provides three

conditions for keeping the recommendation of the Departmental Promotion Committee in sealed cover; (i) If the employee is placed under suspension (ii) in the pending disciplinary proceeding charge-sheet has been issued and (iii) if criminal proceedings are pending against an employee and charge-sheet has been submitted before the competent court. The learned counsel for the petitioner pointed out that none of the conditions is applicable in the case of the petitioner.

A detailed counter affidavit has been filed by the opposite parties and in para-4 of the same it has been stated that name of the petitioner was considered by the Departmental Promotion Committee for promotion on the post of Senior Supply Inspector along with S/Sri Devmani Mishra, S.N. Pandey and Uma Nath Bajpai. Since the annual entries of the petitioner for the years 2005-2006, 2006-2007. 2007-2008 and 2008-2009 were not available, the Departmental Promotion Committee deferred the case of the petitioner for promotion. It has also been mentioned that the promotion of the petitioner has not been deferred on account of the fact that the departmental proceeding has been initiated against the petitioner and the petitioner was placed under suspension vide order dated 29.04.2009, at present she is working in compliance of interim order dated 19.05.2009 passed in Writ Petition No.2809 (S/S) of 2009. The Deputy Commissioner (Food), Lucknow mandal Lucknow is the Enquiry Officer, who has submitted the charge-sheet for approval and the same has been sent back to the Enquiry Officer after its approval on 29.03.2010.

7. The learned counsel for the petitioner in his rejoinder submitted that the charge-sheet dated 29.03.2010 was served upon her on 29.03.2010 whereas the Departmental Promotion Committee held on 02.02.2010. Therefore, no cognizance could have been taken of the charge-sheet against the petitioner on the date of meeting of the Departmental Promotion Committee. The further submission of the learned counsel is that it is the duty of the department to place the entire record/ full information of the incumbents including the character roll entries before the Departmental Promotion Committee and all these preparation should have been done before calling the Departmental Promotion Committee. In support of his submission learned counsel for the petitioner drawn attention of the Court in para-16 of the Government Order No.1194/Ka-I/2000-13/15/91 dated 19.05.2001. Learned counsel also placed reliance on the Government Order No.13/15/91-Ka-1/1993 dated 28.08.1993 (Annexure-RA-1) which provides that in case of non-availability of annual character roll entries of an employee then non-available character roll entry be treated as blank and evaluation of the incumbents be made on the basis of available character roll entries and in view of the government Order dated 20.08.1993 the promotion of the petitioner cannot be deferred.

8. Learned counsel also submitted that it is the duty of the department to prepared the eligibility list and arrange the annual character roll entries of the current years of the incumbents. In case of non-available of the same, the evaluation on the basis of available character roll entries should have been done by the Departmental Promotion Committee. The counsel for the petitioner very emphatically submitted that till date no adverse entry has been communicated to the petitioner and as such the petitioner has every right to presume that there is no adverse entry or material against the petitioner and if

there is any material, which cannot be treated as adverse for the purposes of promotion, crossing of efficiency bar and other service matters in view of Rule 5 of U.P. Government Servants (Disposal of Representation against the Adverse Annual Confidential Reports & Allied Matters) Rules, 1995. Learned counsel for the petitioner prayed that in the interest of justice directions be issued to the opposite parties to convene the Departmental Promotion Committee of the petitioner forthwith and on the basis of available annual character roll entries, her candidature be considered and if her candidature is recommended, she be given promotion from the date when other colleagues of the petitioner as well as juniors to the petitioner have been given promotion i.e. 26.02.2010.

9. I have considered the submissions of learned counsel for the respective parties and gone through the record.

10. It is admitted position that charge-sheet was issued to the petitioner on 29.03.2010 and the Departmental Promotion Committee was held on 02.02.2010 and in pursuance of the recommendation of the Departmental Promotion Committee the promotion orders were issued to the other colleagues of the petitioner. Since present case is not a case of keeping the proceedings of Departmental Promotion Committee in the sealed envelope, the provisions of Government Order dated 28.05.1997 would not be attracted. As per the submission of the opposite parties, the matter of the petitioner's promotion has been deferred on account of non-availability of annual entries of the years 2005-2006 to 2008-2009. The para-16 of the Government Order dated 19.05.2001 cast a duty upon the administrative department to place the relevant information on the prescribed form before the Departmental Promotion Committee and Government Order dated 20.08.1993 further provides that in case of non-availability of annual character roll entries of any employee then the unavailable character roll entry has to be indicated as blank and evaluation is to be done by the Departmental Promotion Committee on the basis of available character roll entry by treating the unavailable entries as average.

11. There is specific pleadings of the learned counsel for the petitioner that no adverse entry has ever been communicated to the petitioner at any point of time and there is no denial of the said fact except that since annual entries for the period 2005-2006 to 2008-2009 were not available on record, it is not proper to say that there is no adverse material against the petitioner.

12. Rule 5 of Uttar Pradesh Government Servants (Disposal of Representation Against Adverse Annual Confidential Reports and Allied Matters) Rules, 1995 (here-in-after referred to as the Rules, 1995) provides that where an adverse report is not communicated or the representation against an adverse report has not been disposed of in accordance with rule 4, such report shall not be treated as adverse for the purposes of promotion, crossing of efficiency bar and other service matters of the government servant concerned. Rule 5 of the Rules, 1995 reads as under:-

"5. Report not to be treated adverse.- Except as provided in Rule 56 of the Uttar Pradesh Fundamental Rules contained in Financial Handbook Volume II, Parts II to IV, where an adverse report is not communicated or a representation against an adverse report has not been disposed of in accordance with Rule 4, such report shall not be treated adverse for the purpose of

promotion, crossing of efficiency-bar and other service matters of the Government Servant concerned."

13. This Court after considering the issue in its entirety is of the view that an employee cannot be made to suffer on account of non-communication of entries on the part of the authorities. The timely recording of the annual entries and maintenance of the record is the responsibility of the administrative department and it is incumbent upon the administrative department to procure all the informations and provide the same in the prescribed proforma to the Departmental Promotion Committee. The State Government has taken care of the situation where such an entry of an employee is not available then as per the Government Order dated 20.08.1993 the said entries have to be reported as blank and evaluation of the employee is to be done on the basis of available entries and the blank entries / unavailable entries is to be assessed as average of the available entries. In view of this back ground there was no occasion for the Departmental Promotion Committee to defer the promotion of the petitioner on account of non-availability of the annual entries of a particular year. Even otherwise, if there is non-communication of any adverse entry in the prescribed time or the representation of an employee is not disposed of in the time scheduled prescribed under Rule 4 of the Rules, 1995 the said entries cannot be read adverse against an employee for the purposes of promotion, crossing of efficiency-bar and other service matters.

14. In view of the aforesaid discussions, this writ petition is disposed of with the directions to the opposite parties to convene the Departmental Promotion Committee within a period of one month from the date of receipt of a certified copy of this order and consider the candidature of the petitioner for promotion on the post of Senior Supply Inspector on the basis of available record and if her candidature is recommended, she be given promotion from the date of her other colleagues especially juniors to her have been given promotion. Further, it is open for the opposite parties to collect the unavailable entries and if they are not available then the opposite parties are required to proceed with the matter in accordance with the Government order dated 20.08.1993.

15. No order as to cost

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.08.2010

BEFORE
THE HON'BLE SANJAY MISRA, J.

Civil Misc. Writ Petition No. 2074 of 1996

Prakesh Chand Agrawal ...Petitioner
Versus
Presiding Officer, Labour Court (II), Kanpur & another ...Respondent

Counsel for the Petitioner
Sri B.N. Singh

Counsel for the Respondent
C.S.C.,
Sri V.B. Singh

U.P. Industrial Dispute Act 1947-Section 6-N-Retrenchment Compensation-workman employeed on fixed term-worked more than an year-whether entitled for retrenchment compensation under the Act? Held 'No' considering fixed term appointment-period automatically comes to an end-finding recorded by labour court regarding

incompetency of workman-cannot be imposed upon employer-and payment of compensation of 15 days wages-held-proper-No question of reinstatement

Held Para 9

In the present case the petitioner was admittedly engaged for a fixed term. He may have a right to the benefits provided under Section 6 N of the U.P. Act and non compliance of the Section by the employer can render his removal as a violation thereof but for claiming re-instatement and full back wages it cannot be made an absolute right. Where he was not granted extension of his engagement such engagement came to an automatic end. The employer had made an assessment of his performance to judge his suitability for the job. They found him unsuitable hence did not extend his engagement. The Labour Court therefore, took the view that it would not be proper to impose an unsuitable person on the employer.

Case Law Discussed:

JT 1998 (8) 585, (2002) 9 SCC 636

(Delivered by Hon'ble Sanjay Misra,J.)

1. Heard Sri B.N.Singh, learned counsel for the petitioner. List of old cases to be taken up at 2.00 p.m. has been revised. None appears on behalf of the respondent no.2, although counter and rejoinder affidavits are available on record.

2. The petitioner claims to have been appointed by the respondent no.2 as clerk and is aggrieved by the award dated 19.10.1994 (Annexure-5 to the writ petition) passed in the Adjudication Case No. 81/82 by the Presiding Officer, Labour Court, No. II U.P. Kanpur.

3. Sri B.N.Singh has submitted that a specific finding has been recorded by the Labour Court that the petitioner is a workman within the definition of Section 2(z) of the U.P. Industrial Dispute Act, 1947 (hereinafter referred to as ' the U.P. Act') and further that the termination of service of the petitioner was illegal and invalid. He states that when such a finding of fact has been recorded and it was not challenged by the employer, the labour court ought to have granted reinstatement with full backwages to the petitioner and having not so done, the impugned award is illegal. According to him the labour court has only awarded compensation of 3.33 years wages to the petitioner without reinstating him.

4. He has referred to a decision of Hon'ble the Supreme Court in the case of ***Anoop Sharma Vs. Executive Engineer, Public Health Division No.1, Panipat (Haryana)*** reported in ***(2005) 5 SCC 497*** and refers to paragraphs 22 and 23 of the said judgement to submit that in case there is any retrenchment by an oral order or communication or he is simply asked not to come for duty, the employer will be required to lead tangible and substantive evidence to prove compliance with clauses (a) and (b) of Section 25-F of the Act. While making his submission, he submits that the provision of Section 6-N of the U.P. Act are para materia with Section 25 of the Industrial Disputes Act and therefore, he states that having not done so, the termination of the petitioner was illegal.

5. In the counter affidavit, the respondents have set up the case that the petitioner was engaged for a fixed one year term for training and when his work and conduct was not satisfactory, the period was extended from time to time in order to enable the petitioner to improve

himself. They say that even after such opportunity, the petitioner did not improve himself and hence his engagement was not extended and it came to an end automatically.

6. Having considered the submission of learned counsel for the petitioner and perused the record, the condition that the petitioner has completed more than one year as workman of the respondent no.2, which is the first condition of Section 6 N of the U.P. Act has been made out inasmuch as a workman who has been in continuous service for not less than one year under an employer can be retrenched only on compliance of the Sub-clause (a), (b) and (c) of Section 6 N of the U.P. Act. There is nothing on record to indicate that the petitioner was given one month notice or wages in lieu thereof nor he has been given compensation which was to be equivalent to 15 days average pay for every year of service or part thereof. Consequently the termination of the petitioner was rightly held by the Labour Court to be illegal.

7. Insofar as the submission that the petitioner was required to be reinstated the Labour Court has recorded a finding that the work of the petitioner was found unsatisfactory by the employer and inspite of opportunities given, he did not improve himself. Therefore, the Labour Court was of the view that such an employee cannot be imposed upon the employer and hence reinstatement was not required to be granted in the present case.

8. There is no error in the view taken by the Labour Court more particularly in view of the law laid down by the Supreme Court in the case of ***Radhey Shyam Gupta Vs. U.P. State Agro Industries Corporation Ltd. & another*** reported in ***JT 1998 (8) SC 585.*** Paragraphs 28 and 34 are quoted hereunder:-

"28. In other words, it will be a case of motive if the master, after gathering some prima facie facts, does not really wish to go into their truth but decides merely not to continue a dubious employee. The master does not want to decide or to direct a decision about the truth of the allegations. But if he conducts an inquiry only for purpose proving the misconduct and the employee is not heard, it is a case where the inquiry is the foundation and the termination will be bad.

34. It will be noticed from the above decisions that the termination of the services of a temporary servant or one on probation, on the basis of adverse entries or on the basis of an assessment that his work is not satisfactory will not be punitive inasmuch as the above facts are merely the motive and not the foundation. The reason why they are the motive is that the assessment is not done with the object of finding out any misconduct on the part of the Officer, as stated by Shah, J. (as he then was) in ***Ram Narayan Das's*** case. It is done only with a view to decide whether he is to be retained or continued in service. The position is not different even if a preliminary inquiry is held because the purpose of a preliminary inquiry is to find out if there is prima facie evidence or material to initiate a regular departmental inquiry. It has been so decided in ***Champakalal's*** case. The purpose of the preliminary inquiry is not to find out misconduct on the part of the Officer and if a termination follows without giving an opportunity, it will not be bad. Even in a case where a regular

departmental inquiry is started, a charge-memo issued, reply obtained, and an enquiry Officer is appointed- if at that point of time, the inquiry is dropped and a simple notice of termination is passed, the same will not be punitive because the enquiry Officer has not recorded evidence nor given any findings on the charges. That is what is held in Sukh Raj Bahadur's case and in ***Benjamin's case***. In the latter case, the departmental inquiry was stopped because the employer was not sure of establishing the built of the employee. In all these cases the allegations against the employee merely raised a cloud on his conduct and as pointed by Krishna Iyer, J. in Gujarat Steel Tubes case, the employer was entitled to say that he would not continue an employee against whom allegations were made the truth of which the employer was not interested to ascertain. In fact, the employer, by opting to pass a simple order of termination as permitted by the terms of appointment or as permitted by the rules was conferring a benefit on the employee by passing a simple order of termination so that the employee would not suffer from any stigma which would attach to the rest of his career if a dismissal or other punitive order was passed. The above are all examples were the allegations whose truth has not been found, and were merely the motive."

In ***State of Punjab & others Vs. Bhagwan Singh*** reported ***in (2002) 9 SCC 636*** it was held in paragraphs 4 and 5 as quoted below:-

"4. This aforesaid order to the extent it stated that the officer was unlikely to prove a good police officer, was in terms of the relevant Rule 12.21 applicable to the respondent. In our view, when a probationer is discharged during the period of probation and if for the purpose of discharge, a particular assessment of his work is to be made, and the authorities referred to such an assessment of his work, while passing the order of discharge, that cannot be held to amount to stigma.

5. The other sentence in the impugned order is, that the performance of the officer on the whole was "not satisfactory". Even that does not amount to any stigma."

9. In the present case the petitioner was admittedly engaged for a fixed term. He may have a right to the benefits provided under Section 6 N of the U.P. Act and non compliance of the Section by the employer can render his removal as a violation thereof but for claiming re-instatement and full back wages it cannot be made an absolute right. Where he was not granted extension of his engagement such engagement came to an automatic end. The employer had made an assessment of his performance to judge his suitability for the job. They found him unsuitable hence did not extend his engagement. The Labour Court therefore, took the view that it would not be proper to impose an unsuitable person on the employer.

10. Insofar as the award of wages of 3.33 years is concerned that would come within the discretion of Labour Court under Section 6 of the U.P. Act for the purpose of awarding compensation to the petitioner and therefore, even if there was violation of Section 6 N of the U.P. Act, the Labour Court was within its

jurisdiction to award compensation to the petitioner which it has done.

11. For the aforementioned reasons there is no error or illegality in the impugned award.

12. The writ petition has no merit. It is accordingly dismissed.

13. No order is passed as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.07.2010

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 2842 of 2010

Dr. Deepak Bhatiya and Others ...Petitioner
Versus
State Of U.P. & Others ...Respondent

Counsel for the Petitioner
Sri N.L. Pandey

Counsel for the Respondents
Sri Satish Chaturvedi (Addl. Advocate General.)
Sri A.K. Yadav
C.S.C.

Constitution of India-Art.226 appointment on post of principal-commission excluded those teachers working in self finance institution-without verifying the fact regarding mode of full time or part time working-held-illegal-teachers working full time basis even in un-aided institutions are qualified for consideration for the post of principal in aided intermediate college.

Held Para 7

This Court holds that the Commission has not justified in excluding such teachers who are working in self finance institutions en masse. The Board must scrutinise the application of the candidates concerned working in such self financed recognized institutions and satisfy itself as to whether they are part time teachers or full part time teachers. All full time teachers appointed in accordance with rules applicable to such institution are within the zone of consideration and the Selection Board shall take appropriate action accordingly.

(Delivered by Hon'ble Arun Tandon,J.)

1. Heard learned counsel for the petitioner and learned counsel for the State-respondents.

Petitioners had been working as full time teacher in institutions which are affiliated from the Central Board for Secondary Education, New Delhi, is recognised Intermediate Colleges which have been granted recognition under self-finance. The petitioners have made applications for being considered for the post of Principal available in various High School and Intermediate Institutions recognised by the Madhyamik Shiksha Parishad in terms of the advertisement published by U.P. Secondary Education Services Selection Board established under U.P. Act No. 5/1982. The application of the petitioners have not been considered by the Selection Board because the petitioners have been working in self financing institution and they were not being giving salary from the State exchequer.

2. Counsel for the petitioner has placed reliance upon the judgement of the Apex Court in the case of ***Mohd. Altaf & Ors. vs. Public Service Commission & Anr. in C.A. No. 961-962 of 1999*** as also upon the judgement of the Apex Court in

Contempt Petition (c) No. 372/2002 in C.A. No. 962/1999 Shamim Khanam vs. K.B. Pandey & another, it is submitted that teachers working in self-financed institution cannot, as a class, be excluded from consideration. Relevant portion of the order of the Supreme Court relied upon by the petitioner is quoted herein below:

"Part time teachers would be excluded from consideration. However, it is made clear that there cannot be a class of exclusion of teachers who are working in self-financed institutions. Any exclusion of a candidate on the basis that he or she is a part time teacher must be made only in individual cases after proper verification."

3. On behalf of the petitioner, it is contended that from the aforesaid, it is clear that there cannot be an en masse exclusion of teachers working it self-financed institution in the matter of consideration for the post of Principal of Intermediate College. The controversy, therefore, stands settled in favour of the petitioners.

4. Shri Satish Chatirvedi, Additional Advocate General could not dispute the correctness of the law as flows from the judgement of the Apex Court noticed above.

5. Full time teachers working in self financing institutions have due recognition from statutory boards cannot be excluded if they satisfy all other conditions, it is only the part time teachers who on examination of individual cases can be excluded from such consideration.

6. So far as teachers working in recognized Intermediate Colleges having recognition under section 7A of the Intermediate Education Act are concerned; this Court may notice that since 1986 all Intermediate and High Schools have been granted recognition under self finance only i.e. under Section 7A. The teachers are appointed for such institutions under Section 7AA read with Government order dated 16.4.2004. Although termed as part time they in fact are required to work as full time teachers. Therefore, their claim also cannot be excluded en masse.

7. This Court holds that the Commission has not justified in excluding such teachers who are working in self finance institutions en masse. The Board must scrutinise the application of the candidates concerned working in such self financed recognized institutions and satisfy itself as to whether they are part time teachers or full part time teachers. All full time teachers appointed in accordance with rules applicable to such institution are within the zone of consideration and the Selection Board shall take appropriate action accordingly.

8. In view of the aforesaid the circular issued by the State Government dated 16.4.2004 has to read accordingly.

9. Let consequential action be taken in the matter of selection of Principle's by the Selection Board pending before it by the Selection Board accordingly.

10. Writ Petition stands disposed of.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.08.2010

BEFORE
THE HON'BLE S.C. AGARWAL, J.

Criminal Revision No. - 3017 Of 2010

Dinesh Kumar Soni and others
...Revisionists
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Sudhir Shandilya

Counsel or the Respondent:
A.G.A.

Criminal Revision-Magistrate taken cognigance-on affidavit filed on Protest Petition-without considering any material of case diary-held-either of procedure prescribed by Division Bench Case of Pakhando Case-not followed by Magistrate-order wholly illegal.

Held Para 6

The Magistrate has not adopted any of the four courses detailed above but proceeded to take cognizance on the basis of affidavits. The cognizance of the offence cannot be taken on the basis of affidavits. Either the Magistrate should have passed the order on the basis of material present in the case diary or should have treated protest petition as a complaint. The course adopted by learned Magistrate is absolutely illegal. Therefore, the impugned order cannot be sustained and is liable to be set aside.

Case Law Discussed:
2001 (43) ACC 1096

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

1. Heard learned counsel for the revisionists and learned AGA for the State.

2. The instant revision is directed against the order dated 26.6.2010 passed by the J.M. Ist, Mahoba in Criminal Case No. 82 of 2010, State Vs. Dinesh Kumar Soni & others, under Sections 457, 380 IPC, P.S. Mahobkanth, District-Mahoba, whereby the revisionists were summoned to face trial under Sections 457, 380 IPC.

3. Since the matter is being remanded to the learned Magistrate, there is no need to issue notice to the complainant-opposite party no. 2.

4. FIR was lodged by the complainant against unknown persons in respect of theft. The police submitted final report. The protest petition was filed by the complainant and affidavits of opposite party no. 2 and his witnesses were filed before the Magistrate. Learned Magistrate took cognizance on the basis of affidavits and summoned the revisionists to face trial under Sections 457, 380 IPC. It was further directed that the case shall proceed as a State case.

5. It is submitted by learned counsel for the revisionists that there was no material on the case diary against the revisionists and therefore, the Magistrate was not justified in summoning the revisionists. It is further submitted that the protest petition filed by opposite party no. 2 was not treated as a complaint, nor statements of complainant and his witnesses were recorded under Sections 200 and 202 Cr.P.C. It is further contended that the cognizance was taken

on the basis of affidavits, which was illegal.

Learned AGA is unable to defend the impugned order.

A Division Bench of this Court in **Pakhando & others Vs. State of U.P. & another, 2001 (43) ACC 1096** has held that :-

(1) He may agreeing with the conclusions arrived at by the police, accept the report and drop the proceedings. But before so doing, he shall give an opportunity of hearing to the complainant ; or

(2) He may take cognizance under Section 190 (1) (b) and issue process straightway to the accused without being bound by the conclusions of the investigating agency, where he is satisfied that upon the facts discovered or unearthed by the police, there is sufficient ground to proceed ; or

(3) he may order further investigation, if he is satisfied that the investigation was made in a perfunctory manner ; or

(4) he may, without issuing process or dropping the proceedings decide to take cognizance under Section 190 (1) (a) upon the original complaint or pretest petition treating the same as complaint and proceed to act under Sections 200 and 202 Cr.P.C. and thereafter decide whether complaint should be dismissed or process should be issued.

6. The Magistrate has not adopted any of the four courses detailed above but proceeded to take cognizance on the basis of affidavits. The cognizance of the offence cannot be taken on the basis of affidavits. Either the Magistrate should have passed the order on the basis of material present in the case diary or should have treated protest petition as a complaint. The course adopted by learned Magistrate is absolutely illegal. Therefore, the impugned order cannot be sustained and is liable to be set aside.

7. The revision is allowed. The impugned order dated 26th June, 2010 passed by the Magistrate is set aside. The matter is remanded to the Magistrate with a direction to decide the fate of final report and the pretest petition in light of directions given above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED LUCKNOW 21.07.2010

BEFORE
THE HON'BLE SHABIHUL HASNAIN, J.

Writ Petition No.4683 (S/S) of 2010

Satya Prakash Pandey ...Petitioner
Versus
Union of India and others ...Respondent

Constitution of India Art. 226-Service law-termination order-on ground of giving false information-application form consisting 12 column-requiring 'yes' or 'no'-petitioner given incorrect information as 'no' regarding pendency of criminal case under Section 323/504/506 IPC-not amount to moral turpitude-even on verification-police personal recommended for recruitment as no other criminal cases pending-petitioner a 20 years young boy belonging to rural area-after getting bail-bonafidely conceived as acquittal-termination order passed very cursory and routine manner without application

of mind deserves to be struck down-consequential directions given.

Held Para 12 and 13

On the basis of the arguments and the material on record, the Court is convinced that the answer 'No' to the composite question put in Clause 12 of the 'Verification Roll' does not amount to supply of false information or suppression of material facts as envisaged under Clause -3 of the said Roll.

The order of termination has been passed in very cursory and routine manner. The matter has not been seriously considered from all angles. There is lack of application of mind which can not be appreciated. It deserves to be struck down. It has also been informed that the petitioner was sent back home despite service of the interim order of this Court. This is a serious matter The act touches the peripheries of contempt. At the moment no cognizance is being taken of this fact but it is expected of a senior officer of a disciplined force to show due respect to the orders of the Court

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

1. Heard Dr. L.P. Mishra, learned counsel for the petitioner and Sri I. H. Farooqui, Assistant Solicitor General of India for all the opposite parties.

2. This matter was initially heard on 14.7.2010 and an objection regarding territorial jurisdiction was raised by Sri I. H. Farooqui. The termination order has been passed at Narsingarh, Tripura, hence it was argued on behalf of opposite parties that this Court does not have territorial jurisdiction to take cognizance of this matter. Learned counsel for the petitioner has argued that the termination order though has been passed at Tripura but the written test of the petitioner was held at Lucknow and he was called for interview at Lucknow. The medical examination was also done at Lucknow and the appointment letter was issued to the petitioner by the Deputy Inspector General of Police, Central Reserve Police Force, Lucknow. Moreover, the basis of termination order is a police verification from police station Unchahar, District-Raibareli in Uttar Pradesh. Lucknow and Raibareli both are within the jurisdiction of Lucknow Bench. Dr. Mishra has further argued that in a case reported in AIR 1976 Supreme Court 331 (Naseeruddin Versus State Transport Appellate Tribunal) it has been held that the Courts within whose jurisdiction part of cause of action has accrued shall have the jurisdiction to decide the matter. On all these counts the writ petition is maintainable at Lucknow.

3. Sri I. H. Farooqui says that he is not pressing the point of territorial jurisdiction hence this Court proceeds with the merit of the case.

4. The facts of the case briefly stated are that the opposite parties advertised in news papers for filling up vacancies in the Central Reserve Police Force. Petitioner applied and was called for Physical Examination. Petitioner appeared for Physical Examination at Lucknow and cleared the same. The petitioner was subsequently called for Written Test to be held at Lucknow on 19.12.2008. The petitioner appeared in the said written test at Lucknow and was declared successful vide result dated 13.01.2009 and was called for interview at Lucknow on 16.01.2009. The petitioner appeared in the said interview on 16.01.2009 and was declared successful on 2.2.2009. Thereafter, the petitioner appeared in the Medical Examination and was

declared selected on 16.2.2009. Appointment letter was issued to the petitioner by the Deputy Inspector General of Police, Central Reserve Police Force, Lucknow in pursuance whereof the petitioner joined on 13.3.2009 on the post of Constable at Lucknow in the office of opposite party No.3. The petitioner was sent for training to Kerala and successfully completed his training. After completion of the training, the petitioner was informed that he was to be posted with the 87th Battalion stationed at Narsingarh, Tripura and an officer from the said battalion arrived and took the petitioner and other candidates who had successfully completed the training along with him to the new place of posting. The petitioner had just joined at his new place of posting at Narsingarh, Tripura where he was served with the impugned notice date 16.6.2010 issued by the Commandant, 87th Battalion-opposite party no.4 terminating the services of the petitioner.

At the time of his appointment, the petitioner was required to fill up a 'Verification Roll' wherein certain information was required to be given by the petitioner about himself. Sri I. H. Farooqui has produced the original record and the form filled in by the petitioner is also before the Court. In column 12 of the said form it was required that the petitioner may furnish information as to whether he was arrested or any case is pending against him in a court of law. Against both these columns the petitioner has written 'No'. The sole case for cancellation of the petitioner's selection is of verification. It has been found that a case under Sections 147/323/504 and 506 IPC were registered as Case Crime No.82 of 2007 at Police Station-Unchahar, District-Raibareli.

5. Petitioner's services have been terminated on the ground that the petitioner has supplied false information. Notice of termination was issued on 16.6.2010 to be effective after the expiry of a period of one month from the date of the notice. Meaning thereby that the petitioner's service have come to an end on 15.7.2010.

Dr. Mishra, learned counsel for the petitioner has argued that the very fact that the petitioner has stated to have "No" against column 12 can not be denied as a matter of fact, but he urges the Court to consider the effect of the case pending against the petitioner in the court at Raibareli. He submits that the petitioner at the time of filling up the form was 20 years of age. He comes from a rural background and the sections under which the case has been registered are 147/323/504/506 IPC. The police report shows that there were twelve persons involved in this petty offence and the petitioner was granted bail from the police station itself. Dr. Mishra has argued that such small offence which did not include any moral turpitude or any sinister design on the part of the young candidate can not be considered as a serious impediment in his joining the department. On all the other counts the petitioner has qualified to be a Constable and except for this blot there is nothing against the petitioner to withdraw his selection. The police verification report has also been placed before this Court. The In-charge of the police station has inquired from the villagers and has found that the petitioner is of good moral character and there is no complaint against him in the records. The Inspector has gone to the extent of writing that the case pending before the Court can not be an impediment for joining the services by the petitioner. The overall assessment which transpires from the report

of the station-in-charge shows that the petitioner except for that petty offence is otherwise a good member of the society.

6. Dr. Mishra has further argued that even if the petitioner had given this information prior to the verification it would not have stopped the opposite parties from allowing him to appear in the examination and competing with all others.

7. An important question which arises for consideration is whether the petitioner who is going to join a disciplined force should have given correct information instead of writing 'No'. Sri I. H. Farooqui has argued that this aspect of the matter is the sole consideration for terminating the services of the petitioner.

Dr. Misra, on the other hand, has argued that the candidate of twenty years of age with rural background could not comprehend the real import of the question put in by the opposite parties in column-12. He has argued that as the petitioner was granted bail from the police station itself, the petitioner thought that the matter has come to an end. Since he was not convicted or sent to jail, he could not understand that he ought to write that any criminal case is pending against him. The matter was too trivial in the assessment of the petitioner. Since the question has been asked in a composite format about the petitioner being arrested or sent to jail, convicted or bound down, a boy of 20 years could not segregate and give category wise reply for lack of comprehension. Since the petitioner was never convicted and never sent to jail he thought it proper to answer 'No'.

8. This line of argument can not be readily accepted by the Court but definitely leaves a mark on the mind. When a series of questions are asked and one word answer is required, it often becomes difficult to give a correct answer. In the present case, it was a young man who was just beginning his carrier with a natural nervousness of being recruited to police force. His excitement may have forced the petitioner to commit such a mistake which can not conclusively be termed as deliberate perjury. It can be clearly seen that composite questions can not be answered in 'Yes' or 'No'. In the present case no separate columns have been assigned for giving the details. Clause-12 is reproduced as under:-

"12. (a) Have you ever been arrested, prosecuted, kept under detention or bound down/fined or convicted by a court of law for any offence or debarred/disqualified by any Public Service Commission from appearing at its examination/selections or debarred from taking any examination/rusticated by any University or any other education authority/Institution ?:"

Had the columns been arranged in the following manner:-

"12. (a) Have you ever been

(a) arrested:- Yes No.

(b) prosecuted:- Yes No.

(c) kept under detention :- Yes No.

(d) or bound down/fined:- Yes No.

(e) convicted by a court of law for any offence:- Yes No.

(f)or debarred/disqualified by any Public

Service Commission from appearing at its examination/selections: - Yes No.

(g) or debarred from taking any examination/rusticated by any University or any other education authority/Institution?: Yes No.

9. It would have been clear and practicable for the candidate to answer properly and correctly but when eight different shades of questions are being combined in one column and the answer has to be given in 'Yes' or 'No', naturally, a young boy of twenty years can not be expected to write 'Yes' because in the present case he was not prosecuted nor kept under detention nor bound down nor fined nor convicted by a court of law. Hence, his answer is 'No' to this question can not be taken as a big offence rendering him totally ineligible for appointment.

Further the argument of Sri I. H. Farooqui that in clause-3 of the same verification roll it has been clearly stated as under:-

"3. If the fact that false information has been furnished or that there has been suppression of any factual information in the Verification Roll comes to notice at any time during the service of a person, his services would be liable to be terminated."

10. He says that the petitioner's services have been terminated under Clause-3 of the Verification Roll. This clause can be invoked only when the opposite parties come to a definite conclusion that the information is a false information. The very fact that composite questions of fact can not be answered in monosyllable 'Yes' or 'No' renders the arguments of Sri Farooqui as fallacious. It can not be accepted.

Apart from the police report from the Inspector In-charge of the police station Unchhar, Raibareli, the character certificate at the level of the Superintendent of Police, Raibareli has also been obtained which shows that character of the petitioner is satisfactory and there is no adverse material against him. A similar character certificate has been issued by the Gram Pradhan of Itaura Bujurg, Raibareli. Learned counsel for the petitioner has argued that the sole purpose of police verification is that whether the candidate is having good moral character and is involved in any criminal case of such a nature which can hold him to be involved in moral turpitude. The offices of the government department should not be held by the persons who can not have the confidence of the people. His character should be above board. At the same time, it is also to be seen that stereotype classifications are not made. For instance, if a person is involved in a scuffle which occurred due to sudden cycle accident on the road or is involved in some kind of 'marpeet' during heated exchange of words on the spur of the moment. Definitely, these are instances which may result into an FIR being lodged and a case being conducted but eruption of scuffle on the spur of the moment will not necessarily mean that a candidate belongs to a group of criminals. It may also not necessarily mean that the petitioner does not have a good moral character.

11. In the world of today when job opportunities are shrinking, a young lad of twenty years can hardly be expected to go an extra mile to inform the authorities about a case which can get him rejected at the threshold. If a specific question is not asked

he can not be expected to analyze the query by himself and prepare the answer which is prejudicial to his interest. Social and economic pressure on a young boy in today's society is a reality. The moral values which are otherwise vanishing can not be stretched beyond a limit. The virtues and values in a candidate should be decided on a practical apparatus. Realities of life can not be wished away. In the present case, when the petitioner was neither convicted nor fined nor bound down nor prosecuted nor debarred from appearing in any examination, his answer to clause 12 as 'No' can be read as near truth. The Inspector in-charge Police Station-Unchahar as well as the Superintendent of Police of the District have verified his character as being good, the certificate of good moral character has been issued by the Village Pradhan. On inquiry no adverse material has come out against him nor any complaint was made to the police by any of the villagers.

12. On the basis of the arguments and the material on record, the Court is convinced that the answer 'No' to the composite question put in Clause 12 of the 'Verification Roll' does not amount to supply of false information or suppression of material facts as envisaged under Clause -3 of the said Roll.

13. The order of termination has been passed in very cursory and routine manner. The matter has not been seriously considered from all angles. There is lack of application of mind which can not be appreciated. It deserves to be struck down. It has also been informed that the petitioner was sent back home despite service of the interim order of this Court. This is a serious matter The act touches the peripheries of contempt. At the moment no cognizance is being taken of this fact but it is expected of a senior officer of a disciplined force to show due respect to the orders of the Court.

14. Accordingly, the order dated 16.6.2010 resulting into the termination of the petitioner's services w.e.f. 16.7.20010 passed by Commandant 8th Battalion, as contained in Annexure-1 to the writ petition, is set aside. The petitioner shall be reinstated in service from the date the other persons of his Batch have been assigned their job in the department.

15. The writ petition is allowed.

16. No order is passed as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.08.2010

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 6260 of 1992

Prakash Narain and another ...Petitioner
Versus
III[rd] Additional District Judge And others ...Respondent

Counsel for the Petitioner:
Sri R.S. Maurya
Sri Kunwal Ravi Singh

Counsel for the Respondent:
S.C.
Sri G.N.Verma

U.P. Consolidation of Holdings Act, Section 49-suit for cancellation of sale deed-on basis of sale deed name initiated-during consolidation operation-the order passed by consolidation proceeding be questioned either by civil or revenue court as per law laid down by Full Bench in Bismillah Case.

Held Para 11

Counsel for the petitioner has placed reliance in the case of Jai Singh Vs. IInd Additional District Judge, Muzaffarnagar and others reported in 2001 (4) AWC 2826 which according to the petitioner holds that a suit for cancellation would lie in civil court only. In my opinion, the judgement has no application in the facts of present case inasmuch as it deals with the proceedings initiated under the U.P. Z.A & L.R. Act. As already noticed above the Full Bench of this Court in the case of Ram Nath (supra) has specifically held that the jurisdiction of the consolidation authorities in respect of right, title and interest over the agriculture land is much wider than that of revenue courts and civil courts.

Case Law Discussed:

1989 (1) AWC 290 ,2004 (2) AWC 1274,1980 ALJ NOC 134, (2001) 3 SCC 24, (1990) 1 SCC 207

(Delivered by Hon'ble Arun Tandon,J.)

1. Petitioner before this Court is plaintiff in Original Suit No. 141 of 1986 which was filed for cancellation of the sale deed executed in respect of plot no. 111.

On behalf of the defendants an objection was raised qua the jurisdiction of the Civil Court to try the suit on the ground that the suit property transferred under the sale deed was an agricultural holding and the suit was barred by Section 49 of the Consolidation of Holdings Act. The objection so raised was formulated as issued no. 3 and has been decided as preliminary issue. The Trial Court held that the suit as presented was maintainable inasmuch as the Civil Court alone had the jurisdiction to cancel the sale deed.

2. Not being satisfied the defendants filed Civil Revision N0. 08 of 1991. The revision has been allowed under the judgement and order of the Additional District Judge dated 7.2.1992 and it has been held that during consolidation operation, mutation has directed on the strength of the sale deed, the same has become final. Reference has also been made to an application made by the plaintiff's father before the Sub-Divisional Magistrate giving his consent for mutation of the name of the defendants who were purchasers of the property in question.

3. The Additional District Judge has held that the sale deed has been executed willingly and voluntarily without any fraud or misrepresentation. It has, therefore, been held that the suit was barred under Section 49 of the Consolidation of Holdings Act.

4. Challenging the order so passed by the additional District Judge, counsel for the petitioner submits that the issue pertaining to cancellation of the sale deed cannot be a subject matter of consideration during the consolidation proceeding. Any mutation and determination of rights which may have taken place on the strength of the sale deed during consolidation proceedings will not bar the suit for cancellation of the sale deed.

Counsel for the petitioner with reference to the Full Bench judgement of this Court in the case of Ram Padarath vs. Second Additional District Judge, Sultanpur and others reported in 1989 (1) AWC 290 as well as to the judgement of the Hon'ble Single Judge in the case of Smt. Mangli Devi vs. Kamlesh Kumar and others 2004 (2) AWC, 1274, contends that where a plaintiff approaches the Civil Court seeking cancellation of a sale deed which may be void or voidable, the issue as to whether the name of the plaintiff is recorded or not is not relevant and it is within the jurisdiction of the civil court to try such a suit.

5. It is stated that in the facts of this case the plaintiff's allegations were that the sale deed has been obtained by fraud and misrepresentation and, therefore, the suit for cancellation of the sale deed could be tried by the Civil Courts only.

6. I have heard counsel for the parties and have examined the record of the present writ petition.

7. The District Judge, Jalaun at Orai in his order dated 7.2.1992 has recorded following findings.

(a) Registered sale deed was executed by the father of the petitioner in respect of property on 12.7.1973 and the plaintiff was one of the attesting witnesses. On the strength of the sale deed, name of the purchaser defendants was mutated in revenue records and no objection was taken by the father of the plaintiff, who was alive at the relevant time. On the contrary, the father gave his consent for mutation in favour of the purchaser in proceeding on an application made for the purpose in the court of S.D.M. It has been found that the suit for cancellation of the sale deed was barred by Section 49 of the Consolidation of Holdings Act. It has been recorded that on the basis of the sale deed, the defendants have been recorded as Bhumidhar in possession of the disputed land in the revenue records. It has been noticed that the sale deed is being questioned by means of the suit filed in the year 1986 i.e. after 12 to 13 years of the execution of the sale deed and after the village in question was de-notified under Section 52 of Consolidation of Holdings Ac. It has lastly been recorded that neither the father of the petitioner nor Prakash Narain claimed any right as title in land in question during consolidation proceedings. In view of the judgement in the case of Ram Padarath vs. Second Additional District Judge, Sultanpur and others reported in 1989 (1) AWC 290, it has been held that the rights of the parties stand determined conclusive during consolidation proceedings and cannot be reopened in suit before the Civil Court or Revenue Court. Further reliance has been placed upon the judgement in the case of Archhey Lal and others vs. Bhunai and others reported in 1980 ALJ NOC 134 for holding that a suit for cancellation of a sale deed where the purchaser has already been recorded as Bhumidhar in revenue record is barred by section 49 of U.P. Consolidation of Land Holdings Act. To similar effect is the judgement of this Court in the case of Zafar Khan and others vs. Board of Revenue, U.P. and others AIR 1985 SC 39 challenging the finding so recorded.

8. Counsel for the petitioner challenging the findings so recorded vehemently contended that since the suit was filed for cancellation of the sale deed civil court alone had the jurisdiction to try the suit and the bar of Section 49 of CH Act would not be applicable. He placed reliance upon the Full Bench judgement of this Court in the case of Ram Padarath vs. Second Additional District Judge, Sultanpur and others reported in 1989 (1) AWC 290 as well as upon the judgement of this court in the case of Ram Nath vs. Smt. Munna reported in AWC 412 for the proposition that a suit for cancellation of a voidable sale deed qua an agricultural plot pending in civil court shall not abate under section 5 of the Consolidation of Holdings Act. Reference is also made to judgement of Hon'ble Supreme Court in the case of Sri Ram and another vs. Ist Additional District Judge and others reported in (2001) 3 SCC 24 wherein it has been held that a recorded tenure holder having a prima facie title and being in possession can file a suit before the civil court for cancellation of

sale deed having been obtained by fraud or impersonation he cannot be directed to file a suit for declaration in the Revenue Court, the reason being that in such a case, prima facie the title of the recorded tenure holder is not under cloud. He has also placed reliance upon the judgement of the Hon'ble Supreme Court in the case of Smt. Bismillah vs. Janeshwar Prasad and others reported in (1990) 1 SCC 207 wherein the judgement of Full Bench of this court in the case of Ram Padarath (supra) has been approved.

9. Suffice is to record that Full Bench of this Court in the case of Ram Padarath (supra) has specifically laid down as follows:

"We are of the view that the case of Indra Dev v. Smt. Ram Pyari has been correctly decided and the said decision requires no consideration, while the Division Bench case, Dr. Ayodhya Prasad v. Gangotri Prasad is regarding the jurisdiction of consolidation authorities, but so far as it holds that suit in respect of void document will lie in the revenue court it does not lay down a good law. Suit or action for cancellation of void document will generally lie in the civil court and a party cannot be deprived of his right getting this relief permissible under law except when a declaration of right or status and a tenure holder is necessarily needed in which event relief for cancellation will be surplusage and redundant. A recorded tenure holder having prima facie title in his favour can hardly be directed to approach the revenue court in respect of seeking relief for cancellation of a void document which made him to approach the court of law and in such case he can also claim ancillary relief even though the same can be granted by the revenue court."

The same Full Bench in paragraph 21 has further specifically held as below:-

"21. The jurisdiction of the consolidation authorities is wider than civil and revenue courts. Section 5(2) of U.P. Consolidation of Holdings Act provides that any suit pending in the trial court or in appeal before any appellate court in which right, title and interest over land is involved will stand abated. In view of the said provision of any appeal, may it be a special appeal, pending before Hon'ble Supreme Court would abate. Adjudication of right, title and interest over 'land' by the consolidation authorities is final. Section 8 of the U.P. Consolidation of Holdings Act provides for revision of the village map after provisional consolidation Scheme for unit is prepared. Sec. 8-A of the said Act provides for preparation of Statement of Principles, while Sec. 9 provides for issue of extracts from records and statements and publication of records mentioned in Section 8 and Section 8-A and issue of notice for inviting objection. Section 9-A provides for disposal of cases relating to claim to land and partition of joint holding. The order passed by the consolidation officer is subject to appellate and revisional jurisdiction. Even if rights are claimed on the basis of void sale-deed or questioned before the consolidation authorities, the consolidation authorities, after recording a finding on the same that it was void sale-deed can determine the rights, title and interest in the land in accordance with law ignoring the said deed on the ground that it was void. The entries are to be corrected by the consolidation authorities themselves and one has not to approach the authorities under U.P. Land Revenue Act after decision by civil or revenue court to correct the papers in accordance with their judgement and decree. If a document is cancelled by civil court then entry is to be made by the registering officer on the copy as provided in Section 31(2) of the Specific Relief Act, which gives seal to the legal ineffectiveness of the said

document. But after determination by consolidation authorities the right, title of the parties taking into consideration void document, the entries will be corrected. After consolidation operations are over, the question cannot be raised or raked up before any civil or revenue court thereafter in view of Section 49 of U.P. Consolidation of Holdings Act which puts a bar on the jurisdiction of civil or revenue court not only to adjudicate such right and title or interest over land adjudicated by consolidation authorities or which could have been raised before them, but was not raised. The jurisdiction of consolidation authorities is thus wider than that of civil court and revenue court."

10. In view of the legal position as aforesaid, which has since been approved by the Hon'ble Supreme Court in the case of Smt. Bismillah (supra) what logically follows is that all issues of right/title in an agriculture holding should be raised before the consolidation authorities once the village is notified under Section 4 of the CH Act. The father of the petitioner should have therefore claimed before the consolidation authorities that the sale deed was void document. No such plea, which was available, was raised before the consolidation authorities by the father or by the petitioner himself who was a attesting witness to the sale deed so executed. This Court holds that rights over the land with reference to the sale deed in the facts of the stood closed with the de-notification of the village and the suit as filed for cancellation of the sale is barred by Section 49 of the Consolidation of Holdings Act. The order of the Consolidation authorities treating the land in dispute to be that the purchaser, can not be reopened in a suit as filed by the plaintiff.

11. Counsel for the petitioner has placed reliance in the case of Jai Singh Vs. IInd Additional District Judge, Muzaffarnagar and others reported in 2001 (4) AWC 2826 which according to the petitioner holds that a suit for cancellation would lie in civil court only. In my opinion, the judgement has no application in the facts of present case inasmuch as it deals with the proceedings initiated under the U.P. Z.A & L.R. Act. As already noticed above the Full Bench of this Court in the case of Ram Nath (supra) has specifically held that the jurisdiction of the consolidation authorities in respect of right, title and interest over the agriculture land is much wider than that of revenue courts and civil courts.

12. Writ petition is dismissed. Interim order is vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.07.2010

BEFORE
THE HON'BLE ANIL KUMAR, J.

Civil Misc. Writ Petition No. 8843 of 2002

Head Constable 92 A.P Madan Pal Singh ...Petitioner

Versus

State Of U.P. & others ...Respondents

Counsel for the Petitoner:
Sri Chandra Bahadur Yadav
Sri S.K.Mishra
Sri Rakesh Tripathi

Counsel for the Resapondents:
C.S.C.

Constitution of India Art 226-Judicial Review-discretion exercised by disciplinary authority-under writ jurisdiction-limited to scrutiny of decision making process only in the light

of the settled principles of law-writ petition against order of dismissal of Head Constable-order passed after full pledged domestic enquiry-bald plea regarding reasonable opportunity found not tenable-punishment found to be commensurate with indiscipline proved-no irregularity or infirmly-writ petition dismissed.

Held Para 44 and 45

Thus the decision by the appropriate authority to grant or not to grant a particular relief to a person is not open to Judicial review by the High Court under Article 226 of the Constitution of India but the power of judicial review is circumscribed to scrutiny of the decision making process only and is to be exercised in the light of the principles laid down above and applying the said principles to the facts of the present case, I do not find any irregularity or infirmity in the impugned orders.

No other point is pressed or argued before me.

Case Law Discussed:

2002 (1) ESC AII 26; 1996 (5) SCC 474; 1983 (1) SCC 124; 1995 (6) SCC 749; 1997 SCC (L&S) 90; 1998 (9) SCC 671; 1989 (2) SCC L&S 303; 2007 (7) SCC 257; 2008 (7) SCC 580; 2010 (5) SCC 775; 1984 (3) ALL ER 935; 1982 (3) ALL ER 141; AIR 1989 SC 997; 1994 (6) SCC 651.

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

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

2. Factual matrix of the present case as submitted by the learned counsel for the petitioner are that the petitioner (Madan Pal Singh) working as Head Constable (Constable No. 92 A.P.) posted at Police Line, Meerut under the control and supervision of Uttar Pradesh Police Headquarter.

3. On 18.01.2000, the petitioner alongwith two other Constables namely Sri Naresh Kumar and Amar Singh was assigned the duty to take a hard-core criminal Sri Sanjay @ Bunti son of Brij Raj Singh from District Jail Meerut to the Court no. 16, Patiyala House Court, New Delhi. While they were returning from New Delhi, on the way they stopped at Modinagar, District Ghaziabad in order to take food in the Hotel 'Sanjha Chulha', Modinagar, Ghaziabad alongwith prisoner Sri Sanjay @ Bunti, who took the advantage of the said stay and escaped away from the custody of the petitioner.

4 In view of the said fact, a First Information Report was lodged at police station Modinagar under Sections 223, 224, 225, 395 and 397 I.P.C. read with Section 29 of the Police Act against him. On the basis of which, a criminal case has been instituted in the competent criminal court.

5. Thereafter, the petitioner was served with the charge-sheet dated 29.02.2000 and a preliminary enquiry was conducted by one Sri Uma Nath Singh, Additional Superintendent of Police (Rural), Ghaziabad, a copy of the said enquiry report is annexed as Annexure no. 4 to the writ petition.

6. On behalf of the petitioner a submission is made that since the criminal case in respect to the same incident is pending against him, so request was made to the authority concerned and the Inquiry Officer to stay the disciplinary proceedings till the decision of the criminal case. But no heed was paid in the matter so the petitioner submitted his reply to the charge-sheet

dated 29.02.2000 on 02.03.2000. Thereafter, the Inquiry Officer conducted the enquiry proceedings and submitted an enquiry report dated 24.11.2000 to the punishing authority.

7. On 24.12.2000, a show-cause-notice was issued to the petitioner by the punishing authority alongwith the enquiry report, he submitted his reply on 31.12.2000. Thereafter, Senior Superintendent of Police, Meerut/Punishing authority, after considering the reply submitted by the petitioner, enquiry report and materials on record, passed the impugned order dated 13.02.2001 dismissing the petitioner from services.

8. Aggrieved by the said order of dismissal dated 13.02.2001, petitioner preferred an appeal before the Deputy Inspector General of Police, Meerut Region, Meerut (respondent no. 3) on 26.02.2001, rejected by order dated 24.05.2001, against the said order, the petitioner preferred a revision before the Inspector General of Police, Meerut Region, Meerut, the same was dismissed by the impugned order dated 20.11.2001, hence the present writ petition has been filed by the petitioner thereby challenging the said order.

9. Learned counsel for the petitioner while assailing the impugned orders submits that no reasonable opportunity whatsoever was given to the petitioner during the course of enquiry proceedings and the Inquiry Officer was personally prejudiced and biased against him. Enquiry proceedings have been conducted against the petitioner with predetermined mind, so the enquiry report as well as the entire action taken thereafter are violative of the principles of natural justice and liable to be set aside.

10. A submission has also been made on behalf of the petitioner that the Inquiry Officer in his enquiry report dated 29.11.2000 had recommended the punishment of dismissal, the said action on the part of the Inquiry Officer was uncalled for and without jurisdiction. The Inquiry Officer has got no jurisdiction to recommend the punishment to be awarded to the petitioner, thus, the enquiry report as well as entire proceedings thereafter are void and on the basis of same, no punishment order can be passed against the petitioner.

11. Learned counsel for the petitioner also submits that the impugned order of dismissal passed by the punishing authority/Senior Superintendent of Police, Meerut is non-speaking order as the same does not specifies any reason on the basis of which the said order has been passed.

12. Last submission made by the learned counsel for the petitioner that in service jurisprudence it is well established that the punishment should be awarded in proportion to the gravity of misconduct committed by the delinquent and in the present case the petitioner who has put more than 20 years of satisfactory services, has been dismissed from services, so the punishment which is awarded to him does not commensurate with misconduct, if any, committed by him, as such the impugned order of dismissal as well as the appellate order and revisional order are arbitrary in nature and liable to be set aside.

13. In support of his case, learned counsel for the petitioner relied the judgment reported in the case of ***Sri Krishna Bhagwan Pandey Vs. U.P. Pradhan Prabandhak Meerut Western***

Region, Meerut and others, [2002(1)E.S.C.(All.)] page 26.

14. Learned Standing Counsel on the other hand submits that in the present case due to sole negligence and carelessness on the part of the petitioner in performing his duty diligently, a hard-core criminal has escaped from his custody. Accordingly, in the said incident, a charge-sheet has been issued, thereafter enquiry proceedings were initiated in which petitioner was provided full opportunity to defend his case and on the basis of enquiry report submitted by the Inquiry Officer, the order of dismissal has been passed by the respondent no. 3, confirmed by the appellate authority as well as by the revisional authority respectively, hence there is neither any illegality nor infirmity in the impugned order under challenge in the present case, accordingly the writ petition lacks merit and deserves to be dismissed.

15. I have heard learned counsel for the parties and perused the record.

16. Undisputed facts of the present case are that the petitioner who was working as Head Constable and posted at Police Lines, Meerut having Constable No. 92 A.P. and posted at Police Lines, Meerut under the control and supervision of Uttar Pradesh Police Headquarter. On 18.01.2000, assigned the duty alongwith two other Constables namely Naresh Kumar and Amar Singh to take a hard-core criminal Sri Sanjay @ Bunti son of Brij Raj Singh from District Jail Meerut to the Court no. 16, Patiyala House Court, New Delhi. While they were returning from New Delhi, in the way they stopped at Modinagar, District Ghaziabad and to take food in the Hotel namely 'Sanjha Chulha', Modinagar, Ghaziabad alongwith prisoner Sri Sanjay @ Bunti, and taking the advantage of their stay in the Hotel, the said prisoner escaped away from their custody with the help of five other unknown persons.

17. In the incident in question, an F.I.R. was registered as Case Crime No. 32 of 2000 at Police Station Modinagar and the petitioner was placed under suspension. Thereafter, a charge-sheet dated 29.02.2000 was served on the petitioner to which he gave his reply dated 02.03.2000. A preliminary enquiry was also conducted by Sri Uma Nath Singh, Additional Superintendent of Police(Rural), Ghaziabad.

18. Further, a fulfledged domestic enquiry was conducted by the Inquiry Officer/Additional Superintendent of Police (Rural) Meerut Region Meerut in which as per material on record ample and adequate opportunity was provided to the petitioner by the Inquiry Officer and after conducting the same he submitted an enquiry report dated 29.11.2000 inter alia stating therein that when the petitioner alongwith other two other Constables were returning from Court no. 16, Patiyala House Court, New Delhi where Sri Sanjay @ Bunti son of Brij Raj Singh resident Badi Haveli, Ghoda Pyas, Police Station Atal Band, District Bharatpur, Rajsthan was produced, by Bajra Vahan at Modinagar, Ghaziabad. The petitioner stopped at Modinagar, District Ghaziabad for taking food in a Hotel namely 'Sanjha Chulha', Modinagar, Ghaziabad alongwith prisoner Sri Sanjay @ Bunti and taking the advantage of the said fact, the said prisoner escaped away, with the help of five unknown persons who got him released from the custody of the petitioner and took in their vehicle. The Inquiry Officer has given a categorical finding of fact in his enquiry report that the said incident has taken place because the

petitioner had put his arms with carelessness. As such, the said act on the part of the petitioner amounts to negligence, indiscipline and carelessness, in discharging his duties. Accordingly he is not entitled to be retained in police services, so his services be terminated.

19. Thereafter, a show-cause-notice was issued to the petitioner to which he submitted his response and after taking the reply submitted by the petitioner, other material documents on record as well as the enquiry report, the order of dismissal dated 13.02.2001 has been passed by Punishing Authority/Senior Superintendent of Police, Meerut (respondent no. 4), confirmed by the appellate authority as well by the revisional authority.

20. In view of the above said fact, the first contention raised by the learned counsel for the petitioner that no reasonable opportunity whatsoever has been given to him during the course of enquiry proceedings is wholly incorrect and wrong because as per the settled law, the reasonable opportunity means as under :-

(a) an opportunity to deny guilt and establish innocence; which a government servant can only do if he is told what the charges leveled against him are and the allegations on which such charges are based.

(b) an opportunity to defend himself by cross examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence which he can effectively do if he was supplied the copies of the documents relied upon and the depositions of witnesses , and finally,

(c) an opportunity to make his representation as to why no punishment should be inflicted on him which he can only do if the competent authority, after the enquiry is over tentatively proposes to inflict one of the scheduled punishments and communicates his tentative decision along with a copy of the inquiry report to the Government servant.

21. In the case of ***State of Tamil Nadu Vs. Thiru K.V. Perumal and others 1996 (5) SCC 474*** , Hon'ble Supreme Court has held as under :-

"The Tribunal seems to be under the impression that the enquiry officer/ disciplinary authority is bound to supply each an every document that may asked for by delinquent officer/employee. It is wrong there. Their duty is only to supply relevant documents and not each and every document asked for by the delinquent officer/ employee. In this case respondent has asked for certain documents. The Registrar, to whom the request was made, called upon him to specify the relevance of each and every document asked for by him. The respondent did not do so. It was the duty of the respondent to point out how each and every documents was relevant to the charges or to the enquiry being held against him and whether and how their non-supply has prejudiced his case. Equally , It is the duty of the Tribunal to record the finding whether any relevant documents were supplied and whether such non-supply has prejudiced the defendant's case."

22. In the instant case, the petitioner has made a bald and vague statement that the reasonable opportunity was not provided to him and further he has not stated that in what manner he is being prejudiced. Moreover, the relevant materials

and documents including the copy of the preliminary enquiry report and the enquiry report, were supplied to the petitioner. As such, the submission made by the learned counsel for the petitioner that no reasonable opportunity was given to the petitioner in the instant case is misconceived argument and the same is rejected having no force.

23. Next contention as raised by the learned counsel for the petitioner that the Inquiry Officer is prejudiced and biased against the petitioner is wholly misconceived and wrong as from the documents which are on record it does not transpires that the said allegation which is made by the petitioner is founded on any sound reasons and grounds. Further, in case if the petitioner has any grievance against the Inquiry Officer that he was personally biased against him, then he should have been impleaded as respondent in the writ petition but the same has not been done in the present case. It is needless to mention herein that it is the settled proposition of law that if the person/officer against whom prejudice or bias is alleged and he is not impleaded in personal capacity in order to rebut the said allegation otherwise the said allegation cannot be taken to be correct.

24. Moreover, the petitioner has failed to establish on the basis of materials on record that the Inquiry Officer was prejudiced and biased against him rather the said plea on the part of the petitioner that the Inquiry Officer was biased and prejudiced is incorrect and wrong and without any foundation and specific pleadings in the writ petition. It is relevant to mention herein that the pleadings made in the writ petition in this regard are vague and bald on the basis of which it cannot be established or proved that the Inquiry Officer was prejudiced or biased against the petitioner and submitted enquiry report. Accordingly, the submission made in this regard is rejected.

25. Next, the submission made by the learned counsel for the petitioner that Inquiry Officer has recommended the punishment to be awarded to petitioner in the enquiry report, accordingly the said action on the part of the Inquiry Officer is without jurisdiction and it rendered the enquiry report and impugned orders passed thereafter against the petitioner is incorrect and wrong and is rejected having no force because when the Disciplinary Authority does not have sufficient time on hand to hold the enquiry, he may appoint an Inquiring Authority. Out of the same necessity, the Inquiry Officer, also has to perform the duties of both prosecutor and Judge. A challenge that he acted as a 'persecutor and judge' and, therefore, the proceedings suffered from "subject bias" would not vitiate the proceedings.

26. In the case of ***Board of Trustees of the port of Bombay Vs. Dilip Kumar Raghavendranath Nadkarni, (1983) 1 SCC 124,*** the Supreme Court recognized it to be lawful that the position of Enquiry Officer both as a persecutor and as a judge is "rolled into one". Thus, the challenge that it violates the first principle of natural justice would not be available.

27. Further, when a duty to decide either way is required to be performed by any person under any obligation cast upon him for performance of the duty, the plea of bias would not forbid performance of such duty and unless the content of the performance is fallacious, mere plea of bias, without anything more, would not defeat the performance.

Even otherwise in the present case after the submission of enquiry report by the Inquiry Officer, the punishing authority had issued a show-cause notice and called for a reply from the petitioner. In response to the same, the petitioner submitted his reply inter alia stating the reasons for not inflicting the punishment of dismissal is proposed in the show-cause notice, further after considering the same and other documents on record, the punishing authority as per it's discretion and on the basis of the materials on record awarded the punishment thereby dismissing the petitioner from services.

28. In view of the said fact, the submission made by the learned counsel for the petitioner that the Inquiry Officer has recommended the punishment has no force and accordingly rejected.

29. Next submission made by the learned counsel for the petitioner that the impugned order passed by the punishing authority is non-speaking and unreasonable order. From perusal of the record, it is clearly borne out that the said authority after taking into consideration the material documents on record as well as the enquiry report has given a categorical finding of fact that there was no justification or reason on the part of the petitioner to stop in the mid-way to take food as he had taken his food in the Police Mess and distance from Delhi to Meerut is 57 Kilometer only, and due to the said sole negligence on the part of the petitioner, the incident in question has taken place. Further, finding was also given by the punishing authority in the impugned order of dismissal that the petitioner was well aware about the fact that the accused Sanjay @ Bunti is hard-core criminal and had a criminal history. So, the action on the part of the petitioner to stop in the mid-way to have food is an action on his part which is nothing but indiscipline and negligence and accordingly on the basis of said findings and reasons the order of dismissal was passed against the petitioner. Accordingly, the submission made in this regard has got no force and is rejected.

30. Last submission made on behalf of the petitioner is that the punishment awarded does not commensurate with the gravity of misconduct, if any, committed by him does not holds the field good as it is the sole prerogative and domain of the punishing authority to impose the punishment on an employee taking into consideration the material documents and evidence on record and misconduct committed by him.

31. Further, in the present case, the petitioner is an employee of a disciplinary force and thus, he is to be maintained discipline and perform his duties with due diligence but in the present case and as per material on record, the action on the part of the petitioner amounts to negligence and carelessness in discharging his duties and due to this reason the said incident took place and a hard-core criminal namely Sanjay @ Bunti escaped away.

32. In the case of ***B.C. Chaturvedi Vs. Union of India (1995) 6 SCC 749,*** Hon'ble Supreme Court has held as under :-

"18. A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact finding authorities have exclusive power to

consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment. Keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."

33. In the case of ***V. Rajarathinam Vs. State of Tamilnadu and another, 1997 SCC(L&S) 90,*** the Court has held as under :-

"that if all the relevant facts and circumstances and the evidence on record are taken into consideration and it is found that the evidence established misconduct against a public servant, the disciplinary authority is perfectly empowered to take appropriate decision as to the nature of the findings on the proof of guilt. Once there is a finding as regards the proof of misconduct, what should be the nature of the punishment to be imposed is for the disciplinary authority to consider."

34. In the case of ***State of Karnataka and others Vs. H.Nagaraj (1998) 9 SCC 671,*** Hon'ble Apex Court after relying earlier judgment in the case of ***Union of India Vs. Parma Nanda (1989) 2 SCC (L&S), 303*** held as under :-

"That it is appropriate to remember that the power to impose penalty on a delinquent officer is conferred on the competent authority either by an Act of legislature or rules made under the proviso to Article 309 of the Constitution. If there has been an enquiry consistent with the rules and in accordance with principles of natural justice what punishment would meet the ends of justice is a matter exclusively within the jurisdiction of the competent authority."

35. In the case of ***Union of India Vs. S.S. Ahluwalia,(2007) 7 SCC 257*** the Hon'ble Apex Court had held as under :-

"8.... The scope of judicial review in the matter of imposition of penalty as a result of disciplinary proceedings is very limited. The court can interfere with the punishment only if it finds the same to be shockingly disproportionate to the charges found to be proved."

36. In the case of ***State of Meghalaya Vs. Mecken Singh N. Marak, (2008) 7 SCC 580,*** the Hon'ble Supreme Court had held as under :-

"The legal position is fairly well settled that while exercising the power of judicial review, the High Court or a Tribunal cannot interfere with the discretion exercise by the disciplinary authority, and/or on appeal the appellate authority with regard to the imposition of punishment unless such discretion suffers from illegality or material procedural irregularity or that would shock the conscience of the court/tribunal. The exercise of discretion in imposition of

punishment by the disciplinary authority or appellate authority is dependent on host of factors such as gratuity misconduct, past conduct, the nature of duties assigned to the delinquent, responsibility of the position that the delinquents holds, previous penalty,if any, and the discipline required to be maintained in the department or establishment he works. Ordinarily the court or a tribunal would not substitute its opinion on reappraisal of facts."

"Secondly, the Tribunal failed to notice that the respondent was holding an important position as Land Reforms Officer during the relevant period having been conferred with various powers and duties under the Regulations. As a Land Reforms Officer, the respondent possessed the official authority for grant of occupancy rights under the Regulations. The co-delinquents were only his subordinates and they carried out his instructions. In the facts and circumstances, therefore, the respondent and the two co-delinquents cannot be said to have been similarly placed."

37. Recently, in the case of ***Administrator Union Territory of Dadra and Nagar Haveli Vs. Gulabhia M. Lad (2010) 5 SCC 775,*** the Hon'ble Supreme Court has held as under :-

"Para 14: The legal position is fairly well settled that while exercising the power of judicial review, the High Court or a Tribunal cannot interfere with the discretion exercise by the disciplinary authority, and/or on appeal the appellate authority with regard to the imposition of punishment unless such discretion suffers from illegality or material procedural irregularity or that would shock the conscience of the Court/Tribunal. The exercise of discretion in imposition of punishment by the disciplinary or appellate authority is dependent of host of factor such as gravity of misconduct, past conduct the nature of duties assigned to delinquent, responsibility of position that the delinquent holds, previous penalty, if any, and the discipline required to maintain in the department or establishment he works. Ordinarily the court or Tribunal would not substitute it's opinion on reappraisal of facts."

38. In view of the above said facts, I have no hesitation in holding that on the facts found and conclusions recorded in the enquiry report, the punishment of dismissal cannot be said to be not commensurate with the indiscipline proved against the petitioner.

39. Further, this Court while exercising the power of judicial review under Article 226 of the Constitution of India does not exercise appellate powers. It is not intended to take away from administrative authorities the powers and discretion properly vested in them by law and to substitute courts as the bodies making the decisions. Judicial review is a protection and not a weapon.

40. In the case of ***Council of Civil Service Unions (CCSU) V. Minister for the Civil Service (1984) 3 ALL ER 935, Lord Diplock*** has observed the scope of judicial review in the following words:-

"Judicial Review as I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control

by judicial review. The first ground I would call 'illegality' the second 'irrationality' and the third 'procedural impropriety".

41. Moreover, judicial review has certain inherent limitations. It is suited more for adjudication of disputes than for performing administrative functions. It is for the executive to administer the law and the function of the judiciary is to ensure that the Government carries out its duty in accordance with the provisions of the rules and statute.

42. In the case of ***Chief Constable of the North Wales Police V. Evans, (1982) 3 ALL ER 141***, it was observed by Lord Hailsham as under:-

"Purpose of judicial review is to ensure that individual receives fair treatment and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorized by law to decide with its conclusion which is corrected in the eyes of the Court."

In the same case, Lord Brightman observed that:-

"Judicial review as the words imply is not an appeal from a decision but a review of the manner in which a decision was made," and held, that "it would be an error to think that the Court sits in judgment not only on the correctness of the decision making process but also on the correctness of the decision itself."

The aforesaid observations made by the Lord Hailsham and Lord Brightman were quoted with approval by their Lordships of Supreme Court in ***State of U.P. V. Dharmendar Prasad Singh, AIR 1989 SC 997,*** and while upholding that the judicial review is directed not against the decision, but is confined to the examination of the decision making process, it was held by the Supreme Court as under:-

"When the issue raised in judicial review is whether a decision is vitiated by taking into account irrelevant, or neglecting to take into account, relevant factors or is so manifestly unreasonable that no reasonable authority entrusted with the power in question could reasonable have made such a decision, the judicial review of the decision making process includes examination, as a matter of law, of the relevance of the factors."

43. In the case of ***Tata Cellular V. Union of India (1994) 6 SCC 651*** the Supreme Court stated that:-

"Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made but the decision making process itself," and enumerated some broad grounds upon which an administrative action is subject to control by judicial review and classified them under the heading of 'illegality', 'irrationality' and 'procedural impropriety.' In their supervisory jurisdiction as distinguished form the appellate one, the Courts do not themselves embark upon rehearing of the matter but nevertheless courts will, if called upon, act in a supervisory capacity and see that the decision making body acts fairly. If the decision making body is influenced by considerations which ought not to influence or fails to take into account the matters which ought to have been taken

into account the Courts will interfere. If the decision making body comes to its decision on no evidence or comes to a finding so unreasonable that a reasonable man could not have come to it then again the Courts will interfere.

Further if the decision making body goes outside its power or misconstrues the extent of its power, then too the Courts can interfere, and if the decision making body acts in a bad faith or with ulterior object which it is not authorized by law, its decision will be set aside in supervisory jurisdiction. A decision of a public authority will be liable to be quashed or otherwise dealt with by appropriate order in judicial review proceedings, where the Courts concludes that the decision is such that no authority properly directing itself on the relevant law and fact acting reasonably could have reached it."

44. Thus the decision by the appropriate authority to grant or not to grant a particular relief to a person is not open to Judicial review by the High Court under Article 226 of the Constitution of India but the power of judicial review is circumscribed to scrutiny of the decision making process only and is to be exercised in the light of the principles laid down above and applying the said principles to the facts of the present case, I do not find any irregularity or infirmity in the impugned orders.

45. No other point is pressed or argued before me.

46. Accordingly, the present writ petition lacks merit and is dismissed.

No order as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.08.2010

BEFORE
THE HON'BLE AMAR SARAN, J.
THE HON'BLE S.C. AGARWAL, J.

Criminal Misc. Writ Petition No. 9873 of 2010

Vinayendra Nath Upadhyay and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Rituvendra Singh
Sri A.K. Pandey
Sri Umesh Narain Sharma
Sri V.P. Srivastava
Sri G.S.Chaturvedi

Counsel for the Respondent:
Sri A.K.Sand (A.G.A.)
Sri Vikas Sahai (A.G. A.)

Constitution of India Art. 226-Power of writ court-single judge dealing with embezzlement of G.P.F. Amount with collusion of authorities as well as concern management of college-given those un-desirable persons by preparing forged record-Court expressed its great concern-directed to lodge FIR against those guilty persons-consequently FIR lodged by competent authority-from allegation of FIR and other material on record-prim-faci-cognizable offence disclose -no interference called far-appeal dismissed.

Held Para 49

In view of the aforesaid it cannot be said that the First Information Report and other material on record does not disclose any cognizable offence, and that any ground exists either for questioning the investigation or for staying the arrests of any of the petitioners. We

therefore dismiss all the writ petitions. The interim orders granted earlier are vacated. The investigating agency is directed to proceed expeditiously in concluding the investigation.

Constitution of India Art. 226-writ jurisdiction-during course of hearing if cognizable offence is committed-and direct the investigation agency-who bound to investigate U/S 154 Cr.P.C.

Held Para 21

A Court in any jurisdiction is no less a citizen than a private person. If the Court in the course of hearing a case finds that a cognizable offence is committed by some persons, it can never be barred from bringing these facts to the notice of the investigating agency, who in turn in view of section 154 of the Code is bound to investigate the said offence, not because the order has emanated from the Court, but because a cognizable offence is disclosed.

Case Law Discussed:

1994 (3) UPLBEC 1551; 1992(2) AWC 962; AIR 2009 SC 984; 2008 (7) SCALE 363; 2008 (12) SCALE 252; AIR 1966 SC 81; AIR 2002 SC 3252; AIR 1984 SC 718; (2003) 11 SCC 251; AIR 1993 SC 1082; AIR 1963 1430; (2004) 4 SCC 236; (2001) 6 SCC 181; (2004) 13 SCC 292; AIR 2009 SC 984; 1997 (34) ACC 726; AIR 1999 SC 3596; AIR 2003 SC 2612; AIR 1955 SC 196;(1999) 3SCC 259; (2007 Cri.L.J.170) (FB); AIR 1952 SC 12; AIR 1962 SC 1305; AIR 1964 SC 685; AIR 1966 SC 1441; AIR 1975 SC 2238

(Delivered by Hon'ble Amar Saran, J)

1. All the aforesaid connected writ petitions have been sent to this Bench headed by one of us (Amar Saran, J.) by order of Hon'ble the Chief Justice dated 5.7.2010.

2. We have heard Sri Umesh Narain Sharma, Sri V.P. Srivastava, and Sri G.S. Chaturvedi, Senior Advocates for the petitioners in some of the petitions, the learned counsel for the other petitioners Punita Mishra, Dinesh Kr. Yadav, Shivanand Tiwari, , Amar Deep Singh and others, Lalit Kumar Pandey, Lallan Prasad have also raised some submissions. Other counsel have adopted their contentions. We have also heard Sri A.K. Sand, and Sri Vikas Sahai, learned Additional Government Advocates for the State and have perused the records of the writ petitions, and have also summoned and seen the records in Civil Misc. Writ Petition No. 23250 of 2010, Special Appeal (Defective) No. 610 of 2010 and in Civil Misc. Contempt Petition No. 1724 of 2004.

3. The petitions are an offshoot of orders passed by Hon'ble Arun Tandon, J on 13.5.2010 in Civil Misc. Writ petition No. 23250 of 2010, wherein the learned single Judge observed as follows:

"Shri M.C. Chaturvedi, Chief Standing Counsel is present in the Court. He submits that the matter is in active consideration of the State Government. It is stated that certain disciplinary proceedings have been initiated against the persons responsible. He further submits that the embezzlement of the money from the GPF account is not in dispute, however the quantification is to be done.

This Court is of the firm opinion that for the embezzlement of the public money, criminal liability does occurs. Therefore, First Information Report has to be lodged against the persons guilty and they must be brought to book.

Let necessary be done by 24.5.2010.

Put up as unlisted on 24.5.2010."

In an earlier order dated 5.5.2010 in writ petition No. 23250 of 2010 Hon'ble Arun Tandon, J. observed as follows: *"Two aspects of the matter are involved, (a) how the 12 crores of rupees, which have been deposited by the teachers and employees in the hope that on retirement they will get the money encashed from the said General Provident Fund and survive during old age, is to be recouped, inasmuch as ultimately such teachers and staffs would suffer if the money is not restored, and (b) no fraudulent withdrawal from the Government Treasury through the office of the District Inspector of Schools, Ballia is prima facie possible from the General Provident Fund unless officers and employees working in the aforesaid two offices collude with the private management and the person concerned."*

4. Pursuant to the aforesaid orders of this Court, the District Inspector of Schools, Ballia lodged an FIR on 23.5.2010 at case crime No. 271 of 2010, under sections 409, 467, 468, 471, 419, 420 IPC, police station Kotwali, district Ballia. The said FIR which nominates the then District Inspector of Schools (DIOS), Sri Brijnath Pandey, Accounts Officer, Sri Kamla Kant and Accounts Clerk, (the petitioner Lallan Prasad, in Cr. Writ Petition No. 9674 of 2010), and the teaching and non-teaching employees in some aided secondary institutions in Ballia numbering 47, and which also implicates the then managers and principals of the said institutions, has been challenged by the petitioners in the bunch of petitions before us.

5. The FIR mentioned that it was being registered pursuant to the order of the High Court in Writ-A No. 23250 of 2010. It was mentioned in the FIR that during the period October 2005 and April 2006 the Principals and Managers of the non-government aided secondary and higher secondary colleges at Ballia entered into a criminal conspiracy with certain teachers and non-teaching staff of their institutions and the then District Inspector of Schools, Accounts Officer and the Accounts Clerk with the objective of embezzling public money. Forged documents were manufactured with the aim of illegally paying salaries to teaching and non-teaching employees whose appointments were unauthorised after showing false dates of appointments. Arrears were paid without authorization from the competent authority, and funds meant for the GPF accounts were diverted for distribution as arrears of salary. The details of the concerned teaching and non-teaching employees, and the illegal payments received by each, and the role of the aforementioned DIOS, accounts officer and clerk, and the Principals and Managers and some illustrations of the *modus operandi* adopted at the concerned institutions in Ballia are given in an audit report which was conducted by an Audit team of the Education Directorate Allahabad, pursuant to earlier complaints, and is annexed to the FIR. The FIR and the audit report further show that in some instances the college records were dishonestly removed to hamper audit, in other cases the teaching and non-teaching employees got payments made in furtherance of their conspiracy with the aforesaid educational authorities without even producing the relevant papers from the College. In a case the GPF amount standing to the credit of a regular teacher

was unauthorizedly withdrawn by collusively affixing the photograph of another person which was verified by the principal of the institution (Langtu Baba Inter College, Harihankala), and the withdrawal was approved by the principal and the manager (the then DIOS Brajnath, who was acting as the manager) after forged ledgers were got prepared, which bore the signatures of the college principal and the then accounts officer and the accounts clerk (petitioner Lallan Prasad, in Cr. Misc. Writ Petition No. 9674 of 2010) at the DIOS office.

6. It was submitted by Sri V.P. Srivastava and some other learned counsel for the petitioners that the teaching and non teaching employees had been validly appointed and that there were orders of the High Court in different writ petitions validating their appointments or directing either payment of salary or to consider their representations within a stipulated period of time. Some of these orders have even been annexed.

7. Furthermore in Civil Misc. Contempt Petition No. 1724 of 2004 an order dated 12.7.05 was passed directing payment of salaries to the petitioners in whose cases final orders had been issued in the writ petitions filed by them. This Contempt was filed to ensure compliance of an order dated 25.2.04 passed in C.M.W.P. No. 25885 of 2003. Hence the petitioners could not be faulted for receiving the salaries.

8. It may be noted that the said contempt petition was eventually dismissed by an order dated 12.12.05.

Significantly in Civil Misc. Writ Petition No. 25885 of 2003, which was the basis for the direction in the Civil Contempt, the single judge was looking at the illegal and fraudulent appointments in the educational institutions at Ballia where the matters had been handed over to the CBCID for investigation. The CBCID had even recommended lodging of criminal cases and the salary of 329 employees had been with-held. The Director of Education (Secondary) had found that 104 employees had approached the High Court and obtained orders in writ petitions directing payments of salaries pending completion of enquiry. It was also noticed in the said order dated 25.2.04 that the enquiry had resulted in favourable reports for 75 employees. But significantly the single Judge observed:

"I have perused the enquiry report submitted in respect of 75 teachers/employees, which has been forwarded to the State Government. From this report, I find that the individual cases have not been considered in detail. The interim order of this court for making the payment of the salaries until the conclusion of the enquiry have been found to be conclusive to validate the appointment. In some case, casual observations have been made that the appointments are valid on the ground that there are sanctioned posts available in the institution. The report concerning sanction of posts and validity of the appointments by following proper and due procedure have not been considered and discussed. In the aforesaid facts and circumstances, I find that the department must give due expediency to the matter and each case must be considered individually. The enquiry officer must record findings about each and every appointment separately. Where the appointments are found valid immediate

action must be taken for restoration of payment of the salary. The department must not wait for the entire matter to be considered. The decision may be taken at the level of Director of Education. In case, he finds that the appointment was valid. In any case, the entire enquiry must be concluded as expeditiously as possible and not later than 3 months from today".

9. The issues and criteria that are to be considered in individual cases for ad hoc appointments against substantive or short term vacancies, such as the requirement to first fill up the available vacancies by promotions, and only in the absence of eligible persons, by direct recruitment, the need for intimation of vacancies to the Education Services Commission through the DIOS, the time period allowed to the Commission to appoint suitable candidates, before the management could take steps for filling up vacancies, the need for inviting applications for the vacancies through the employment exchange and by publication in two local newspapers which have a wide circulation in the State, the essential qualifications required for different posts, the cases where prior or subsequent approvals by the DIOS are needed, the position when a regular person is selected by the Education Services Commission in the cases where an *ad hoc* employee has been appointed, have been spelt out in depth by the Full Bench of this Court in *Kumari Radha Raizada and others v. Committee of Management, Vidyawati Darbari Girls Inter College and others,1994 (3) UPLBEC 1551*, after considering the statutory provisions contained in the U.P. Secondary Education Services Commission and Selection Board Act, 1981, the U.P. Intermediate Education Act, 1921, and the various U.P. Education Services Commission (Removal of Difficulties) Orders.

10. In another Full Bench decision in *Gopal Dubey v. District Inspector of Schools, Maharajganj and another, 1992(2) AWC 962,* interpreting the provisions of section 9 of the U.P. High Schools and Intermediate Education Colleges (Payment of Salaries of Teachers and other Employees) Act 1971 it has been held that unless the post for which the salary has been paid is approved by the State government (Director of Education), the payments made by the management of the institution to such employees will not be re-reimbursed by the State.

11. The individual appointments and payments made therefore needed to be tested on the aforesaid criteria spelt out in the Full Bench decisions. If it was found that the appointments did not meet the said criteria, as they had simply been made or continued pursuant to orders of in the High Court in pending or disposed of writ petitions, which gave directions to consider the representations of the petitioners, or to pay salaries or to show cause etc., and where regular persons had been appointed by the Commission, then the *ad hoc* appointments made by the managements needed to be set aside. Steps for seeking vacation of single or division bench High Court orders in Civil Writs and Contempt petitions which were in the teeth of the decision of the Full Bench in *Radha Raizada* and statutory provisions, by filing Special Appeals before the Division bench or the Supreme Court were required. But it appears that these steps have deliberately not been taken in a *mala fide* manner, and the

petitioners and others may have colluded with educational authorities for obtaining favourable orders.

12. It must be stated emphatically that in any view of the matter, there could be absolutely be no justification for payment of salaries for such teachers from the General Provident Fund, from which as the Chief Standing Counsel admitted before the Single Judge in *Bhim Singh's* case, there had been illegal withdrawals to the tune of Rs.12 crores. The said G.P.F. money is held in trust, and the proper holders of the GPF will be severely harmed if they are unable to receive due payments at retirement or otherwise. The DIOS in the contempt petition could have pleaded inability to comply with the order of the contempt Judge, until budgetary allocation of salaries were made by the State government, or the management itself could have made the necessary payments from its own sources, if it was so advised. Withdrawal of salaries from funds earmarked for GPF of bona fide employees could never be countenanced.

13. It was next submitted that the petitioners were merely teaching and non teaching employees, managers and Principals of the institutions concerned and were wholly unaware of the source of the funds or that the disputed funds were earmarked for G.P.F. Also the payments had been released by the DIOS, Accounts officer and other educational authorities to save their own skins in the contempt petition. The payments were not made at the instance of the petitioners. Pressure was brought to bear on the petitioners by the DIOS by orders dated 28/29.3.2006 and 18/20.4.2006 to submit the salary bills.

14. In our view considering the scale at which the withdrawals have been made from the GPF money, it is difficult to believe that the petitioners were only unwary and innocent recipients of the money, and their hands were absolutely clean. There was no need for the DIOS and other educational authorities to have gone out of their way for facilitating the dubious appointments of the petitioners, unless they were swayed by extraneous considerations. The single judge appears to have rightly observed in his order dated 5.5.10 that *"no fraudulent withdrawal from the Government Treasury through the office of the District Inspector of Schools, Ballia is prima facie possible from the General Provident Fund unless officers and employees working in the aforesaid two offices collude with the private management and the person concerned."*

15. Specifically it was argued by Sri. U.N. Sharma, learned Senior counsel appearing for Vinayendra Upadhyay, that the FIR was unauthorised as it has been instituted on the direction of the Single Judge in Civil Misc. Writ petition No. 23250 of 2010, whilst hearing a service matter and the said bench had no jurisdiction to issue a general direction for lodging FIRs against known and unknown persons, particularly as the petitioner in the said writ petition Bhim Singh had mainly sought a relief of getting the GPF refunded from one Ashok Kumar Singh, who was arrayed as respondent no.10 in the said writ petition. Such a direction, if at all, could have been issued only by a bench hearing Public Interest Litigations (PILs). Also no opportunity was given to the petitioners to raise objections before the Single Judge bench which had issued the general direction for lodging the FIRs

and the said order was in violation of the principles of natural justice, as they were not parties in Civil Misc. Writ petition No. 23250 of 2010. For these reasons the Division Bench in Special Appeal (Defective) No. 610 of 2010, by an order dated 30.6.2010 finally disposing of the Special Appeal had stayed the operation of the order of the single judge in Civil Misc. Writ Petition No. 23250 of 2010 directing registration of the FIR so far as it related to the case of the petitioner Vinayendra Nath Upadhyaya.

16. It may be noted that the prayers in the single judge writ petition No. 23250 of 2010, apart from the first prayer for a mandamus directing the concerned authorities to recover the amount of G.P.F. which had been misappropriated by respondent No. 10 (Ashok Kumar Singh) were to:

"b) issue a writ, order or direction in the nature of mandamus directing to the competent authorities to take appropriate action against guilty teachers/employees; Manager/ Principal and officials/Officers, who are involved in said misappropriation of funds of G.P.F in the light of audit report dated 4.12.2006 (Annexure no.11 of the writ petition) and in the light of order dated 4.1.2008, passed by Additional Director of Education (Annexure no.12 of the writ petition);

c) issue a writ, order or direction which this Hon'ble Court may deem fit and proper in the circumstances of the case".

17. Thus the general direction for lodging the FIRs was issued in terms of the audit report dated 4.12.06 which produced evidence of the diversion of funds meant for GPF for payment of salaries of employees, whose appointments were illegal and unauthorized, and false dates of appointment were mentioned based on forged documents. There were instances of dishonest removal of service papers to hamper audit etc.

18. The single judge further rightly justifies his order dated 13.5.2010 directing registration of FIRs for embezzlement of public money by observing that Sri M.C. Chaturvedi, Chief Standing Counsel "submits that the embezzlement of the money from the GPF account is not in dispute, however the quantification is to be done."

19. In *Nirmal Singh Kahlon v. State of Punjab, AIR 2009 SC 984* the Supreme Court saw no difficulty in a private interest litigation being changed to a public interest litigation, or in issuing directions of a general nature where large scale systematic irregularities or fraud was noticed by the High Court. In this regard it was observed in paragraph 32 : *"The High Court while entertaining the writ petition formed a prima facie opinion as regards the systematic commission of fraud. While dismissing the writ petition filed by the selected candidates, it initiated a suo motu public interest litigation. It was entitled to do so. The nature of jurisdiction exercised by the High Court, as is well known, in a private interest litigation and in a public interest litigation is different. Whereas in the latter it is inquisitorial in nature, in the former it is adversarial. In a public interest litigation, the court need not strictly follow the ordinary procedure. It may not only appoint committees but also issue directions upon the State from time*

to time. {See Indian Bank vs. Godhara Nagrik Co-op. Credit Society Ltd. and Anr. [2008 (7) SCALE 363] and Raju Ramsing Vasave v. Mahesh Deorao Bhavpurkar and others, [2008 (12) SCALE 252].

Further in *Dwarka Nath v. Income Tax Officer, Special Circle, D. Ward, Kanpur, AIR 1966 SC 81 and Padma v. Hiralal Motilal Desarda, AIR 2002 SC 3252* it has been held that in view of the comprehensive phraseology in Article 226, which gives powers to the High Court not only to issue specified writs, but to issue orders and directions for "any other purpose", an ex facie power is conferred on the High Court to reach injustice wherever it is found, and to mould its relief for meeting the complicated requirements of a case.

20. Also it has been laid down in *A.R. Antulay v. Ram Das Sriniwas Nayak, AIR 1984 SC 718* in paragraph 6 that the concept of locus standi is foreign to Indian jurisprudence, and if a cognizable offence has been committed, anyone can put the criminal law in motion, unless the statute restricts the right to file the FIR to a particular category of persons. The relevant passage reads thus:

"It is a well recognised principle of criminal jurisprudence that anyone can set or put the criminal law into motion except where the statute enacting or creating an offence indicates to the contrary. Locus standi of the complainant is a concept foreign to criminal jurisprudence save and except that where the statute erecting an offence provides for the eligibility of the complainant, by necessary implication the general principle get excluded by such statutory provision. Punishment of the offender in the interest of the society being one of the objects behind penal statutes enacted for larger good of the society. Right to initiate proceedings cannot be whittled down. circumscribed or fettered by putting in into a strait-jacket formula of locus standi unknown to criminal jurisprudence. save and except specific statutory exception."

21. A Court in any jurisdiction is no less a citizen than a private person. If the Court in the course of hearing a case finds that a cognizable offence is committed by some persons, it can never be barred from bringing these facts to the notice of the investigating agency, who in turn in view of section 154 of the Code is bound to investigate the said offence, not because the order has emanated from the Court, but because a cognizable offence is disclosed.

22. In *M. Narayandas v. State of Karnataka,(2003) 11 SCC 251* it has been held that in view of section 154 (1) of the Code, a duty has been cast on the investigating officer to reduce any "information" about the commission of a cognizable case in writing. The expression 'credible information' or reasonable complaint has deliberately not been used in the provision by the legislature.

23. Therefore the investigating officer has no option but to lodge the FIR and to proceed with investigation if any information about the commission of a cognizable offence is received.

Paragraph 33 of *M. Narayandas may be usefully extracted here- "It is, therefore, manifestly clear that if any*

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

24. So far as the other criticism against the single judge's order for having violated principles of natural justice was concerned, it may be noted that as on examining the petition filed by Bhim Singh and obtaining responses from the Standing Counsel, the Single Judge reached a conclusion about large scale irregularities in appointments and illegal diversion of GPF money, he could only order a general investigation and lodging of FIRs against persons who may be involved in the crime. As the single judge had no knowledge as to all the persons who could be involved in the fraud, there was no question of issuing notices to the potential accused at that stage.

25. By the order dated 13.5.10 the single judge had simply directed that a "First Information has to be lodged aginst the persons guilty and they must be brought to book." Thereafter if the investigating agency was *prima facie* satisfied of the complicity of any person in an offence, there was no requirement in law of providing an opportunity of hearing to the accused before registration of the FIR.

26. At the stage of investigation the accused has no *locus standi* or right of prior hearing before the FIR is lodged. In *Union of India v. W.N. Chadha, AIR 1993 SC 1082*, it has been clarified that an accused has no right to challenge the letter rogatory issued by an Indian Court to a foreign Court for obtaining evidence regarding the source of funds kept in the Swiss Bank. As no deprivation of liberty or property was involved, hence the principle of *audi alteram partem,* was not attracted.

27. The subsequent stage of investigation by the police is governed by the Code of Criminal Procedure (hereafter called the Code). Chapter 12 of the Code confers no right of prior hearing to the accused at the stage of investigation, but the right of hearing is only provided when the Sessions Judge or Magistrate considers whether to discharge or to frame a charge against the accused under sections 227/228 or 239/240 of the Code. Under section 235(2) in the case of a Sessions triable case, or section 248(2) in a warrant case triable by a Magistrate again the accused have a right of being heard.

28. That the accused has no right of hearing at the stage of investigation and does not come into the picture till the order taking cognizance has been passed has also been emphasized in *Chandra Deo Singh v. Prakash Chandra Bose, AIR 1963 SC 1430 Shashi Jena & Ors. v. Khodal Swain & Anr., (2004) 4 SCC 236* and a catena of other decisions.

29 Significantly it has been observed in paragraph 98 in *Union of India v. W.N. Chadha:*

98."If prior notice and an opportunity of hearing are to be given to an accused in every criminal case before taking any action against him, such a procedure would frustrate the

proceedings, obstruct the taking of prompt action as law demands, defeat the ends of justice and make the provisions of law relating to the investigation as lifeless, absurd and self-defeating. Further, the scheme of the relevant statutory provisions relating to the procedure of investigation does not attract such a course in the absence of any statutory obligation to the contrary."

30. It also appears to us that the order in Special Appeal (Defective) No. 610 of 2010, dated 30.6.2010 staying the operation of the order of the single judge in Civil Misc. Writ Petition No. 23250 of 2010 directing registration of the FIR so far as it related to the case of the petitioner Vinayendra Nath Upadhyaya was passed as the division bench was under the impression that no action had yet been taken on the direction of the single judge for registration of the FIR. Thus it was observed in the order in the Special Appeal (Defective), that : "*Sri Pandey, learned Advocate rightly points out that against the report no stay has been given. That appears to be rightly so. Once there is order of this court directing lodging of first information report and that has been executed/ complied there may not be possibly any occasion for any co-ordinate bench to grant relief."* (Emphasis supplied). Thus the Special Appeal Court was proceeding on the footing that no FIR had been registered till then. This position was factually incorrect, because pursuant to the order of the single judge dated 13.5.2010, the FIR had already been registered at Case Crime No. 271 of 2010 on 23.5.10, whereas the order disposing of the Special Appeal was passed only on 30.6.2010.

31. After the registration of the FIR, the said FIR could only be challenged before a bench hearing criminal writs, and not before a bench disposing of a Special Appeal against an order of a single judge directing registration of the FIR.

32. Another argument raised by Sri V.P. Srivastava was that as an earlier FIR dated 25.4.2002 naming 11 persons had been lodged against some of the petitioners for obtaining ad-hoc appointments illegally in which the arrests had been stayed in various writ petitions and after charge sheets, proceedings had been stayed on applications under Section 482 Cr.P.C., the present FIR could only be considered an enlargement of the earlier FIR and it could not have been filed as it was in violation of the law laid down in *T.T.Antony v. State of Kerala and others etc., (2001) 6 SCC 181 and Upkar Singh v. Ved Prakash and others, (2004) 13 SCC 292.* It was argued that a second FIR is only permissible when a cross version of the incident is given by the accused, and there can be no second FIR for introducing some other material or for implicating additional accused with respect to the earlier incident.

33. It may be noted that in the decision of Upkar Singh itself, it is mentioned in paragraphs 21 and 22 as corrected, vide Official Corrigendum No. F.3/Ed. B.J./86/2004 that:

"21. From the above it is clear that even in regard to a complaint arising out of a complaint on further investigation if it was found that there was a larger conspiracy than the one referred to in the previous complaint then a further investigation under the Court culminating in another complaint is permissible.

22. A perusal of the judgment of this Court in Ram Lal Narang's case (supra) not only shows that even in cases where a prior complaint is already registered, a counter complaint is permissible but it goes further and holds that even in cases where a 1st complaint is registered and investigation initiated, it is possible to file a further complaint by the same complainant based on the material gathered during the course of investigation. Of course, this larger proposition of law laid down in Ram Lal Narang's case is not necessary to be relied on by us in the present case. Suffice it to say that the discussion in Ram Lal Narang's case is in the same line as found in the judgments in Kari Choudhary and State of Bihar v. J.A.C. Saldanna (supra). However, it must be noticed that in T. T. Antony's case Ram Lal Narang's case was noticed but the Court did not express any opinion either way." (Emphasis added).

34. Recently in *Nirmal Singh Kahlon v. State of Punjab, AIR 2009 SC 984,* the case law on the point has been reviewed, and the Apex Court, has re-affirmed the above noted view in *Upkar Singh,* and opined that if the new conspiracy is different or covers a larger canvas, and even some new accused are added (although some accused may be common in the two FIRs), there is no fetter on lodging the second FIR.

35. In the instant case we find that the earlier FIR dated 25.4.02 nominated 10 named government employees, 7 of whom were clerks, an accounts officer, and two accountants. The said 10 accused persons are completely different from the three government officials, i.e. the DIOS, Accounts officer and accounts clerk named in the present case. There are no allegations in the earlier case of diversion of General Provident Fund Money, but the allegations were of getting fake appointments and payments made to 131 persons who were ineligible for employment. There was thus no difficulty in the second FIR being registered.

36. Contrary to the aforesaid submission of duplication of FIRs, Sri G.S. Chaturvedi has argued that the FIR should be quashed because for multiple causes of action, and multiple conspiracies of unrelated teachers from different educational institutions with educational authorities in Ballia a single FIR at crime No. 271 of 2010 had been lodged in the present case, and that there should have been multiple FIRs. He placed reliance on a decision of this Court in *Rashid Aziz v. State of U.P., 1997 (34) ACC 726.* The FIR in the said case appears to have been quashed with liberty to file separate FIRs principally because the FIR by the District Magistrate in *Rashid Aziz* was unwarranted as the DM himself was the sanctioning authority in that case under section 39 of the Arms Act.

37. Moreover, looking to the complex nature of allegations, and the case being in the nature of a scam, of diversion of GPF money to wrongfully appointees, where the *modus operandi* of the criminal activity alleged may have been similar, the investigation by a single agency was desirable. Indeed scams of such magnitude are usually investigated together by pivotal agencies like the CBI or the CBCID. Questions relating to misjoinder of charges under section 223 of the Code can be agitated at the stage of framing of charges, and not at the initial stage of investigation. There is also

nothing to prevent the investigating officer from filing separate charge sheets in exercise of his powers under section 173 (2) of the Code, if he is so advised. It is open for the supervisory agencies in the police establishment to look into this issue, and give appropriate guidance to the investigating officer.

38. In *Satvinder Kaur v. State (Government of NCT, Delhi), AIR 1999 SC 3596,* where the goods in the marriage had been entrusted in Patiala, but the FIR was lodged in Delhi, the lack of territorial jurisdiction with the investigating officer, was held not to be a ground for refusing to lodge the FIR or to investigate the case. In *Union of India. v. Prakash P. Hinduja, AIR 2003 SC 2612, relying on H.N. Rishbud v. State of Delhi, (AIR 1955 SC 196)* it has been held that any illegality in an investigation does not vitiate the trial, unless it has caused a miscarriage of justice. In the latter case, the investigation into a case under the Prevention of Corruption Act was conducted by an officer below the rank of Dy. Superintendent of Police. This was in violation of section 5-A of the Prevention of Corruption Act. It was observed that even an invalid investigation does not vitiate an order of cognizance, unless miscarriage of justice has resulted.

39. It was further submitted by Sri G.S. Chaturvedi, that offences under the provisions alleged i.e 409, 467, 468, 419 and 420 IPC are not made out. We refrain from giving elaborate comment on this point as it may prejudice, the investigation or trial. Suffice it is to state that the money meant for GPF was money which was to be held in trust for the *bona fide* employees and was to be utilized in a particular manner in accordance to the directions in law. There would be a criminal breach of trust, if the said money was diverted for payment of salaries of some employees. As per the FIR there are allegations of preparation of forged documents by mentioning false dates of appointments and for withdrawing the GPF etc. which have been made for causing wrongful losses to the public exchequer or to *bona fide* employees. Thus prima facie it cannot be said that offences under the aforesaid sections are not disclosed.

40. In *Rajesh Bajaj v. State NCT of Delhi, (1999) 3 SCC 259* it has been observed that there cannot be a hypertechnical approach at the stage of investigation, and whether an offence under a particular section is disclosed cannot be sieved through a cullender of the finest gauzes at this stage. Thus in paragraph 12 at page 263 the aforesaid law report notes: *"The High Court seems to have adopted a strictly hypertechnical approach and sieved the complaint through a cullendar of finest gauzes for testing the ingredients under Section 415 IPC. Such an endeavour may be justified during trial, but certainly not during the stage of investigation."*

41. It was also submitted by Sri G.S. Chaturvedi, that the payments were made and salaries paid from the GPF accounts only for compliance of the Court's orders and the said actions were protected under section 78 of the Penal Code.

42. As we have already clarified above, salaries cannot be paid arbitrarily from any source or account, and withdrawal of money from the GPF account, which is money held in trust for the regular *bona fide* employees would

amount to criminal breach of trust. Moreover, Section 78 of the Penal Code only takes away the criminality of an act done in good faith in pursuance of or which is warranted by the judgment or order of a court. The act of giving appointments to employees who may not be entitled to employment under the statutory provisions, only on the strength of some interim or final orders of the Court, and then making payments to them from the GPF money of *bona fide* employees, which is a criminal act, as it is against the law or directions as to how a trust has to be executed, can never be described as an act in good faith justified by Court orders.

43. It was next submitted by Sri V.P. Srivastava, that there was no embezzlement, but only a temporary withdrawal of GPF sums for ensuring compliance of the High Court's orders.

44. Even a temporary unlawful diversion of money perhaps with the intent to restore it in future, is a dishonest act which would amount to an offence. In *Ram Narain Poply v. CBI, 2003 Cri.L.J 4801 it has been observed that "When a person misappropriates to his own use the property that does not belong to him, the misappropriation is dishonest even though there was an intention to restore it at some future point of time."*

45. One last submission was raised by learned counsel that in several writ petitions arising out of the present crime number the arrest of the petitioners have been stayed by different orders of this Court.

46. We notice that in some cases the writ petitions have been dismissed straight away. There are other cases on which the petitioners' counsel rely, where the writ petitions have been dismissed or disposed of, with an interim relief, that till submission of charge sheets their arrests should be stayed, without even saying anything on the merits of the matter. The said orders are in the teeth of the decision of the Full Bench of this Court, in *Ajeet Singh v State of U.P., (2007 Cri.L.J.170) (FB),* which has disapproved of orders staying arrests by non-reasoned orders whilst dismissing or disposing of the petition. Relying on the decisions in *State of Orissa v. Madan Gopal Rungta, AIR 1952 SC 12, Amarsarjit Singh v. State of Punjab, AIR 1962 SC 1305, State of Orissa v. Ram Chandra Dev, AIR 1964 SC 685, State of Bihar v. Rambalak Singh "Balak", AIR 1966 SC 1441, Premier Automobiles Ltd. v. Kamlakar Shantaram Wadke, AIR 1975 SC 2238 it is observed in paragraph 83 by the Full Bench: "the writ Court has no competence to issue any direction protecting the right of the petitioner interregnum, for the reason that writ does not lie for granting only an interim relief and interim relief can be granted provided the case is pending before the Court and rights of the parties are likely to be adjudicated upon on merit"*

47. Considering the scope of interference under Article 226 of the Constitution, and after the considering the conspectus of authorities on the point, it has been observed in paragraph 19 by the Full Bench in *Ajeet Singh's* case:

19. "The power of quashing the criminal proceedings has to be exercised very sparingly and with circumspection and that too in the rarest of rare cases and the Court cannot be justified in

embarking upon an enquiry as to the reliability or genuineness or otherwise of allegations made in the F.I.R. or complaint and the extraordinary and inherent powers of Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. However, the Court, under its inherent powers, can neither intervene at an uncalled for stage nor it can 'soft pedal the course of justice' at a crucial stage of investigation/proceedings. (Vide State of West Bengal v. Swapan Kumar Guha, AIR 1982 SC 949; Madhavrao Jiwaji Rao Scindia v. Sambhajirao Chandrojirao Angre, AIR 1988 SC 709; The Janata Dal v. H. S. Chowdhary, AIR 1993 SC 892; Mrs. Rupan Deol Bajaj v. Kanwar Pal Singh Gill, AIR 1996 SC 309; G. Sagar Suri v. State of U.P., AIR 2000 SC 754 : (2000 All LJ 496); and Ajay Mitra v. State of M.P., AIR 2003 SC 1069)."

48. We may mention here that after extensive hearing to the parties, and reserving the case for orders on 19.7.2010, an affidavit dated 20.7.10 was filed in Cr.Misc. Writ Petition No. 9873 of 2010, Vinayendra Nath Upadhyay v State of U.P. and others annexing therein an order of the Apex Court dated 19.7.10 in Special Leave to Appeal (Crl) No(s) 5429/2010, Om Prakash Chaubey v. State of U.P. & Ors. The said order read as follows:

"Issue notice.

By way of ad-interim relief, it is directed that the petitioner shall not be arrested."

In deference to the aforesaid interim order of the Supreme Court issuing notice on the aforesaid appeal and staying the arrest of the appellant therein, we had granted an interim stay of arrest of the petitioners till 4.8.2010 by our orders dated 22.7.2010 and 28.7.2010.

But subsequently we have been informed by the High Court's Computer section, that after a lengthy hearing by the Supreme Court on 19.7.2010 in the case of Dr. Lalendra Pratap Singh, SLP (Criminal) 5412 of 2010, the Principal of Sukhpura Inter College, who was a co-accused along with the petitioners in the same Crime number and whose Criminal Writ petition was earlier dismissed by the High Court, which had been challenged in the Supreme Court. When the Apex Court was about to dismiss the petition, the petitioner's counsel made an oral prayer for withdrawing his petition, whereupon the bench consisting of Hon'ble Mr. Justice Harjit Singh Bedi and Hon'ble Mr. Justice C.K. Prasad, dismissed the petition as withdrawn by the following order :

UPON hearing counsel the Court made the following

ORDER

"After arguing the matter at very length and when we were about to make an order of dismissal, the learned counsel for the petitioner prays that the petition be dismissed as withdrawn. Ordered, as prayed for."

49. In view of the aforesaid it cannot be said that the First Information Report and other material on record does not disclose any cognizable offence, and that any ground exists either for questioning the investigation or for staying the arrests of any of the petitioners. We therefore dismiss all the writ petitions. The interim orders granted earlier are vacated. The

investigating agency is directed to proceed expeditiously in concluding the investigation.

50. It is also made clear that the observations hereinabove have only been made in answer to the submissions raised by learned counsel. The investigating agency and the trial court are expected to apply their independent minds for reaching their own conclusions.

51. The records of the single judge C.M.W.P. No. 23250 of 2010, Bhim Singh v. State of U.P., Special Appeal (Defective) No. 610 of 2010 and also of Civil Misc. Contempt Petition No. 1724 of 2004 which were earlier summoned by this Court may now be sent back to their appropriate sections.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.07.2010

BEFORE
THE HON'BLE RAVINDRA SINGH, J

Criminal Misc. Bail Application No. 12752 of 2010

Nar Narain Pandey ...Petitioner
Versus
State of U.P. ...Opposite Party

Counsel for the Petitioner
Sri Ronak Chaturvedi
Sri G.S. Chaturvedi

Counsel for the Opposite Party
Sri B.R.J. Pandey
Sri R.J. Pandey
Sri Viresh Mishra
A.G.A.

Criminal Procedure Code 1973, Section 439-Bail-Indian Penal Code Section 302-Deceased sustained gunshot injury in the Karkhana of the applicant-his licensed revolver lying nearby-FIR lodged by relative of deceased who also claims to be an eyewitness-allegations that deceased taken by the applicant from his premises to Karkhana of the applicant, where he was shot dead-dead body of the deceased found there-applicant fled from place of occurrence-plea that deceased committed suicide after applicant refused him loan-not sustainable-Applicant held not entitled to bail-application rejected.

Held Para 6

Considering the facts, circumstances of the case, submission made by the learned counsel for the applicant, learned A.G.A., the learned counsel for the complainant and from the perusal of the record it appears that in the present case F.I.R. has been lodged by Satish Kumar Dubey, who claims himself to be an eye witness, alleged occurrence has taken place in two parts, first part has taken place in the premises owned by the deceased from where he was taken to the Karkhana of the applicant and second part has taken place in a newly constructed house/Karkhana of the applicant where the deceased has been shot dead, his dead body was also found there, according to the bail application the applicant was present at the time and place of occurrence, he gave telephonic message to the police station concerned, according to his version the deceased committed suicide, but the applicant fled away from his Karkhana, he was not present at the place of occurrence at the time of the preparation of the inquest report, the dead body was found on a chair, according to the post mortem examination report the deceased has sustained one firearm wound of entry on his right parietal region of head, it was having blackening and charring, active role of taking to the place of occurrence has been assigned, the deceased, he was done to death, inside the Karkhana of the applicant at

that time he was catching hold the deceased and without expressing any opinion on the merits of the case the applicant is not entitled to bail, the prayer for bail is refused.

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

1. This application has been filed by the applicant Nar Narain Pandey alias Nanhey by the applicant Nar Narain Pandey alias Nanhey with a prayer that he may be released on bail in case crime no. 69 of 2010 under section 302 I.P.C. P.S. Gopiganj district Sant Ravidas Nagar(Bhadohi).

2. The facts of the case, in brief, are that the F.I.R. has been lodged by Satish Kumar Dubey on 6.3.2010 at 00.10 a.m. at P.S. Gopiganj in respect of the alleged incident occurred on 5.3.2010 at 7.45 p.m., distance of the police station was bout 5 km from the alleged place of occurrence, the applicant and the co-accused Bridhi Narain Pandey alias Jajjey Pandey are named in the F.I.R. as accused, one accused is unknown. It is alleged that the first informant along with his family members was residing in the commercial premises known as Tulsi Chitra Mandir, Gopiganj. On 5.3.2010 at about 6 p.m. the first informant along with his nephew Anil Kumar alias Guddu and Umesh Kumar Shukla were ready to go to Allahabad to attend a birth day party then the applicant and co-accused Bridhi Narian Pandey alias Jajjey came there on a bullet motorcycle who exchanged the hot talks with his nephew deceased Anil Kumar Dubey, they were demanding Gunda Tax/ Rangdari, in the meantime, they got an opportunity to put the deceased Anil Kumar Dubey in his Maruti Zen Car No. U.P. 60A 2442 by availing the same they proceeded towards Mirzapur Road, the above mentioned car was chased by the first informant Umesh Kumar Shukla and Balram Pandey by boarding themselves in Tata Sumo vehicle, the above mentioned Maruti Zen car was seen by them in front of the newly constructed house/workshop where it was parked. The first informant along with other persons reached there and saw inside the house that the applicant and one unknown person, were catching hold the deceased, thereafter, the accused Bridhi Narian Pandey alias Jajjey Pandey caused gun shot injury on the temporal region of the deceased at about 7.45 p.m. consequently the deceased died instantaneously.

3. The accused persons after extending the threat and showing weapons escaped from the place of occurrence. After the death of the deceased, the licensed revolver of the deceased was found lying near the dead body, probably the gun shot injury was caused by that revolver. According to the post mortem examination report the deceased has sustained firearm wound of entry size 1 c.m. in diameter on the right parietal region, which was having blackening and charring, its exit wound was injury no.2, having the size of 1.5 c.m. in diameter on the left parietal region. The applicant applied for bail before the learned Sessions Judge Bhadohi Gyanpur, who rejected the same on 21.4.2010.

4. Heard Sri G.S.Chaturvedi, Senior Advocate assisted by Sri Ronak Chaturvedi, learned counsel for the applicant, learned A.G.A. for the State of U.P. and Sri Viresh Mishra, senior Advocate, assisted by Sri B.R.J. Pandey, learned counsel for the complainant.

It is contended by the learned counsel for the applicant :

1. That the prosecution story is false, concocted and highly improbable.

2. That the presence of the first informant and other witnesses at the alleged place of occurrence is highly doubtful, the manner in which the accused persons came to the premises of the first informant, and , the deceased was taken in his Maruti Zen Car , is wholly unreliable.

3. That the dead body of the deceased was found in a workshop of the applicant and his car was parked in front of that house, the licensed revolver of the deceased was also laying near the dead body, belies the whole prosecution story because if the deceased was killed by his licensed revolver, and the accused persons were not having their own weapons, there was no need to take away the deceased in the car to the place of occurrence, if he was forcibly taken by the applicant and other co-accused persons, licensed revolver would have been used by the deceased in his defence but there is no such story.

4. That the I.O. prepared the site plan of the place of occurrence on 6.3.2010 and prepared the recovery memo of one revolver; four live cartridges and one empty cartridge.

5. That according to the prosecution version also only one shot was discharged, it may be discharged by the deceased himself for committing suicide.

6. That as per allegation levelled against the applicant, only role assigned to the applicant is of catching hold of the deceased, he did not cause any injury to the deceased, the role of causing gun shot injury is assigned to the co-accused Bridhi Narian Pandey alias Jajjey, the role of catching hold in such a case is not probable.

7. That the deceased has committed suicide, about which information was sent to the police on 5.3.2010 at 20.05 hours by the applicant, which has been recorded in the G.D. no. 54 at 20.15 O' Clock on 5.3.2010.

8. That the inquest report has been prepared on 5.3.2010 since 9.30 p.m. to 11.20 p.m., on the basis of the information given by the applicant. The first informant Satish Kumar Dubey, Satish Kumar Dubey and Umesh Kumar are the witnesses of the inquest report, but they did not make any allegation, the F.I.R. has been registered on 6.3.2010 at 0.10 a.m. whereas the proceedings of inquest report were completed by 11.20 p.m. on 5.3.2010, the F.I.R. is delayed and it has been lodged after great thought and consultation, the delay of four hours in lodging the F.I.R. has not been explained.

9. That it is alleged that the accused persons after committing the crime hurriedly left the place of occurrence whereas in the inquest report it is mentioned that the gate of workshop/ house was closed, it shows that no body witnessed the incident that's why it has not been specifically alleged that by which weapon the injury was caused.

10. That the deceased was running his business in loss, he was indebted, the deceased had come to the applicant to take the loan of Rs. 1 lac for the business of his Cinema on which the applicant shows his helplessness, then the deceased committed suicide by his licensed revolver.

11. That the place of occurrence which has been shown as newly constructed house is a Karkhana, nobody resides in that house.

12. That the applicant is an innocent person he has not committed the alleged offence, prior the alleged incident the applicant was falsely implicated under sections 323,504,506 I.P.C. and section 3(1)(x) of S.C./S.T. Act in case crime no. 2216A of 2008 P.S. Gopiganj district Sant Kabir Nagar in which after investigation final report was submitted whereas in its cross case lodged by the applicant charge sheet was submitted. The applicant is a man of high status, there is no chance of his absconding or tampering with the evidence, he may be released on bail.

5. In reply to the above contention it is submitted by the learned A.G.A. and the learned counsel for the complainant that it is a pre-planned murder, the deceased was taken by the applicant and other accused persons in his car, from which he was taken inside the Karkhana/house where he has been killed, active role of catching hold is assigned to the applicant, in such a case where in an organized manner the murder is committed, the role of catching hold does not have lesser importance. The role of catching hold is probable because the deceased has been killed by causing injury on the left parietal region of the head. So far as the preparation of the inquest report is concerned, it has been prepared on the basis of the telephonic message given by the applicant, it is definite case of the applicant that the deceased had come to the applicant to take a loan of Rs.1 lac, on showing his helplessness by the applicant, the deceased has committed suicide, it means that the deceased has committed suicide in the presence of the applicant, the suicide was committed inside the Karkhana/house of the applicant, even then the applicant did not remain present at the place of occurrence, the inquest report has been prepared on the same day but neither the applicant nor his family member was present there, the inquest report shows that the deceased was sitting on chair and the revolver was lying on his right side, which shows that the deceased had not committed suicide by sitting on the chair, the injury was caused from a very close range by some other person and to save the skin from the criminal liability telephone message was given to the police station on 5.3.2010 at 8.05 p.m. there was no improbability in the prosecution story. The prosecution has come forward with the correct version, the prosecution story is fully corroborated by the post-mortem examination report. Due to presence of the first informant, witness Umesh Kumar and Balram Pandey at the time of preparation of the inquest report it can not be said that F.I.R. lodged subsequently, is concocted because according to the inquest report the cause of death was not due to suicide committed by the deceased, the Rai panchan shows that the deceased died due to head injury, the same opinion was of S.H.O. concerned also, the applicant is a most powerful and influential person, in case, he is released on bail, he shall tamper with the evidence.

6. Considering the facts, circumstances of the case, submission made by the learned counsel for the applicant, learned A.G.A., the learned counsel for the complainant and from the perusal of the record it appears that in the present case F.I.R. has been lodged by Satish Kumar Dubey, who claims himself to be an eye witness, alleged occurrence has taken place in two parts, first part has taken place in the premises owned by the deceased from where he was taken to the Karkhana of the applicant and second part has taken place in a newly constructed house/Karkhana of the applicant where the deceased has been shot dead, his dead body was also found there, according to the bail application the applicant was present at the time and place of

occurrence, he gave telephonic message to the police station concerned, according to his version the deceased committed suicide, but the applicant fled away from his Karkhana, he was not present at the place of occurrence at the time of the preparation of the inquest report, the dead body was found on a chair, according to the post mortem examination report the deceased has sustained one firearm wound of entry on his right parietal region of head, it was having blackening and charring, active role of taking to the place of occurrence has been assigned, the deceased, he was done to death, inside the Karkhana of the applicant at that time he was catching hold the deceased and without expressing any opinion on the merits of the case the applicant is not entitled to bail, the prayer for bail is refused.

7. Accordingly this application is rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.07.2010

BEFORE
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ (B) Petition No. 16678 of 2006

Smt. Candrawati & Others ...Petitioner
Versus
Board Of Revenue U.P ...Respondent

Counsel for the Petitioner:
Sri A.P. Paul
Sri B.B. Paul
Sri P.P. Paul
Sri S.S. Verma
Sri N.C. Nishad
Sri S.C. Verma
Sri S.S. Rajput
Sri R.B. Singh
Sri Vikram Nath

Counsel for the Respondent:
C.S.C.
Sri B.R. Verma
Sri V.K. Singh
Sri Ramesh Chandra
Sri Abhishek Goyal
Sri Ashish Gopal
Sri Arun Kumar
Sri V.V. Singh

Constitution of India Art 226-Patta granted by L.M.C. without following the procedure-most of the allotees are relative of village Pradhan-Writ Petition challenge the order of Board of Revenue writ filed after 8 years-plea the time consumed in review application-not available-the attempt to continue their illegal possession for long period itself disqualify them seeking interference by he Writ Court-petition dismissed with cost of Rs.10000 on each of the petitioner

Held Para 23

No other point was pressed. I find no merit in the writ petitions. Before saying omega to the case, it is disturbing to note the manner in which the present writ petitions were filed. As already stated above, these petitions have been filed with considerable delay of years altogether but without any sufficient explanation. The petitioners appear to be clever persons and they tried to install the proceedings of their ejectment by filing review application before the Board of Revenue and undaunted with their failure in the review application, writ petition no.50632 of 2000 and writ petition no.16678 of 2006 have been preferred with considerable delay only with a view to remain in occupation of the disputed land somehow or the other.

Case Law Discussed
JT. 2010 (6) SC 41;AIR 1993 SC 852; (1994) 6 SCC 620; (1995) 1 SCC 242; AIR 1997 SC 1236; AIR 1977 SC 781; AIR 1999 SC 2284; AIR 2003 SC 718; (2004) 7 SCC 166; JT 2010 (3) SC 510; AIR 1994 SC 853

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

1. All these writ petitions were heard together and are being disposed of by a common judgment.

2. These petitions arise out of proceeding under section 198(4) of the U.P.Z.A. & L.R. Act. There are as many as fifty petitioners in writ petition No.16678 of 2006 and the said writ petition is reported to be barred by laches of eight years and ninety two days. In this petition, the petitioners have sought a writ, order or direction in the nature of Certiorari for quashing the orders dated 8.1.1988, 6.1.1997 and 29th of September, 1997 passed by the respondent nos.2 and 1 respectively.

3. The writ petition no.41847 of 1997 has been preferred by 37 persons wherein orders dated 29th of September, 1997, 6th of January, 1997 and 8th of January, 1988 has been sought to be quashed.

4. In the writ petition no.50632 of 2000 there are five petitioners seeking Quashing of the orders dated 29th of September, 1997, 6th of January, 1997 and 8th of January, 1988.

The background facts may be noticed in brief.

5. The proceedings giving rise to the present writ petitions were initiated against the petitioners under section 198 (4) of the Act for cancellation of Patta/lease granted to them on the ground that these Pattas were allotted in violation of the prescribed procedure. The proceedings were initiated on the application filed by one Soni and four other persons. It was stated by them that the Land Management Committee by its resolution dated 5th of May, 1984 resolved to grant Pattas to such persons who were not even resident of village Lalpur Raiyatpur. The Pradhan of the village and the members of the Land Management Committee have executed the leases in favour of fictious persons and thus caused loss to the Gaon Sabha. Most of such allottees are not eligible for grant of any Patta. The persons to whom the Pattas have been granted possessed land even more than thirty bighas. Gross irregularity was committed while granting the Patta as no Munadi etc. was done.

6. In nutshell, allegations of fraud, collusion and malpractice of very serious nature against the Pradhan and members of Land Management Committee were set out therein. It was further stated that the Chairman of Management Committee and other members of the Committee got the leases in the names of their wives, relatives and near and dear ones. On these allegations the allotment of lease which was approved by the Sub Divisional Magistrate on 6th of August, 1984 was challenged through the application dated 11th of October, 1984 i.e. shortly after the allotment. Notices were issued to the allottees and their statements were recorded.

7. The Additional Collector (Admn.) by the order dated 8.1.1988 found that Rule 173 of the Rules framed under the U.P.Z.A. & L.R. Rules was breached and gross irregularity was committed in granting Pattas. Consequently, it cancelled the leases. The matter was carried in revisions before the Additional Commissioner, Agra Division, Agra who by the order dated 28th of February, 1994 recommended in favour of the petitioners to the Board of Revenue. The Board of Revenue by its order dated 6th of January, 1997 disagreed with the

recommendations made by the Additional Commissioner on the finding that the Rule 173 was breached, the allotments are null and void and, consequently, it upheld the order of the trial authority.

8. From the record of the writ petition Nos.16678 of 2006 and 50632 of 2000, it appears that the petitioners filed a review application to review and recall the order dated 6.1.1997. The review application was dismissed on 29th of September, 1997. The writ petition No.50632 of 2000 was presented before the Stamp Reporter on 11th of October, 2000 and was reported to be in time up to 28th of December, 1997. In other words, it was barred by laches of around three years. The writ petition no.16678 of 2006 was presented before this Court on 22nd of March, 2006. The Stamp Reporter has reported that the petition was in time up to 28th of December, 1997 and was barred by laches of eight years and ninety two days.

9. Sri B.B. Paul, learned counsel for the petitioners, submits two points for consideration before this Court. Firstly, no notice of hearing as contemplated under the Act was given to the petitioners by the trial authority and the allottees were not properly described in the array of the parties. Secondly, the Land Management Committee was not impleaded in the proceedings as one of the parties. It was also submitted that there is no material to show that the applicants at whose instance the machinery was set in motion are 'aggrieved persons' within the meaning of Section 198 (4) of the Act.

10. In reply, Sri B.R. Verma, Advocate, submits that it is a case of total fraud on the part of the allottees, Pradhan and members of the Land Management Committee. The Pattas were granted to the petitioners in utter disregard of statutory provisions. The allottees were put to notice and their statements were recorded by the trial authority and submission to the contrary is incorrect. No prejudice has been caused to the petitioners; the writ petition is liable to be dismissed as it is nothing but a case of total fraud. Sri Rajesh Kumar, learned brief holder on behalf of the State of U.P., submits that it is a case where the petitioners obtained the leases in question in total violation of statutory provisions. None of them deserve any sympathy of the Court. The petitioners by adopting dilatory tactics succeeded to prolong this simple litigation by more than two decades.

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

12. Taking the first point first that notice as required under Section 198 (5) of the Act was not given, may be considered. The contention is that subsection (5) of section 198 mandatorily requires service of a show cause notice on the person in whose favour allotment or lease was made before cancellation of allotment or lease. Elaborating the argument, the learned counsel for the petitioner placed strong reliance upon the order of the revisional court in this regard. The Court was taken through the said order repeatedly. It was submitted that the Additional Commissioner on examination of the file reached to the conclusion that no show cause notice was issued to the allottees before cancellation vide para 8 thereof. On a careful consideration of the matter, it is not possible to agree with the aforesaid submission. Subsection (5) of section 198 of the Act provides for service of a show cause notice before cancellation, on the person in whose

favour the allotment or lease was made. The said provision contains well known doctrine of natural justice that no person shall be condemned unheard. There is neither any pleading nor proof that the allottees were either not heard or not served by the trial authority before passing of the cancellation orders. It was rightly pointed out by the learned counsel for the respondents, in reply, that the allottees were permitted to lead the evidence and their statements were recorded.

13. Attention of the Court was invited towards the order of the trial authority dated 8th of January, 1988. It is mentioned therein that show cause notices were issued to the allottees and all of them had appeared and got their statements recorded and only one point was raised on their behalf that due procedure as prescribed for allotment or lease was followed. The learned counsel for the petitioners could not give any reply with regard to the aforesaid statement as contained in the order of trial authority. There appears no plea, at least, none was shown during the course of argument that statement of fact as contained in the order of trial authority referred to above in any manner is incorrect. Sri Rajesh Kumar, learned brief holder invited the attention of the Court towards copy of the order sheet filed as Annexure-6 to the writ petition no.59632 of 2000. Its bare perusal would show that Ram Lal and Jag Ram, the two allottees, had appeared on 19th of September, 1986 and notices were directed to be issued fixing 9th October, 1986 to other allottees. There is, thus, no reason to doubt about the service of notices on the allottees/petitioners. Had notices were not served on them, they could have filed an application for recall of the exparte order before the trial authority, a course which is very natural in such matters. None of the petitioners could dare to take the recourse to any such procedure. Straight way two revisions were filed which came for consideration before the Additional Commissioner. Even, the Additional Commissioner, on whose order strong reliance was placed, has noticed in the order that notices were issued to the allottees. However, according to him, these notices were short of legal requirement. As under the notices, the allottees were directed to appear on a particular date. He categorised the notices as notice of giving information or letter of invitation. Evidently, therefore, the notices were issued to the allottees/petitioners who appeared before the trial authority without raising any objection with regard to its invalidity or vagueness etc.. This being so, the argument of the petitioners that there is non compliance of subsection (5) of section 198 of the Act falls down. The other aspect of the plea is that petitioners have not taken care to place a copy of the said notices before this Court to arrive at a conclusion that notice issued to them was not a notice as required under subsection (5) of Section 198. Taking into consideration the aim and object of the notice as contemplated under subsection (5) together with the fact that the petitioners did, admittedly, participate in the proceeding before the trial authority and no prejudice whatsoever has been caused to them even if there was some irregularity in the notice, the argument of the petitioner has got no substance. It may be in the nature of a technical objection but without any substance.

14. A feeble attempt was made that the addresses of allottees have not been mentioned in the array of the parties. No such objection appears to have been taken by the petitioners before the authorities below. The petitioners were made fully

aware of the cancellation proceedings and they took active part by getting their evidence recorded. Even if their addresses were not mentioned in the complaint filed by the contesting private respondents, it is inconsequential, having caused no prejudice to the petitioners. Technically, the addresses might not have been mentioned in the complaint but it is mentioned therein that all the allottees to whom the land was allotted in pursuance of the resolution dated 5th of May, 1984 approved on 6th of August, 1984 were parties to the proceedings.

15. Now, I take up the second point. A reference was made to Rule 178 A(2) of the Rules framed under the Act in support of the plea that the Land Management Committee is a necessary party and an opportunity of hearing before passing of the final orders is required to be given to it along with the allottees of the land in dispute. The Land Management Committee was a party being opposite party no.1 as is evident from the application filed by the contesting respondents for cancellation of leases granted to the petitioners. The said provision has been made for benefit of the Land Management Committee. No grievance has been raised by the Land Management Committee to the effect that opportunity of hearing was not afforded to it before cancellation. It is not understandable as to how the petitioners can raise any such grievance on behalf of the Land Management Committee when the Land Management Committee is not coming forward. The said argument is wholly untenable and is therefore, rejected.

16. Lastly, it was urged that an application for cancellation of lease or allotment can be filed only by a person aggrieved by an allotment of a land, as contemplated under subsection (4) of section 198. The complainants, according to the petitioners, were not aggrieved persons and therefore they could not file the said application. No such argument appears to have been advanced before the Courts below by the petitioners. The argument has been sought to be raised for the first time before this Court. It is difficult to find any such ground in the writ petition No.16678 of 2006 filed by Smt. Chandrawati and others through Sri B.B. Paul, advocate, who appeared on behalf of the petitioners. The said writ petition contains as many as ten grounds, there is no such ground in this regard. Nor it is possible to decipher the said plea from the body of the writ petition. The said argument is not required to be considered even. Even otherwise also, I do not find any merit therein. The petition for cancellation was filed by the contesting private respondents on very serious allegations. A bare perusal of the said application would show that the allotments were made in violation of law. The Zamindari Abolition and Land Reforms Act has been enacted with a purpose and object to abolish the Zamindari system and settle the land with the tillers of soil. The Act has also taken care to provide land to landless labourers and other weaker member of society to enable them to earn their livelihood and lead a decent and respectable life. With these loud objects section 195 for settlement of vacant land, the land vested in the Gaon Sabha under section 117 and the land which comes in possession of Land Management Committee under Section 194 or under any other provision of this Act, has been made. The idea and purpose is to provide land to needy persons for their upliftment. Obviously, the said provision has not been made for greedy persons or persons of means or persons belonging to effluent class. A plain and simple reading of the application filed by the contesting

private respondents gives a picture that the allotments in question were made for wrongful personal gains and not for the uplift-ment of poor and needy persons of the society. It is a case of greedy persons and not of needy persons. There is no averment in any of these three petitions disputing the allegations, as contained in the complaint, that the land was allotted to needy persons, after due notice etc. as required by law to eligible persons. Even the persons having more than thirty bighas of land have been given allotment by the Land Management Committee in collusion with the Gram Pradhan to benefit and oblige their relatives, friends, near and dear ones. The allottees are not residents of the village in question and relatives of the members of the Land Management Committee have been benefited by such allotments. A detailed procedure for allotment of land has been prescribed by section 198 of the Act. It provides various categorise including preferential categories to whom the allotments should be made in order of preference. For the sake of convenience subsection (1) of Section 198 of the U.P.Z.A. & L.R. Act is reproduced below:-

17. **Section 198** -- "In the admission of persons to land as [Bhumidhar with non-transferable rights] or asami under Section 195 or Section 197 (hereinafter in this section transferred to as allotment of land) the Land Management Committee shall subject to any order made by a Court under Section 178 observe the following order of preference :

[1][(a) landless widow, sons unmarried daughters or parents residing in the circle of a person who has lost life by enemy action while in active service in the Armed Forces of the Union;

(b) a person residing in the circle, who has become wholly disabled by enemy action while in active service in the Armed Forces of the Union;

(c) a landless agricultural labourer residing in the circle and belonging to a [2][Schedule Caste, Schedule Tribe, other backward class or a person of general category living below poverty line];

(d) any other landless agricultural labourer residing in the circle;

(e) a Bhumidhar, 3[***] or asami residing in the circle and holding land less than 1.26 hectares (3.125 acres);

(f) landless person residing in the circle who is retired, released or discharged from service other than service as an officer in the Armed Forces of the Union;

(g) a landless freedom fighter residing in the circle who has not been granted political pension;

(h) any other landless agricultural labourer belonging to a 2[Schedule Caste, Schedule Tribe, other backward class or a person of general category living below poverty line] not residing in the circle but residing in the Nyaya Panchayat Circle referred to in Section 42 of the U.P. Panchayat Raj Act, 1947].

18. Rule 173 of the Rules provides procedure for admission to land by providing that the Land Management Committee when it intends to admit any person to land shall announce by beat of drums in the circle of Gaon Sabha in which the land is situate at least seven days before the date of meeting for admission of land, the number of plots, their areas and the date on which the admission there to has to be

made. Strikingly, it has been found by the trial authority which finding has been affirmed by the Board of Revenue that no such Munadi by beat of drums in the circle of the Gaon Sabha was made. A clear-cut seven days notice is required to be given before the date of meeting for admission of land. It has been found as a fact that Munadi was done on 1st of May, 1984 and the resolution was passed within four days on 5th of May, 1984. The requirement of law that there should be at least one week's notice, has not been adhered to. Further, it has been found that in the document showing the Munadi, the plot numbers intended to be leased out or its area have not been mentioned. In other words, no opportunity was given to the public at large to come to know about the intended allotment and as such the public failed to apply for the allotment. At this juncture, it is interesting to note that this part of the order of the trial authority has not been touched or disturbed by the Additional Commissioner who recommended the petitioners' case favourably. The Board of Revenue examined this aspect of the case and reached to the conclusion that due procedure was not followed. It is also important to note that no attempt was made by the learned counsel for the petitioners to challenge this part of the order of the Board of Revenue. In other words, the fact that the disputed allotments or leases were made in utter violation of Section 198 and Rule 173 of the Rules is even acceptable to the petitioners. The Apex Court in a recent decision of **Manohar Lal (D) by Lrs. Vs. Ugrasen (D) by Lrs. And others, JT. 2010 (6) SC 41** has after consideration of its earlier judgment with regard to the point as to when the discretionary jurisdiction under Article 226 of the Constitution of India should be exercised, has held as follows:-

".....When a person approaches a Court of Equity in exercise of its extraordinary jurisdiction under Article 226/227 of the Constitution, he should approach the Court not only with clean hands but also with clean mind, clean heart and clean objective. "Equally, the judicial process should never become an instrument of appreciation or abuse or a means in the process of the Court to subvert justice." Who seeks equity must do equity. The legal maxim "Jure naturaw aequum est neminum cum alterius detrimento et injuria fieri locupletiorem", means that it is a law of nature that one should not be enriched by the loss or injury to another. (vide ***The Ramjas Foundation & Ors. Vs. Union of India & Ors. AIR 1993 SC 852; K.P. Srinivas Vs. R.M. Premchand & ors. (1994) 6 SCC 620 and Nooruddin Vs. (Dr.) K.L. Anand (1995) 1 SCC 242).***

48. Similarly, in ***Ramniklal N. Bhutta & Anr. Vs. State of Maharashtra & Ors. AIR 1997 SC 1236,*** *this Court observed as under:-*

"The power under Article 226 is discretionary. It will be exercised only in furtherance of interest of justice and not merely on the making out of a legal point.....the interest of justice and the public interest coalesce. They are very often one and the same. ..... The Courts have to weigh the public interest vis-Ã -vis the private interest while exercising....any of their discretionary powers (Emphasis added).

49. ***In M/s Tilokchand Motichand & Ors. Vs. H.B. Munshi & Anr. AIR 1970 SC 898; State of Haryana Vs. Karnal Distillery, AIR 1977 SC 781; and Sabia Khan & Ors. Vs. State of U.P. & Ors. AIR 1999 SC 2284****, this Court held that filing totally misconceived petition amounts to*

abuse of the process of the Court. Such a litigant is not required to be dealt with lightly, as petition containing misleading and inaccurate statement, if filed, to achieve an ulterior purpose amounts to abuse of the process of the Court. A litigant is bound to make "full and true disclosure of facts."

50. In ***Abdul Rahman Vs. Prasony Bai & Anr. AIR 2003 SC 718; S.J.S. Business Enterprises (P) Ltd. Vs. State of Bihar & Ors. (2004) 7 SCC 166; and Oswal Fats & Oils Ltd. Vs. Addl. Commissioner (Admn), Bareily Division, Bareily & Ors. JT 2010 (3) SC 510,*** *this Court held that whenever the Court comes to the conclusion that the process of the Court is being abused, the Court would be justified in refusing to proceed further and refuse relief to the party. This rule has been evolved out of need of the Courts to deter a litigant from abusing the process of the Court by deceiving it."*

19. This being so, no case for interference under Article 226 of the Constitution of India has been made out. In this fact situation, when no notice was given to the public at large and the allotments were under secret cover illegally, it cannot be said that the contesting private respondents are not person aggrieved within the meaning of Section 198 (4) of the Act. It is not a case of the petitioners that these persons do not reside in the village in question or in any manner are incompetent for allotment of the land under the aforesaid section.

20. To say least, the present case is a case of fraudulent use and abuse of the power conferred on the Land Management Committee and the Pradhan to allot the land.

21. The Apex Court in the case of **S.P. Chengalvarya Naidu Vs. Jagannath, AIR 1994 SC 853** has held that Court should not lend its support to a tax evader, property grabber or a persons who has not approached Court with clean hands. A person whose case is based on falsehood has no right to approach the Court. He can be summarily thrown out at any stage of litigation.

22. It is equally settled that a fraud vitiates every solemn act.

23. No other point was pressed. I find no merit in the writ petitions. Before saying omega to the case, it is disturbing to note the manner in which the present writ petitions were filed. As already stated above, these petitions have been filed with considerable delay of years altogether but without any sufficient explanation. The petitioners appear to be clever persons and they tried to install the proceedings of their ejectment by filing review application before the Board of Revenue and undaunted with their failure in the review application, writ petition no.50632 of 2000 and writ petition no.16678 of 2006 have been preferred with considerable delay only with a view to remain in occupation of the disputed land somehow or the other.

24. The petitioners are required to be dealt with firmly and therefore, it is provided that each petitioner of the aforesaid three writ petitions will be liable to pay cost @ Rs.10,000/- (Rupees Ten Thousand). The Collector, Aligarh shall recover the cost from them if not paid within the period of one month and shall deposit the said amount in the account of public exchequer.

25. In view of the above discussions, all the three writ petitions are hereby dismissed with cost of Rs.10,000/- payable by each petitioner individually within a period of one month and are also required to hand over the possession forthwith.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.07.2010

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.

Civil Misc. Writ Petition No. 16935 of 2008

Devendra Kumar Jaisawal ...Petitioner
Versus
State Of U.P. and others ...Respondent

Counsel for the Petitioner
Sri Rama Nand Pandey,
Sri Pradeep Narain Pandey

Counsel for the Respondent
C.S.C.

Constitution of India Art 226-Service-Compassionate Appointment-U.P. Recruitment of dependants of Govt. servants Dying in Harness Rules 1974, Rule 2 (a)-length of service of deceased employee-requirement of three years continues service-held, not a sine qua non for regular employees-direction issued for providing appointment of petitioners

Held Para 9 and 10

On facts in the present case, it remains undisputed that the petitioner's father had been regularly appointed and, therefore, the three years completion of service is not a sine qua non for such an employee to enable his dependant to claim appointment under the Dying-in-Harness Rules. The impugned order has, therefore, been passed against records and by misconstruing the Rules. The counter affidavit also suffers from the same infirmity.

In this view of the matter, the order dated 26.12.2007 is unsustainable. It is hereby quashed. The respondent-Director shall proceed to process the appointment of the petitioner under the compassionate appointment rules forthwith and pass an order within a period of six weeks from the date of presentation of a certified copy of this order before him.

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

1. Heard Sri Pradeep Narain Pandey, learned counsel for the petitioner and learned standing counsel for the State.

2. The petitioner claims compassionate appointment after the death of his father late Dr. Ram Pratap Jaisawal, who died in harness within a short span of time while working as Medical Officer.

3. The petitioner's father had been selected in the year 1988 but on account of pending litigations the appointment order could not be issued and that took several years. Ultimately, he came to be appointed on 7th April, 2000. The appointment order was issued after the litigation had come to an end and the appointment was made on a temporary basis against a substantive vacancy. After selection, it was a regular employment. Unfortunately, he died on 13th July, 2000 within a short span of time.

4. The petitioner applied for compassionate appointment and the same has been rejected on the ground that the petitioner's father had not completed three years of regular service and, therefore, in view of the Uttar Pradesh Recruitment of Dependants of Government Servants Dying

in Harness Rules, 1974, the petitioner cannot get the benefit of compassionate appointment.

5. A counter affidavit has been filed and the same stand has been taken in the counter affidavit.

6. Learned standing counsel contends that the petitioner has been rightly non-suited as his father had worked only for three months.

7. Having perused the affidavit exchanged between the parties, it would be appropriate to quote Rule 2(a) of the Rules, 1974 which indicates the definition of a Government servant:

"2 (a) "Government servant" means a Government servant employed in connection with the affairs of Uttar Pradesh, who-

(i) was permanent in such employment; or

(ii) though temporary had been regularly appointed in such employment; or

(iii) though not regularly appointed, had put in three years continuous service in regular vacancy in such employment."

8. A perusal of the aforesaid definition indicates that a Government Servant has been defined alternatively in three clauses as contained therein. All three clauses are independent of each other. The criteria of an employee having put in three years continuous service is in respect of a Government servant who has not been regularly appointed but has put in three years continuous service in a regular vacancy. Thus, the aforesaid rider of three years is a precondition in relation to such category of Government employees, who have not been regularly appointed.

9. On facts in the present case, it remains undisputed that the petitioner's father had been regularly appointed and, therefore, the three years completion of service is not a sine qua non for such an employee to enable his dependant to claim appointment under the Dying-in-Harness Rules. The impugned order has, therefore, been passed against records and by misconstruing the Rules. The counter affidavit also suffers from the same infirmity.

10. In this view of the matter, the order dated 26.12.2007 is unsustainable. It is hereby quashed. The respondent-Director shall proceed to process the appointment of the petitioner under the compassionate appointment rules forthwith and pass an order within a period of six weeks from the date of presentation of a certified copy of this order before him.

11. With the aforesaid observations, the writ petition is disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.07.2010

BEFORE
THE HON'BLE SANJAY MISRA, J.

Civil Misc. Writ Petition No. 34565 of 2003

Sanjiv Kumar Rastogi ...Petitioner
Versus
Additional Commissioner/Chief Controlling Revenue Authority and another ...Respondent

Counsel for the Petitioner:
Sri Rajiv Gupta
Sri K.S. Ojha

Counsel for the Respondent:
C.S.C.

Indian Stamp Act 1899 Section 47-A-U.P. Zamindari Abolition and Land Reforms Act 1950 Section 143-Stamp Duty-Deficiency of court fee-purchase of agricultural land as per entry in revenue records-authorities assessing market value on potential user for residential purpose-No deceleration v/s 143 UPZALR Act in respect of land as non-agricultural-no cogent material on record to show that instrument in question deficiently stamped-Held; value of land to be determined as on date of transaction-and not on presumption of future user or purpose.

Held Para 8, 9 and 10

Learned counsel for the petitioner has placed reliance upon a decision of this court in the case of Veer Bal Singh Vs State of U.P. and Others 2009 (108) RD 124 and has relied upon paragraph 9 to state that unless there is a declaration under Section 143 of the U.P. Z.A. & L.R. Act an agricultural land cannot be treated as non agricultural. He states that admittedly there is no declaration under Section 143 of the U.P.Z.A. & L.R. Act with respect to the land in question and therefore it could not be treated as non agricultural land.

He has further relied upon paragraph 16 to 19 of the said judgment to state that the respondent no. 2 could not determine the deficiency in stamp duty on the date of execution of the sale deed without any material on record and also he could not determine the deficiency by recording that the future utility of the land was for residential purpose and therefore it has to be treated as non agricultural.

The submission of learned counsel for the petitioner appears to have substance inasmuch as there is no cogent evidence referred to in the impugned orders to enable the authorities to charge stamp duty of the land in question as non agricultural land. There is also no evidence on record to indicate that on the date when the land in question was purchased by the petitioner it was non agricultural. In fact report of the Tehsildar in the year 2001 has clearly stated that two years back i.e. in the year 1999 the land was being used for agricultural purpose. Admittedly the portion purchased by the petitioner is half portion of the plot in question and there is no construction existing over the land in question. Consequently the respondents have committed an error in determining the deficiency of stamp duty on the future utility of the land which was earlier admittedly used as agricultural land. The impugned orders have been passed without any basis and even on the reports available on record the land in question was agricultural in the year 1997 when it was purchased by the petitioner.

Case Law Discussed:
2009 (108) RD 124

(Delivered by Hon'ble Sanjay Misra,J.)

1. Heard Sri K.S. Ojha learned counsel for the petitioner and learned Standing Counsel for the respondents. Counter and rejoinder affidavits have been exchanged between the parties.

2. The petitioner claims to have purchased an area of 0.136 hectare agricultural land in Village Mawana Kalan, Pargana Hastinapur, Tehsil Mawana, District Meerut by sale deed dated 15.10.1997 for sale consideration of Rs. 36,000. For the purpose of paying the stamp duty the value of the property was fixed at Rs. 41,000 and therefore a total of Rs. 4350 was paid in

accordance with the market value of Rs. 6 lakh per hectare fixed by the District Magistrate for agricultural land.

3. The petitioner is aggrieved by the order dated 30.5.2001 (annexure 3 to the writ petition) passed by the Sub Divisional Magistrate, Mawana, District Meerut as well as by the appellate order dated 18.11.2002 (annexure 4 to the writ petition) passed by the Additional Commissioner/Chief Controlling Revenue Authority, Meerut and the order dated 3.6.2003 (annexure 5 to the writ petition) whereby the review application filed by the petitioner before the respondent no. 1 has been rejected.

4. Learned Standing Counsel while referring to the counter affidavit has submitted that clearly the land in question was described within the urban area and Nagar Palika limits and hence for the purpose of payment of stamp duty the value of Rs.500 per square yard for residential area fixed by the District Magistrate was chargeable. He further states that the land in question is situated half km. from the main road and its area is 680 square metres which is clearly for the purpose of residential use.

5. Having considered the submission of learned counsel for the parties and perused the records the Tehsildar had made a report on 20.6.1998 on a query made by the petitioner that the land in question is outside the Nagar Palika limits. The Tehsildar had also submitted a report before the respondent no. 2 on 12.4.2001 by stating that this land was used for agricultural purpose till two years back and at present the land is lying vacant and the circle rate applicable is Rs. 6 lakh per hectare.

6. In the order passed by the respondent no. 2 under Section 47 A of the Stamp Act a finding has been recorded that the land in question was earlier being used for agricultural purpose and is entered in the revenue records as agricultural land. He has also found that the land in question is situated near the Kishanpur Birana road and is lying vacant but it is likely to be used for residential purpose and therefore the stamp duty to be charged is to be according to the circle rate of Rs. 500 per square metre and hence the petitioner is liable to pay Rs. 30,700 as stamp duty whereas he has only paid Rs. 4350 as stamp duty.

7. The first appellate authority has confirmed the findings recorded by the respondent no. 2 and has rejected the review application of the petitioner on the same ground by further holding that the future use of the land in question is likely to be residential and therefore when no agricultural activity is going on it has to be charged at Rs. 500 per square metre.

8. Learned counsel for the petitioner has placed reliance upon a decision of this court in the case of Veer Bal Singh Vs State of U.P. and Others 2009 (108) RD 124 and has relied upon paragraph 9 to state that unless there is a declaration under Section 143 of the U.P. Z.A. & L.R. Act an agricultural land cannot be treated as non agricultural. He states that admittedly there is no declaration under Section 143 of the U.P.Z.A. & L.R. Act with respect to the land in question and therefore it could not be treated as non agricultural land.

9. He has further relied upon paragraph 16 to 19 of the said judgment to state that the respondent no. 2 could not determine the deficiency in stamp duty on the date of execution of the sale deed without any material on record and also he could not determine the deficiency by recording that the future utility of the land was for residential purpose and therefore it has to be treated as non agricultural.

10. The submission of learned counsel for the petitioner appears to have substance inasmuch as there is no cogent evidence referred to in the impugned orders to enable the authorities to charge stamp duty of the land in question as non agricultural land. There is also no evidence on record to indicate that on the date when the land in question was purchased by the petitioner it was non agricultural. In fact report of the Tehsildar in the year 2001 has clearly stated that two years back i.e. in the year 1999 the land was being used for agricultural purpose. Admittedly the portion purchased by the petitioner is half portion of the plot in question and there is no construction existing over the land in question. Consequently the respondents have committed an error in determining the deficiency of stamp duty on the future utility of the land which was earlier admittedly used as agricultural land. The impugned orders have been passed without any basis and even on the reports available on record the land in question was agricultural in the year 1997 when it was purchased by the petitioner.

11. The impugned orders being based on no material or evidence are arbitrary and liable to be set aside. The impugned order dated 30.5.2001, 18.11.2002 and 3.6.2003 passed by the respondent nos. 1 and 2 are hereby set aside. The writ petition is allowed.

12. No order is passed as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.07.2010

BEFORE
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE DILIP GUPTA, J.

Civil Misc. Writ Petition No.47233 of 2009

Pradeep Kumar ...Petitioner
Versus
Union of India & others ...Respondent

Counsel for the Petitioner:
Sri Kamal Singh Yadav

Counsel for the Respondents:
Sri J.K.Tiwari
A.S.G.I.
C.S.C. (2009/41192)
Sri M.C.Tripathi

Constitution of India-Act 226-Medical Practise-Right to held, not absolute Restrict by Chief Medical Officer on unregistered unqualified practitioners, held, reasonable-Degree/diploma of Ayurvedic Ratna by Hindi Sahitya Sammelan Prayag-not recognized by Indian Medicine Control Council-Act-1970-question squarely covered by Apex Court judgement in 2009 (5) SCC 206.

Held Para 4 and 5

The question whether Hindi Sahitya Sammelan Prayag, Allahabad has the authority to award medical qualifications after 1967, has been considered by this Court and the Supreme Court. In the judgement dated 1.6.2010 in Rajasthan Pradesh V.S. Sardarshahar & Another Vs. Union of India & others

[MANU/SC/0408/2010] the Supreme Court has held that the degrees awarded by Sammelan after 1967 are not recognized under the Indian Medicine Central Council Act 1970, to authorize medical practice in Indian Medicine. The Bihar Indian Medicine Board has no authority to grant registration on such degree, to allow a person to practice in other States including in Uttar Pradesh, vide Ayurvedic Enlisted Doctors Association Mumbai Vs. State of Maharashtra [JT 2009 (5) SCC 206 : MANU/SC/0312/2009] and Nawab Khan Vs. State of U.P. [(1999) 2 AWC 1150 (DB)].

The question raised are squarely covered by judgement of the Supreme Court.

Case Law Discussed:

2004 (2) AWC 967; 2000(5) SCC 80; MANU/SC/0408/2010; 2009 (5) SC 206; 1999 (2) AWC 1150.

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

1. List is revised. No one appears for the petitioner. Sri J.K. Tiwari, learned standing counsel appears for the respondents.

2. The petitioner has prayed for directions to quash the notice dated 14.8.2009 issued by the Chief Medical Officer directing unregistered and unqualified medical practitioner to produce their Degrees and Registration and to establish that they are practicing medicine on the basis of their valid qualifications. The directions were issued on 28.1.2004 in **Rajesh Kumar Srivastava Vs. State of U.P**. [2004 (2) AWC 967] in pursuance of the order of this Court to enforcing directions issued by the Supreme Court in **D.K. Joshi Vs. State of U.P.** [(2000) 5 SCC 80].

3. The petitioner claims to be registered with State Ayurvedic & Unani Chikitsa Parishad, Bihar in pursuance to the Degree of Ayurvedic Ratna, 1986 from Hindi Sahitya Sammelan Prayag, Allahabad

4. The question whether Hindi Sahitya Sammelan Prayag, Allahabad has the authority to award medical qualifications after 1967, has been considered by this Court and the Supreme Court. In the judgment dated 1.6.2010 in **Rajasthan Pradesh V.S. Sardarshahar & Another Vs. Union of India & others** [MANU/SC/0408/2010] the Supreme Court has held that the degrees awarded by Sammelan after 1967 are not recognized under the Indian Medicine Central Council Act 1970, to authorize medical practice in Indian Medicine. The Bihar Indian Medicine Board has no authority to grant registration on such degree, to allow a person to practice in other States including in Uttar Pradesh, vide **Ayurvedic Enlisted Doctors Association Mumbai Vs. State of Maharashtra** [JT 2009 (5) SCC 206 : MANU/SC/0312/2009] and **Nawab Khan Vs. State of U.P.** [(1999) 2 AWC 1150 (DB)].

5. The question raised are squarely covered by judgment of the Supreme Court.

6. The writ petition is **dismissed.**

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.07.2010

BEFORE
THE HON'BLE ANIL KUMAR, J.

Civil Misc. Writ Petition No. 58855 of 2007

Sri Ram Manohar Kapoor ...Petitioner
Versus
State Of U.P. and others ...Respondent

Counsel for the Petitioner:
Sri Yogish Kumar Saxena

Counsel for the Respondents:
C.S.C.

Constitution of India Article 226- recovery of excess amount from post retiral benefits-whatever excess amount given-on negligence of authorities-No allegation of concealment or instrumental in getting excess amount-can not be recovered-for omission on part of employer petitioner can not be punished

Held Para 24

Moreover from the perusal of the orders under challenge in the present case it is crystal clear that respondent no.3 while passing the impugned order dated 8.10.2007 has not given any findings that whether there was any fault or fraud played on the part of the petitioner by virtue of which the additional dearness allowances was granted to him at the rate of Rs. 219/- with effect from 1.8.1979 by means of order dated 6.2.1992, so the same is in contravention to the order dated 4.4.2007 passed in Special Appeal no. 656 of 2003 as well as against the principles of natural justice.

Case Law Discussed:

1995 Supp (1) SCC 18; 2006 (4) ESC 2379 (AII) (DB); 1995 Supp (3) SCC 722; 1998 SCC (L&S) 462; 1998 (2) SCC 589; 2000 SCC (L&S) 394; 2003 SCC (L&S) 90; 2005 (2) ESC 1067 (AII)

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

1. By means of the present writ petition, the petitioner has challenged the order dated 8.10.2007 passed by Finance Controller, Public Works Department (Pension Cell) Lucknow, opposite party no.3.

2. Heard Yogish Kumar Saxena, learned counsel for the petitioner and the learned Standing Counsel appearing on behalf of the respondents.

3. In brief, the facts as submitted by the learned counsel for the petitioner, are that the petitioner was working as Junior Engineer in the Public Works Department. During the tenure of his service, respondent no.1 has issued a Government Order dated 20.11.1979 by which additional dearness allowance was given to the employees of different category.

4. In pursuance of the said Government Order, by means of order dated 6.2.1992 the petitioner has been given dearness allowance of Rs.219 with effect from 1.8.1979. However, the petitioner was not satisfied with the fixation of additional dearness allowance at the rate of Rs. 219/-. As per his version he was entitled for dearness allowance at the rate of Rs. 224/- so he submitted a representation in this regard to respondent no.2 but nothing has been done in the matter in question.

5. In the meantime, the petitioner retired from service on 30.4.1995 after attaining the age of superannuation. Further , when the post retiral benefits pension etc. were not given to him , he filed a Civil Misc. Writ Petition no. 26285 of 1995 for payment of his post retiral benefits , disposed of by order dated 26th September, 1995 with the direction that the Engineer-in-Chief Public Works Department , U.P. Lucknow shall pass appropriate orders and direct the subordinates that the petitioner's post retirement benefit and claims be cleared within two weeks from the date of filing of a certified copy of the said order. Despite the said directions given by this Court, the Engineer-in-Chief, Public Works Department, U.P. Lucknow , opposite party no.2 did not pay any heed in the matter in question as such the petitioner was compelled to file a contempt petition.

6. Thereafter on 16.12.1995, the opposite party no.2 has passed an order thereby fixing additional dearness allowance

payable to the petitioner as Rs. 208.10 paisa instead of Rs. 219/- fixed and paid to the petitioner by order dated 16.2.1992. The petitioner has challenged the same before this Court by way of Writ Petition No. 5530 of 1996 dismissed by order dated 20.5.2003. The said order was challenged by filing Special Appeal No. 656 of 2003, Sri Ram Manohar Kapoor Vs. State of U.P. and others and on 4.4.2007, disposed of with the following directions:-

"We, therefore, modify the judgement of the learned Single Judge and dispose of the appeal without expressing any opinion on merit, with the direction to the respondent no.4, Financial Controller, who is expert in finance matters to re-examine the matter and pass a detail reasoned order with regard to the rate of payment of additional dearness allowance and also whether the order dated 6.2.1992 fixing the petitioner -appellant's pay-scale was rightly passed or not. Because of the fact that the appellant has retired from service long back, it is further directed that the aforesaid decision shall be taken by respondent no.4 expeditiously preferably within a period of six weeks from the date of production of a certified copy of this order after affording opportunity of hearing to the appellant to explain the factual aspects. The order of the Executive Engineer dated 15.12.1995 will be subject to the subsequent order passed by the respondent no.4."

7. In pursuance to the same , the respondent no.3 Finance Controller, Public Works Department (Pension Cell) Lucknow has passed the impugned order 8.10.2007.

8. Sri Y.K.Saxena , learned counsel for the petitioner submits that impugned order dated 8.10.2007 is in violation of order dated 4.4.2007 passed by this Court in Special Appeal no.656 of 2003 where it has been held that there is no material to demonstrate that the order dated 6.2.1992 of the Executive Engineer fixing the salary of the petitioner- appellant was passed either on account of any fraud or misrepresentation attributable to the appellant or through connivance of lower staff so the same is without jurisdiction.

9. Learned counsel for the petitioner further submits that the impugned order is also in contravention to the Government Order dated 20.11.1979 by which the additional dearness allowances was fixed at the rate of 219/- with effect from 1.8.1979, hence the action on the part of the respondents thereby recovering the amount of Rs. 30,000/- paid to him as excess amount towards additional dearness allowance after retirement of the petitioner, is an action arbitrary , illegal and against the principles of natural justice. In support of his contention , learned counsel for the petitioner has placed reliance in the case of **Sahib Ram Vs. State of Haryana and others , 1995 Supp (1) SCC18** and **Ram Murti Singh Vs. State of U.P. and others 2006 (4) ESC 2379 (All) (DB).**

10. Learned Standing Counsel submits that in pursuance to the order passed in Special Appeal, after hearing the petitioner and going through the record , the Finance Controller has passed the order dated 8.10.2007 holding therein that the petitioner is not entitled for additional dearness allowance at the rate of Rs.219/- with effect from 1.8.1979 as in view of the Government order dated 12.8.1983 the petitioner is entitled for additional dearness allowance amounting to Rs. 208.10 paisa hence the present writ petition filed by the petitioner is misconceived and liable to be dismissed.

11. I have heard the learned counsel for the petitioner and gone through the record.

12. In the present case , the petitioner retired employee of Public Works Department had initially been granted additional dearness allowance in view of the Government Order dated 20.11.1979 of Rs. 219/- (122+97.20 paisa) with effect from 1.8.1979 by means of order dated 6.2.1992. However thereafter the same was reduced by order dated 16.12.1995 to Rs. 208.10 paisa(122+86.10 paisa). In view of the said fact a sum of Rs. 30,000/- was deducted from the post retiral benefits.

13. Thus , the core question which is to be decided in the present case is whether by means of order dated 6.2.1992, in pursuance to the Government Order dated 20.11.1979 , petitioner was rightly granted additional dearness allowance of Rs. 219/- with effect from 1.8.1979 or not?

14. An average employee is considered to have no saving capacity except through forced savings, such as , contribution to provident Fund or premium towards Life Insurance etc. He is expected to consume his pay packet in meeting the daily needs for him and his family. If by mistake the employer makes over payments and such mistake is not induced by any representation from the employee and the employee has received higher scale due to default it is only to just and proper not to recover and excess amount already paid to him .

15. In **Shaib Ram Vs. State of Haryana, 1995 Supp (1) SCC 18** there was a mistake in the fixation of pay-scale of the appellant. He received his pay on higher pay-scale than due resulting in over payment, which the State Subsequently sought to recover , the Hon'ble Supreme Court observed:

"....it is not on account of any misrepresentation made by the appellant that the benefit of higher pay scale was given to him but wrong construction made by the Principal for which the appellant cannot be held to be at fault. Under the circumstances the amount paid till date may not be recovered from the appellant."

16. In **Nand Kishore Sharma Vs. State of Bihar 1995 Supp (3) SCC 722** the employees of Agriculture Department were granted revised pay-scale on the recommendation of Anomaly Committee consent to which was given by the Finance Department . The employees were given benefits of revised pay with arrears of pay. However, the State Government never officially accepted the revised pay-scale and sought to recover the difference of salary from the employees was interfered by the Supreme Court stating that payment having been made as a result of Anomaly Committee's recommendation and concurrence of the Finance Department, the State could not have reversed the same, more so, without affording prior opportunity to the employees the recovery was impermissible. However, the withdrawal of the revised pay scale was allowed.

17. In the case of **State of Jammu and Kashmir V. Pirzada Gulam Nabi , 1998 SCC (L&S) 462** it is held by the Apex Court that when salary was already paid under any misapprehension and by the time correct position emerged the employee already retired from service, the Courts may be reluctant to order recovery from such retired employee, as recovery would put a retired employee to hardship.

18. In **Union of India Vs. Ram Gopal Agarwal (1998) 2 SCC 589** noticing that recovery order caused hardship , the Supreme Court held that such recovery cannot be effected. The same view was taken in **Bihar State Electricity Board V. Bijay Bahadur, 2000 SCC (L&S) 394.**

19. In **K. Vasudevan V Mohan N. Mali, 2003 SCC (L&S) 90** payments were effected on account of wrong promotion; the Supreme Court held that promotion could be annulled but no recovery was permissible.

20. In the case of **Duryodhan Lal Jatav V State of U.P. And others 2005 (2) ESC 1067 (All)** this Court has held that if additional payment has been made to the employees for no fault of their, they should not be penalized for this.

21. In the case of **Ram Murti Singh Vs. State of U.P. and others , 2006 (4) ESC 2379 (All) (DB)** this Court has held that "*Having given our anxious consideration to the various pleas raised by the learned counsel for the parties , we find that now it is well settled by the decision of the Apex Court that if employees have received higher scale due to no fault of theirs, it would only be just and proper not to recover any excess amount already paid to them".*

22. In view of the above stated proposition of law in the instant case the order dated 8.10.2007 passed by opposite party no.3 is not sustainable and arbitrary in nature.

23. Further this Court while deciding the Special Appeal filed by the petitioner (Special Appeal No. 656 of 2003, Sri Ram Manohar Kapoor Vs. State of U.P. And others) by order dated 4.4.2007 has held as under:-

"we have considered the submissions . From a perusal of averments made in the counter affidavit, we do not find any material to demonstrate that the order dated 6.2.1992 of the Executive Engineer fixing the salary of the petitioner-appellant was passed either on account of any fraud or misrepresentation attributable to the appellant or through connivance of lower staff and thus the finding recorded by the learned Single Judge cannot be sustained."

24. Moreover from the perusal of the orders under challenge in the present case it is crystal clear that respondent no.3 while passing the impugned order dated 8.10.2007 has not given any findings that whether there was any fault or fraud played on the part of the petitioner by virtue of which the additional dearness allowances was granted to him at the rate of Rs. 219/- with effect from 1.8.1979 by means of order dated 6.2.1992, so the same is in contravention to the order dated 4.4.2007 passed in Special Appeal no. 656 of 2003 as well as against the principles of natural justice.

25. For the foregoing reasons , the writ petition is allowed. The order dated 8.10.2007 passed by opposite party no.3 is set aside.

26. No order as to costs.
