ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.11.2010

BEFORE
THE HON'BLE ANIL KUMAR, J.

Civil Revision No. 52 of 2001

Dinesh Chand Pandey and others
...Petitioner
Versus
Shri Narain Pathak and others
...Respondent

Counsel for the Petitioner:
Sri U.S. Sahai
Sri D.C. Mukharji

Counsel for the Respondent:
Sri D.C. Mukharjee

Code of Civil Procedure Order XIV Rule 2 as amended by Act No. 104 of 1976-Rule 2 (2)-Preliminary issue-regarding bar of 22 of U.P. Intermediate Act 1921 and Section 14 of payment of salary Act-trial Court rejected the request for decision of preliminary issue as first-held-Trail Court not exercised its discretion properly-an issue of law and jurisdiction be decided first-order passed by Trial Court set-a-side.

Held: Para 18

In view of the abovesaid facts and legal position which has been stated in the preceding paragraphs, and from a perusal of sub- Rule 2 Order 14 it is clear that an issue of law may be tried as a preliminary issue provided it relates to the jurisdiction of the Court or to a bar to the suit created by law for the time being in force.

Case law discussed:
AIR 1988 All 299, 1995 (13) LCD 252, 2009 All. C.J. 1370

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

1. Matter is taken in the revised cause list.

2. None appeared on behalf of the answering respondents.

Heard Sri U.S. Sahai, learned counsel for the revisionist and perused the record.

3. Facts in brief as submitted by the learned counsel for the revisionist are that initially a regular suit (Suit No. 107 of 1994) filed by plaintiff/O.P. Nos. 1 to 18 in the court of IVth Additional Chief Judicial Magistrate/Additional Civil Judge (Sr. Div.), Sultanpur in which the present revisionists are defendants.

4. On the basis of pleadings, the issues were framed by the trial court and issue No. 5 and 6 are as under:-

(a) whether the present suit is barred in view of the provisions as provided under Section 22 of the U.P. Intermediate Education Act, 1921.

(b) Whether the present suit is barred as per the provisions as provided under Section 14 of Payment of Salaries Act, 1971.

5. The trial court thereafter decided the abovesaid issues as well as issue No. 7 (whether a suit in question is liable to be dismissed on the ground of non-joinder of necessary parties) as preliminary issue and by means of the impugned order dated 11.01.2010 has held that the issue Nos. 5 and 6 are a mixed question of law and fact, so the same shall be decided later on and accordingly a request has

been made by the defendant-revisionist to decide the same as preliminary issue has been rejected Whereas issue No. 7 was also decided against the defendant/respondent.

6. Aggrieved by the order dated 11.01.2001, the present revision has been filed before this Court.

7. Sri U.S. Sahai, learned counsel for the revisionist while challenging the impugned order submits that the impugned order dated 11.01.2001 passed by trial court is contrary to law because as per the provisions as provided under order 14 Rule 2(2) CPC, the trial court has to decide the issue Nos. 5 and 6 as a preliminary issue in view of the fact that the same is based on question of law because the suit filed by the plaintiff/O.P. Nos. 1 to 18 is barred as per the provisions as provided under Section 22 of the U.P. Intermediate Education Act, 1921 read with Section 14 of the Payment of Salaries Act. So, the same is liable to be quashed.

8. I have heard Sri U.S. Sahai, learned counsel for the revisionist and gone through the record, the sole and mute question which is to be decided in the present case whether in view of the provisions as provided under order 14 Rule 2(2) CPC, the issue Nos. 5 and 6 which has been framed in the instant case (to the effect that whether the suit in question is barred by the provisions as provided under Section 22 of the U.P. Intermediate Education Act, 1921 and the suit in question is barred as per the provisions of Section 14 of the Payment of Salaries Act, 1971) should be decided as preliminary issue in view of the provisions as provided under Order 14 Rule 2(2) CPC and keeping in view the said fact whether the impugned order passed by the trial court in the instant case is in accordance with law or not?

9. In order to adjudicate and decide the abovesaid question whether a issue is to be heard and decided as a preliminary issue by a Court or not, I feel appropriate to have a glance to the provisions of order XIV Rule 2 CPC:-

10. Order XIV, Rule 2 of the Code of Civil Procedure as it stood prior to the amendment made in the year 1976 read as follows:--

"R. 2. Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues, of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined."

11. Under the above provision once the court came to the conclusion that the case or any part thereof could be disposed of on the issues of law only it was obliged to try those issues first and the other issues could be taken up only thereafter, if necessity survived. The court had no discretion in the matter. This flows from the use of the word "it shall try those issues first".

Material change has been brought about in legal position by amended 0.14, R. 2 and after the amendment made by Act 104 of 1976 which came into effect on 1-2-1977, the Order XIV Rule 2(2) CPC is as follow:-

"R. 2(1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force,

and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue."

12. The word "shall" used in old 0.14, R. 2 has been replaced in the present Rule by the word "may". Thus now it is discretionary for the Court to decide the issue of law as a preliminary issue or to decide it along with the other issues. It is no longer obligatory for the Court to decide an issue of law as a preliminary issue.

13. Another Change brought about by the amended provision is that not all issues of law can be decided as preliminary issues. Only those issues of law can be decided as preliminary issues which fell within the ambit of Clauses (a) and (b) of sub-r. (2) of R.2 of O. 14. Cl. (a) mentions "jurisdiction of the Court" and clause (b) deals with "bar to the suit created by any law for the time being in force."

14. Thus, Sub-rule (2) leaves discretion upon the Court. It is not mandatory on the Court to decide the question of the jurisdiction or other issues relating to the maintainability of the suit. Sub rule (I) of Rule 2 mandates a Court that not with standing that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

15. The intention of the Legislature is that instead of prolonging the suit by first deciding a preliminary issue and thereafter deciding other issues, be avoided as far as possible, if all the issues are decided that may avoid unnecessary multiplicity of the proceedings in relation to deciding the preliminary issue. It is open for the Court, however, in some circumstances if it is apparently clear that the suit is not maintainable or barred by jurisdiction, to dispose of such issue, may decide such issues as preliminary issue.

16. In the case referred of ***M/s. Ram Babu Singhal v. M/s. Digamber Parshad Kirti Parshad. AIR 1988 All 299.*** It has been held in "paragraphs 6" as under:--

"However, when the Court comes to the conclusion that the question of jurisdiction of the Court depends upon the detailed evidence of the parties which are almost identical with the matter which relates to other *issues in the suit and the Court comes to the conclusion that this could not be decided as a preliminary issue it cannot be said that the Court committed any error of jurisdiction or illegality. There is nothing in S. 21, which makes it mandatory for the Court to decide the question of jurisdiction as a preliminary issue."*

17. In the case of **Aligarh Muslim University and others Vs. 8th Additional District Judge, Aligarh and others 1995 (13) LCD 252** wherein it has been held as under:-

" In the courts in our country litigations are pouring in day in & day out and the courts must exercise their judicial prudence to dispose of the matters at the earliest and such objection of the present nature, as was raised by the defendants in the suit, should have been taken first without going at that stage to the exercise of calling for bundles of documents. I am not, at this stage, recording any judicial finding on the necessity or otherwise of the documents as I feel that the court of the first instance should have decided the preliminary issue on the eligibility of Miss. Gulshan Akhtar which could have ended the suit at that stage itself, if the objection was sustained."

In the case of **K.G. Plasto Chem (I) Private Limited Vs. M/s Tulison Industrial (Machines) Pvt. Ltd. and others 2009 All. C.J. 1370,** the court in para Nos. 12, 18 & 22 has held as under:-

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

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

Para 22 - *Since another essential ingredient for operation of provisions of Order XIV, Rule 2 (2) is that the issue of law must relate either to the jurisdiction of Court, or to a bar to the suit created by any law' for time being in force, therefore, now next question arises for consideration as to whether issue of res judicata relates to the jurisdiction of Court or to a bar to the suit created by any law for the time*

being in force? In this connection it is necessary to point out that under the provisions of Order XIV, Rule 2 (2), C.P.C. where the issue of law relates to the jurisdiction of the Court or to a bar to the suit created by law for instituting the claim, the same shall be tried as preliminary issue. Thus the issue of res judicata must have some material bearing with the jurisdiction of the court to try subsequent suit or issue in a subsequent suit which has been directly and substantially in issue in former suit and has been heard and finally decided by the Court having competence to decide such suit or issue. Therefore, in this manner, the issue of res judicata, in my considered opinion, must relate to the jurisdiction of the Court and also create a bar by law for time being in force to try a subsequent suit and thus satisfies the essential ingredients of Order XIV, Rule 2 (2), C.P.C."

18. In view of the abovesaid facts and legal position which has been stated in the preceding paragraphs, and from a perusal of sub- Rule 2 Order 14 it is clear that an issue of law may be tried as a preliminary issue provided it relates to the jurisdiction of the Court or to a bar to the suit created by law for the time being in force.

19. For the foregoing reasons, the revision is allowed, the impugned order dated 11.01.2001 passed by trial court is set aside and the matter is remanded back to the trial court to decided the issue Nos. 5 and 6 as a preliminary issue after giving opportunity of hearing of the parties expeditiously preferably within a period of three months from the date of receiving of the certified copy of this order.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.09.2010

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

Special Appeal No. 78 of 2003

Chandra Bhan Pratap Singh ...Petitioner
Versus
Executive Engineer, Deoria and others ...Respondents

Counsel for the Petitioner:
Sri Surendra Tewari
Sri Vikas Kumar Mishra

Counsel for the Respondents:
C.S.C.

U.P. Govt. Servant (Discipline and Appeal) Rules 1999- Rule 9-Punishment without following procedure provided in Rule 9-suggestion of previous enquiry officer regarding warning-ignored without recording any reason-change of enquiry officer by D.M. (Incharge) subsequent enquiry report-quantify huge amount of recovery-without giving opportunity to the appellant deniei of enquiry report being confidential record-held-such approach not only unlawful but malice in law-Single Judge ignored this material aspect committed great error-enquiry Report along with punishment quashed-direction to conclude fresh enquiry within specified period given.

Held: Para 25 and 26

Lastly the disagreement appears to be not recorded in accordance with Rule 9 of the 1999 Rules, inasmuch as, it is founded on surmises, namely that if the schemes have been implemented by the appellant after his suspension then the guilt is established. There is nothing indicated in the impugned order about

any such implementation having been carried out after the suspension as alleged, and which also stands corroborated as the order was passed in the absence of the original file. The conclusion drawn that if a thief is caught with stolen goods, then subsequent return of the goods, does not absolve him of the guilt, is an expression of a rhetoric which cannot supplant or substitute the reasons, which are required for holding of a re-inquiry.

In our opinion, the order dated 24th October, 2001 does not pass the test of Wednsebury reasonableness, which is inbuilt and expressly provided for in Rule 9 of the Rules. The order, therefore, is unsustainable in law.

Case law discussed:

JT 1993 (6) SC 1, (2003) 4 SCC 739

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

1. This appeal questions the correctness of the decision of a learned Single Judge in a writ petition filed by the appellant challenging the imposition of recovery of a certain amount on alleged charges of misappropriation and embezzlement. The petition failed upon a finding that it was devoid of merits, hence this appeal.

2. The appellant is a tube-well operator working under the authority of the Executive Engineer, Tube-well Division-II, Head Office Salempur, District Deoria. The appellant was suspended on three charges, vide order dated 6th January, 2001. The suspension order recites that under the Maternity Benefit Scheme, a sum of Rs. 12,700/-had not been distributed and had been misappropriated. Similarly an amount of Rs. 1,49,500/-for the Girl Child Development Scheme was also misappropriated. The third allegation was that under the Jawahar Rojgar Scheme, the proposed construction to certain extent were not carried out and an amount of Rs.2,44,000/-for the said purpose was embezzled.

3. The suspension order simultaneously appoints Mr. K.P. Dwivedi, the District Agricultural Officer, Deoria as an Enquiry Officer to conduct the enquiry.

4. The appellant appears to have moved an application on 22nd January, 2001 for change of the Enquiry Officer on certain allegations. The petitioner was served with a charge sheet dated 25th January, 2001 calling upon him to submit his reply.

5. During the pendency of this appeal, we had directed the learned Standing Counsel to produce the original records, which has been placed before us.

` 6. From a letter dated 27th June, 2001 available in the records, it appears that Mr. K.P. Dwivedi, Enquiry Officer, had been transferred and consequently, the Executive Engineer sent the said letter, calling upon the District Agricultural Officer to proceed with the enquiry against the appellant and the appellant was called upon to submit his reply to the charges to the said authority.

7. The enquiry report was submitted by the succeeding Enquiry Officer Mr. Amar Deo Singh on 18th July, 2001 and the appellant was found guilty of the charges of having misappropriated a sum of Rs. 2,300/- only. The Enquiry Officer further suggested that the appellant should be issued an warning. The said enquiry report was submitted before the Executive

Engineer, who forwarded the same to the Chief Development Officer, Deoria for approval and appropriate action.

8. The report appears to have been placed before the then District Magistrate (In-charge) who passed an order on 24th October, 2001 that the enquiry had been entrusted to Mr.K.P. Dwivedi and, therefore, the report submitted by Sri Amar Deo Singh, District Agricultural Officer was sheer nonsense and is a concocted story. He further opined that the original documents are not appended to the file. It was also stated therein that there are no details as to when the Maternity Benefit Scheme or the Girl Child Development Scheme were implemented, and in case the implementation has been carried out after the suspension of the appellant, then the guilt is established. The logic given in support of this conclusion is that, if a thief is caught and he then returns back the stolen property, he cannot absolve himself of the guilt. He, therefore, directed that Mr. Vijay Nath Mishra, Assistant Director (Savings), who is an honest officer should be asked to conduct the enquiry against the appellant.

9. The appellant filed Civil Misc. Writ Petition N, 35581 of 2001 for quashing of the suspension order dated 6th January, 2001, which was disposed of 0n 8th November, 2001, with a direction to the Executive Engineer to complete the departmental proceedings.

10. A notice was issued to the appellant on 07.02.2002 calling upon him to show cause and to submit a reply. The said show cause notice recites that the District Magistrate/Chief Development Officer vide note dated 24.10.2001 had disagreed with the earlier enquiry report whereafter an enquiry was got conducted through Sri Vijay Nath Mishra. The appellant on 15th February, 2002 wrote a letter to the disciplinary authority namely the Executive Engineer that the said show cause notice cannot be replied unless the appellant is provided opportunity to inspect the entire file as he was not aware of the second enquiry having been set up and conducted through Dr. Vijay Nath Mishra.

11. The reply was submitted on 19th February, 2002 whereafter the Executive Engineer passed the order dated 29th April, 2002 holding that the appellant was guilty of having misappropriated an amount of Rs.4,77,325, hence the same should be realized from him @ Rs.3,500/- per month to be deducted from his salary in installments. This order was assailed by the appellant in the writ petition giving rise to the present appeal and an interim order was passed on 14.06.2002 staying the recovery proceedings.

12. The respondents filed a counter affidavit through the Executive Engineer. The stand taken by the respondents is that the reply to the show cause notice given by the petitioner was not found to be satisfactory and the subsequent enquiry which was conducted established that the appellant was guilty of misappropriation, In paragraph 15 of the counter affidavit, it was categorically stated that in view of the reply submitted by the appellant to the enquiry proceedings conducted earlier, and the reply to the show cause notice, it was not necessary to associate the appellant with the subsequent enquiry proceedings. It has further been averred therein that the enquiry report and the evidence in support thereof is confidential

and, therefore, there was no obligation to disclose the same to the appellant.

13. The writ petition was dismissed holding that since the appellant had been given an opportunity to show cause and, therefore, the argument that the appellant was not given any opportunity is not correct.

14. Learned counsel for the appellant submits that the learned Single Judge committed a manifest error in disposing of the matter without adverting to the facts in relation to the second enquiry that was conducted and has, therefore, misdirected himself on the said issue resulting in miscarriage of justice. He submits that the impugned judgement having proceeded on erroneous assumptions deserves to be set aside.

15. He further submits that Rule 9 of the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999 (hereinafter referred to as 'the 1999 Rules') has not been followed and the entire subsequent enquiry proceedings are vitiated. It is urged that the subsequent enquiry proceedings are an outcome of malafides of the then District Magistrate (In-charge), who for no valid reason got another enquiry conducted without associating the appellant with the same, and relying on the subsequent enquiry report, the impugned order has been passed, which is in violation of principles of natural justice.

16. Learned counsel for the appellant submits that the copy of the enquiry report was not given to the appellant and apart from thet, in view of there being a substantive departure from the rules and procedure, the entite action smacks of arbitrariness, He submits that there was no occasion for any re-enquiry in the circumstances as indicated in the order dated 24th October, 2001. The learned Single Judge did not appreciate the controversy in correct perspective and has wrongly applied the ratio of the decisions referred to in the judgement.

17. Mr. M.S. Peparsenia, learned Standing Counsel submits that the appellant had been given full opportunity to contest the charges and the District Magistrate (In-charge) was justified in ordering a reenquiry keeping in view the fact that the enquiry report submitted earlier was not found to be credit worthy. He submits that on merits, it is evident that the appellant was guilty of the charges even on the basis of the earlier report and hence, the appellant deserved to be punished. His contention is that the subsequent enquiry is not vitiated and is founded on the same material, which existed at the time of the first enquiry. The appellant having failed to give any satisfactory reply to the conclusions arrived at by the authority the order of recovery cannot be faulted with.

18. Having heard learned counsel for the parties, it would be apt to quote Rule 9 of the 1999 Rules to reflect the procedure applicable to an enquiry against a Government servant:

"9. Action on Inquiry Report.- *(1) The disciplinary authority may, for reasons to be recorded in writing, remit the case for re-inquiry to the same or any other Inquiry Officer under intimation to the charged Government servant. The Inquiry Officer shall thereupon proceed to hold the inquiry from such stage as*

directed by the disciplinary authority, according to the provisions of Rule 7.

(2) The disciplinary authority, if it disagrees with the findings of the Inquiry Officer on any charge, record its own findings thereon for reasons to be recorded.

(3) In case the charges are not proved, the charged Government servant shalll be exonerated by the disciplinary authority of the charges and inform him accordingly;

(4) If the disciplinary authority having regard to its findings on all or any of charges is of the opinion that any penalty specified in Rule 3 should be imposed on ***the charged Government servant, he shall give a copy of the inquiry report and his findings recorded under sub-rule (2) to the charged Government servant and*** *require him to submit his representation if he so desires, within a reasonable specified time. The disciplinary authority shall, having regard to all the relevant records relating to the inquiry and representation of the charged Government servant, if any, and subject to the* ***provisions of Rule 16 of these rules, pass a reasoned order imposing one or more penalties mentioned in Rule 3 of these rules*** *and communicate the same to the charged Government servant.*

19. The facts I this case disclose that the appellant was subjected to a disciplinary enquiry under the suspension order dated 6th January, 2001 and Mr. K.P. Dwivedi was appointed as an Enquiry Officer. From the records produced by the learned Standing Counsel and the letter dated 27th June, 2001, it is clear that the appointment of the said Enquiry Officer was objected to by the appellant with a request to appoint somebody else as an Enquiry Officer. However, before the said application could be disposed of, Mr. K.P. Dwivedi, Enquiry Officer had already been transferred and Mr. Amar Deo Singh had taken over charge as the District Agricultural Officer.

20. A perusal of the said letter further indicates that the appellant was directed to submit his reply before the District Agricultural Officer as his application for change of Enquiry Officer became Mr. K.P. Dwivedi. This document, therefore, establishes that the District Agricultural Officer was appointed as an Enquiry officer to proceed with the matter and the same also stands corroborated by the averments contained in Para 5 of the counter affidavit to the writ petition.

21. Upon submission of the reply, the enquiry was completed by Mr. Amar Deo Singh, Enquiry Officer who submitted his report on 18th July, 2001 and recommended a recovery of Rs. 2,300/- with a warning to be issued to the appellant in order to avoid any further repetition of such acts. The said report appears to have been placed before the Executive Engineer, who is the disciplinary authority and in stead of proceeding on the same, the said report was forwarded to the Chief Development Officer for approval and appropriate action. The matter travelled up to the District Magistrate(In-charge) who expressed his anguish in the order dated 24th October, 2001 as noted above and ordered a fresh enquiry.

22. In our considered opinion and keeping in view the provisions of Rule 9 of the 1999 Rules, the reasons to be recorded for holding a re-enquiry have to be founded on some valid criteria. In the instant case, the District Magistrate (In-charge) has opinionated that the enquiry had been entrusted to Mr. K.P. Dwivedi and, therefore, no other officer should have conducted the enquiry. He described the enquiry report of fMr. Amar Deo Singh dated 18th July, 2001 as sheer nonsense tailored to suit the appellant and that it is a piece of story writing. To our mind the first reason given that the enquiry had been entrusted to Mr. K.P. Dwivedi and not to Mr. Amar Deo Singh is against records. From the letter dated 27th June, 2001, it is more than clear that the appellant had objected to Mr. K.P. Dwivedi being appointed as an Enquiry Officer and a request had been made to change him. Before the said application could be disposed of, Mr. Dwivedi had already been transferred without submitting any enquiry report and by the same order dated 27th June, 2001 of the Executive Engineer, the then District Agricultural Officte, Mr. Amar Deo Singh, was directed to conclude the enquiry after receiving the reply of the appellant. Thus, Mr. Amar Deo Singh was fully authorized under a valid order to proceed to hold the enquiry, which aspect has been completely overlooked by the then District Magistrate (In-charge) while passing the order on 24th October, 2001.The disagreement on this count is therefore, without any basis.

23. The second reason given is that the file did not contain the original records. It is surprising as to why, without looking to the original records the District Magistrate (In-charge) proceeded to order a re-enquiry which reflects non-application of mind.

24. The third reason given that the enquiry report of Mr. Amar Deo Singh is sheer nonsense and is a story to set up to shield the appellant, is also an irrational conclusion without referring to any part of the enquiry report. To describe the document as sheer nonsense, appears to be a rash decision, which reflects non-application of mind and is founded on mere anguish and anger. It is well said that the anger is the enemy of reason.

25. Lastly the disagreement appears to be not recorded in accordance with Rule 9 of the 1999 Rules, inasmuch as, it is founded on surmises, namely that if the schemes have been implemented by the appellant after his suspension then the guilt is established.There is nothing indicated in the impugned order about any such implementation having been carried out after the suspension as alleged, and which also stands corroborated as the order was passed in the absence of the original file. The conclusion drawn that if a thief is caught with stolen goods, then subsequent return of the goods, does not absolve him of the guilt, is an expression of a rhetoric which cannot supplant or substitute the reasons, which are required for holding of a re-inquiry.

26. In our opinion, the order dated 24th October, 2001 does not pass the test of Wednsebury reasonableness, which is inbuilt and expressly provided for in Rule 9 of the Rules. The order, therefore, is unsustainable in law.

27. Apart from this, we have our reservations about the authority of the District Magistrate (In-charge) top pass

such order in relation to the disciplinary proceedings where the Executive Engineer is the disciplinary authority, It appears that the District Magistrate was annoyed with the enquiry report and the order was issued in sheer disgust by the authority.

28. Having held so, even the so called second enquiry was held without participation of the appellant and without associating him with the proceedings and apprising him of the contents of the enquiry report. This issue need not detain us for long in view of the specific averment contained in paragraph 15 of the counter affidavit of Mr. Sunil Kumar filed before the learned Single Judge. The entire enquiry proceedings, subsequently conducted, has been indicated to be a secret affair and it has been adverted therin that it was not obligatory in law for the respondents to associate the appellant in the subsequent enquiry as all such proceedings and the documents including the enquiry report were confidential. The aforesaid approach is not only unlawful but also appears to be suffering from malice in law.

29. Learned counsel for the appellant has, therefore, rightly relied on the decision in the case of ***Managing Director, ECIL, Hyderabad Vs. B. Karunakar*** reported in ***JT 1993 (6) SC 1.*** The non supply f the enquiry report and not allowing the appellant to be associated with the second enquiry is clearly violative of principles of natural justice and all the provision of fair play. It is also in violative of Rule 9 of 1999 Rules which specifically requires that an order shall be passed only after service of the enquiry report on the delinquent employee.

30. The appellant has ben prejudiced as is evident from a perusal of the impugned order inasmuch as the previous enquiry report indicated the appellant in an altogether different manner as noticed above whereas the subsequent enquiry report quantities a huge amount of recovery from the appellant, which has been imposed without giving him any opportunity to rebut the same. The second enquiry report, which has been filed along with the counter affidavit before this Court dated 15.01.2002 records its conclusion on the basis of the material which had been collected earlier but all conclusions run counter to the earlier report.

31. In our opinion, this seriously prejudices the rights of the appellants and hence the proceedings are clearly vitiated. If the authority has been conferred with a power, the said exercise of power has to be for the purpose for which it has been conferred and not for any oblique purpose. In the instant case, the anguish of the District Magistrate (In-charge) was made the basis of the material available on record and, therefore, the action suffers from malice in law enunciated by the Apex Court in the case of ***State of A.P. And others Vs. Goverdhanlal Pitti*** reported in ***(2003) 4 SCC 739*** (Paragraph 12).

32. The order impugned in the petition records only conclusions and no cogent reasons. It does not objectively deal with the defence of the appellant and is therefore vitiated.

33. For the reasons given hereinabove, the subsequent enquiry proceedings and the punishment order are unsustainable and, therefore, the learned

Single Judge committed an error by dismissing the writ petition.

34. Accordingly, the subsequent enquiry proceedings under the order of the District Magistrate (In-charge) dated 24.10.2001 and the impugned order date 29th April, 2002 are quashed. The judgement of the learned Single Judge dated 14.01.2003 is set aside. The appeal is allowed and the matter stands remitted to the Disciplinary Authority in terms of Rule 9 of the 1999 Rules leaving it open to the Disciplinary Authority to proceed from the stage of the submission of the first enquiry report. It shall be open to the Disciplinary Authority to conclude the proceedings as expeditiously as possible preferably within a period of three months from the date of production of a certified copy of this order.

SUPERVISORY JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.12.2010

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Misc. Writ Petition No. 719(M/S) of 2002

Ram Pal ...Petitioner
Versus
Board of Revenue U.P. and others ...Respondents

U.P. Land Revenue Act-readwith U.P. Land laws (Amendment) Act 1997 Section-219-Second Revision before Board of Revenue-held not maintainable-keeping in view of amended provision by which the provision of Section 218 omitted-amended provision enforcible w.e.f. 18.08.1997-revision itself decided by Addl. Commissioner in 2001-against that order of remand by Board of Revenue itself without jurisdiction-protection of section 10 not available.

Held: Para 12

Thus what was been protected under Section 10 is the reference made under Section 218 of U.P.Land Revenue Act, 1901, which was pending before the Board on 18th August, 1997 i.e. the date of commencement of the said amendment. Such pending reference shall continue to be heard and decided by the Board as the Act has not been enacted. It is not the case of the parties before this Court, in the case in hand, that any such reference was pending before the Board and that has been answered after 18th August, 1997. The revision decided by the Addl. Commissioner obviously was pending before him since no reference was made to the Board. Atleast this is evident from the record. Hence the question of attracting Section 10 of U.P. Act 20 of 1997 would not arise. The said revision having been decided in 2001, no further revision was liable to be entertained under Section 219 by the Board as there was no other provision except 219 wherein a revision could have been decided by the Commissioner or the Board, as the case may be, but not one after the other as if the subsequent authority is deciding the second revision. In Shri Ram (supra) it appears that a reference was made under Section 218 to the Board before 18th August, 1997 and after the amendment of the Act, Board of Revenue remanded the matter to Addl. Commissioner for deciding the matter as a revision. This Court took the view that such reference could not have been remanded since it was not protected under Section 10 of the Amendment Act and ought to have been decided by the Board itself.

Case law discussed:

1990 (90) RD 467, 2000 (18) LCD 1401, 1974 ALJ (72) 295, 1983 All. L.J. NOC 1, AIR 1957 All. 205, 1980 All. L.J. 904, Writ Petition No. 25961 of 2008(Smt. Anisa Khan Vs. State of U.P. and others), 1996 (87) RD 569, 2004 (96) RD 656, 2007 (102) RD 20

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

1. Heard Sri K.S.Rastogi for the petitioner, learned Standing Counsel for respondent No.1, Sri Ram Prakash Shukla (respondent No.2), who is appearing in person and Ms. Savita Jain appearing for rest of the private respondents. As requested and agreed by learned counsel for the parties, this writ petition is being heard and decided under the Rules of the Court at this stage.

2. Basically, the orders impugned in the writ petition arising out of the mutation proceedings, this Court would have declined to exercise its extra ordinary equitable jurisdiction under Article 226 of the Constitution of India but considering submission that the impugned revisional order is wholly without jurisdiction, which is a well established exception in such matter, as referred above, I am inclined to proceed further decide the matter accordingly.

3. The short question up for consideration is whether after amendment made in 1997, second revision would lie or not.

4. The petitioner initiated mutation proceedings before Tehsildar Mohammadi, District Khiri relying on a registered Will-deed dated 13.12.1990 alleged to be executed by Shiv Narain Lal with regard to the land situated in village Bhoora Pipri, Pargana and Tehsil Mohammadi. Respondents No.2 to 6 preferred their objection challenging the Will. The execution as well as registration of Will deed, both was challenged. The application was ultimately allowed on 21.11.1995 and Addl. Tehsildar, Mohammadi (Kheri) directed to record the name of petitioner and his brother Ram Lal in place of Shiv Narayan Lal. Respondents No.2 to 6 filed an appeal before the Sub-Divisional Magistrate Mohammadi (Kheri). The appeal was dismissed on 03.09.1996 whereagainst a revision was filed, which was rejected by the Addl. Commissioner on 6th May, 2000. The second revision preferred before the Board of Revenue has been allowed by the impugned order dated 29th August, 2001.

5. Learned counsel for the petitioner submits that in view of U.P. Land Laws (Amendment) Act, 1997 (U.P. Act 20 of 1997) (hereinafter referred to as "Amendment Act of 1997"), which came into force on 18th August, 1997, Section 218 was omitted and 219 was substituted in the Act conferring power upon Board of Revenue or the Commissioner or the Addl. Commissioner or the Collector etc. to decide revisions. Hence second revision was not maintainable, after the amendment, before the Board of Revenue and in this regard placed reliance on a single judge decision in **Shri Ram Vs. Board of Revenue, U.P. and others 1999 (90) RD 467.**

6. On the contrary, Ms Savita Jain firstly contended that a notification under Section 4 of U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as '1953 Act') has been published on 9th August, 2008 which included the land in question and therefore, in view of Section 5(2) of 1953 Act, the writ petition shall stand abated due to consolidation operation going on in Village Bhoora Pipari, Post Office Sisora Nikoompur, District Lakhimpur. She as well as Sri Ram Prakash Shukla (respondent No.2) (in person), contended that the order of mutation was obtained by the petitioner relying on a forged and fictitious Will and therefore, the impugned

order passed by the Board of Revenue resulted in substantial justice, hence it is a fit case whereunder Article 226 of the Constitution of India this Court may not exercise its equitable jurisdiction and even if the second revision was not maintainable, the order impugned may not be interferred.

7. It is further contended that it is not a case of second revision. Prior to Amendment Act of 1997, the respondents No. 2 to 6 had preferred an appeal before the Addl. Commissioner under Section 218 but after the amendment of the statute, the same was treated to be revision and has been decided accordingly. Therefore, what they say is that it is not a case of second revision, and Board of Revenue has rightly relied on the decision of this Court in **Kali Shankar Dwivedi Vs. Board of Revenue & Anr. 2000 (18) LCD 1401.**

8. Coming to the first question about the abatement of the proceedings of writ petition, taking recourse to Section 5(2)(a) of 1953 Act, I find that this issue has been decided by a Full Bench of this Court in **Udai Bhan Singh Vs. Board of Revenue, U.P. at Allahabad & Ors. 1974 ALJ (72) 295** and the Court answered this issue in para 16 of the judgment as under:

"By the Court.- The answer to the question referred is that Sec.5(2)(a) of the U.P. Consolidation of Holdings Act has no impact on writ petitions or special appeals arising out of them in which judgments or orders passed in suits or proceedings relating to declaration of rights in land covered by Notification under Sec. 4 of the said Act are in challenge."

9. Therefore, the submission advanced by Ms Savita Jain referring to Section 4 notification is negatived.

10. Now coming to the question whether revision made before the Board of Revenue is maintainable in view of the amendment made in 1997, in my view, the revision filed before the Board of Revenue despite the aforesaid amendment would not be maintainable.

11. I quote hereat Section 10 of U.P. 20 of 1997 which is a transitory provision and has protected the pending revision and reads as under:

"Notwithstanding anything contained in this Act all cases referred to the Board under Section 218 of the U.P. Land Revenue Act, 1901, or under Section 333-A of Uttar Pradesh Zamindari0.00" Abolition and Land Reforms Act, 1950 as they stood immediately before the commencement of the Act and pending before the Board on the date of such commencement shall continue to be heard and decided by the Board as if this Act has not been enacted."

12. Thus what was been protected under Section 10 is the reference made under Section 218 of U.P.Land Revenue Act, 1901, which was pending before the Board on 18th August, 1997 i.e. the date of commencement of the said amendment. Such pending reference shall continue to be heard and decided by the Board as the Act has not been enacted. It is not the case of the parties before this Court, in the case in hand, that any such reference was pending before the Board and that has been answered after 18th August, 1997. The revision decided by the Addl. Commissioner obviously was pending before him since no reference was made to the Board. Atleast this is evident from the record. Hence the question of attracting Section 10 of U.P. Act 20 of 1997 would not arise. The said revision having been

decided in 2001, no further revision was liable to be entertained under Section 219 by the Board as there was no other provision except 219 wherein a revision could have been decided by the Commissioner or the Board, as the case may be, but not one after the other as if the subsequent authority is deciding the second revision. In **Shri Ram (supra)** it appears that a reference was made under Section 218 to the Board before 18th August, 1997 and after the amendment of the Act, Board of Revenue remanded the matter to Addl. Commissioner for deciding the matter as a revision. This Court took the view that such reference could not have been remanded since it was not protected under Section 10 of the Amendment Act and ought to have been decided by the Board itself.

13. In **Kali Shanker Dwivedi (supra)** the detailed facts have not been given as to when the matter was filed and decided by the Commissioner and when the revision was filed before the Board of Revenue. The two authorities, in my view, as such may not help the parties before me in answering the issues specifically raised in this case. In my view, the Board of Revenue has also erred in law relying on the decision in **Kali Shanker Dwivedi (supra)** without looking into the fact that Section 10 of Amendment Act of 1997 which says otherwise, was confined to the reference already pending before the Board of Revenue under Section 218 of U.P. Land Revenue Act, 1901 or under Section 333-A of U.P.Z.A. & L.R. Act, 1950 and none else.

14. So far as the question of genuinity of Will-deed is concerned, tentatively it would not have been seen in summary proceedings. It is always open to the party aggrieved to take up the matter in regular suit since an order passed in mutation proceedings does not confer a title which otherwise is not vest. For such purpose, a regular suit is always a remedy open to the party concerned. This Court in **Arjun Vs. Board of Revenue & others 1983 All. L.J. NOC 1**, placing reliance on **Jaipal Vs. Board of Revenue AIR 1957 All. 205** and **Lekhraj & another Vs. Board of Revenue & others 1980 All. L.J. 904** dismissed the writ petition challenging the revisional order arising out of mutation proceedings, observing that the aggrieved party has efficacious alternative remedy of suit for seeking redressal of his grievance, hence petition is not maintainable.

15. Recently, an Hon'ble Single Judge of this Court in **Writ Petition No. 25961 of 2008 (Smt. Anisa Khan Vs. State of U.P. and others)** decided on 29.7.2010 placing reliance on **Jaipal Vs. Board of Revenue (supra), Summer Lal Vs. Board of Revenue 1996 (87) RD 569, Sahed Jan @ Bonde Vs. Board of Revenue 2004 (96) RD 656 and Jagdish Narain Vs. Board of Revenue 2007 (102) RD 20,** observed as under:

"All the three authorities have decided the mutation proceedings and as such being summary in nature cannot be the subject matter of interference in this writ petition since the said impugned orders do not confer any title on the respondents and are only made for the purpose of either realization of land revenue or to refer to possession at that time."

16. Therefore the question of genuity of Will deed cannot be decided in summary proceedings.

17. In view of the above, writ petition is allowed. The impugned order dated 29.08.2001 passed by the Board of Revenue

(Annexure No.4 to the writ petition) is hereby set aside.

18. There shall be no order as to costs.

APPELLATE.JURISDICTION
CIVIL.SIDE
DATED: LUCKNOW 30.11.2010

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE VIRENDRA KUMAR DIXIT, J.

Special Appeal No.-758 of 2009

Srmaamiksha Ve 5601 (M/S) 05 ...Petitioner

Versus

University Of Lucknow Through Its Vice Chancellor Lko. and other ...Respondents

Counsel for the Petitioner:
Inperson

Counsel for the Respondents:
U.N.Mishra

Constitution of India, Art.226-Right to admission-petitioner appellant being much below in merit of admission test in 3 years LLB course-writ court directed the V.C. For consideration of representation on assumption of existing several vacant seat-rejected order challenged-by interim measure-appellant allowed by the Court to peruse LLB and result declared-provisionally-appellant got enrolled by Bar Council as an Advocate-applied for admission in LLM in meantime writ petition dismissed-considering Doctrine of merger interim order merge in final order-Single Judge dismissed the petition-held-proper-considering maxim "Actus Curiae neinem gravabit"-appellant spent substantial portion of his life-no allegation of fraud in getting admission in LLB-order of Single Judge modified maintaining the direction to the extent for refusal admission in LLM course-but set-a-side to the extent of rejecting LLB degree with all consequential benefits

Held: Para 18 and 19

Accordingly, we are of the view that benefit availed by the the appellant in pursuing her study of LL.B. Course, and consequential registration as an Advocate with the Uttar Pradesh State Bar Council, should not be annulled.

However, so far as the finding recorded by the Hon'ble Single Judge with regard to admission in LL.M. Course is concerned, requires no interference. Since the admission of the appellant in LL.B. Course was in pursuance of interim order passed by this Court, we are maintaining the appellant's right, on the basis of admission of LL.B. Course, however, the appellant cannot be permitted to pursue her further studies in pursuance of the orders of this Court or application moved for LL.M. Course, 2009.

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

1. Heard the appellant in person and the learned counsel for the respondents.

2. Present appeal under Rule 5 Chapter VIII of Allahabad High Court Rules, 1952, is against the judgment and order dated 6.10.2009, passed by Hon'ble Single Judge of this Court, in Writ Petition No.5601 (M/S) of 2005.

3. The appellant preferred Writ Petition No.5601 (M/S) of 2005 whereby, an order dated 20.10.2005 passed by the Vice-Chancellor, Lucknow University was impugned. By the said order dated 20.10.2005, the Vice-Chancellor of the University has denied admission to the appellant in LLB Course and rejected representation on the ground that appellant does not qualify on merit being placed at

serial No.502 of merit list. According to respondent, the last candidate admitted under general category, was placed at the serial No.135 of the merit list.

4. The order dated 20.10.2005, impugned before the Hon'ble Single Judge, reveals that earlier, the appellant filed Writ Petition No.5051(M/S) of 2005 with the grievance that she had applied for admission to L.L.B. three years course but in spite of several vacancies, her candidature was not considered by the opposite parties. Hence the Vice-Chancellor was directed to look into the matter and take decision with regard to admission keeping in view the existing vacancy. In consequence thereof, the representation of the appellant was rejected for the lack of vacancy.

5. During the pendency of writ petition before Hon'ble Single Judge, by an interim order dated 29.5.2006 in Writ Petition No.5601 (M/S) of 2005, this Court had permitted the appellant to appear in 2nd Semester Examination provisionally and by another interim order order dated 5.1.2007, the petitioner was permitted in 3rd Semester Examination provisionally and the declaration of result was subject to outcome of writ petition. By another interim order dated 15.5.2007, the appellant was permitted to appear in the 4th Semester Examination of LLB three years course and the case was directed to be listed for final hearing. Another interim order dated 21.11.2007 was passed by the Hon'ble Single Judge permitting the appellant to appear in 5th Semester Course Examination and the respondents were also directed to declare the result of the appellant of 1st, 2nd, 3rd and 4th Semester Examination. By another interim order dated 19.4.2008 passed by the Hon'ble Single Judge, the appellant was permitted to appear in the 6th Semester of L.L.B., however, the result thereof, was directed not to be declared till further orders of this Court. Later on, by subsequent interim order dated 23.5.2008, the Court directed to declare the result of 6th Semester Examination. By subsequent interim order dated 16.7.2008, the appellant was directed to deposit entire fees with regard to admission and examination of law course and to declare the result of all semesters of LL.B. Course.

6. During the pendency of Writ Petition No.5601 (M/S) of 2005, the appellant filed another writ petition being Writ Petition No.3196 (M/S) of 2008 seeking a writ in the nature of mandamus to respondents to give admission in LL.M. Course, 2008. In pursuance of the marksheets issued from the respondent University, with regard to LL.B. Course, the appellant was enrolled to Uttar Pradesh State Bar Council, having enrolment No.03810/08 and in consequence thereof, she has been practising in this Court.

7. Before the Hon'ble Single Judge, the respondentsrelied upon the cases reported in **AIR 1992 SC 1926: State of Maharashtra Vs. Vikas Sahebrao Roundale; 1998 (5) SCC 377: C.B.S.E. Vs. P. Sunil Kumar; 1994 (6) SCC 1: State of U.P. & others. Vs. Ramona Perhar (Km.) and 2005 (23) L.C.D. 1601: Dr. Ram Manohar Lohia Awadh University Faizabad. Vs. Civil Judge (Junior Division)** in which one of us (Hon'ble Mr. Justice Devi Prasad Singh) was a member.

8. Hon'ble the Single Judge held that since the appellant was admitted for LLB in pursuance of interim order and her name in the merit list was much below the name of

last selected candidate, she was not entitled for admission and consequential studies. Accordingly, the writ petition was dismissed and deprived the appellant from all the benefits extended to her during pendency of writ petition. The prayer for admission of appellant to the LLM Course was also rejected by Hon'ble Single Judge.

9. While dismissing the writ petition, the Hon'ble Single Judge has passed the order, the operative portion of which, is reproduced as under:

"After going through the order impugned, I find that the Vice Chancellor has rightly rejected the petitioner's representation seeking admission in LL.B. course as her merit was much below to the last candidate admitted in the course and after giving admission to the candidate who was at the rank of 135, the total seats also filled up. Therefore, I do not find error in the order impugned. Since the petitioner succeeded to appear in the examination and to get declaration of result under the strength of the various interim orders passed by this Court time to time which is not permissible as has been held by the Hon'ble Supreme Court in several cases discussed here-in-above. I am of the view that the petitioner is not entitled to receive any benefit on the basis of the said result. Therefore, I hereby provide that the petitioner's result of LL.B. examination shall be nonest and she shall not be entitled to get benefit of degree of LL.B. Examination, if awarded to her.

In the result the writ petitions are dismissed."

10. There appears to be no dispute over the proposition of law that ordinarily, the student should not be permitted to appear in examination provisionally by interim order. Admission of candidates to pursue studies having no place in merit list, shall amount to slackening the standard of education. Ordinarily, in academic matters, Courts should not pass interim orders unless prima facie case is made out to grant such reliefs. In the present case, from time to time, Hon'ble Single Judge has passed the interim orders without taking note of the fact that the appellant was much below to the last selected candidate admitted for LL.B Course. Passing of such interim orders in academic matters, no doubt, shall lower down the standard of education. It would have been better in case the writ petition filed by the appellant should have been decided at an early date preferably, at initial stage. However, sometimes, delay is caused because of non-filing of counter affidavit by the State Government or its instrumentalities and universities. In absence of counter affidavit being not filed by the State Government or its instrumentalities or universities, the interim orders are passed but while passing interim orders, care must be taken that whether the person who approached the Court, has prima facie, a case for admission to course concerned or not. Only in the event of clinching evidence and prima facie case in the academic matters, the interim orders may be passed.

11. It is settled law that interim order merges to the final order passed in a petition or suit. Accordingly, in our opinion, Hon'ble Single Judge has rightly held that since the writ petition is dismissed, all the reliefs given to the appellant, shall lose its sanctity. However, in the present case, it appears that the appellant has not only passed the LL.B. Course but has enrolled herself with the Uttar Pradesh State Bar Council.

12. It is not disputed fact on record that the appellant has got admission in LL.B. Course though her name was below the lowest selected candidate in pursuance of interim order. It appears that the appellant was admitted to LL.B. Course not in order of merit but against the existing vacancies.

13. In the case reported in **1994 (6) SCC 241:Kumari Madhuri Patil and another. Vs. Addl. Commissioner, Tribal Development and others,** Hon'ble Supreme Court has dealt with the case where candidate applied for admission in the MBBS course and in pursuance of directions issued by the High Court, she was admitted in the MBBS course and continued her studies. Though the candidate does not qualify on merit but since she was admitted in pursuance of directions issued by the High Court, she was permitted to complete her course with the following observations:

"18. The delay in the process is inevitable but that factor should neither be considered to be relevant nor be an aid to complete the course of study. But for the fact that she has completed the entire course except to appear for the final examination, we would have directed to debar her from prosecuting the studies and appearing in the examination. In this factual situation no useful purpose would be served to debar her from appearing for the examination of final year MBBS. Therefore, we uphold the cancellation of the social status as Mahadeo Koli fraudulently obtained by Km. Suchita Laxman Patil, but she be allowed to appear for the final year examination of MBBS course. She will not, however be entitled in future for any benefits on the basis of the fraudulent social status as Mahadeo Koli. However, this direction should not be treated and used as a precedent in future cases to give any similar directions since the same defeats constitutional goals."

14. In another case reported in **2001 SCC (L&S) 117: State of Maharashtra. Vs. Milind and others,** the aforesaid proposition based on equitable ground, has been reiterated by the Hon'ble Supreme Court. The case of **Milind** (supra) has been followed by Hon'ble Supreme Court in the case reported in **(2004) 2 SCC 105: R. Vishwanatha Pillai. Vs. State of Kerala and others,** with the following observations:

"27. In *State of Maharashtra. v. Milind* a Constitution Bench of this Court while permitting the candidate to retain the degree obtained by him even though his claim as member of the Scheduled Tribe was rejected, observed: (SCC p.31, para 38)

"38. Respondent 1 joined the medical course for the year 1985-86. Almost 15 years have passed by now. We are told he has already completed the course and may be he is practising as a doctor. In this view and at this length of time it is for nobody's benefit to annul his admission. Huge amount is spent on each candidate for completion of medical course. No doubt, one Scheduled Tribe candidate was deprived of joining medical course by the admission given to Respondent 1. If any action is taken against Respondent 1, it may lead to depriving the service of a doctor to the society on whom public money has already been spent. In these circumstances, this judgment shall not affect *the degree obtained by him and his practising as a doctor. But we make it clear that he cannot claim to belong to the Scheduled Tribe covered by the Scheduled Tribes Order. In other words, he cannot take advantage of*

the Scheduled Tribes Order any further or for any other constitutional purpose. Having regard to the passage of time, in the given circumstances, including interim orders passed by this Court in SLP (C) No.16372 of 1985 and other related affairs, we make it clear that the admissions and appointments that have become final, shall remain unaffected by this judgment." (emphasis supplied).

15. It is settled proposition of law that no one should suffer for the act of Courts. The maxim "Actus Curiae neminem gravabit", which means that the act of the Court shall prejudice no one, becomes applicable in such a case. In such a fact situation the Court is under an obligation to undo the wrong done to a party by the act of the Court. (Vide Shiv Shankar and others Vs. Board of Directors, Uttar Pradesh State Road Transport Corporation and another., 1995 Suppl. (2) SCC 726; M/s GTC Industries Ltd. Vs. Union of India and others, AIR 1998 SC 1566; and Jaipur Municipal Corporation Vs. C.L. Mishra, (2005) 8 SCC 423).

16. Though, we are of the view that the interim order should not have been passed by Hon'ble Single Judge from time to time permitting the appellant to pursue her course but keeping in view the fact that the appellant was permitted to pursue her study and completed her course and later on, enrolled with Uttar Pradesh Bar Council, she should not be put to suffer on equitable ground. The appellant has spent a substantial portion of her life to pursue her studies with regard to LL.B. Course and thereafter, enrolled with the Bar Council and has been practising as Advocate. The time is essence of life and a person cannot be deprived of his or her source of livelihood in case he or she has completed studies and thereafter entered her life as an Advocate. Things would have been different in case while approaching this Court, the appellant would have committed some fraud and obtained interim order with regard to admission in LL.B. Course and thereafter, would have got enrolled herself in Uttar Pradesh State Bar Council. In the event of commission of fraud, no equitable relief can be granted by the Courts.

17. It would be too hard to deprive the petitioner from successful completion of LL.B. Course and consequential enrolment with the State Bar Council. The clock cannot be turned back depriving the petitioner from her status more so when it is exclusively not based on interim orders passed by this Court and also not rests on commission of fraud or misrepresentation. From the record, it appears that in pursuance of the interim orders, the respondent University granted admission and the appellant continued with her studies along with her regular status without any disturbance to other candidates admitted in the same academic session.

18. Accordingly, we are of the view that benefit availed by the the appellant in pursuing her study of LL.B. Course, and consequential registration as an Advocate with the Uttar Pradesh State Bar Council, should not be annulled.

19. However, so far as the finding recorded by the Hon'ble Single Judge with regard to admission in LL.M. Course is concerned, requires no interference. Since the admission of the appellant in LL.B. Course was in pursuance of interim order passed by this Court, we are maintaining the appellant's right, on the basis of admission of LL.B. Course, however, the appellant cannot be permitted to pursue her further

studies in pursuance of the orders of this Court or application moved for LL.M. Course, 2009.

20. In view of the above, we allow the appeal in part and set aside/modify the judgment and order dated 6.10.2009 to the extent it rejects the appellant's admission of LL.B. Course and consequential reliefs. The appellant shall be entitled for all benefits with regard to admission in LL.B. Course but the judgment and order of the Hon'ble Single Judge to the extent of rejecting appellant's claim with regard to admission in LL.M. Course, is maintained.

21. Accordingly, the appeal is allowed in part.

No orders as to costs.

APPELLATE.JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.11.2010

BEFORE
THE HON'BLE PRADEEP KANT, J.
THE HON'BLE RITU RAJ AWASTHI, J.

Special Appeal No. 813 of 2010

U.P. State Road Transport Corporation and another ...Petitioner
Versus
Mirza Athar Beg and others ...Respondents

U.P. State Road Transport Corporation Employees (other than officer) Service Regulations 1981-Regulation 39-Petitioner initially appointed as Counductor on 01.11.51-promoted on post of junior clerk on 07.09.1998-Regularized 16.04.1960-after existence of corporation promoted on post of Senior Clerk-retired on 31.1.1991-petitioner/Respondent not accepted G.P.F. But claimed pension-Single Judge issued direction for pension subject to refund of G.P.F. Amount-held not proper-pension not bounty G.O. Dated 16.09.1960 having no retrospective application-being permanent employee of earstwhile Roadways-working with Corporation on deputation-service conditions can not be changed-direction for payment of pension within specified period issued.

Held: Para 34 and 35

Thus, the respondent was working on a pensionable post with the erstwhile Roadways, when he was sent on deputation to the Corporation and he being a permanent employee of the erstwhile Roadways, his conditions of service remain unaffected and unchanged even on the issuance of the Government order dated 16.9.60, notified on 28.10.60. Therefore, the respondent was fully entitled to the benefit of pension which has been granted by the learned Single Judge.

The last plea of the appellants that once the respondent had accepted the Provident Fund amount, he was not entitled to claim pension, can also not be accepted for the reason that there cannot be any estoppel against law, as the pension is not a charity or bounty and moreso when the learned Single Judge has issued a direction for refund of the amount so received by the appellants before paying amount of pension.

Case law discussed:
[Writ Petition No. 1313 (SS) of 2001], (Writ Petition No. 1226 of 1987), [Writ Petition No. 544 (SB) of 2000]

(Delivered by Hon'ble Pradeep Kant, J.)

1. Heard Sri Mahesh Chandra for the appellants and Sri Ghaus Beg for the private respondent.

2. The special appeal has been filed with a delay of one month and twenty six day. Sri Ghaus Beg has no objection in condoning the delay.

3. We also feel that the delay is not such so as to deprive the appellant of hearing on merits. The delay is, therefore, condoned.

4. The U.P. State Road Transport Corporation (hereinafter referred to as the Corporation) has preferred this special appeal against the judgement and order dated 25.8.2010 passed by the learned Single Judge, by means of which the writ petition filed by the private respondent (hereinafter referred to as the respondent) claiming pension has been allowed, with a direction that he shall return the amount of Contributory Fund, received by him.

5. The brief facts of the case are that the respondent was appointed on the post of Conductor on 1.11.51 in the erstwhile U.P. Government Roadways (hereinafter referred to as the Roadways). He was promoted on the post of Junior Clerk w.e.f. 7.9.58 in the office of the Assistant General Manager at Charbagh Depot. His promotion was regularised on 16.4.60, as is evident from the office order dated 3.3.61.

6. On 29.5.62, the State of Uttar Pradesh took preliminary steps to constitute a statutory Corporation under Section 50 of the Road Transport Corporation Act, 1950 and consequently the U.P. State Road Transport Corporation was constituted with effect from 1.6.72.

7. The respondent was promoted as Senior Clerk on 8.4.86 and was posted at City Bus Service Depot, Lucknow in the office of the Assistant Regional Manager (previously designated as Assistant General Manager). He retired while working on the post of Senior Clerk on 31.10.91.

8. The respondent did accept the Employees' Provident Fund (EPF) amount on retirement but claimed that he was entitled to pension, as he was sent on deputation from the erstwhile Roadways, where his post was pensionable and, therefore, in terms of Government order of 5.7.72, his conditions of service cannot be inferior to the conditions, which were in force and applicable to him, when he was working as a Government servant.

9. Not being able to get the desired relief, the respondent preferred the present writ petition claiming the aforesaid relief of pension. Counter affidavit was filed by the Corporation, wherein his claim was denied.

10. The learned Single Judge after considering the pleadings and the specific case of the parties, has allowed the writ petition, holding that the respondent was entitled for pension. Taking note of the fact that the respondent had already received the EPF amount, the learned Single Judge issued a further direction that this award and payment of pension would be subject to refund of the money received under the EPF account.

11. Sri Mahesh Chandra, learned counsel for the Corporation mainly argued that by virtue of the Government order dated 16.9.60, the benefit of pension, which was otherwise available to the employees who were working in the Roadways, was taken away, therefore, on the date of transfer of the respondent to the Corporation i.e. when he was sent on deputation, since he was not working on a pensionable post, he was not entitled for pensionary benefits.

12. In furtherance of the aforesaid plea, it has also been urged that by virtue of the Government order dated 5.7.72, the only requirement was that the service conditions of the employees who are sent on deputation

from the Roadways to the Corporation, would not be inferior to the one which they were enjoying as Government servants and since respondent was not having the benefit of pension in the Roadways, he cannot claim any pension.

13. We have gone through the Government order dated 16.9.60 and we find force in the argument of the learned counsel for the respondent Sri Ghaus Beg that the aforesaid Government order firstly cannot be made applicable retrospectively and secondly it does not apply to the erstwhile Roadways' employees, who were permanent.

14. Learned Single Judge has considered the Government order dated 28.10.60, as the Government order dated 16.9.60 was notified on the said date. The contents of the aforesaid two Government orders are the same.

15. Learned Single Judge has held that the aforesaid Government order cannot be given retrospective effect and that it was meant for future employees.

16. Sri Ghaus Beg in response to the aforesaid argument, submits that the respondent being a permanent Government servant on the date of issuance of the aforesaid Government order, was not covered by the same and that the view taken by the learned Single Judge does not call for any interference.

17. The Government order dated 16.9.60 which was notified on 28.10.60, takes into account the nature of service, which the Roadways employees were performing and treating it to be a nationalised commercial undertaking, it was decided to change the service conditions of the existing temporary Government employees, which were made applicable to the future entrants also. The Government order does not create any ambiguity that it was applicable on all temporary employees except those who were referred to in Para 2 of the same order.

18. The Government order says that in view of the special service conditions of the employees of the Roadways it seems necessary to evolve a new set of service conditions for the employees which may be compatible with the nature of work and functions of the organisation. It made clear, that the revised terms and conditions of service shall be applicable to all further entrants in the Roadways Organisation and shall be enforced in the manner mentioned therein. These service conditions were to be applicable to all existing temporary employees, except those mentioned in Para 2 of the Government order.

19. Para 7 of the Government order further made it clear that the revised terms and conditions of services mentioned in Para 1 shall not apply to the following categories of employees:

a) All employees working in the office-establishment of the Asstt. General Manager, General Manager, Service Manager, Chief Mechanical Engineers, Roadways Central workshop, Kanpur.

b) Supervisory staff of the rank of Junior Station Incharge and above of the Traffic side.

c) Technical staff of the rank of Junior Foreman and above on Engineering side.

20. Learned counsel for the appellants submitted that the respondent did not fall in any of the categories aforesaid, namely, sub-clauses (a), (b) and (c) of Para 7 and,

therefore, he was not covered by the aforesaid exception.

21. Sub-clause (a) of Para 7 includes the employees who were working in the office-establishment of the Assistant General Manager and the respondent was working in the office of Assistant General Manager, when in the Roadways, therefore, it cannot be said that he was not an employee covered by the said exclusion clause.

22. Apart from this the last paragraph of the Government order pronounced in unequivocal terms that these orders shall come into force with effect from October, 1960 and shall apply to all future entrants in the service of the Roadways organisation and also to the existing temporary employees who opt to continue to work on the revised terms and conditions of service. It further clarifies that the status of Roadways employees already made permanent shall remain unaffected. It further says that all existing temporary employees except those mentioned in Para 2 may be asked to indicate in writing if the new service conditions mentioned in the said order are acceptable and those who accept the new terms and conditions of service will be required to fill in a separate acceptance form which will be kept with their service record.

23. The last paragraph of the Government order, which clarifies that it was not applicable nor could be made applicable to the employees of erstwhile Roadways, who were permanent, reads as under:

"These orders shall come into force with effect from October, 1960 and shall apply to all future entrants in the service of the Roadways organisation and also the existing temporary employee who accept to continue to work on the revised terms and conditions of service. The status of Roadway employee already made permanent remains unaffected. All existing temporary employees except those mentioned in Para 2 above may be asked to indicate in writing if the new service conditions mentioned above are acceptable to those who accept the new terms and conditions of service will be required to fill in a separate acceptance form which will be kept with their service record. If, however, any of the employees do not accept the new terms their services are to be terminated in accordance with terms of their services with a term of employment. I am to suggest that the implications by the Engg. and that necessary action may please be initiated forthwith in order to implement above orders."

24. It is not the case of the appellants that the respondent was not a permanent employee of the Roadways. It is also not being disputed by the Corporation that the status of Roadways employees, who were permanent, remained unaffected under the said Government order dated 16.9.60. It is also not the case of the appellants that the respondent was ever treated as temporary employee and that he was asked to indicate his option in writing, if he was agreeable to new service conditions mentioned in the aforesaid Government order and if so, he has filled the prescribed form.

25. There was no occasion for the respondent to fill in any such form of acceptance of new service conditions nor any such option appears to have been asked for, for the obvious reason that he was a permanent staff on the date of issuance of the Government order and, therefore, his status was not affected by the aforesaid Government order, meaning thereby that the pensionary benefits of those employees, who were covered by that Government order

might have been taken away, but such a condition would not be applicable to the respondent.

26. Counsel for the appellants also made an attempt to assail the finding of the learned Single Judge on the interpretation of Regulation 39 of the Regulations known as U.P. State Road Transport Corporation Employees (Other than officers) Service Regulations, 1981, which provides as under:

***"Pension and other retirement benefits.**--(1) (i) Subject to the provisions of Clause (ii) of this sub-regulation, an employee of the corporation shall not be entitled to pension, but he shall be entitled to the retirement benefits mentioned in sub-regulation (2).*

(ii) A person, who was the employee of the State Government in the erstwhile U.P. Government Roadways and has opted for the service of the Corporation shall be entitled to pension and other retirement benefits in terms of the G.O. No. 3414/302-170-N-72, dated July 5, 1972.

(2) Without prejudice to the provisions of sub-regulation (1) an employee (including an employee who was in the service of the State Government in the erstwhile U.P. Government Roadways Department), shall be entitled to the following retirement benefits :--

(i) Employees Provident Fund or the General Provident Fund, as the case may be;

(ii) Gratuity in accordance with the Payment of Gratuity Act, 1972 or the relevant Government Rules, as may be applicable;

(iii) Amount due under Group Insurance Scheme, 1972;

(iv) One free family pass in a year for Journey within the State;

(v) A free family pass for his return to his home from the place of posting at the time of retirement in case he does not accept railway fare;

(vi) Any other benefit that may be allowed by the Corporation from time to time."

27. Learned Single Judge has considered the aforesaid Regulation and relying upon the judgement of the Uttarakhand High Court in the case of ***Prem Singh vs. State of U.P. and others [Writ Petition No. 1313 (SS) of 2001]*** decided on 1.11.03, has observed that the said Regulation itself provide for the benefit of pension to the employees working in the Roadways, after they were sent on deputation to the Corporation.

28. This judgement became the subject matter of challenge before the apex court, where the Special Leave Petition was later on dismissed as withdrawn.

29. Sub-clause 1 (ii) of Regulation 39 makes it clear that an employee of the State Government in the erstwhile U.P. Government Roadways who has opted for the service of the Corporation, shall be entitled to pension and other retiral benefits in terms of Government order dated 5.7.72. The Government order dated 5.7.72 protects all benefits including pensionary and retiral benefits, which were available to the employees of the erstwhile Roadways, even after being sent on deputation in the Corporation.

30. The finding recorded by the learned Single Judge with regard to the aforesaid Regulation 39 does not call for any interference by us.

31. Learned Single Judge has also considered the case of ***Harbansh Pathak vs. State of U.P. and others (Writ Petition No. 1226 of 1987)*** but has not relied upon the same, in view of the judgement in the case of ***U.P.S.R.T.C. Vs. S.M. Fazil and others [Writ Petition No. 544 (SB) of 2000],*** wherein a distinction has been drawn that at the time when the case of Harbansh Pathak was decided, the Regulations had not come into force and, therefore, it could not be a binding law, with respect to the employees who stand covered by the Regulations.

32. The appellants thus, could not establish that in what manner, the respondent was not entitled to the benefit of pension, when not only the Regulations framed (Regulation 39) protected the said benefit as it was available to him as an employee of the erstwhile Roadways but the Government order of 1972 also protected the aforesaid benefit.

33. Learned counsel for the Corporation could not otherwise prove nor, as a matter of fact, urge that the respondent was not entitled to pension on the post on which he was working in the erstwhile Roadways, prior to the issuance of Government order dated 16.9.60.

34. Thus, the respondent was working on a pensionable post with the erstwhile Roadways, when he was sent on deputation to the Corporation and he being a permanent employee of the erstwhile Roadways, his conditions of service remain unaffected and unchanged even on the issuance of the Government order dated 16.9.60, notified on 28.10.60. Therefore, the respondent was fully entitled to the benefit of pension which has been granted by the learned Single Judge.

35. The last plea of the appellants that once the respondent had accepted the Provident Fund amount, he was not entitled to claim pension, can also not be accepted for the reason that there cannot be any estoppel against law, as the pension is not a charity or bounty and moreso when the learned Single Judge has issued a direction for refund of the amount so received by the appellants before paying amount of pension.

36. We thus, uphold the order passed by the learned Single Judge.

Considering the fact that 19 years have elapsed since the respondent retired and the prayer of the respondent's counsel that the amount of EPF already received, may be adjusted towards the arrears of pension, we provide that the pension shall be fixed as per rules within a maximum period of two months from the date of receipt of a certified copy of this order and the same shall be paid regularly with effect from the current month. The arrears of pension shall be paid within a maximum period of one month from its determination, after adjusting the amount of EPF (contribution of the employer), which has already been received by the respondent. It would also be open to the respondent to deposit the amount of EPF (contribution of the employer), already received and if such a deposit is made, there would not be occasion for deducting the said amount.

37. This direction shall be complied with by all concerned departments and the pension is to be paid within the time frame prescribed.

In regard to the apprehension of the respondent that the Corporation will charge interest on the contribution of the employer towards the EPF, suffice would be to mention that, in such an event the respondent would also be entitled to the interest on the delayed payment of pension.

38. We, therefore, provide that no interest be charged on the EPF amount, as the respondent also says that he will not claim any interest on the amount of pension.

39. With the aforesaid directions/observations, the special appeal is dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 09.12.2010

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

U/S 482/378/407 No. 1257 of 2010

Mohd. Alliyas ...Petitioner
Versus
State of U.P. and others ...Respondent

Counsel for the Petitioner:
N.K. Dwivedi

Counsel for the Respondent:
Govt. Advocate
D.R. Singh Yadav

Code of Criminal Procedure-Section 482-Offence under Section 363, 366, 376 IPC-Quashing of chargesheet-applicant ofter performing marriage with prosecutrix-got two issues from her wedlock -she admitted the marriage and physical relationship with applicant on her free will-as such continuation of criminal proceeding amounts to abuse of process-held-if applicant surrender within prescribed period and executive personal bond-magistrate to commit the case for Trail before session judge with liberty to move discharge application-be considered in accordance with law.

Held: Para 5

Considering the facts, circumstances of the case submissions made by learned counsel for the applicant and O.P. No. 2, it is directed that applicant shall appear before the court concerned within 30 days from today, his appearance shall be noted in his present and he shall furnish his personal bonds, thereafter the matter will be committed to the court of sessions, after committal, in case the applicant moves discharge application through his counsel within 30 days thereafter, the trial court shall pass the appropriate order on the discharge application expeditiously in accordance with law.

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

1. Heard learned counsel for the applicant, learned A.G.A.and learned counsel for O.P. No. 4.

2. This application has been filed with a prayer to quash the charesheet dated 17.2.2009 in case crime No. 4840 of 2008 under sections 363, 366, 376 IPC P.S. Kotwali Nagar, District Faizabad pending in the court of learned C.J.M. Faizabad in case No. 13423 of 2009.

3. It is contended by learned counsel for the applicant that in the present case the applicant has performed the marriage with the prosecutrix, from their wedlock two children have been born. According to the medical examination report the age of prosecutrix was 22 years, according to the statement recorded under section 164 Cr.P.C. she was aged about 20 years and she has not supported the prosecution

version in her statement recorded under section 164 Cr.P.C. in which she has clearly stated that she has performed physical relationship with her free will and consent and she has performed the marriage. In such circumstances, the chargesheet submitted against the applicant may be quashed.

4. In reply of the above contention it is submitted by learned counsel for O.P No. 2 that he has not objection in quashing the proceedings of the above mentioned case but it is submitted by learned A.GA. that such plea may be taken by the applicant at the time of framing of the charge or by way of moving the discharge application.

5. Considering the facts, circumstances of the case submissions made by learned counsel for the applicant and O.P. No. 2, it is directed that applicant shall appear before the court concerned within 30 days from today, his appearance shall be noted in his present and he shall furnish his personal bonds, thereafter the matter will be committed to the court of sessions, after committal, in case the applicant moves discharge application through his counsel within 30 days thereafter, the trial court shall pass the appropriate order on the discharge application expeditiously in accordance with law.

6. With this direction, this application is finally disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.12.2010

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE B.K. NARAYANA, J.

Service Bench No.-1680 of 2009

Dr. Raksha Goswami ...Petitioner
Versus
State Of U.P. Thru Chief Secy. and others ...Respondents

Counsel for the Petitioner:
Sri Sanjay Kumar

Counsel for the Respondent:
C.S.C.

Constitution of India Art. 226-Right to work-Petitioner being selected on post of Director Ayurvedic-not allowed to work-instead of that Govt. Deputed Senior P.C.S. Officer-no reason disclosed-held-petitioner having bright Service carrier-can not be deprived from her promotional avenues-such action suffer from malice in law-in view of law laid down by Apex Court in Salem Advocate Bar association case exemplary cost of Rs. 50000/-to petitioner and Rs. 50000 be deposited with Mediation Center imposed.

Held: Para 23 and 24

We constraint to observe that government employee who possessed bright service career should not be deprived from his/her promotional avenues in case he or she is entitled in accordance with rule. The denial of promotional avenues with intention to adjust other shall be demoralizing effect on the government employee. Moreover once a person belonging to a cadre entitled for promotional avenues and for the said post he or she is selected in accordance to rules then such person can not be divested to enjoy the fruit of

promotional avenues with intention to accommodate other that too a person who does not belong to same cadre. It does not borne out from the record as to why government is interested to place a person belonging to outside cadre on the post of Director Ayurved (PCS officer) divesting a selectee to work as Head of the Department. Action of the State Government seems to suffer from malice in law and may be for extraneous reasons and considerations. It is a fit case where exemplary cost should be imposed while allowing the writ petition.

In view of above, writ petition is liable to be allowed with exemplary cost keeping in view the principle emerges from a case reported in (2005) 6 Supreme Court Cases 344, Salem Advocate Bar Association (II), Vs. Union of India.

Case law discussed:

AIR 1972 SC 1546, (1980) 3 SCC 245, 2007 (10) SCC 528, (2005) 6 Supreme Court Cases 344, Salem Advocate Bar Association (II), Vs. Union of India

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

1. Heard Shri S.K.Kalia learned Senior Advocate assisted by Shri Sanjay Kumar learned counsel appearing on behalf of the petitioner and Shri D.K.Upadhayay learned Chief Standing Counsel.

2. Controversy in question seems to be an instance where for one or other reason State Government had deprived the petitioner to discharge duty as Director Ayurved, though she was selected and appointed in accordance to rules. Government for the reasons best known to it seems not interested to assign the duty to the petitioner for the post of Director Ayurved rather it wants to place a person of its choice as the head of the Department.

3. The petitioner was promoted to officiate on the post of Director Ayurved by order dated 23.9.2005 contained in Annexure No. 13 to the writ petition. It appears that certain adverse entries were given to the petitioner de hors the Rules, which according to Shri S.K.Kalia learned Senior Advocate, was done in order to create obstacle in petitioner' career. In consequence thereof, the petitioner had filed a Writ Petition No. 335 (SB) of 2006 in which by an order dated 22.8.2006, contained in Annexure-20 to the writ petition, a Division Bench of this Court had directed to provide opportunity of hearing with regard to entries granted by the respondents. According to petitioner's counsel, in pursuance of the order of this Court, representation was considered and the entries were corrected and thereafter, a selection committee was constituted to select a person for regular promotion and appointment on the post of the Director, Ayurved in accordance with Rules namely, "The Uttar Pradesh State Medical (Ayurvedic and Unani) Services Rules, 1990" (in short, the Rules). The petitioner was selected for the post of Director Ayurved and appointed by the Office Memorandum dated 6.8.2007 as contained in Annexure No.26 to the writ petition.

4. In pursuance of the said order dated 6.8.2007, the petitioner resumed charge of the post of Director of Ayurvedic. However, it appears that the State Government was not in a mood to permit the petitioner to continue on the post of Director, Ayurvedic in spite of the fact that she was selected for the said post. According to petitioner's counsel, with intention to give way to other and divest the petitioner from the post of Director for extraneous reasons, by order

dated 23.9.2009, as contained in Annexure No. 28 to the writ petition, the petitioner was suspended.

5. The order of suspension was subject matter of dispute before this Court in a Writ petition No.1419 (SB) of 2009 as contained in Annexure No. 45 to the writ petition. The order of suspension was stayed by order dated 12.10.2009. Since, order of suspension was stayed respondents State should have permit the petitioner to resume duty on the post of Director Ayurvedic but instead of restoring the petitioner on the said post by the impugned order dated 23.10.2009 as contained in Annexure-1 to the writ petition, the post of Director Ayurved (Pathyakram Evam Mulyankan) was created and by the impugned order dated 29.10.2009, as contained in Annexure-2 to the writ petition, the petitioner has been appointed on the said post. Feeling aggrieved, the present writ petition was filed.

6. While assailing the impugned order, learned counsel for the petitioner has invited attention of this Court towards the overwhelming material on record which prima facie, indicates that respondents had tried to shift the petitioner to work on the post of the Director, Ayurved (Pathyakram Evam Mulyankan) for extraneous reasons. Once she was appointed vide office memorandum dated 6.8.2007 in pursuance to selection held in accordance to rules respondent seems to be not justified in shifting the petitioner to other newly created post. It has not been disputed that instead of permitting the petitioner to work on the post of Director Ayurvedic, a PCS Officer has been permitted to discharge duties on the said post. While appointing PCS Officer on the post of Director Ayurved respondents had not assigned any reason. Meaning thereby petitioner who belong to same cadre i.e. Directorate of Ayurved has been deprived from her right to work as Head of the Department. The submission of petitioner's counsel carries weight that it has been done by the State authorities for some extraneous reasons otherwise there would have been no justification to direct the PCS officer to officiate on the post of Director Ayurved. For any reason, in case, State was of the view that the petitioner should be permitted to discharge duty on the post of newly constituted post and then regular selection should have been done from person amongst the same cadre for the post of Director Ayurved instead of directing a PCS Officer to officiate on said post.

7. Attention of this Court has been invited towards the Rules, a copy of which has been annexed as Annexure-18 to the writ petition. Under Rule 5 of the said Rules, various cadre posts have been provided namely, Director Ayurvedic and Unani Uttar Pradesh, Additional Director, Ayurvedic and Unani (Administration and Planning), Additional Director, Ayurvedic and Unani (Education) and so on. For convenience, Rule 4 and Rule 5 of the Service Rule namely "The Uttar Pradesh State Medical (Ayurvedic and Unani) Services Rules, 1990" admittedly applicable to present case, are reproduced as under:-

4. Cadre of the Service-(1) The strength of the service and of each category of posts therein shall be such as may be determined by the Government from time to time.

(2) The strength of the service and of each category of posts therein shall, until order varying the same are passed be as given in Appendix "A":

Provided that---

(a) the appointing authority may leave unfilled, or the Governor may hold in abeyance any vacant post without thereby entitling any person to compensation.

(b) The Governor may create such additional permanent or temporary posts as he may consider proper.

5. Source of recruitment--- Recruitment to the various categories of posts in the service shall be made from the following sources:-

(1) *Director, Ayurvedic and Unani, Uttar Pradesh*--By promotion from amongst the substantively appointed Principals of State Ayurvedic and Unani Colleges in Uttar Pradesh and the Additional Director who have completed two years service as Principal of Additional Director on the first day of the year of recruitment.

(2) (a) *Additional Director, Ayurvedic and Unani (Administration and Planning)*--By promotion from amongst the substantively appointed Deputy Directors who have completed two years of service as Deputy Director on the first day of the year of recruitment.

(b) *Additional Director, Ayurvedic and Unani (Education)*-By promotion from amongst the substantively appointed Professors of State Ayurvedic and Unani Colleges and Deputy Directors who have completed two years' service as Professor or Deputy Director on the first day of the year of recruitment.

(3) (a) *Deputy Director, Ayurvedic (Administration), Deputy Director, Ayurvedic (Education), Deputy Director (Planning)* -By promotion from amongst the substantively appointed Regional Ayurvedic Officers who have complete two years service as Regional Ayurvedic Officers on the first day ofte year of recruitment.

b) *Deputy Director (Unani)*--By promotion from amongst the substantively appointed Regional Unani Officers who have completed two years of service as Regional Unani Officers on the first day of the year of recruitment.

(4) Assistant Drug Controller--By promotion from amongst the substantively appointed Drug Inspectors who have put in seven years of service on the first day of the year of recruitment.

(5) Regional Ayurvedic and Unani Officers--By promotion from amongst the substantively appointed. Ayurvedic and Unani Chikitsa Adhikari who have competed ten years service as chikitasa Adhikari Adhikari on the first day of the year of recruitment.

(6) Superintendent, State Pharmacies--By direct recruitment through the commission.

(7) Ayurvedic and unani chikitsa Adhikari, Manager State Pharmacy and Assistant Manager, State Pharmacy--By direct recruitment through the commission."

8. Under Service Rules framed under Article 309 of the Constitution of India, there is no post of Director, Ayurved (Pathyakram Evam Mulyankan). In the absence of any post created under the Rule respondent seems to be acted in a highhandedness manner by directing to take work on a post which does not found place in the service Rule of the cadre. The rule (supra) apply to Ayurved Department even after its bifurcation from Unani.

9. Shri D.K.Upadhayay learned Chief Standing counsel submits that State Government has right to create a post since both the posts in question are of equal status, hence, the Government has right to direct the petitioner to work on the post of Director, Ayurved (Pathyakram Evam Mulyankan).

10. So far as the question of status is concerned, under sub-rule (2) of Rule 15 of the Rules, the Director Ayurvedic, has got different duties with wide administrative and statutory powers. He is the member of Committee with regard to selection for the post of the Additional Directors. For convenience Sub-rule (2) of Rule 15 of the Rule is reproduced as under:-

"Sub-Rule 2 of Rule 15 Recruitment to the posts of Additional Director, Ayurvedic and Unani, Deputy Director shall be made on the basis of seniority subject to the rejection of unfit and Assistant Drug Controller. Regional Ayurvedic and Unani Officers shall be made on the basis of merit through a Selection Committee, compromising:

(1) Secretary to the Government of Uttar Pradesh in Medical Education Department.

(ii) Secretary to the Government of Uttar Pradesh in personnel Department.

(iii) Director, Ayurvedic and Unani, Uttar Pradesh, Senior Secretary shall preside over the Committee."

11. In the present case, the post of Director, Ayurved (Pathyakram Evam Mulyankan) created by the impugned government order has got no nexus with regard to statutory duty assigned by the Rules. The post of Director Ayurved possess much higher status and statutory functions and belong to same cadre than the post of Director, Ayurved (Pathyakram Evam Mulyankan).

12. Learned counsel for the petitioner has relied upon a judgement of Hon'ble Supreme Court reported in **AIR 1972 SC 1546, State of Haryana Vs. Shamsher Jang Shukla and (1980) 3 SCC 245, Katyani Dayal and others Vs. Union of India and others.**

13. In the case of Shamsher Jang Shukla (supra) Hon'ble Supreme Court held that in case, there is Act or Rules, it will have got primacy over the executive instruction over the government orders.

14. In the case of Katyani Dayal (supra), their Lordship of Hon'ble Supreme Court held that if there is an Act of Parliament or a Rule under the proviso to Article 309 on the matter, the executive power, under Article 53 and 73, may not be exercised in a manner inconsistent with or contrary to such Act or Rule.

Relevant portion from the judgement of Katyani Dayal (supra) is reproduced as under:-

"39. The inevitable sequitur from these constitutional provision is that the President, acting directly or through officers subordinate to him, is free to constitute a service (with as many cadres as he chooses), to create posts without constituting a service or to create posts outside (the cadres of) the constituted service. The President (or the person directed by him) may, or, again, if he so chooses he may not, make rules regulating the recruitment and conditions of service of persons appointed to such service or posts. He is also free to make or not to make appointments to such services or posts. Nor is it obligatory for him to make rules of recruitment etc. before a service may be constituted or a post created or filled. But, if there is an Act of Parliament or a rule under the proviso to Article 309 on the matter, the executive power, under Articles 53 and 73, may not be exercised in a manner inconsistent with or contrary to such Act or rule (vide B.N. Nagarjan v. State of Mysore (1966) 3 SCR 682, 668; AIR 1966 SC 1942; (1967 1 LLJ 698 : State of Kerala vs. M. K. Krishan Nair (1978 2 SCR 864; (1978 1 SCC 552; 1978 SCC (L&S) 76."

15. Though the record indicates that process was initiated for the post of Director, Ayurved (Pathyakram Evam Mulyankan) in the year 2007 but it is admitted fact that the Rules in question have not been amended till date. Though, Sri D.K. Upadhyay, learned Chief Standing Counsel submits that the Government has not taken any steps to frustrate the Rules but it appears that since under the Rules the post of Director, Ayurved (Pathyakram Evam Mulyankan) is not provided, government should not have appointed the petitioner on the said post and more so when she was selected for the post of Director Ayurved by Office Memorandum dated 6.8.2007 as contained in Annexure-6 to the writ petition in accordance to rules. The respondents do not seem to be justified in not giving the fruits of her long standing career in the Department of Ayurved. Even if, for the shake of argument, it is accepted that the Government has acted rightly to create the post of the Director Ayurved (Pathyakram Evam Mulyankan) by the executive instructions that too, could have been done by adjusting other person instead of frustrating the petitioner's selection on the post of the Director Ayurvedic in terms of Rules referred to hereinabove. Action of the State Government seems to frustrate the petitioner's rightful claim to work on the post of Director Ayurved.

16. The statutory right is available to the petitioner to continue on the post of Director Ayurved in view of selection done for the said post in accordance with rules. It appears that State Government has taken decision to deprive the petitioner from the post of the Director Ayurvedic from time to time and also to frustrate the various orders passed by this Court.

17. It has been argued by Shri D.K.Upadhayay learned Chief Standing counsel that under Rules 25 government has got power to issue an order for relaxation of service condition. For convenience Rule 25 of the Rule is reproduced as under:-

"25. Relaxation from the conditions of service--Where the State Government is satisfied that the operation of any rule regulating the conditions of service of persons appointed to the service causes

undue hardship in any particular case. It may, notwithstanding any thing contained in the rules applicable to the case, by order, dispense with or relax the requirements of that rule to such extent and subject to such conditions as it may consider necessary for dealing with the case in just and equitable manner:-

Provided that where a rule has been framed in consultation with the Commission, that body shall be consulted before the requirements of the rule are dispensed with or relaxed."

18. Government possess certain power under Rule, which is not disputed, but by issuing executive instructions government does not seem to has got power to do a thing which is not conform by the Rules. Rule 25 or any provision contained in the Rule should not be read in a piecemeal but entire rule should be considered collectively.

19. It is settled law that while interpreting statutory provisions statute should be read line by line, section by section and whole of the statue not in a piecemeal. According to Maxwell, a construction which would leave without effect any part of the language of a statute will normally be rejected. Relevant portion from ***Maxwell on the Interpretation of Statutes*** *(12th edition page 36)* is reproduced as under:-

17."A construction which would leave without effect any part of the language of a statute will normally be rejected. Thus, where an Act plainly gave an appeal from one quarter sessions to another, it was observed that such a provision, though extraordinary and perhaps an oversight, could not be eliminated."

20. Hon'ble Supreme Court by catena of judgment held that while interpreting any section of a statute, every word and provision should be looked into in context to which it is used and not in isolation vide ***2002 (4) SCC 297 Grasim Industries Limited v. Collector of Customs; 2003 SCC (1) 410 Easland Combines v. CCE; 2006 (5) SCC 745 A. N. Roy v. Suresh Sham Singh and 2007 (10) SCC 528 Deewan Singh v. Rajendra Prasad Ardevi.***

21. In view of above, submission made by learned Chief Standing counsel seems to be misconceived. Power possessed by the State Government is to enforce the Rules in its letter and spirit not to do a thing which is not provided by the Rule. Government may take a decision or issue executive instructions in conformity of the Rule. A person cannot be compel to discharge duty on a post which does not found place in the Rule itself. Unless Rule is amended appropriately and a decision is taken thereon petitioner cannot be divested to discharge duty on the post of Director Ayurved keeping in view the selection and appointment made by the Committee (supra).

22. The other submission that government has got power to create post under Rule 4 (2) (b) also show that the creation of posts should be confined to various post designated by the rule itself. It speaks for creation of number and strength of the post under the Rule and not to create entirely different post which has got no reference in the rule itself.

Rule 4 of the Service Rules, 1990 provides the strength of the service and of each category of posts therein shall be such as may be determined by the Government from time to time and according to Sub-rule (2) of Rule 4 the strength of the Service and of each category of posts therein shall until ordered varying the same are passed, be as given in Appendix "A". The said Appendix "A" provide the sanctioned strength of the service and there is only one post of Director Ayurvedic and Unani Services, Uttar Pradesh, one post of Additional Director, Ayurvedic and Unani (Administration and Planning) and one post of Additional Director Ayurvedic and Unani (Education) does not include Director Ayurved (Pathyakram Evam Mulyankan).

23. We constraint to observe that government employee who possessed bright service career should not be deprived from his/her promotional avenues in case he or she is entitled in accordance with rule. The denial of promotional avenues with intention to adjust other shall be demoralizing effect on the government employee. Moreover once a person belonging to a cadre entitled for promotional avenues and for the said post he or she is selected in accordance to rules then such person can not be divested to enjoy the fruit of promotional avenues with intention to accommodate other that too a person who does not belong to same cadre. It does not borne out from the record as to why government is interested to place a person belonging to outside cadre on the post of Director Ayurved (PCS officer) divesting a selectee to work as Head of the Department. Action of the State Government seems to suffer from malice in law and may be for extraneous reasons and considerations. It is a fit case where exemplary cost should be imposed while allowing the writ petition.

24. In view of above, writ petition is liable to be allowed with exemplary cost keeping in view the principle emerges from a case reported in **(2005) 6 Supreme Court Cases 344, Salem Advocate Bar Association (II), Vs. Union of India.**

25. Writ petition is allowed to the extent of petitioner's appointment on excadre post. A writ in the nature of certiorari is issued quashing the impugned order dated 29.10.2009 as contained in Annexure-2 to the writ petition with consequential benefit and costs quantifies to Rs. 1,00000/- (one lac). Respondents are directed to deposit the cost in this court within a month from today out of which Rs. 50,000/- shall be remitted to the Mediation Center Lucknow. Petitioner shall be entitled to withdrawn rest of the amount of Rs. 50,000/-.

26. A writ in the nature of mandamus is issued directing the opposite parties to permit and restore the petitioner to resume duty on the post of Director Ayurved forthwith in terms of appointment letter dated 6.8.2007, as contained in Annexure no. 26 to the writ petition, with all consequential benefits.

Writ petition is allowed accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.12.2010

BEFORE
THE HON'BLE DEVENDRA PRATAP SINGH, J.
THE HON'BLE MRS. JAYASHREE TIWARI, J.

Civil Misc. Writ Petition No. 2110 of 2005

State Of U.P. Thru' Secy. Avas and another ...Petitioner
Versus
A.D.J. Allahabad and another ...Respondents

Counsel for the Petitioner:
Sri S.P. Kesharwani (S.C.)

Counsel for the Respondents:
Sri Kailash Chand Srivastava

U.P. Urban Land (Ceiling and Regulation) Repeal Act 1999-Section 4 and 5-abatement of proceedings-without Notice opportunity-in proceeding under Section 10 (1) declared surplus land-by order 22.02.1985-possession not taken within prescribed period-delay in filling appeal condemned-appeal allowed on merit examining this issued-held-justified warrant no interference-petition dismissed.

Held: Para 7

A perusal of the alleged possession memo dated 26.12.1996, which is Annexure-2 to the writ petition, shows that it is only a notice to the land holder to handover possession of the vacant land to the Collector with a note to the Collector to take possession of the said land. This is, in fact, not a possession memo but only a notice under section 10 (5) of the Act and there is no material on record to show that in pursuance thereof, either the land holder had given vacant possession to the Collector or the Collector had taken over possession of the vacant land. In fact, the Governor exercising powers under section 35 of the Act, has framed Uttar Pradesh Urban Land Ceiling (Taking of Possession, Payment of Amount and Allied Matters) Directions, 1983 providing procedure for taking over possession of vacant land and keeping that in view, this Court vide order dated 2.2.2010 had given an opportunity to the petitioner to produce the Form ULC I, II and II to show that the possession was taken over by the petitioner. Even those records were not produced before this Court. It is apparent that proceedings under section 10 (6) by which the authorities are entitled to take forcible possession of the vacant land were never initiated, therefore, the appellate court was fully justified in holding that the possession of the vacant land was never taken over by the State. This Court in several cases including in the case of State of U.P. Vs. Hari Ram and another Vs. [2005 (60) ALR] 535 and also in the case of Mukkaram Ali Khan Vs. State of U.P. and others [AIR 2007 SC (Suppl) 985] has held that where actual physical possession has not been taken over, all proceedings under the Act would abate in view of section 3 and 4 of the Repeal Act.

Case law discussed:
[2005 (60) ALR], [AIR 2007 SC (Suppl) 985]

(Delivered by Hon'ble. Mrs. Jayashree Tiwari, J.)

1. Heard learned learned counsel for the parties.

2. This petition arising out of proceedings under the Urban Land Ceiling Act, 1976 (here-in-after referred to as the Act) has been filed challenging the order dated 20.12.2000 by which delay in filing the appeal has been condoned and the order dated 22.10.2002 by which the appeal itself has been allowed.

3. It appears that upon enforcement of the Act, notice under section 8 of the

Act was issued to the respondent no. 2 proposing to declare 5955.37 sq. meters of land as surplus in the Urban Angloration Area of Allahabad in Peepal Gaon. It appears that an exparte order dated 22.2.1985 was passed holding 5955.37 sq. meters of land as surplus. Thereafter, proceedings under section 10 (1) and 10 (3) of the Act were also initiated and after vesting of the land, a notice under section 10 (5) of the Act was issued on 26.12.1996 calling upon the respondent no. 1 to hand over possession of the surplus land and the Collector, Allahabd was also asked to take possession of the said land in accordance to law. However, the Act was repealed vide Urban Land (Ceiling and Regulation) Repeal Act, 1999 with effect from 18.3.1999 and it was provided that where possession of the vacant land has not been taken over by the Government, all proceedings will abate. It appears that the respondent no. 2 preferred an appeal on 20.12.2000 against the order dated 22.2.1985 along with a delay condonation application with the allegation that he had no notice whatsoever of the proceedings and the order declaring surplus was factually incorrect and therefore, sought quashing of the said order. The delay condonation application was allowed when the counsel for the petitioner lodged no objection vide order dated 20.12.2000 and thereafter the appeal itself has been allowed on the ground that the possession of the vacant land was not taken over by the State and therefore, in view of the provisions of the Repealing Act 1999, entire proceedings abate.

4. Learned counsel for the petitioner has firstly urged that the appellate court had illegally allowed the delay condonation application without any opportunity to the petitioner to file their objections.

5. A perusal of the order shows that the District Government Counsel (Civil) appearing on behalf of the petitioner before the appellate court had himself contended that there was no objection to the delay condonation and therefore, the appellate court was fully justified in condoning the delay. Further, from the pleading of the writ petition, there is no material to show that the admission recorded by the court below was not correct. Even otherwise, a perusal of the order shows that the respondent no., 2 was never personally served the notice issued by the competent authority inviting objections to the proposal sent for declaring surplus land. Further, neither before the lower appellate court nor before this Court, the petitioners have disclosed the actual date of service and the mode of service upon the land holder and even the report of the process server has not been annexed, and as such, the court below was fully justified in believing the affidavit filed by the land holder. Thus, examining the issue from any angle, it cannot be said that there was any error in condoning the delay by the courts below.

6. It is then urged that since the possession of the disputed land had already been taken over by the State on 26.12.1996, thus, the proceedings under the Act could not have been abated in view of Repeal Act.

7. A perusal of the alleged possession memo dated 26.12.1996, which is Annexure-2 to the writ petition, shows that it is only a notice to the land holder to handover possession of the vacant land to the Collector with a note to the Collector to take possession of the said land. This is, in fact, not a possession memo but only a

notice under section 10 (5) of the Act and there is no material on record to show that in pursuance thereof, either the land holder had given vacant possession to the Collector or the Collector had taken over possession of the vacant land. In fact, the Governor exercising powers under section 35 of the Act, has framed Uttar Pradesh Urban Land Ceiling (Taking of Possession, Payment of Amount and Allied Matters) Directions, 1983 providing procedure for taking over possession of vacant land and keeping that in view, this Court vide order dated 2.2.2010 had given an opportunity to the petitioner to produce the Form ULC I, II and II to show that the possession was taken over by the petitioner. Even those records were not produced before this Court. It is apparent that proceedings under section 10 (6) by which the authorities are entitled to take forcible possession of the vacant land were never initiated, therefore, the appellate court was fully justified in holding that the possession of the vacant land was never taken over by the State. This Court in several cases including in the case of **State of U.P. Vs. Hari Ram and another Vs.** [2005 (60) ALR] 535 and also in the case of **Mukkaram Ali Khan Vs. State of U.P. and others** [AIR 2007 SC (Suppl) 985] has held that where actual physical possession has not been taken over, all proceedings under the Act would abate in view of section 3 and 4 of the Repeal Act.

8. Lastly, it is urged that in view of the Repeal Act, the appeal itself was not maintainable before the District Judge and therefore entire proceedings are void ab initio.

9. Be it so, quashing of the order of the appellate court would result in revival of another void order and therefore the Court declines to set aside the appellate order.

10. No other point has been urged.

11. For the reasons above, this is not a fit case for interference under Article to 226 of the Constitution of India. Rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.12.2010

BEFORE
THE HON'BLE D.P. SINGH, J.
THE HON'BLE MRS. JAYASHREE TIWARI, J.

Civil Misc .Writ Petition No.2112 of 2005

State of U.P.and another ...Petitioners
Versus
Additional District Judge Allahabad and another ...Respondents

Counsel for the Petitioners:
Sri S.P. Kesharwani (S.C.)

Counsel for the Respondents:
.....

Urban Land (Ceiling and Regulation Repeal Act,1991)-Section-10(5)-possession of surplus land-land declared surplus by ex-party order on 25.03.82 possession memo dated 27-4-96-mere notice-No records placed to prove.that in persuance of notice vacant possession given to collector-despite of opportunity Form ULC I,II and III not produced-in absence of physical possession all proceeding stood autometically abated.

Held: Para 7

A perusal of the alleged possession memo dated 27.4.1996, which is Annexure-2 to the writ petition, shows that it is only a notice to the land holder to handover possession of the vacant land to the Collector with a note to the Collector to take possession of the said land. This is, in fact, not a possession memo but only a notice under section 10

(5) of the Act and there is no material on record to show that in pursuance thereof, either the land holder had given vacant possession to the Collector or the Collector had taken over possession of the vacant land. In fact, the Governor exercising powers under section 35 of the Act, has framed Uttar Pradesh Urban Land Ceiling (Taking of Possession, Payment of Amount and Allied Matters) Directions, 1983 providing procedure for taking over possession of vacant land and keeping that in view, this Court vide order dated 2.2.2010 had given an opportunity to the petitioner to produce the Form ULC I, II and II to show that the possession was taken over by the petitioner. Even those records were not produced before this Court. It is apparent that proceedings under section 10 (6) by which the authorities are entitled to take forcible possession of the vacant land were never initiated, therefore, the appellate court was fully justified in holding that the possession of the vacant land was never taken over by the State. This Court in several cases including in the case of State of U.P. Vs. Hari Ram and another Vs. [2005 (60) ALR] 535 and also in the case of Mukkaram Ali Khan Vs. State of U.P. and others [AIR 2007 SC (Suppl) 985] has held that where actual physical possession has not been taken over, all proceedings under the Act would abate in view of section 3 and 4 of the Repeal Act.

Case law discussed

[AIR 2007 SC (Suppl) 985]

(Delivered by Hon. Mrs. Jayashree Tiwari, J.)

1. Heard learned learned counsel for the parties.

2. This petition arising out of proceedings under the Urban Land Ceiling Act, 1976 (here-in-after referred to as the Act) has been filed challenging the order dated 20.12.2000 by which delay in filing the appeal has been condoned and the order dated 28.10.2002 by which the appeal itself has been allowed.

3. It appears that upon enforcement of the Act, notice under section 8 of the Act was issued to the respondent no. 2 proposing to declare 8711.23 sq. meters of land as surplus in the Urban Angloration Area of Allahabad in Peepal Gaon. It appears that an exparte order dated 25.3.1982 was passed holding 8711.23 sq. meters of land as surplus. Thereafter, proceedings under section 10 (1) and 10 (3) of the Act were also initiated and after vesting of the land, a notice under section 10 (5) of the Act was issued on 27.4.1996 calling upon the respondent no. 1 to hand over possession of the surplus land and the Collector, Allahabd was also asked to take possession of the said land in accordance to law. However, the Act was repealed vide Urban Land (Ceiling and Regulation) Repeal Act, 1999 with effect from 18.3.1999 and it was provided that where possession of the vacant land has not been taken over by the Government, all proceedings will abate. It appears that the respondent no. 2 preferred an appeal on 20.12.2000 against the order dated 25.3.1982 along with a delay condonation application with the allegation that he had no notice whatsoever of the proceedings and the order declaring surplus was factually incorrect and therefore, sought quashing of the said order. The delay condonation application was allowed when the counsel for the petitioner lodged no objection vide order dated 20.12.2000 and thereafter the appeal itself has been allowed on the ground that the possession of the vacant land was not taken over by the State and therefore, in view of the

provisions of the Repealing Act 1999, entire proceedings abate.

4. Learned counsel for the petitioner has firstly urged that the appellate court had illegally allowed the delay condonation application without any opportunity to the petitioner to file their objections.

5. A perusal of the order shows that the District Government Counsel (Civil) appearing on behalf of the petitioner before the appellate court had himself contended that there was no objection to the delay condonation and therefore, the appellate court was fully justified in condoning the delay. Further, from the pleading of the writ petition, there is no material to show that the admission recorded by the court below was not correct. Even otherwise, a perusal of the order shows that the respondent no., 2 was never personally served the notice issued by the competent authority inviting objections to the proposal sent for declaring surplus land. Further, neither before the lower appellate court nor before this Court, the petitioners have disclosed the actual date of service and the mode of service upon the land holder and even the report of the process server has not been annexed, and as such, the court below was fully justified in believing the affidavit filed by the land holder. Thus, examining the issue from any angle, it cannot be said that there was any error in condoning the delay by the courts below.

6. It is then urged that since the possession of the disputed land had already been taken over by the State on 27.4.1996, thus, the proceedings under the Act could not have been abated in view of Repeal Act.

7. A perusal of the alleged possession memo dated 27.4.1996, which is Annexure-2 to the writ petition, shows that it is only a notice to the land holder to handover possession of the vacant land to the Collector with a note to the Collector to take possession of the said land. This is, in fact, not a possession memo but only a notice under section 10 (5) of the Act and there is no material on record to show that in pursuance thereof, either the land holder had given vacant possession to the Collector or the Collector had taken over possession of the vacant land. In fact, the Governor exercising powers under section 35 of the Act, has framed Uttar Pradesh Urban Land Ceiling (Taking of Possession, Payment of Amount and Allied Matters) Directions, 1983 providing procedure for taking over possession of vacant land and keeping that in view, this Court vide order dated 2.2.2010 had given an opportunity to the petitioner to produce the Form ULC I, II and II to show that the possession was taken over by the petitioner. Even those records were not produced before this Court. It is apparent that proceedings under section 10 (6) by which the authorities are entitled to take forcible possession of the vacant land were never initiated, therefore, the appellate court was fully justified in holding that the possession of the vacant land was never taken over by the State. This Court in several cases including in the case of **State of U.P. Vs. Hari Ram and another Vs.** [2005 (60) ALR] 535 and also in the case of **Mukkaram Ali Khan Vs. State of U.P. and others** [AIR 2007 SC (Suppl) 985] has held that where actual physical possession has not been taken over, all

proceedings under the Act would abate in view of section 3 and 4 of the Repeal Act.

8. Lastly, it is urged that in view of the Repeal Act, the appeal itself was not maintainable before the District Judge and therefore entire proceedings are void ab initio.

9. Be it so, quashing of the order of the appellate court would result in revival of another void order and therefore the Court declines to set aside the appellate order.

10. No other point has been urged.

11. For the reasons above, this is not a fit case for interference under Article to 226 of the Constitution of India. Rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.12.2010

BEFORE
THE HON'BLE ANIL KUMAR, J.

MISC. SINGLE No. 2242 of 2006

Om Prakash ...Petitioner
Versus
State of U.P. Thru Secy. Home and others. ...Respondents

Counsel for the Petitioner:
K.N.Mishra

Counsel for the Respondents:
C.S.C.

Arms Act-Section 14-Application for Fire Arm Licence-rejected on ground of pendency of criminal case-final report already submitted-apart from that petitioner already possessing DBBL Gun licence-which renewed during this period-held-refusal beyond scope of section 14-not proper-even without assigning any reason by cripic order passed by authorities below-not sustainable.

Held: Para 20

Needless to mention herein that it is a well settled provisions of law that any order which has been passed by the authority must always be supported with adequate reasons and justifications and in the present case, the order passed by the Licencing Authority is nonspeaking order and is passed without disclosing any reasons whatsoever, so the same cannot be sustained.

Case law discussed:
[2010 (I) JIC 232 (All)], [2010 (2) JIC 585 (All)], [2010 (1) JIC 232 (All)].,[2010 (2) JIC 585 (All)]

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

1. Heard Sri K.N. Mishra, learned counsel for the petitioner and Sri Rakesh Srivastava, learned Standing Counsel on behalf of the opposite parties.

2. By means of the present writ petition, the petitioner has challenged the impugned orders dated 07.01.2006 (Annexure2) passed by Commissioner, Devi Patan Mandal, Gonda rejecting the petitioner's appeal and order dated 23.02.2005 (Annexure1) passed by District Magistrate, Gonda by which the petitioner's application for grant of licence for 315 Bore Rifle has been rejected.

3. In brief the facts of the present case are that the petitioner has applied for a licence of N.P. Bore Rifle in the year 1999, thereafter the O.P. No. 3/District Magistrate, Gonda/Licencing Authority called the report from the concerned police authority in order to consider the matter regarding grant of arm licence.

4. On 22.02.2005, Superintendent of Police, Gonda submitted a report against the petitioner stating therein that a criminal case No. 154 of 2000 under Section 147, 148, 149 307, 427 IPC has been registered in which the final report has been submitted by the police in the court of ACJM, 1st Gonda, and the same is under consideration. In the said report it is stated that the petitioner already possessed a licence in respect to SBBL 12 Bore Gun and he has a criminal history, so there is no justification or reason to grant another licence.

5. Taking into consideration the said report dated 22.02.2005 submitted by Superintendent of Police, Gonda, the Licencing Authority/District Magistrate, Gonda by order dated 23.02.2005 rejected the petitioners application for grant of licence for NP Bore Rifle, challenged by him before the Appellate Authority/Commissioner, Devi Patan Mandal, Gonda, who dismissed the appeal on the ground that a criminal case against the petitioner is pending and he has already a SBBL Gun licence. Hence the present writ petition has been filed before this Court.

6. Learned counsel for the petitioner while assailing the impugned orders dated 23.02.2005 and 07.01.2006 passed by O.P. Nos. 3 and 2 submitted that they are illegal and arbitrary in nature as the same have been passed on the recommendation of the Superintendent of Police, Gonda dated 22.02.2005 without application of their own mind.

7. He further submits that in the criminal case registered against the petitioner, the police authority has already submitted the final report, so there is no justification or reason for not granting the licence in his favour.

8. Learned counsel for the petitioner further submits that the O.P. Nos. 2 and 3 failed to appreciate the fact that the petitioner who has already a licence of SBBL Gun since the year 2002 thereafter renewed from time to time, so keeping the said facts and the provisions as provided under Section 15(3) of the Arms Act, 1959 (hereinafter referred to as the Act) read with Section 13 of the Act, no good reasons or grounds exist on the part of the opposite parties not to grant second licence him in respect to the N.P. Bore Rifle rather the same is contrary to the mandatory provisions as provided under Section 3(2) of the Act by which a person can have three fire arms licences in his possession at any time. In order to support the said contention, learned counsel for the petitioner relied on the following judgments **(a) Sunil Shukla, Advocate Vs. State of U.P. & Ors. [2010(I) JIC 232 (All)] (b) Wasim Ahmad Vs. State of U.P. & Ors. [2010 (2) JIC 585 (All)].**

9. In view of the abovesaid facts, counsel for the petitioner submits that the impugned orders dated 23.02.2005 and 07.01.2006 are contrary to law and liable to be set aside.

Sri Rakesh Srivastava, learned Standing Counsel for the respondents submits that on the application submitted by the petitioner for grant of licence of N.P. Bore Rifle, the District Magistrate/Licencing Authority vide a letter dated 10.12.2002 called a report from SubDivisional Magistrate and Superintendent of Police, Gonda and in the said report dated 22.02.2005, it was recommended for not issuing the required

the licence as sought by the petitioner, keeping in view the said facts, a criminal history of the petitioner and he already has a Single Bore Gun in his possession. The O.P. No. 3 rejected his application for grant of another licence.

10. Sri Rakesh Srivastava, learned counsel for the respondents further submits that as per Section 14(1) (b)(i)(3) of the Act. Licencing Authority can refuse to grant a licence for any reason which it may deem fit and proper before granting a licence under the Act. So, the order dated 23.02.2005 passed by O.P. No. 3 thereby rejecting the petitioner's application and order dated 07.01.2006 passed by Appellate Authority/O.P. No. 2 dismissing his appeal is perfectly valid, the present writ petition is liable to be dismissed.

11. I have heard the counsel for the parties and gone through the record. Before adjudicating and deciding the dispute involved in the present case, it s appropriate to have some mandatory provisions which govern the filed in question.

12. Chapter II of the Arms Act 1959 provides for acquisition, possession, manufacture, sale, import, export and transport of arms and ammunition and the relevant portion of Section 3(2) therein are as under:

"Notwithstanding anything contained in subsection (1), no person, other than a person referred to in subsection (3), shall acquire, have in his possession to carry, at any time, more than three firearms."

13. Chapter III of the Arms Act deals with the provisions relating to licences and Section 13 therein provides the procedure in respect to grant of licence the same is reproduced hereinbelow:

"(1) An application for the grant of a licence under Chapter II shall be made to the licensing authority and shall be in such form, contain such particulars and be accompanied by such fee, if any, as may be prescribed.

(2) [Note: Subs. by Act 25 of 1983, s. 6 (w.e.f. 2261983)] On receipt of an application, the licensing authority shall call for the report of the officer in charge of the nearest police station on that application, and such officer shall send his report within the prescribed time.

(2A) The licensing authority, after such inquiry, if any, as it may, consider necessary, and after considering the report received under subsection(2), shall, subject to the other provisions of this Chapter, by order in writing either grant the licence or refuse to grant the same.

Provided that where the officer in charge of the nearest police station does not send his report on the application within the prescribed time, the licensing authority may, if it deem fit, make such order, after the expiry of the prescribed time, without further waiting for the report].

(3) The licensing authority shall grant

(a) A licence under section 3 where the licence is required

(i) By a citizen of India in respect of a smooth bore gun having a barrel of not less than twenty inches in length to be used for protection or sport or in respect of muzzle loading gun to be used for bona fide crop protection:

Provided that where having regard to the circumstances of any case, the licensing authority is satisfied that in muzzle loading gun will not be sufficient for crop protection, the licensing authority may grant a licence in respect of any other smooth bore gun a aforesaid for such protection, or

(ii) In respect of a point 22 bore rifle or an air rifle to be used for target practice by a member of rifle club or rifle association licensed or recognised by the Central Government ;

(b) A licence under section 3 in any other case or licence under section 4, section 5, section 6, section 10 or section 12, if the licensing authority is satisfied that the person by whom the licence is required has a good reason for obtaining the same."

14. Section 14 of the Arms Act lays down the conditions on which the licence can be refused to a person the relevant portion of Section 14 are being reproduced hereinbelow:

15. **Refusal of licences -** (1) Notwithstanding anything in section 13, licensing authority shall refuse to grant

(a) a licence under section 3, section 4, or section 5 where such licence is required in respect of any prohibited arms or prohibited ammunition:

(b) A licence in any other case under Chapter II,

(i) where such licence is required by a person whom then licensing authority has reason to believe

(1) to be prohibited by this Act or by any other law for the time being in force from acquiring, having in his possession or carrying any arms or ammunition, or

(2) to be of unsound mind, or

(3) to be for any reason unfit for a licence under this Act, or

(ii) where the licensing authority deems it necessary for the security of the public peace or for public safety to refuse to grant such licence.

(2) The licensing authority shall not refuse to grant any licence to any person merely on the ground that such person does not own or possess sufficient property.

(3) Where the licensing authority refuses to grant a licence to any person it shall record in writing the reasons for such refusal and furnish to that person on demand a brief statement of the same unless in any case the licensing authority is of the opinion that it will not be in the public interest to furnish such statement.

16. Lastly Section 15 of the Arms Act provides for Duration and renewal of licence, and the relevant portion i.e. SubSection 3 of Section 15 is being reproduced hereinbelow:

"(3) Every licence shall, unless the licensing authority for reasons to be

recorded in writing otherwise decides in any case, be renewable for the same period for which the licence was originally granted and shall be so renewable from time to time, and the provisions of section 13 and 14 shall apply to the renewal of a licence as they apply to the grant thereof."

17. Now reverting to the facts of the present case it is not disputed between the parties that the petitioner is already holder of a Gun Licence No. 783 in respect to the SB Gun 12 Bore and he has applied for another licence for N.P. Bore Rifle to the O.P. NO. 3/Licencing Authority.

18. Thereafter, the said authority called the report from the concerned police authorities in order to consider the petitioner's application for grant of Arms Licence. In response to the same, Superintendent to Police, Gonda submitted a report dated 22.02.2005 inter alia stating therein that a criminal Case bearing Case Crime No. 154 of 2000 under Section 147, 148, 149, 37 and 427 I.P.C. registered in Police StationKotwali, Gonda in which a final report was submitted in the Court of ACJM, Gonda.

19. Further the said authority has also recommended that the petitioner has a licence in respect to S.B. 12 Bore Gun he has a criminal background, so second licence should not be granted to him taking into consideration the said fact and without giving any reasons whatsoever, by way of nonspeaking order, the Licencing Authority/District Magistrate, Gonda rejected the petitioner's application for grant of licence vide order dated 23.02.2005 and appeal was also dismissed by the appellate authority/Commissioner, Devi Patan Mandal, Gonda.

20. Needless to mention herein that it is a well settled provisions of law that any order which has been passed by the authority must always be supported with adequate reasons and justifications and in the present case, the order passed by the Licencing Authority is nonspeaking order and is passed without disclosing any reasons whatsoever, so the same cannot be sustained.

21. Further in the present case there is only one criminal matter against the petitioner and in which the police has submitted his final report. Moreover, he is a holder of an arms licence in respect to S.B. 12 Bore Gun, granted in his favour in the year 2002 subsequently renewed as per the provisions of SubSection 3 of Section 15 of the Act, the said Section provides that the licence which has been granted shall be so renewable from time to time and the provisions of Section 13 and 14 of the Act shall apply to the renewal of licence as they may apply to grant thereof.

22. Reading the provisions of the Section 19 (3) and provisions in respect to grant of fresh licence as provided under Section 13 of the Arms Act, the action on the part of the O.P. No. 3 to refuse the grant of second licence to the petitioner is an action which is contrary to law, because as per the SubSection 3 of Section 2 of the Act a person can acquire or possess three fire arms licences at any time so the orders which are under challenge in the present writ petition are arbitrary in nature and cannot sustain.

23. In the case of **Sunil Shukla, Advocate Vs. State of U.P. & Ors. [2010 (1) JIC 232 (All)].**

"I have considered the submissions the parties and have perused the record. From the perusal of the Act it is clear that a person who is having arm licence, can make another application and can acquire and possess three firearms and arm licences in view of Section 3 of the Act. Even the proviso requires a person having more than three arms on the date of amendment of the Act of 1983 which came into force, to surrender more than three arms. Thus the acquiring and possessing of more than one arm is not prohibited. On the other hand, it is permitted. From the perusal of Section 3 of the Act, it appears that it does not provide that for acquiring a licence for the second arm, the applicant has to disclose some special reason. In case the law does not provide or prescribe, in that circumstances, the question is whether the authorities below can reject the application filed by a person disclosing this fact that he is having a licence of a particular arm. The application of other firearm made by the petitioner could have been rejected by the respondents on the ground that the police report was not submitted in his favour. But this is not the position in the present case. The police authorities have submitted a report in favour of the petitioner. Therefore, as the order passed by the District Magistrate does not disclose any reason for refusing the licence for possessing the DBBL gun by the petitioner, the only reason assigned in the impugned order is that the petitioner has not disclosed any special reason for acquiring the second arm licence. If law does not prohibit the petitioner from obtaining another arm licence, it could not have been refused by the respondents on the ground that special reasons to be recorded were required to be intimated in the application made by the petitioner. In view of the aforesaid fact, the order passed by the District Magistrate dated 11208 cannot be sustained."

24. In the case of **Wasim Ahmad Vs. State of U.P. & Ors. [2010 (2) JIC 585 (All)]** this Court has held that in paragraph Nos. 12 and 12 has held as under:

Para 12 *A Division Bench of this Court in the case of Ram Shanker Vs. State of U.P. 1980 A.W.C. 154, has laid down that the absence of genuineness of the need is not a ground for refusing a licence under Section 14 of the Act. Lack of genuineness of the need is therefore, not one of the ground for refusing a licence.*

Identical question was considered by the learned Single Judge in Case of Ram Khelawan Misra Vs. state of U.P. and another, 1982 A.W.C. 123 and in paragraph nos. 6 and 10 of the aforesaid judgment this court held as under:

"6. In the present case, the District Magistrate has in his order stated that the S.D.M. and the Superintendent of Police have written ' No objection' on the application of the petitioner, but that was not a recommendation for the grant of a licence. He has ultimately observed that the need of the applicant was not genuine. It would, therefore, be seen that the order passed by the District Magistrate does not come under any of the clauses of Sec. of the Act. The expression to be for any reason unfit for a licence under the Act is not synonymous with the applicant not having genuine need. Section 14 of the Act prohibits the grant of a licence where the person is under some disability, or is of unsound mind or where he is such type person who may endanger the public peace or public safety. The plea that the petitioner does not have a genuine need cannot be

equated with any of the clauses under sec. 14 of the Act. There is no provision in sec. 14 of the act to refuse a licence if the need of the applicant is not genuine. A Division Bench of this Court in the case of Ram Shanker Vs. State of U.P., 1980 A.W.C. 154, has laid down that the absence of genuineness of the need is not a ground for refusing a licence under Sec. 14 of the Act. . Lack of genuineness of the need is therefore not one of the grounds for refusing a licence."

10. Section 14 of the Act commences with a non obstante clause (notwithstanding anything in Sec. 13) and then lays down the grounds for refusing to grant the licence. Since the grant of a licence can be refused only under the provisions of Sec. 14 and its subclauses, I do not find any provision which permits the licensing authority to refuse the grant of a licence on the ground that the applicant did not establish a genuine need. "

Similar view was taken by this Court in the case of Ram Chandra Yadav Vs. State of U.P. reported in 2009 (9) ADJ, 2007.

***Para 13**-The failure of the appellate authority to redeem the illegality committed by the licensing authority, Additional District Magistrate, Gorakhpur has rendered the order of appellate authority also totally unsustainable. Hence in view of the settled legal position on the issue that the fire arm licence can not be refused merely on the ground that the need of licence is not genuine, the orders passed by the respondent no. 2 and 3 are totally unsustainable in the eyes of law and are liable to be set aside.*

25. For the foregoing reasons, the impugned orders dated 07.01.2006 (Annexure2) passed by Commissioner, Devi Patan Mandal, Gonda and order dated 23.02.2005 (Annexure1) passed by District Magistrate, Gonda are set aside and the matter is remanded back to the Licencing Authority/District Magistrate, Gonda to consider afresh in accordance with law in respect to grant of arms licence to the petitioner in response to his application submitted for the said purpose expeditiously, say, within a period of four months from the receiving the certified copy of this order.

26. With the above observations, the writ petition is allowed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 01.12.2010

BEFORE
THE HON'BLE RAJIV SHARMA, J.
THE HON'BLE VEDPAL, J.

Criminal Appeal No. 528 of 1998

Ramesh and others ...Appellants
Versus
State of U.P. ...Respondent

Criminal Procedure Code-Section 389-of Bail during pendency of appeal-conviction for offence under Section-323,302,307,149 IPC-claim of Parity-third Bail application-earlier applications rejected on merit-counsel for applicant unable to argue the case finally-cannot blame the court for delay in disposal of appeal-held-bail can not be granted on parity-or on ground of delay. No case for bail-appeal itself be listed for hearing.

Held: Para 14 and 32

In view of the aforesaid discussion, we are of the considered opinion that parity can not be the sole ground for granting bail.

In view of what has been stated above, we are of the opinion that the applicant does not deserve bail on the ground of parity, long incarceration in jail or any other grounds. Bail is therefore refused and application for bail is rejected accordingly.

Case law discussed:

1983 Cr.L.J. 736, 1997 (34) ACC 311, (1998 U.P. Cr.R.263), AIR 1995 SC 705, 1997 (1) SCC 35, (1998 U.P. Cr.R. 263), 2003 ALL. L.J. 625, U.P. 2005 (52) ACC 205, Special Leave Petition No. 4059 of 2000 decided on 12.3.2001,

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

1. This is third application for bail on behalf of the appellant Vishram who alongwith seven others was tried by the court of IVth Additional Sessions Judge, Hardoi in S.T.No.493 of 1997 (Crime No.140/1994) : State Vs. Ramesh @ Munnu and others and each of them was convicted and sentenced to undergo rigorous imprisonment for one year under Section 148 I.P.C., to under rigorous imprisonment for life under Section 302/149 I.P.C., to undergo rigorous imprisonment for 10 years under Section 307/149 I.P.C. and to undergo rigorous imprisonment for one year under Section 323/149 I.P.C. All the sentences were made to run concurrently.

2. The first application for bail was moved by the appellant alongwith memo of appeal and was rejected on merit on 21.12.1999. Thereafter, second application for bail was moved which was also rejected on merit on 21.5.2003. This third application for bail was moved on 26.4.2005 and is pending since then for disposal.

We have heard the learned counsel for the applicant as well as learned A.G.A. and perused the record of the case.

3. The learned counsel for the applicant, assailing the veracity of the prosecution case and evidence adduced by the prosecution during the trial, in substance contended that applicant has been falsely implicated in the case on account of enmity; and prosecution witnesses are not independent and reliable and similarly situated Co- accused have been admitted to bail by the Division Bench of this Court on 20.7.2010 hence on the ground of parity appellant too deserves bail and his long incarceration in jail is per- se illegal as being violative of Article 21 of the Constitution of India. That the applicant is not in a position to temper with the prosecution evidence and there is no danger of accused absconding or fleeing if released on bail; and as such he should also be enlarged on bail pending the appeal.

4. The bail is however opposed by learned A.G.A. by contending in support of the prosecution version that it is a case of heinous offence, wherein two persons were murdered and an attempt was made to commit murder of three persons who also received injuries in the incident. He further contended that it is third application for bail and previous two bail applications were rejected on merit and the grounds now taken by him are not available to him and the applicant has suppressed material facts and does not deserve bail.

5. We have carefully considered the respective submissions made by the parties. Before passing order on the merit of the bail application, we would like to express our views on the legal question

whether on the sole ground of parity, the applicant is entitled for bail

6. The matter of granting bail on the ground of parity has been considered in several decisions by this Court. The Full Bench in **Sunder Lal Vs. State 1983 Cr. L.J. 736** did not accept this proposition, which will be evident from the following observations in para 15 which is as under;-

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

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

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

8. It is further held by the Division Bench in **Chander @ Chandra Vs. State of U.P. (1998 U.P. Cr.R. 263)** that if bail has been granted in flagrant violation of well settled principles, the order granting bail would not be in accordance with law. Such order can never form the basis for a claim founded on parity.

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

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

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

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

10. Again Hon'ble Apex Court in Secretary Jaipur Development Authority V. Daulatmal Jain, 1997(1) SCC 35, observed in para-24 as follows:

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

In para 17 in the case of **Chander @ Chandra Vs. State of U.P. (1998 U.P. Cr.R. 263),** it was held that:-

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

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

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

The **Apex Court** in the aforesaid case has further observed:-

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

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

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

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

14. In view of the aforesaid discussion, we are of the considered opinion that parity can not be the sole ground for granting bail.

15. It has also been submitted by the learned counsel for the appellant that the appellant is languishing in jail since long and hence on the basis of long detention period in jail, he is entitled to be released on bail because due to delay in disposal of the appeal, his fundamental rights of speedy disposal envisaged under Article 21 of the Constitution of India is being violated.

16. In so far as the long pendency of this appeal is concerned, we were conscious and mindful that after admission of appeal, the paper book was prepared long back and appeal is pending for final hearing since long. Therefore, we requested the learned counsel for the appellant to argue the appeal finally on merit on which learned counsel stated that he has been engaged to argue bail application only and thus he argued bail application only and not the appeal on merit.

17. In these circumstances, when appellant is not prepared to argue the appeal on merit, he cannot complain otherwise that his appeal is pending since long and his right of speedy disposal of appeal is being violated. No one can take advantage of his own wrong or his own inaction. In these circumstances the fact that appeal is still pending is no ground to admit the appellant to bail when he is not prepared to argue the appeal on merit.

18. Further in our opinion on the basis of the long incarceration in jail also, an accused cannot be admitted to bail in heinous offence like murder and dacoity etc. In the present case, the appellant had also been convicted under Section 302 I.P.C. and has been sentenced to undergo imprisonment for life. Imprisonment for life means imprisonment for the whole remaining life. In this context, reference may also be made to the case of Pramod Kumar Saxena Vs. Union of India and others : 2008 (63) ACC 115 in which Hon'ble Apex Court has held that mere long period of incarceration in jail would not be per se illegally. If the accused has committed offence, he has to remain behind bar. Such detention in jail even as under trial prisoners would not be violative of Article 21 of the Constitution of India and is permissible under the Code of Criminal Procedure.

19. The principle applicable to grant of bail at the pre-trial stage are different from the release of the appellant on bail during pending of appeal. At the pre-trial stage there is a presumption of innocence

in favour of an accused till it is established that he is guilty.

20. After trial, Section 389 of the Code of Criminal Procedure deals with the release of the appellant on bail and suspension of sentence pending appeal. It states as under :-

"389. Suspension of sentence pending the appeal; release of appellant on bail.-*(1) Pending any appeal by a convicted person, the appellate court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also if he is in confinement, that he be released on bail, or on his own bond.*

* * *

(2) The power conferred by this section on a appellate court may be exercised also by the High Court in the case of an appeal by a convicted person to a court subordinate thereto.

(3) Where the convicted person satisfies the court by which he is convicted that he intends to present an appeal, the court shall-

(i) where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or

(ii) where the offence of which such person has been convicted is a bailable one, and he is on bail, order that the convicted person be released on bail unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the appellate court under sub-section (1), and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

(4) When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced."

21. Bare reading of the above provision makes it clear that during the pendency of appeal, an appellate court is empowered to suspend sentence on the appellant by releasing 0.00"him on bail. Such action, however, can be taken only after affording opportunity to the Public Prosecutor in case of offence punishable with death or imprisonment for life or imprisonment for ten years or more and after recording reasons in writing. When a person is convicted by an appellate court, he cannot be said to be an "innocent person" until the final decision is recorded by the superior court in his favour.

22. In Case of., State of Haryana v. Hasmat (2004) 6 SCC 175 Hon'ble ,Apex Court stated: (SCC p. 176, para 6) :-

"6. Section 389 of the Code deals with suspension of execution of sentence pending the appeal and release of the applicant on bail. There is a distinction between bail and suspension of sentence. One of the essential ingredients of Section 389 is the requirement for the appellate court to record reasons in writing for ordering suspension of execution of the sentence or order appealed. If he is in confinement, the said court can direct that he be released on bail or on his own bond. The requirement of recording

reasons in writing clearly indicates that there has to be careful consideration of the relevant aspects and the order directing suspension of sentence and grant of bail should not be passed as a matter of routine." (emphasis supplied).

23. In case Akhilesh Kumar Sinha v. State of Bihar*(2000) 6 SCC 461*, Vijay Kumar v. Narendra(*2002) 9 SCC 364*, Ramji Prasad v. Rattan Kumar Jaiswa*(2002) 9 SCC 366,,* State of Haryana v. Hasmat*(2004) 6 SCC 175,* Kishori Lai v. Rupa*(2004) 7 SCC 638*and State of Maharashtra v. Madhukar Wamanrao Smarth*(2008) 5 SCC,* it has been observed by Hon'ble Apex Court, that once a person has been convicted, normally, an appellate court will proceed on the basis that such person is guilty. It is no doubt true that even thereafter, it is open to the appellate court to suspend the sentence in a given case by recording reasons. But it is well settled, as observed in Vijay Kumar(supra) that in considering the prayer for bail in a case involving a serious offence like murder punishable under Section 302 IPC, the Court should consider all the relevant factors like the nature of accusation made against the accused, the manner in which the crime is alleged to have been committed, the gravity of the offence, the desirability of releasing the accused on bail after he has been convicted for committing serious offence of murder, etc. It has also been observed in some of the cases that normal practice in such cases is not to suspend the sentence and it is only in exceptional cases that the benefit of suspension of sentence can be granted.

24. In Case of Sidhartha Vashisht Alias Manu Sharma Versus State (Nct Of Delhi) (2008) 5 SCC 230 Hon'ble Supreme Court held as under :

"The mere fact that during the period of trial, the accused was on bail and there was no misuse of liberty, does not per se warrant suspension of execution of sentence and grant of bail. What is really necessary is to consider whether reasons exist to suspend execution of the sentence and grant of bail."

25. In view of the above, it cannot be said that the detention of applicant in jail pending appeal is in any way violative to the provision of Article 21 of the Constitution of India.

26. It is not in dispute that it is third application for bail The first application for bail was rejected on merit on 21 Dec 1999 and 2nd application for bail was rejected on merit on 21 May 2003. Certain arguments on merit has also been raised and made in this third application for bail, but in view of law laid down by Division Bench of this Court in case of Satya Pal Vs. State of U.P. 1998(37) ACC 287 and observation made by Hon'ble Apex Court in Kalyan Chandra Sarkar etc, Vs. Rajesh Ranjan @ Pappu Yadav 2005 (51) ACC 727, subsequent Bail application on the same Grounds which were available at the time of dismissal of previous bail application is not maintainable. Further this third bail application was moved on26 April 2005 was pending even on 20 July 2010 when other co- accused were granted bail but this application was not pressed at that time.

27. It further reveals from the record that present applicant along with Co - accused Rama Kant got the forged bail

order of this Court, on the basis of which Rama Kant succeeded to get him released and is still absconding Thus conduct of applicant pending appeal has not been fair ,and such person can not be admitted to bail, in this serious offence of double murder.

28. The offence for which appellant has been convicted are of serious nature. The considerations which normally weigh with the court in granting bail in non-bailable offence have been explained by Hon'ble Apex Court in State v. Capt. Jagjit Singh, AIR 1962 SC 253 and Gurcharan Singh v. State (Delhi Admn.), AIR 1978 SC 179 and basically they are - the nature and seriousness of the offence; the character of the evidence; circumstances which are peculiar to the accused; a reasonable possibility of the presence of the accused not being secured at the trial; reasonable apprehension of witnesses being tampered with; the larger interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case. Recently Hon'ble Apex Court in Gobarbhai Naranbhai Singala Versus State Of Gujarat & Ors.& Jayeshbhai @ Panchabhai Muljibhai Satodiya Versus jayrajsinh Temubha Jadeja & Anr. (Appeal (crl.) 198 of 2008(Arising out of SLP(CRL) No. 6646 of 2005)With Criminal Appeal No. 199 of 2008(Arising out of SLP(CRL) No. 4283 of 2006)-Decided on 29-1-2008 observed as under :-

"This Court in Amarmani Tripathi's case has held that while considering the application for bail, what is required to be looked is, (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of accused absconding or fleeing if released on bail; (v) character, behavior, means, position and standing of the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail"

29. Thus in view of above principle laid down by Hon'ble Supreme Court, while considering prayer for bail, what was required to be taken into account was the above factors, but these factors were not taken into account while considering bail of co-accused on 20-07-2010 and bail was granted solely on the basis of long incarceration. Thus it cannot be said to be in consonance with the principles laid down by Hon'ble Supreme Court. Hon'ble Supreme Court Court in case of Chenna Boyanna Krishna Yadav Versus State Of Maharashtra & Anr (2007) 1scc 242 has held that when the gravity of the offence alleged is severe, long period of incarceration or the fact that the trial is not likely to be concluded in the near future either by itself or conjointly may not entitle the accused to be enlarged on bail.

30. The appeal is pending for final hearing, therefore observations on merits, one way or the other are likely to prejudice one or the other party to the appeal.
0.00"

31. Hence, we are not entering into the correctness or otherwise of the merit of the evidence on record, however, it cannot be overlooked that as on today, the applicant has been found guilty and convicted by a competent criminal court. Initial presumption of innocence in favour

of the accused, therefore, is no more available to the applicant. The trial Court has also given cogent reasons for accepting the prosecution case and believing prosecution witnesses

32. In view of what has been stated above, we are of the opinion that the applicant does not deserve bail on the ground of parity, long incarceration in jail or any other grounds. Bail is therefore refused and application for bail is rejected accordingly.

33. List this appeal for final hearing on merit in the next cause list.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.12.2010

BEFORE
THE HON'BLE SHRI NARAYAN SHUKLA, J.

Misc. Single No.-7351 of 2010

Ram Sanehi ...Petitioner
Versus
Commissioner, Lucknow Div. Lucknow and another ...Respondent

Counsel; for the Petitioner:
Sri Alok Kumar Srivastava

Counsel for the Respondents:
C.S.C

Arms Act-Section 17 (3)-suspension of Arms licence-on involvement in criminal case U/S 498 A/304-B IPC readwith 3/4 Dowry Prohibition Act-apprehension of authorities about misuse of Arm in pressurizing the witness-held-in view of full bench decision in Kailash Nath Case petitioner cannot retain the licence as matter of right-enquiry itself be expedited.

Held: Para 5 & 6

It has been answered by the Full Bench of this Court in the case of Kailash Nath (Supra), therefore, I am of the view that the petitioner cannot claim right of retaining of that very arms licence.

In view of above, I am of the view that the orders impugned do not suffer from error. Therefore, no interference is warranted by this court, at this stage. Let inquiry for cancellation of petitioner's arms licence be expedited with his cooperation by the Licensing Authority.

Case law discussed:
ALR 1984 (10) 223, 1985 (22) A.C.C.,Page 353

(Delivered by Hon'ble S.N.Shukla, J.)

1. Heard Mr. Alok Kumar Srivastava, learned counsel for the petitioner and Mr. Rakesh Kumar Srivastava, learned Standing counsel.

The petitioner has challenged the order dated 4-6-2010 Passed by District Magistrate, Hardoi; whereby the petitioner?s arms licence has been suspended due to his involvement in a criminal case as also the order dated 21-10-2010 Passed the Commissioner, Lucknow Division, Lucknow under the strength of the case decided by the Full Bench of this Court i.e. **Chhanga Prasad Sahu Vs. State of U.P.and others, reported in ALR 1984 (10) 223,** in which it has been held that having regard to the scheme and purpose of the provisions contained in Sections 17 and 18 of the Act and the nature of the enquiry that a licensing authority is to make before directing revocation/suspension of an arms licence, it has no power to suspend the arms licence pending enquiry into its cancellation/suspension.

2. On the other hand, learned Standing counsel submits that in different case i.e. **Kailash Nath and others Vs. State of U.P. and others (H.C,F.B.), reported in 1985 (22) A.C.C., page 353** by the same very strength of the Bench of this Court it has been held that the right to carry the arms is merely a personal privilege and on taking out such privilege no civil consequences follow. Further the Full Bench has also expressed their opinion that obtaining of a licence for acquisition and possession of fire arms and ammunition under the Arms Act is nothing more than a privilege and the grant of such privilege does not involve the adjudication of the rights of an individual nor does it entail civil consequences.

The power of suspension can be exercised by the Licensing Authority on certain conditions as is envisaged in section 17 (3) of the Arms Act, which is reproduced hereunder:-

3. ***"17(3).*** *- The licensing authority may be order in writing suspend a licence for such period as it thinks fit or revoke a licence-*

(a) if the licensing authority is satisfied that the holder of the license is prohibited by this Act or by any other law for the time being in force, from acquiring, having in his possession or carrying any arms or ammunition, or is of unsound mind or is for any reason unfit for a licence under this Act; or.

(b) if the licensing authority deems it necessary for the security of the public peace or for public safety to suspend or revoke the licence; or

(c) if the licence was obtained by the suppression of material information or on the basis of wrong information provided by the holder of the licence or any other person on his behalf at the time of applying for it; or

(d) if any of the conditions of the licence has been contravened;or

(e) if the holder of the licence has failed to comply with a notice under sub-section (1) requiring him to deliver-up the licence."

4. Keeping in view the involvement of the petitioner in criminal case registered in case crime no. 216/2009, under sections 498A/304 B IPC and 324 Dowry of Prohibition Act, the Licensing Authority held that the petitioner can misuse his power in pressurizing the witnesses during trial in his favour. In this situation, it is not proper in the public interest to retain the arms by the petitioner. Involvement of the petitioner in the aforesaid case is not disputed. Only the question for consideration is whether he is entitled to hold the arms licence during the trial of the aforesaid case till it is cancelled finally. The nature of right of holding the arms licence has been discussed by the Full Bench of this Court in the case of **Kailash Nath (Supra).**

5. It has been answered by the Full Bench of this Court in the case of **Kailash Nath (Supra),** therefore, I am of the view that the petitioner cannot claim right of retaining of that very arms licence.

6. In view of above, I am of the view that the orders impugned do not suffer from error. Therefore, no interference is warranted by this court, at this stage. Let

inquiry for cancellation of petitioner's arms licence be expedited with his cooperation by the Licensing Authority.

7. With the aforesaid observations, the writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.12.2010

BEFORE
THE HON'BLE F.I. REBELLO, C.J.
THE HON'BLE PRADEEP KANT, J.

Misc. Bench No. 12168 of 2010

Manoj Agarwal ...Petitioner
Versus
Collector, Lucknow and others ...Respondent

Counsel for the Petitioner:
Subhash Vidyarthi

Counsel for the Respondent:
C.S.C.
A.K. Chaturvedi

U.P. Public Money (Recovery of Dues Act 1972-Section 3)-Recovery of telephone bills-as arrears of land Revenue-in absence Deed of agreement, nor advance any loan, nor related to credit of higher-purchase of goods by Banking Camp or govt Company under state sponsored scheme-issue of recovery certificate held-without jurisdiction-legal aspect discussed.

Held: Para 5

It would, thus, be clear that for the purpose of recovery of dues as arrears of land revenue, there must be an agreement relating to a loan, advance or grant and if there be a default of payment of any installment thereof, then said amount defaulted can be recovered as arrears of land revenue. In the instant case, respondent no.3 has not given any loan, advance or grant to the petitioner, nor is related to credit in respect of, or relating to hire-purchase of goods sold by a Banking Company or a Government Company under the State-sponsored scheme. Thus, it will be clear that the recovery certificate issued by respondent no.3 for recovery of the amount in terms of the Act 1890 is clearly without jurisdiction and without authority of law and, consequently, respondents 1 and 2 could not have acted on the same. The recovery citation, therefore, issued by respondent no.2 is without jurisdiction.

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

1. M/s. Richa Telecom, a propriety firm of the petitioner, entered into an agreement with M/s. ICICI Prudential Life Insurance Company Limited (hereinafter referred to as the 'ICICI Company') for providing telecom services. Pursuant to that, according to the petitioner, he took a number of telephone connections from various telecom companies, including Bharat Sanchar Nigam Limited (BSNL), which were installed at various offices of the ICICI Company. There arose some disputes and differences between the petitioner and the ICICI Company in respect of payment of bills, which have been referred to an Arbitrator.

2. According to the petitioner, the telecom companies including BSNL - respondent no.3, raised several bills for various telephone connections taken by the petitioner at various locations across the Uttar Pradesh and Uttaranchal, and on 21.06.2010, respondent no.3 sent a recovery certificate to the Collector, Lucknow for recovery of a sum of Rs. 1,65,699/- towards arrears of telephone bills as arrears of land revenue. According to the petitioner, respondent no.3 is a

Company incorporated under the Companies Act, and dues of its telephone bills cannot be recovered as arrears of land revenue, as it has no authority to issue recovery certificate to the Collector, Lucknow for recovery of the amount as arrears of land revenue and, as such, the recovery certificate issued is null and void. The petitioner is also aggrieved by recovery citation dated 06.09.2010 issued by the Tehsildar, Lucknow, for a sum of Rs. 1,65,699/-,in pursuance of the said recovery certificate.

3. The principal contention urged on behalf of the petitioner is that neither the respondent no.3 could have issued the recovery certificate nor could respondents 1 and 2 issue the citation for recovery of dues of respondent no.3, as the agreement entered into between the petitioner's firm and respondent no.3 is purely a contractual agreement. The recovery certificate purported to have been issued by respondent no.3 is under the provisions of the Revenue Recovery Act, 1890 (hereinafter referred to as the 'Act 1890'). Section 3 of the Act 1890 sets out that where an arrear of land revenue or a sum recoverable as an arrear of land revenue, is payable to a Collector by a defaulter being or having property in a district other than that in which the arrears accrued or the sum is payable, the Collector may send to the Collector of other district a certificate in the form as nearly as may be of the Schedule, setting out various particulars as set out therein. It would, thus, be clear that insofar as the provisions of the Act 1890 are concerned, the amount sought to be recovered must be an arrear of land revenue or a sum recoverable as an arrear of land revenue and payable to a Collector by a defaulter.

4. Appearance has been put on behalf of respondent no.3, though no reply has been filed. On being asked by the Court to show as to under which provision, the recovery certificate was sent by respondent no.3 to respondents 1 and 2 for recovery of the amount, learned counsel for the respondent no.3 fairly concedes that there is no provision under which the said amount could be recovered as arrears of land revenue.

5. There is another provision, namely, the Uttar Pradesh Public Moneys (Recovery of Dues) Act, 1972 (in short 'Act 1972'), wherein 'Corporation' has been defined under Section 2(a). The petitioner is not a Corporation as per Section 2(a) of the Act 1972. It may be a Government Company in terms of Section 2 (c) of the Act 1972. The relevant portion of Section 3 of the Act 1972 reads as under:-

"3. Recovery of certain dues as arrears of land revenue.- (1) Where any person is party,--

(a) to any agreement relating to a loan, advance or grant give to him or relating to credit in respect of, or relating to hire-purchase of, goods, sold to him by the State Government or the Corporation, by way of financial assistance; or

(b) to any agreement relating to a loan, advance or grant given to him or relating to credit in respect of, or relating to hire-purchase of goods sold to him, by a banking company or a Government company, as the case may be, under a State-sponsored scheme; or

(c) to any agreement relating to a guarantee given by the State Government

or the Corporation in respect of a loan raised by an industrial concern; or

(d) to any agreement providing that any money payable thereunder to the State Government [or the Corporation] shall be recoverable as arrears of land revenue; and such person--

(i) makes any default in repayment of the loan or advance or any instalment thereof; or

(ii) having become liable under the conditions of the grant to refund the grant or any portion thereof, makes any default in the refund of such grant or portion or any instalment thereof; or

(iii) otherwise fails to comply with the terms of the agreement;

then, in the case of the State Government, such officer as may be authorised in that behalf by the State Government by notification in the official Gazette, and in the case of the Corporation or a Government company the Managing Director [or where there is no Managing Director then the Chairman of the Corporation, by whatever name called] [or such officer of the Corporation or Government company as may be authorised in that behalf by the Managing Director or the Chairman] thereof, and in the case of a banking company, the local agent thereof, by whatever name called may send a certificate, to the Collector, mentioning the sum due from such person and requesting that such sum together with costs of the proceedings be recovered as if it were an arrear of land revenue.

(2) The Collector on receiving the certificates shall proceed to recover the amount stated therein as an arrear of land revenue."

It would, thus, be clear that for the purpose of recovery of dues as arrears of land revenue, there must be an agreement relating to a loan, advance or grant and if there be a default of payment of any installment thereof, then said amount defaulted can be recovered as arrears of land revenue. In the instant case, respondent no.3 has not given any loan, advance or grant to the petitioner, nor is related to credit in respect of, or relating to hire-purchase of goods sold by a Banking Company or a Government Company under the State-sponsored scheme. Thus, it will be clear that the recovery certificate issued by respondent no.3 for recovery of the amount in terms of the Act 1890 is clearly without jurisdiction and without authority of law and, consequently, respondents 1 and 2 could not have acted on the same. The recovery citation, therefore, issued by respondent no.2 is without jurisdiction.

6. In the light of that, the petition deserves to be allowed and is, accordingly, allowed in terms of prayers Clauses (A) and (B), which read as under:-

"(A) A writ, order or direction in the nature of certiorari may kindly be issued quashing the recovery certificate dated 21.06.2010 issued by the respondent no.3 and recovery citation dated 06.09.2010 issued by the respondent no.2, copies whereof have been filed herewith as **Annexure No. 1 and 2** respectively.

(B) A writ, order or direction in the nature of mandamus may kindly be issued commanding the respondents not to proceed to recover any amount from the

petitioner as arrears of land revenue in pursuance of the recovery certificate dated 21.06.2010 issued by the respondent no.3 and recovery citation dated 06.09.2010 issued by the respondent no.2, copies whereof have been filed herewith as **Annexure No.1 and 2** respectively."

7. In the circumstances of the case, there shall be no order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.12.2010

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

Civil Misc. Writ Petition No.21559 of 2002

Smt. Indrawati Singh ...Petitioner
Versus
Union of India and others ...Respondents

Counsel for the Petitioner:
Sri Surya Narayan

Counsel for the Respondents:
Sri Ajit Kumar Singh
Sri Dev Shankar Shukla

Arm Forces Tribunal Act, 2007 Section-34-Petition relating to grievance of Service matter-Cause of action-certainly falls within jurisdiction of Tribunal-Writ Petition stood transferred before the tribunal-under section 34 of the Act.

Held: Para 6

In view of this, it has been laid down that the Writ Petitions pending before this Court, wherein, the cause of action is such as would fall within the jurisdiction of the Tribunal after enforcement of the Armed Forces Tribunal Act, 2007, would stand transferred to the Tribunal for adjudication in view of Section 34 of the said Act.

Case law discussed:
2010 (4) ADJ 251 (DB), Special Appeal Defective No. 218 of 2006

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

1. Case called out in the revised list.

2. None is present for the petitioner.

Sri Dev Shankar Shukla, learned counsel for the respondents is present.

3. The present Writ Petition has been filed by the petitioner, inter-alia, praying for payment of suitable compensation as well as for Special Family Pension and Children Allowance according to the relevant Rules with effect from the date of desertion order dated 16-12-1988, and further for quashing the dismissal order dated 28-04-1992 in respect of the husband of the petitioner, namely, Nand Kishore Singh, who was serving in Armoured Corps and was posted in 43 Arm Regiment C/o 56 APO.

4. Thus, the subject matter of the Writ Petition pertains to service matter in respect of the husband of the petitioner who was a member of the Armed Forces covered by the Army Act, 1950.

5. In ***Dev Saran Mishra Vs. Union of India and others, 2010 (3) A.D.J. 593 (paragraphs 23, 24, 25, 26 and 27),*** a learned Single Judge of this Court has considered in detail the provisions of the Armed Forces Tribunal Act, 2007 in the light of various judicial decisions, and has held that in case the cause of action involved in a Writ Petition is such as falls within the jurisdiction of the Tribunal after enforcement of the Armed Forces

Tribunal Act, 2007, such cause of action has to be adjudicated upon in the first instance by the Tribunal. It is only after the decision of the Tribunal, that the matter would come to the High Court under Article 226/227 of the Constitution of India.

6. In view of this, it has been laid down that the Writ Petitions pending before this Court, wherein, the cause of action is such as would fall within the jurisdiction of the Tribunal after enforcement of the Armed Forces Tribunal Act, 2007, would stand transferred to the Tribunal for adjudication in view of Section 34 of the said Act.

7. The above decision of the learned Single Judge has been followed by the Division Benches of this Court in the following decisions :

(A) Order dated 22-03-2010 passed in Civil Misc. Writ No. 15363 of 2007 [(Late) Brig. (Retd.) Gaj Raj Singh Siwach & others Vs. Union of India & others], since reported in 2010 (4) ADJ 251 (DB).

(B) Order dated 28-10-2010 passed in Special Appeal Defective No. 218 of 2006 [Anil Kumar Singh Vs. Union of India & another].

8. The cause of action in the present case, as noted above, is evidently such as falls within the jurisdiction of the Tribunal after enforcement of the Armed Forces Tribunal Act, 2007.

9. Hence, in view of the above decisions, it is apparent that the present Writ Petition is to be transferred to the Tribunal under Section 34 of the Armed Forces Tribunal Act, 2007.

10. We direct accordingly.

The Registry is directed to take appropriate steps in this regard.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.12.2010

BEFORE
THE HON'BLE DILIP GUPTA, J.

Civil Misc. Writ Petition No. 56644 of 2010

Shiv Manorath Shukla and others
...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare
Sri Vijendra Tripathi

Counsel for the Respondents:
Sri Suman Sirohi (S.C.)
C.S.C.

National Rural Employment Guarantee Act, 2005-appointment of Rojgar Sewak-Clause 4 of G.O. 25.08.2010-requiring fresh Selection of those who have completed 3 years-although initial appointment for one year-extended subject to satisfactory work-the person who initially appointed ofter facing selection-having experience-can not be compelled to face fresh selection-to this extent G.O. Of 25.8.10 set a side.

Held: Para 28

It is, therefore, not possible, in view of the aforesaid decisions of the Supreme Court to uphold the policy of the Government contained in the Government Order dated 25th August, 2010 regarding holding of fresh

selections for appointment of Rojgar Sewak after every three years. The appointment of the Rojgar Sewaks should be continued even after they have worked for three years, though one year at a time, subject to satisfactory work as was the procedure adopted prior to the expiry of three years of service.

Case law discussed:

2003 (21) LCD 1383; Writ Petition No.35653 of 2003; 2010 (7) ADJ 169; 2008 (7) ADJ 188; (1985) 4 SCC 43; (2009) 6 SCC 611; AIR 2001 SC 1447; (2001) 8 SCC 491 ;(2003) 5 SCC 437.

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

1. The petitioners, who were appointed as Panchayat Mitras in District Kaushambi in December, 2006, have filed this petition for quashing that portion of paragraph 4 of the Government Order dated 25th August, 2010 which provides that where Gram Panchayat Rojgar Sewaks have completed three years of working, fresh selection proceedings should be undertaken for appointment of Rojgar Sewaks in accordance with the Government Order dated 23rd November, 2007. A further prayer has been made for restraining the respondents from taking any action in pursuance to the aforesaid paragraph 4 of the Government Order.

2. The Panchayat Raj Department of the State Government issued a Government Order dated 3rd July, 2006 notifying a Scheme for appointment of Panchayat Mitras in Gram Panchayats under the National Rural Employment Guarantee Act, 2005 (hereinafter referred to as the "Act') in twenty two districts including District Kaushambi. The said Government Order dated 3rd July, 2006 provides for appointment of a Panchayat Mitra in each Gram Panchayat of the specified districts to provide administrative assistance for implementing the National Rural Employment Guarantee Scheme (hereinafter referred to as the "Scheme'). The appointment is to be made on contractual basis for a period of one year or till the continuance of the Scheme, whichever is earlier, on a monthly honorarium of Rs.2000/-. However, after the expiry of the period of one year, fresh selection is required to be made but if the work of the Panchayat Mitra during this period of one year is found to be satisfactory, then the Gaon Sabha can pass a resolution for renewal of the contract for a period of one year at a time subject to the maximum period of two years.

3. On 23rd November, 2007, the State Government issued another Government Order changing the designation of Panchayat Mitra to Gram Rojgar Sewak and such appointments stood transferred from the Panchayat Raj Department to the Gram Vikas Department of the State Government. The other conditions substantially remained the same.

4. It is on the basis of the Government Order dated 3rd July, 2006 that the District Magistrate, Kaushambi issued a Circular dated 23rd July, 2006 to all the Block Development Officers of the District for inviting applications for appointment of Panchayat Mitras. The petitioners applied for appointment as Panchayat Mitra and they were appointed on various dates in December, 2006. Subsequently their designation stood altered to Gram Rojgar Sewaks in terms of the Government Order dated 23rd November, 2007 and the contract of appointment of each of the petitioners was

also renewed one year at a time for two years. Thus, they have completed three years as Panchayat Mitras/Gram Rojgar Sewaks.

5. Paragraph 4 of the Government Order dated 25th August, 2010 issued with regard to employment of Gram Rojgar Sewaks provides that on completion of three years of working, fresh selection proceedings shall be undertaken in accordance with the Government Order dated 23rd November, 2007 for appointment of Gram Rojgar Sewaks in which the existing Rojgar Sewaks can also apply and preference shall be given to them if their working is found to be satisfactory.

6. The petitioners claim to be working as Gram Rojgar Sewaks and because of the stipulation contained in paragraph 4 of the Government Order dated 25th August, 2010 apprehend that their services shall be terminated followed by fresh selection proceedings.

7. Sri Ashok Khare, learned Senior Counsel appearing for the petitioners assisted by Sri Vijendra Tripathi, learned counsel submitted that paragraph 4 of the Government Order dated 23rd November, 2007, in so far as it provides for fresh selections, is arbitrary as according to him no objective shall be achieved by holding fresh selection and the Gram Rojgar Sewaks who have been continuing for three years should be permitted to continue in the same manner in which their appointments were earlier renewed on finding their services to be satisfactory. The submission of the learned Senior Counsel is that there is no necessity for holding fresh selections after every three years and that such a procedure introduces an element of uncertainty in regard to their service and gives room for nepotism and corruption. In support of his contention he has placed reliance upon the decision of this Court in **Chandra Kishore & Ors. Vs. State of U.P. & Ors., 2003 (21) LCD 1383** which was followed by this Court in **Writ Petition No.35653 of 2003 (Manoj Kumar Rastogi & Ors. Vs. State of U.P. & Ors.) decided on 28th October, 2003.**

8. Sri V.K. Singh, learned Additional Advocate General for the State of U.P. has, however, contended that the petitioners have no vested right to continue even after three years and paragraph 4 of the Government Order dated 25th August, 2010 does not suffer from any illegality since under the Government Order dated 23rd November, 2007 maximum period for which a Rojgar Sewak could be appointed on contract basis is three years and by the Government Order dated 25th August, 2010 only a benefit has been conferred upon them to participate in fresh selection if their working is found to be satisfactory. In support of his contention he has placed reliance upon the Division Bench judgment of this Court in **Smt. Geeta Devi Vs. Uma Shanker Yadav & Ors., 2010 (7) ADJ 169.**

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

10. Section 3 of the Act provides for guarantee of rural employment to households. It stipulates that the State Government shall provide to every household whose adult members volunteer to do unskilled manual work not less than one hundred days of such work

in a calender year in accordance with the Scheme framed under the Act. The State Government has to, under Section 4 of the Act, make a Scheme within one year from the date of the commencement of the Act. Under Section 13 of the Act, the Panchayats at the district, intermediate and village level shall be the principal authorities for planning and implementation of the Scheme made under the Act. Section 15 of the Act provides for appointment of a Programme Officer for every Panchayat at the intermediate level who has to assist the Panchayat in the discharge of its functions. Section 18 of the Act provides that the State Government shall make available to the District Programme Coordinator and the Programme Officer necessary staff and technical support as may be necessary for the effective implementation of the Scheme.

11. The Government Order dated 3rd July, 2006, accordingly, made provisions for appointment of a Panchayat Mitra in each Gram Panchayat to provide administrative assistance for implementation of the Scheme. Paragraph 1 of the said Government Order provides for the minimum eligibility requirements, while paragraph 2 enumerates the procedure for selection. The applications have to be placed before the Administrative Committee of the Gram Panchayat which shall select the Panchayat Mitras on merit on the basis of the average percentage of marks obtained by the candidates at the High School and Intermediate level and thereafter details of the selected candidates are forwarded to the committee headed by the District Magistrate. The appointment is made for a period of one year on contractual basis and fresh selection has to take place after the expiry of the period of one year but if after the expiry of the said period of one year, it is found that the work of the Panchayat Mitra is satisfactory, then his contract can be renewed for a further period of one year at a time subject to maximum of two renewals.

12. The petitioners were selected as Panchayat Mitras in December, 2006 under the Government Order dated 3rd July, 2006 for a period of one year and as their work was found to be satisfactory, their appointments were renewed for a period of one year and subsequently for one more year. In terms of the Government Order dated 23rd December, 2007, they were designated as Gram Rojgar Sewak. Under the Government Order dated 3rd July, 2006 and 23rd November, 2007, the maximum period for which they can continue as Panchayat Mitra is three years and, therefore, their appointment came to an end in December, 2009 but they have continued to work as Panchayat Mitras.

13. The grievance of the petitioners is with regard to paragraph 4 of the Government Order dated 25th August, 2010 which provides for fresh selection of Gram Rojgar Sewaks after the expiry of three years. It is the contention of the petitioners that they should be permitted to continue, if their work is found to be satisfactory, in the same manner as they were permitted to continue earlier and a fresh selection should not be resorted to.

14. Sri Ashok Khare, learned Senior Counsel appearing for the petitioners has placed reliance upon the decision of this Court in Chandra Kishore (supra) in support of his contention that fresh selection should not take place after every

three years for appointment of Gram Rojgar Sewak. The relevant portion of the judgment is as follows:-

"In the instant petitions, the State Government has frankly admitted that there is a need of teachers. They have also admitted that several thousands of posts of teachers are lying vacant. **They have not denied their responsibilities to impart education. They have not denied the right to the petitioners to continue but they have contended that they have to go through a fresh selection while admittedly they have already gone through a due process of selection and they are duly selected and qualified Subject Experts. If the posts are there and the work is there and obligation of the State to impart education is there and even then these petitioners are deprived of their right of employment which will be a breach of their fundamental right to continue in employment arbitrarily by imposing unreasonable restriction.**

The initial policy of the State Government in making appointment to the teachers on the post of Subject Expert indicates that the Government desire to give preference to the teachers having experience. Now by issuing an order on 30.6.2003, the Director Education is debarring those experienced teachers who had obtained experience before the joining on the post of Subject Experts and those who have further increased their experience by teaching the students in the three academic sessions. **Therefore, this restriction that the maximum limit for giving appointment to a Subject Expert will be three years, is most arbitrary and unreasonable and contrary to the requirement as shown in the advertisement."**

(emphasis supplied)

15. The aforesaid judgment was followed by this Court in Manoj Kumar Rastogi (supra).

16. It is not in dispute that the need to employ Rojgar Sewaks exists. The scheme of the Act is to provide at least 100 days of work in a calender year to such adult members of a household who volunteer to do unskilled manual work and Programme Officers are appointed to assist the Panchayat in the discharge of its functions. The Act further provides for making available to the District Programme Coordinators and Programme Officers necessary staff and technical support for effective implementation of the Scheme and it is for this purpose that the State Government issued the order dated 3rd July, 2006 for appointment of a Panchayat Mitra in each Gram Panchayat to provide administrative assistance for implementation of the Scheme though subsequently by the Government Order dated 23rd November, 2007 the designation of Panchayat Mitra was changed to Rojgar Sewak and the implementation of the Scheme was shifted to the Gram Vikas Department from the Panchayat Raj Department. It is, therefore, seen that Rojgar Sewaks have to perform the important task of assisting the District Programme Coordinator and the Programme Officers for the proper implementation of the Scheme framed under the Act. The Government Orders dated 3rd July, 2006 and 23rd November, 2007 provide for a detailed procedure for appointment of such Panchayat Mitra/Rojgar Sewak. An advertisement

has to be issued and thereafter the Selection Committee meets and examines the cases and recommends the names on the basis of the marks obtained by the candidates in the High School and Intermediate Examinations. These appointments are then approved by the competent authority and the Rojgar Sewaks are appointed for one year but if their services are found to be satisfactory, then their appointment is renewed for one year at a time subject to a maximum period of two years. The petitioners were initially appointed as Panchayat Mitras in December, 2006 for a period of one year and as their work was found to be satisfactory, their appointment was renewed for one year at a time for two years. Though the Government Orders dated 3rd July, 2006 and 23rd November, 2007 did provide that the maximum period for which the Rojgar Sewak can be appointed is three years but the Government Order dated 25th August, 2010 has relaxed this condition to a certain extent and it provides that such Rojgar Sewaks who have completed three years of service can again apply in the fresh selections and preference shall be given to them.

17. The grievance of the petitioners is limited to the holding of fresh selections and what they contend is that if their work is found to be satisfactory, their appointment should be renewed without holding fresh selections. According to them they have gained experience and as their services have been found to be satisfactory, there is no good reason to replace them with other persons and, therefore, the requirement of holding a fresh selection is not only arbitrary but introduces an element of uncertainty in their service.

18. All that has been contended by the learned Additional Advocate General for the State is that the procedure contemplated under the Government Order dated 23rd November, 2007 enables the Department to examine whether better candidates are available to be selected and there is no harm in adopting such a procedure. It is also his contention that the appointment of Rojgar Sewak is purely contractual in nature and since the petitioners were aware of the terms and conditions of appointment when they sought initial appointment they cannot turn around and contend that they should be continued in service even after the expiry of three years.

19. In Chandra Kishore (supra), the Court accepted the contention of the petitioners therein that the restriction of maximum limit of three years for giving appointment is arbitrary and unreasonable since the petitioners had gone through the selection process and the requirement existed. Observations to the same effect were also made by a Division Bench of this Court in **Dr. Dinesh Kumar Rajput & Ors. Vs. State of U.P. & Ors., 2008 (7) ADJ 188** after following the decision of the Supreme Court in **Ratan Lal & Ors. Vs. State of Haryana & Ors., (1985) 4 SCC 43.** This apart the State Government itself has, by the Government Order dated 25th August, 2010, relaxed the maximum limit of three years term of Rojgar Sewaks, though with a rider that they shall have to compete in fresh selection with others. The Act contemplates framing of a Scheme for implementation of the Act and Section 18 also provides that the State Government shall make available to the District Programme Coordinator and the Programme Officer necessary staff and

technical support as may be necessary for the effective implementation of the Scheme. It is for this purpose that the State Government has provided for appointment of Rojgar Sewaks and though the Act does not provide for fresh selections after every three years, the Scheme framed by the State Government provides for holding fresh selections after every three years.

20. The decision of the Supreme Court in the case of **Mohd. Abdul Kadir & Anr. Vs. Director General of Police, Assam & Ors., (2009) 6 SCC 611** clinches the issue in favour of the petitioners. The Government of India formulated the Prevention of Infiltration of Foreigners Scheme for Assam for strengthening the Assam Governmental machinery for detection and deportation of foreigners in the year 1960. The Scheme was extended from time to time. A Selection Board was constituted for selection of ex-servicemen to the various posts which were sanctioned under the additional scheme. The Inspector General of Police, Border Assam issued a circular dated 17th March, 1995 laying down the following procedure for appointment/continuation of the ex-servicemen as ad-hoc Border staff:-

(i) All appointments shall be for a contract period of one year.

(ii) Termination notice should be issued to every ad-hoc employee at least 45 days before the date of expiry of one year from the date of appointment.

(iii) The ad hoc employee, on receiving information regarding termination from service, shall, if he desires to continue, send an application seeking fresh appointment for a further term of one year. The application should reach the office of IGB (B), Assam at least 30 days before the date of expiry of one year.

(iv) The concerned DIGP (Range)/Superintendent of Police shall send a performance report and medical certificate in respect of each ad hoc employee to whom such termination notice has been issued at least 30 days before the date of such termination while forwarding the applications for fresh appointment.

(v) The applications for fresh appointment shall be considered with reference to the respective performance report and medical certificate, and those found fit and suitable will be re-appointed at least 20 days before the date of expiry of the contract period of one year.

(vi) Such fresh appointment letters shall be issued by the Superintendent of Police (Border) Assam and the ad hoc employees cleared for fresh appointment shall sign an agreement and submit his joining report.

(vii) If application for fresh appointment is not received in due time, it will be taken that the ad-hoc employee has not sought fresh appointment and he will not be considered for fresh appointment."

21. Writ petitions were filed in the Guwahati High Court as the ad-hoc employees felt aggrieved by the process of reappointment introduced by the aforesaid circular dated 17th March, 1995 and it was submitted that such a procedure introduced an element of

uncertainty in regard to their service and gave room for nepotism and corruption. The writ petition was allowed by a learned Judge of the High Court but the Division Bench set aside the order and dismissed the writ petition. The matter was taken to the Supreme Court by the employees. The Supreme Court rejected the plea of the appellants-employees regarding regularisation of their services but quashed the Circular dated 17th March, 1995 holding that artificial breaks by annual terminations followed by fresh appointments is contrary to the Scheme and the principles of service jurisprudence and in this context observed:-

"8. **We may next consider the challenge to the procedure of annual termination and reappointment introduced by the circular dated 17.3.1995**. The PIF Scheme and PIF Additional Scheme were introduced by Government of India. **The scheme does not contemplate or require such periodical termination and re-appointment**. Only ex-servicemen are eligible to be selected under the scheme and that too after undergoing regular selection process under the Scheme. They joined the scheme being under the impression that they will be continued as long as the PIF Additional Scheme was continued. **The artificial annual breaks and reappointments were introduced by the state agency entrusted with the operation of the Scheme. This Court has always frowned upon artificial breaks in service. When the ad-hoc appointment is under a scheme and is in accordance with the selection process prescribed by the scheme, there is no reason why those appointed under the scheme should not be continued as long as the scheme continues**. Ad-hoc appointments under schemes are normally co-terminus with the scheme (subject of course to earlier termination either on medical or disciplinary grounds, or for unsatisfactory service or on attainment of normal age of retirement). Irrespective of the length of their ad hoc service or the scheme, they will not be entitled to regularization nor to the security of tenure and service benefits available to the regular employees. **In this background, particularly in view of the continuing Scheme, the ex-serviceman employed after undergoing selection process, need not be subjected to the agony, anxiety, humiliation and vicissitudes of annual termination and re-engagement, merely because their appointment is termed as ad hoc appointments. We are therefore of the view that the learned Single Judge was justified in observing that the process of termination and re-appointment every year should be avoided and the appellants should be continued as long as the Scheme continues, but purely on ad hoc and temporary basis, co- terminus with the scheme. The circular dated 17.3.1995 directing artificial breaks by annual terminations followed by fresh appointment, being contrary to the PIF Additional Scheme and contrary to the principles of service jurisprudence, is liable to be is quashed.**

.....

10. The appeal is allowed in part accordingly as follows:

(i) The circular dated 17.3.1995 is quashed. **The appellants shall not be subjected to annual terminations and re-appointments (subject to observations in para 8 above).**

(ii) The benefit of this order will be available to other similarly situated ad hoc border staff, even if they have not approached the court for relief. In view of the above, the interlocutory applications for impleading are disposed of as having become infructuous.

(iii) This order will not however come in the way of ad hoc employees working as Border staff, being subjected to any periodical medical examination or service review to assess their fitness and suitability for continuation."

(emphasis supplied)

22. The relief prayed for by the petitioners in this petition is more or less similar to the relief granted by the Supreme Court in the aforesaid case since what the petitioners are claiming in this petition is that fresh selections should not take place for appointment after every three years and their contract of appointment should be renewed annually subject to satisfactory work.

23. The Supreme Court in Mohd. Abdul Kadir (supra) found that procedure for reappointment after every year is arbitrary and against service jurisprudence since when appointment is under a Scheme and is in accordance with the selection process prescribed by the Scheme, there is no reason why such appointments under the Scheme should not be continued as long as the Scheme continues subject ofcourse to termination either on medical or disciplinary grounds or for unsatisfactory service or on attainment of normal age of retirement.

24. The Supreme Court has time and again pointed out that in exercise of the power of judicial review, the Courts do not ordinarily interfere with the policy decisions of the executive unless the policy can be faulted on the ground of mala fide, unreasonableness, arbitrariness or unfairness as arbitrariness, irrationality, perversity and mala fide render the policy unconstitutional. Thus, when the policy of the Government is found to be arbitrary, the Courts would be justified in interfering with the policy decision. In this connection reference can be made to the decisions of the Supreme Court in **M/s. Ugar Sugar Works Ltd. Vs. Delhi Administration & Ors., AIR 2001 SC 1447; Union of India Vs. Dinesh Engineering Corpn. & Anr. (2001) 8 SCC 491 and Union of India & Anr. Vs. International Trading Company & Anr. (2003) 5 SCC 437.**

25. In **A. Satyanarayana & Anr. Vs. S. Purushotham & Ors., 2008 AIR SCW 3282** the scope of judicial review of a policy decision reflected in a statutory rule was also examined by the Supreme Court and it was observed:-

"We, however, are of the opinion that the validity or otherwise of a quota rule cannot be determined on surmises and conjectures. Whereas the power of the State to fix the quota keeping in view the fact situation obtaining in a given case must be conceded, the same, however, cannot be violative of the constitutional scheme of equality as contemplated under Articles 14 and 16 of the Constitution of India. **There cannot be any doubt whatsoever that a policy decision and, in particular, legislative policy should not ordinarily be interfered with and the Superior Courts, while exercising its power of judicial review, shall not consider as to whether such policy**

decision has been taken mala fide or not. But where a policy decision as reflected in a statutory rule pertains to the field of subordinate legislation, indisputably, the same would be amenable to judicial review, inter alia, on the ground of being violative of Article 14 of the Constitution of India. {See Vasu Dev Singh & Ors. v. Union of India & Ors. [2006 (1) SCALE 108] and State of Kerala & Ors. v. Unni & Anr. [(2007) 2 SCC 365]."

(emphasis supplied)

26. The only reason pointed out by learned Additional Advocate General for the State is that holding of fresh selections after three years may result in appointment of a better person as a Rojgar Sewak. This does not appeal to reason and a policy for fresh selection every year has been held to be arbitrary and against service jurisprudence by the Supreme Court in Mohd. Abdul Kadir (supra) though with certain exceptions namely when service is found to be unsatisfactory or on medical or disciplinary grounds.

27. The decision in Geeta Devi (supra) relied upon by the learned Additional Advocate General for the State of U.P. also does not help the respondents inasmuch as this issue was not involved. The relevant observations are:-

"In view of this admitted position that the period of two years of engagement of respondent no. 1 has expired long back, the question as to whether the appellant could have removed him under the impugned order or not, looses significance inasmuch as once the tenure of the respondent no. 1 has come to an end, there is no legal right vested in him to claim continuance. Even otherwise, the order impugned in the writ petition passed, by the appellant, was backed up by a resolution as indicated in the order itself. The respondent no. 1 was also handed over his dues in accordance with the said Government Order. In such a situation, once the contract of engagement has expired and admittedly there was no other extension possible or actually made under any law for the time being in force, there was no occasion for the learned Single Judge to have granted an interim order, the impact whereof was to continue the respondent no. 1 as Gram Rojgar Sevak."

28. It is, therefore, not possible, in view of the aforesaid decisions of the Supreme Court to uphold the policy of the Government contained in the Government Order dated 25th August, 2010 regarding holding of fresh selections for appointment of Rojgar Sewak after every three years. The appointment of the Rojgar Sewaks should be continued even after they have worked for three years, though one year at a time, subject to satisfactory work as was the procedure adopted prior to the expiry of three years of service.

29. The condition contained in paragraph 4 of the Government Order dated 25th August, 2010 to the extent that fresh selection shall take place after three years is, therefore, set aside and it is provided that even after expiry of three years of service, the appointment of Rojgar Sewak shall be renewed for a period of one year at a time subject to satisfactory work.

30. The writ petition is, accordingly, allowed to the extent indicated above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.10.2010

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

Civil Misc. Writ Petition No. 63621 of 2009

Lalta Prasad and others ...Petitioner
Versus
Housing Commissioner U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Pooja Srivastava

Counsel for the Respondents:
C.S.C.

Court Fee Act-Section 5-More than 35 person-Seeking direction for the authority concern- to -accept house rent as per direction of Court-stamp reporter reported deficiency of court fee separately-Held-act of authority offect in general-common question of fact and law envolve-for consideration case fall– under category(A) of principle No I-hence even more than single person jointly challenging such act-Single Court fee payable sufficient.

Held: Para 22

From a perusal of the averments made in the Writ Petition, it is evident that the petitioners are aggrieved by the same act of the Additional Labour Commissioner, namely, refusal to accept the rent in respect of the quarters allotted to the petitioners. The act of the Additional Labour Commissioner affects the petitioners in general. The challenge to the said act of the Additional Labour Commissioner by all the petitioners is on the basis of the same facts, namely, the orders passed by this Court in Civil Misc. Writ Petition 6373 of 1991 filed by the Workmen living in the labour colony at Kanpur. The reliefs sought in the Writ Petition is regarding the said act of the Additional Labour Commissioner. Hence, the right to seek relief, if any, arises to the petitioners from the same act of the Additional Labour Commissioner. Further, common questions of law and fact are involved in such a situation. Hence, such a case falls in category (A) of Principle No. 1, mentioned above. Therefore, in case more than one petitioner joins in a single Writ Petition challenging the said act, only a single set of Court Fee is required to be paid.

Case law discussed:
AIR 1981 SC 298 (paragraph 63), AIR 1984 Allahabad 46 (F.B.) (paragraph 34 and 36), (1994) 2 UPLBEC 1228 (D.B.).

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

Order on

Objection, filed under section 5 of the Court Fees Act, 1870 against the Report/order of the Taxing Officer dated 10.11.2009 as well as the Report of the Stamp Reporter dated 29.10.2009.

1. It appears that the present writ petition, whrein 35 persons have joined as petitioners, was placed before the Stamp Reporter for getting the same reported. The Court Fee paid on the Writ Petition is Rs. 100/-while Rs. 5/- has been paid as Court Fee on the Stay Application. The Stamp Reporter in his Report dated 29.10.2009 reported that there was deficiency of Rs. 3570/- in Court Fee paid on the Writ Petition and the Stay Application. The said Report was evidently given by the Stamp Reporter on the ground that separate Court Fee was payable by each of the 35 petitioners in respect of the Writ Petition and the Stay Application.

2. The learned counsel for the petitioners objected to the said Report of

the Stamp Reporter whereupon the matter was placed before the Taxing officer.

3. The Taxing Officer by his Report/ order dated 10.11.2009 has agreed with the Report of the Stamp Reporter holding that each petitioner has separate and independent cause of action and has to pay separate Court Fee. Accordingly, the Taxing Officer has directed the petitioners to make good the deficient Court Fee as per the Report of the Stamp Reporter.

4. Thereafter, Objections under Section 5 of the Court Fees Act, 1870 have been filed on behalf of the petitioners against the said Report/ order of the Taxing Officer dated 10.11.2009 and the Report of the Stam Reporter dated 29.10.2009.

5. The Stamp Reporter thereafter put a Note dated 20.11.2009, interallia, stating that the matter be placed before the Court. The Writ Petition was presented on 20.11.2009.

6. On 24.11.2009, Hon'ble S.U. Khan, J. passed the following order:

"Question of payment of court fees is not being decided finally at this stage. Taxing Officer has reported that there is deficiency in court fees and each of the 35, petitioners should pay separate court fees.

Let the matter be placed before the Hon'ble Judge, who is nominated to hear the objection against such orders passed by Taxing Officer.

Meanwhile, issue notice pending admission to the respondents."

7. Pursuant to the said order dated 24.11.2009, the aforesaid Objections filed on behalf of the petitioners under Section 5 of the Court Fees Act, 1870, have been placed before me.

8. For deciding the question of Court Fee, relevant allegations made in the Writ Petition may be noted.

9. It is, interalia, alleged in the Writ Petition that the petitioners were employees in M/S Triveni Engineering Limited, and were living in the quarters constructed by the State Government under the U.P. Industrial Housing Act, 1955; and that on the closure of M/S Triveni Engineering Limited and its shifting to some other part of the state, the petitioners got themselves engaged in other factories wherein production was carried on in Naini, Allahabad: and that the rent of one room tenement was fixed at Rs. 10/- per month while rent in respect of two room tenement was fixed at Rs. 17.50 per month; and that in 1988, the petitioners were asked to vacate the quarters, and several notices were issued to the petitioners, which were challenged in a Writ Petition before this Court; and that this Court passed a Stay Order Staying the eviction of the petitioners from the quarters in their possession: and that since then, the petitioners have been living in the quarters and they had been paying rent regularly; and that by the order dated 29.11.1990, the State Government enhanced the monthly rent of the aforesaid quarters from Rs. 10/- and Rs. 17.50 to Rs. 235/- per month; and that the Workmen living in the colonies in Kanpur filed Civil Misc. Writ Petition No. 6373 of 1991 before this Court Challenging the said order dated 29.11.1990, and this Court passed a Stay Order dated 31.3.1992 staying the operation of the order dated 29.11.1990 enhancing the rent of the quarters and

further staying the eviction of the Workmen from the quarters in their possession: and that the said Civil Misc.Writ Petition No. 6373 of 1991 filed by the Workmen living in the colonies at Kanpur was decided by this Court by the judgement dated 19.2.2009; and that while dismissing the writ Petition, this Court directed that the order dated 29.11.1990 would be enforced with effect from the date of the said judgment dated 19.2.2009, and the arrears would not be recovered from the labourers staying in the labour colony; and that the petitioners herein have been approaching the representative of the Additional Labolur Comkissioer for depositing the rent but the said representative has begun refusing to accept the rent; and that the petitioners approached the Additiional Labour Commissioner but he insisted and that the petitioners are continuing to live in the quarters allotted to them; and that it is necessary that the respondents be directed to accept the monthly rent as being paid by the petitioners in the past years and not to refuse accepting the same.

On the basis of the allegations made in the Writ Petitiion, the petitioners have made the following prayers:

"(i) to issue a suitable writ direction or order or a writ in the nature of mandamus to accept rent from the petitioners at the rate at which they had been paid in the past and which the respondents accepted earlier, but are now refusing to accept the same.

(ii) to issue a writ in the nature of mandamus or any other writ direction or order commanding the respondents not to vacate the petitioners from the quarters which they are occupying on account of their failure to pay the rent at the enhanced rate.

(iii) to issue any othe writ direction or order or grant such other and further relief as may be deemed fit and proper in the circumstances of the case.

(iv) to award for costs."

10. I have heard Shri K.P. Agrawal, learned Senior Counsel assisted by Miss. Pooja Srivastava, learned Counsel for the petitioners.

11. It is submitted by Shri K.P. Agrawal, learned Senior Counsel appearing for the petitioners that the cause of action in respect of all the petitioners is non-acceptance of rent. As the cause of action in respect of all the petitioners is identical, joint Writ Petition is maintainable. Shri Agrawal has further referred to the Stay Order dated 31.3.1992 passed in Civil Misc. Writ Petition No. 6373 of 1991, and the judgment dated 19.2.2009 whereby the said Writ Petition was dismissed with certain directions. A copy of the judgment dated 19.2.2009 passed in the said Writ Petition was also submitted for perusal of the Court during arguments.

12. Shri K.P. Agrawal submits that in view of the cause of action as pleaded in the Writ Petition, one set of Court Fee is payable, and the Report/ Order of the Taxing Officer as also the Report of the Stamp Reporter requiring payment of separate Court Fee in respect of each petitioner, are nor correct.

13. Shri K.P. Agrawal, learned Senior Counsel appearing for the

petitioners has relied upon the following decisions:

1. Akhil Bharatiya Soshit Karamchari Sangh (Railway) represented by its Assistant General Secretary on behalf of the Asson. Etc. Vs. Union of India and others, AIR 1981 SC 298 (paragraph 63).

2. Umesh Chand Vinod Kumar and others Vs. Krishi Utpadan Mandi Samiti, Bharthana and another, AIR 1984 Allahabad 46 (F.B.) (paragraphs 34 and 36).

14. I have considered the submissions made by Shri K.P. Agrawal, learned Senior Counsel appearing for the petitioners.

15. In order to appreciate the submissions, it is necessary to refer to certain judicial decisions including those cited by Shri K.P. Agrawal wherein the principles regarding payment of Court Fee in case where more than one petitioner joins in a single Writ Petition have been considered.

16. In ***Mota Singh and others etc. etc. Vs. State of Haryana and others, AIR 1981 SC 484,*** different truck owners having no relation with each other either as partners or any other legally subsisting jural relationship of association of persons, joined as petitioners in one Writ Petition in respect of the impugned tax, and paid only one set of Court Fee. Their Lordships of the Supreme Court held that where every owner of a truck plying his truck for transport of goods has a liability to pay tax impugned in the Writ Petition, each one has his own independent cause of action arising out of the liability to pay tax individually and the Writ Petition of each one would be a separate and independent Petition and each such person would be liable to pay legally payable Court Fee on his Petition. Relevant portion of the decision of the Supreme Court is reproduced below (paragraph 1 of the said AIR):

"We have carefully gone through the office report prepar3ed pursuant to the directions given by us. We are prima facie satisfied that the petitioners have not paid court-fees legally payable and that the petitioners have so modeled tha title clause of the petitions as may indicate that the payment of the legally payable court fee could be evaded. Having regard to the nature of these cases where every owner of a truck plying his truck for transport of goods has a liability to pay tax impugned in the petition, each one has his own independent cause of action. A firm as understood under the Partnership Act or a Company as understood under the Indian Companies Act, if it is entitled in law to commence action either in the firm name or in the Company's name, can do so by filing a petition for the benefit of the company or the partnership and in such a case cout fee would be payable depending upon the legtal status of the petitioner. But it is too much to expect that different truck owners having no relation with each other either as partners or any other legally subsisting jural relationship of association of persons would be liable to pay only one set of court-fee simply because they have joined as petitioners in one petition. Each one has his own cause of action arising out of the liability to pay tax individually and the petition of each one would be a separate and independent petition and each one would be a separate and independent petition and each such person would be liable to pay legally payable

court-fee on his petition. It would be a travesty of law if one were to hold that as each one uses high way, he has common cause of action with the rest of truck pliers."

17. In ***Umesh Chand Vinod Kumar case*** (Supra), relied upon by Shri K.P. Agrawal, learned Senior Counsel appearing for the petitioners, five questions were referred by a Division Bench of this Court to the Larger Bench. The Full Bench answered the five questions as under (paragraph 45 of the said AIR):

"45. *Our answer to the referred questions is as follows:-*

Q. 1- whether an association of persons, registered or unregistered, can maintain a petition under Article 226 of the constitution for the enforcement of the right of its members as distinguished from the enforcement of its own rights?

A. 1-The position appears to be that an association of persons, registered or unregistered, can file a petition under Article 226 for enforcement of the rights of its members as distinguished from the enforcement of its own rights-

1. In case members of such an association are themselves unable to approach the court by reason of poverty, disability or socially or economically disadvantaged position ("Little Indians").

(2). In case of a public injury leading to public interest litigation: provided the association has some concern deeper than that of a wayfarer or a busybody, i.e., it has a special interest in the subject matter.

(3). Where the rules or regulations of the association specifically authorize it to take legal proceedings on behalf of its members, so that any order passed by the court in such proceedings will be binding on the members.

In other cases an association, whether registered or unregistered, cannot maintain a petition under Article 226 for the enforcement or protection of the rights of its members, as distinguished from the enforcement of its own rights.

Q. 2 Whether a single writ petition under Article 226 of the constitution is maintainable on behalf of more than one petitioner, not connected with each other as partners or those who have no other legally subsisting jural relationship where the questions of law and fact, involved in the petition, are common?

A. 2 A single writ petition under Art. 226 of the Constitution by more than one petitioner, not connected with each other as partners or any other legally subsising jural relationship, is maintainable where the right to relief arises from the same act or transaction and there is a common question of law or fact or where though the right of claim does not arise from the same act or transaction, the petitioners are jointly interested in the cause or causes of action.

Q.3. In case the answet to question No. 1 is in the affirmative, whether only one set of court-fees would be payable on such petition or each such indivisual petitioner has to pay court-fees separately?

A. 3 Where a single writ petition by an association or by more than one person is maintainable, ten a single set of

court-fees would be payable. Else, each petitioner is liable to pay separate court-fees.

Q. 4 In case answer to question No. 1 is in the negative, whether the defect of misjoinder of several petitioners in the writ petition can be cured by requiring each such petitioner to pay separate court-fees?

A. 4 The technical defect of misjoinder of petitioners can, in the discretion of the Court, be cured by each petitioner paying separate court-fees.

Q. 5 Whether the petition is maintainable for questioning similar actions taken by different Mandi Smitis independently of each other in cases where the aggrieved party seeks relief against each such Committee on identical grounds?

A. 5 Our answer to this question is in the affirmative."

While discussing Question No. 2, noted above, the Full Bench considered the decision of the Supreme Court in ***Mota Singh* case** (supra) and observed as under (paragraph 28 of the said AIR)*:*

"28*. It appears to us that according to this decision a joint writ petition would be validly maintainable if there is legally subsisting jural relationship of association of persons between them or if they have the same cause of action. In substance, this decision applies the same principle of procedure as was enunciated by the Full Bench of our Court in* ***Mall Singh's case (1968 All LJ 210),*** *namely, generally joinder of more than one person can be permitted in a proceeding under Art. 226 where the right to relief arises out of the same act or transaction or where the petitioners are jointly interested in the cause of action and a common question of law or fact arises. In other words, joinder of more than one person is permissible when the cause of action is the same. Such joinder may not be permissible if the cause of action is similar."*

Further, while dealing with Question Nos, 3 and 4, mentioned above, the Full Bench observed as under (paragraph 36 of the said AIR):

"36*. Where a single writ petition by an association or by more than one person is maintainable as mentioned above, only one set of court-fees would be payable. The levy of court-fee will not depend on the number of persons who have joined in the writ petition. But, where a single writ petition is not validly maintainable, but nonetheless several persons join in it, then the principle laid down in* ***Mota Singh's case (AIR 1981 SC 484)*** *will apply; namely, each petitioner will have to pay court-fee separately as if he had filed a separate writ petition. In such cases the writ petition may not, in the discretion of the Court, be dismissed outright. The defect of misjoinder of petitioners can be cured by requiring each petitioner to pay separate court-fees."*

18. In ***Saroja Nfand Jha and others Vs. M/S Hari Fertilizers, Varanasi and others, (1994) 2 UPLBEC 1228 (D.B.),*** a Division Bench of this Court considered the answere given in regard to Question Nos. 2 and 3 by the Full Bench of this Court in ***Umesh Chand Vinod Kumar case*** (supra), and held as follows (paragraph 5 of the said UPLBEC):

*"**5**. According to the decision of Full Bench, Single writ petition under Article 226 of the Constitution of India by more than one petitioner, not connected with each other as partners or any other legally subsisting jural relationship, is maintainable in two contingencies, viz. (1) where the right to relief arises from the same act or transaction and there is a common question of law or fact; and (2) where right to relief does not arise from same act or transaction, the petitioners are jointly interested in the cause or causes of action, If a single writ petition by more than one person is maintainable, then only a single set of court-fee is required to be paid. In other cases each petitioner has to pay separate court-fees, even for convenience sake one writ petition is filed by more than one petitioner.*

19. Keeping in view the proposition laid down in the above decisions, we may summarise the principles regarding payment of Court Fee in case where more than one petitioner joins in a single Writ Petition:

1. A single Writ Petition under Article 226 of the Constitution of India by more than one petitioner, not connected with each other as partners or any other legally subsisting jural relationship, is maintainable in following two situations:

A. Where the right to relief arises from the same act or transaction and there is common question of law or fact.

B. Where though right to relief does not arise from the same act or transaction, the petitioners are jointly interested in the same cause or causes of action.

2. If a single Writ Petition by more than one person is maintainable, then only a single set of Court Fee is required to be paid. In other cases, each petitioner has to pay separate Court Fee, even if for convenience sake one Writ Petition is filed by more than one petitioner.

20. As regards the decision ***in Akhil Bharatiya Soshit Karamchari Sangh (Railway) represented by its Assistant General Secretary on behalf of the Asson, Etc. Vs. Union of India and others, AIR 1981 SC 298,*** relied upon by Shri K.P. Agrawal, learned Senior Counsel appearing for the petitioners, it may be mentioned that the observations made in paragraph 63 of the said decision (as reported in AIR) pertained to the question of locus-standi. In this regard, reference may also be made to paragraph 33 of the Full Bench decision of this Court in ***Umesh Chand Vinod Kumar case*** (supra) (as reported in AIR) wherein the decision of the Supreme Court in ***Akhil Bharatiya soshit Karamchari Sangh*** case (supra), has been considered.

21. Keeping in view the principles, mentioned above, let us now consider the question of deficiency in payment of court Fee in the present case.

22. From a perusal of the averments made in the Writ Petition, it is evident that the petitioners are aggrieved by the same act of the Additional Labour Commissioner, namely, refusal to accept the rent in respect of the quarters allotted to the petitioners. The act of the Additional Labour Commissioner affects the petitioners in general. The challenge to the said act of the Additional Labour Commissioner by all the petitioners is on the basis of the same facts, namely, the

orders passed by this Court in Civil Misc. Writ Petition 6373 of 1991 filed by the Workmen living in the labour colony at Kanpur. The reliefs sought in the Writ Petition is regarding the said act of the Additional Labour Commissioner. Hence, the right to seek relief, if any, arises to the petitioners from the same act of the Additional Labour Commissioner. Further, common questions of law and fact are involved in such a situation. Hence, such a case falls in category (A) of Principle No. 1, mentioned above. Therefore, in case more than one petitioner joins in a single Writ Petition challenging the said act, only a single set of Court Fee is required to be paid.

23. Even otherwise also, the petitioners in such a case are jointly interested in the cause of action, and such a case will fall in category (B) of Principle No. 1, mentioned above, in any view of the matter. Hence, in case more than one petitioner joins in a single Writ Petition challenging such act, only a single set of Court Fee is required to be paid.

24. In view of the above, I am of the opinion that the Report/Order of the Taxing Officer dated 10.11.2009 as well as the Report of the Stamp Reporter dated 29.10.2009 in regard to the deficiency in payment of Court Fee are not correct. The Report/ Order of the Taxing Officer dated 10.11.2009 is set aside. It is held that only one set of Court-Fee is payable which has already been paid, and the Writ Petition is in order.

25. It is made clear that the above discussion in the present order is only for deciding the question of deficiency in payment of Court Fee, and there is no expression of any opinion in regard to the maintainability of the Writ Petition or the merits thereof.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.11.2010

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 63663 of 2008

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

Counsel for the Petitioner:
Sri Vinod Sinha
Sri Mahesh Sharma

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

Intermediate Education Act 1921, Chapter-III Regulation 2-50% Promotion Quota-in the institution in Question including Head Clerk-Four post of Clerk created-Head Clerk already retired-petitioner being class 4th employee-claimed appointment on class III post under promotion Quota Denied by D.I.O.S.-on logic out of 3 post of junior clerks 50% of 2 post fall under direct recruitment-no post under promotion Quota available-held-wrong approach-statute provides to first fill 50% promotion Quota,according to logic of D.I.O.S. Itself-even on promotion of Head Clerk one of 3 post of junior Clerk - two post fall under promotion quota-order impugned quashed with consequential directions.

Held: Para 14

If the logic of the DIOS is accepted, even then what this Court has observed would be the correct position for the reason that a person working on the post of

Assistant Clerk after five years if promoted he would take the colour of the source of his recruitment. The fact remains that out of four posts, only one was actually filled in by promotion and therefore, one more post could have been filled in by promotion. In the absence of non-availability of anyone to fill in the post of Head Clerk by promotion, the post of Assistant Clerk could have been filled in by promotion of a Class IV employee as that would not have exceeded the quota meant for promotion. The statute provides that first of all the authority concerned has to ensure that not less than 50% of the post should be filled in by promotion and thereafter only, it can take recourse for direct recruitment.

Case law discussed:

2009 U.P.L.B.E.C. (2) 1443, 2009 ADJ (2) Pg. 90, Civil Misc. Writ Petition No. 51617 of 2009

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

1. All these three writ petitions are connected involving common questions of law and fact and therefore, as requested and agreed by learned counsel for the parties are being decided by this common judgment.

2. The writ petition No.44379 of 2008 the first in point of time was filed by one Sukhbir Singh. The orders dated 06.06.2008 and 16.6.2008 passed by the District Inspector of Schools, Gautambudh Nagar (hereinafter referred to as DIOS) (Annexure 4 and 5 to the writ petition), have been assailed by the petitioner.

3. The order dated 6th June, 2008 is addressed to the Manager/Principal, Sri Ram Model Inter College, Thora, District Gautam Buddh Nagar (hereinafter referred to "the College") informing that Sukhbir Singh is not eligible for promotion to the post of Assistant Clerk, hence proposal of the management passed on 20.5.2007 is being disapproved. It says that the managerial cadre in the college consist of one post of Head Clerk and three of Assistant Clerk. One Pawan Kumar Mittal is already working as Assistant Clerk by way of promotion and one Narendra Kumar is working as Assistant Clerk being a compassionate appointee. The post of Head Clerk is to be filled in by promotion only and since Sukhbir Singh is Daftari a Class IV employee, and is junior to the other Class IV employee, hence he is not eligible for promotion to the post of Assistant Clerk. By letter dated 16th June, 2008, relaxing the procedure of appointment on a vacant post in the College, and granting prior approval, the DIOS gives approval of appointment of Rahul Awana, Son of Late Budh Ram Awana as Assistant Clerk in the scale of 3050-4590 as a compassionate appointee.

4. The case of the petitioner Sukhbir Singh is that he is the only eligible Class IV employee entitled to be promoted to the post of Assistant Clerk and therefore, the DIOS has clearly erred in holding that the petitioner was not eligible for promotion to the post of Assistant Clerk. He further submits that the DIOS has also erred in law by observing that there were some other Class IV persons senior to the petitioner, inasmuch as, other persons were working as Peon while the petitioner was a Daftari which carries a higher pay scale than that of a Peon and hence the petitioner was senior being in the higher pay scale in Class IV to other persons. Though in the writ petition the petitioner also lay his claim with respect to reservation available to handicapped persons but that has not been pressed before this Court knowing it well that the entire cadre of Class IV consist of only four posts out of which two

were to be filled in by direct recruitment and two were by promotion. Therefore, qua one source the cadre consisted of only two posts and hence the reservation at all could not have been claimed in view of law laid down by this Court in the case of **Dr. Vishwajit Singh Vs. State, 2009 U.P.L.B.E.C. (2) 1443** which in turn refers to another bench judgment in the case of **Smt. Pholpati Devi Vs. Smt. Asha Jaiswal, 2009 ADJ (2) Pg. 90.** This is in consonance with the law enunciated by Full Bench in **Civil Misc. Writ Petition No. 51617 of 2009 (Heera Lal Vs. State of U.P. & Ors.)** decided on 9th July, 2010.

5. The DIOS in its counter affidavit has said that one Ranvir Singh was senior to the petitioner as Class IV employee having been appointed on 28.8.1972, the petitioner was rightly denied promotion even though he was a Scheduled Caste and possess educational qualification of Intermediate. It further says that the post of Head Clerk is to be filled in by promotion and therefore, in the category of Assistant Clerk only one post could have been filled in by promotion. No promotio0n ever could be made on the post of Head Clerk since no Assistant Clerk having experience of five years was available which is the condition of eligibility under the Regulations, hence, it was vacant but that would not make the petitioner entitle to claim promotion on the post of Assistant Clerk. Hence the appointment of respondent No.4 Rahul Awana has rightly been made on compassionate basis being as a direct recruitee. He has also said in para 14 that vacant post of Assistant Clerk was reserved for Backward candidate and thus the appointment of respondent No.5 was made by the DIOS.

6. On behalf of Rahul Aawana, Sri S.K. Anwar appears and has adopted the same stand as that of DIOS.

7. The writ petition No.44578 of 2008 has been filed by another Class IV employee i.e. Malkhan Singh of the same college i.e. Sri Ram Model Inter College, Tohra, District Gautam Budh Nagar assailing the order dated 14th August 2008 of DIOS whereby the DIOS has directed the Manager/Principal of the College not to make any promotion on the post of Assistant Clerk and instead treating the vacant post as Assistant Clerk, reserved for OBC, appoint Sri Rahul Aawana on compassionate basis failing which appropriate action under U.P. High School and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971 shall be taken and the Management may also be dissolved by appointing Authorized Controller. The facts in this writ petition are all similar to what have been stated in earlier case except that Malkhan Singh claimed himself to be senior to Sukhbir Singh, inasmuch as, Malkhan was appointed as Peon on 08.08.1972 and Sukhbir Singh appointed as Peon in 1973. It also says that Malkhan Singh is a Scheduled Caste candidate possessing requisite qualification of Intermediate and therefore, is eligible for promotion to the post of Assistant Clerk. The post of Daftari fell vacant in 2005 whereupon the management by its resolution, which was approved by the DIOS on 02.3.2006, promoted Sukhbir Singh as Daftari in the College illegally and thereafter when the post of Assistant Clerk fell vacant on 31.12.2006 due to retirement of one Chandra Pal, again attempted to promote Sukhbir Singh illegally which order of promotion has rightly been disapproved by the DIOS.

Malkhan Singh, therefore, has supported disapproval of promotion of Sukhbir Singh on the post of Assistant Clerk but the rest of the action of the DIOS in not allowing promotion on one post of Assistant Clerk and filling in the same by appointment of Rahul Awana- respondent No.4 in Writ Petition No.44578 of 2008 has been impugned by him.

8. The third writ petition No.63663 of 2008 has also been filed by Malkhan Singh challenging the order dated 16.10.2008 whereby his representation has been rejected by DIOS claiming promotion on the post of Assistant Clerk.

9. It appears that before filing Writ Petition No.44578 of 2008, Malkhan Singh had already approached this Court vide Writ Petition No.26129 of 2007 which was disposed of on 17th January, 2008 directing the DIOS to consider and pass appropriate order on the representation of Malkhan Singh with regard to promotion on the post of Assistant Clerk and pursuant thereto, order dated 16th October, 2008 has been passed which is impugned in the third writ petition No.63663 of 2008 filed by Malkhan Singh.

10. The short controversy engaging attention in these writ petitions is, "whether one post of Assistant Clerk, with which we are concerned, can be filled in by promotion or by direct recruitment."

11. Regulation 2, Chapter III of the Regulations under the Intermediate Education Act, 1921 provides for filling of at least 50% of class III post by promotion. The cadre, in the case in hand, consist of one post of Head Clerk and three post of Assistant Clerk. Though the post of Head Clerk in status and pay scale is higher to the post of Assistant Clerk but for the purpose of Regulation 2 Chapter III of the Regulations, irrespective of the pay scale and status, all 4 post are to be considered as a single cadre for the purpose of applying the quota of promotion and direct recruitment. It is also not disputed by the parties that the post of Head Clerk can be filled in only by promotion. If the post of Head Clerk would have been occupied meaning thereby somebody is appointed, it would result in saying that one Class III post is already filled in by promotion, in rest of the post of Assistant Clerks, the quota of promotion and direct recruitment could have been calculated accordingly. It has been held that if there is only one post or three post, then the solitary post or two post out of three shall be filled in by promotion since promotion quota cannot be less than 50 per cent. In the present case since the post of Head Clerk is liable to be filled in by promotion and therefore, the DIOS has concluded that out of three posts of Assistant Clerk two have necessarily to be filled in by direct recruitment and only one by promotion and that too by applying reservation.

12. The cadre consist of two post for direct recruitment and two for promotion meaning thereby if the reservation is applied, it would be beyond the percentage of reservation prescribed in Uttar Pradesh Public Services (Reservation For Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994, which is impermissible. This aspect has already been considered and decided by this Court in the case of **Smt. Pholpati Devi (supra) and Dr. Vishwajit Singh (supra).**

13. Therefore, in the above circumstances, I have no hesitation in holding that so far as the reservation is

concerned, even by roster, it would not apply otherwise it would cross the maximum limit prescribed by statute, which is not permissible.

14. Now, coming to the main aspect of the matter as to whether the post is to be filled in by promotion or not, the question as to how the post of Head Clerk can be filled in, to my mind, ought not to have impressed on the DIOS when the post is lying vacant and cannot be filled in whatever may be reason. The fact remains that out of four posts, only one was actually filled in by promotion and one by direct recruitment. If the logic of the DIOS is accepted, even then what this Court has observed would be the correct position for the reason that a person working on the post of Assistant Clerk after five years if promoted he would take the colour of the source of his recruitment. The fact remains that out of four posts, only one was actually filled in by promotion and therefore, one more post could have been filled in by promotion. In the absence of non-availability of anyone to fill in the post of Head Clerk by promotion, the post of Assistant Clerk could have been filled in by promotion of a Class IV employee as that would not have exceeded the quota meant for promotion. The statute provides that first of all the authority concerned has to ensure that not less than 50% of the post should be filled in by promotion and thereafter only, it can take recourse for direct recruitment.

15. In view of the above discussion, the decision of DIOS for filling in the post of Assistant Clerk in question, in the College, by direct recruitment and not by promotion cannot sustain. The appointment of respondent-Rahul Awana by direct recruitment therefore, has also to go. The writ petitions are accordingly allowed. The impugned orders are hereby quashed. The respondents shall take steps for filling in the post of Assistant Clerk of the College in question by promotion in accordance with law. The steps for filling in the post in question by promotion, as directed above, shall be completed by the authority concerned within two months from the date of production of a certified copy of this order before him.

16. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 3.12.2010

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No.65815 of 2008

Ram Ratan Agnihotri ...Petitioner
Versus
Senior Superintendent, Central Jail, Fatehgarh & others ...Repondents

Counsel for the Petitioner:
Sri Ram Kirti Singh

Counsel for the Respondents:
C.S.C.

Fundamental Rules-Rule 56 (C)-Compulsory retirement-authorities considering previous conduct-adverse entries-appraisal of work and scrutiny of service record-taken decision to compulsory retire-petitioner never challenge those entries-plea regarding single adverse entry can not be basis to compulsory retire-misconceived-no allegation of mala fide or malice against authority-decision taken in public interest-no reason for interference by writ court-can not act as appellate authority.

Held: Para 19

Considering the entire service record of the petitioner and in particular, the aforesaid adverse entries, it cannot be said that the competent authority has acted arbitrarily and there was no material at all to form an opinion that the petitioner deserved to be compulsorily retired under F.R. Rule 56(c). It is not the case of the petitioner that the above entries have been recorded against him by the various authorities on account of any malice or mala fide nor anyone has been impleaded eo-nomine. There is no challenge by the petitioner to the aforesaid entries. This Court will not sit in appeal over the decision of the competent authority based on over all assessment of service record of a Government servant for taking the decision of compulsory retirement of such an officer unless it is arbitrary ex facie. F.R. 56 as enacted in Uttar Pradesh empowers the competent authority to consider the entire service record and the same having been perused, the competent authority, in my view, has rightly held that the petitioner should be compulsorily retired and I do not find any reason to interfere with the said decision. The contention of the petitioner, thus, that the impugned order has been passed without any material and is arbitrary, is rejected.

Case law discussed:

JT 2001 (3) SC 223, AIR 1954 SC 369, (1996) 4 SCC 504, (1992) 2 SCC 317, AIR 1998 SC 3058, (1996) 5 SCC 331, AIR 2001 S.C. 1109, AIR 995 SC 111, 2001 (3) SCC 389, (1998) 4 SCC 92

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

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

2. The order of compulsory retirement is under challenge passed under Fundamental Rule 56(c). It appears that earlier petitioner came up to this court by means of writ petition no. 34414 of 1999, assailing the aforesaid order of compulsory retirement, which was disposed of on 7.5.2008. This court observed that order of compulsory retirement was passed as a punishment, hence it is harsh. The matter was remanded for reconsideration. It is pursuant to this observation and direction, the impugned order has been passed by Senior Superintendent, Central Jail, Fatehgarh on 14/15.10.2008 affirming the order of compulsory retirement of the petitioner.

3. Learned counsel for the petitioner submits that in view of sub para 6 only for one year his Annual Confidential Report was found bad and on that basis he could not have been held a dead wood. Reliance is placed on **State of Gujrat Vs. Umedbhai M. Patel, JT 2001 (3) SC 223.**

4. The submission is thoroughly misconceived. Aforesaid order shows that following punishments were imposed upon the petitioner pursuant to disciplinary proceedings held at different times.

"1. जिला कारागार, कानपुर में रात्रिगस्त के समय सीढ़ियों पर बैठकर डंघते हुए पाये जाने पर आदेश दिनांक 10.06.93 द्वारा दण्ड स्वरूप आगामी एक वर्ष की वेतनवृद्धि रोके जाने के दण्ड से दण्डित किया, जिसका प्रभाव भविष्य की वेतनवृद्धियो पर नहीं पड़ेगा।

2. वरिष्ठ अधीक्षक, केन्द्रीय कारागार, फतेहगढ़ के आदेश दिनांक 06.07.96 द्वारा बंदी की आत्महत्या के प्रकरण में वर्तमान वेतनक्रम में तीन स्तर नीचे एक वर्ष के लिए उतारा गया जिसका प्रभाव भविष्य की वेतनवृद्धियों पर नहीं पड़ेगा। उक्त दण्ड को उप महानिदेशक कारागार कानपुर परिक्षेत्र कानपुर द्वारा अपील में निरस्त कर दिया गया है।

3. वरिष्ठ अक्षीक्षक, केन्द्रीय कारागार, फतेहगढ़ के आदेश दिनांक 13.04.91 द्वारा विचाराधीन बंदी छोटेलाल के पलायन में दोषी पाये जाने पर दण्ड स्वरूप तीन वर्षों की वेतनवृद्धियां रोकी गयी। जिसका प्रभाव भविष्य की वेतनवृद्धियों पर नहीं पड़ेगा। इसके अतिरिक्त दिनांक 07.04.94 को प्रधान बंदीरक्षक पद हेतु चुनाव में सम्मिलित हुए जिसमें अयोग्य पाये गये।

4. वरिष्ठ अधीक्षा, केन्द्रीय कारागार, फतेहगढ़ के आदेश दिनांक 20.06.87 के द्वारा जेल लाईन मे अनाधिकृत रूप से जानवर पालने के संबंध में एक वेतनवृद्धि रोकी गयी जिसका प्रभाव भावी वेतनवृद्धियों पर नहीं पड़ेगा।

5. सेवा में एक लघुदण्ड चेतावनी है जिस पर याची के हस्ताक्षर है इसके 03 दिन का अतिरिक्त ड्रिल तथा साप्ताहित परेड में बैरक गन्दी पाये जाने पर कठोर चेतावनी दी गयी तथा भण्डारे के निरीक्षण में भण्डारा गन्दा पाये जाने पर याची को चरित्र पंजिका के माध्यम से चेतावनी दी गयी एवं अर्दली डियूटी में अनुपस्थित पाये जाने पर चरित्र पंजिका के माध्यम से चेतावनी दी गयी।

6. पिछले 10 वर्षों की गोपनीय प्रविष्टियों में पांच वर्ष की गोपनीय प्रविष्टियां अच्छी पायी गयी तथा 02 वर्ष की उत्तम, एक वर्ष की खराब एवं एक वर्ष की प्रमाण पत्र के आधार पर दी गयी है।''

5. Besides above, learned counsel for the petitioner admits that compulsory retirement is not a punishment under disciplinary rules but is an order passed in exercise of power under Fundamental Rule 56(c).

6. Compulsory retirement is a facet of "doctrine of pleasure" embodied in Article 310 of the Constitution. The rule holds balance between the rights of individual Government servant and the interest of the public. It is intended to enable the employer to energise its machinery and make it more efficient by compulsorily retiring those who in its opinion should not be there in public interest. The object is to weed out the dead wood in order to maintain high standard of efficiency and honesty. It does not cast any stigma and cannot be constituted as a punishment to a Government servant when exercised in public interest under F.R. 56.

7. In ***Shyam Lal Vs. State of U.P. and another,*** AIR 1954 SC 369 it was held that an officer who has compulsory retired does not lose any part of the benefit that he has earned and is entitled for pension and other retiral benefits in accordance with Rules. There is no deprivation of the accrued benefits. Though from the point of view of the officer/employee concerned, he may think to have been punished for not being allowed to serve till he attains the age of superannuation prescribed under the Rules, but there is distinction between the loss of benefits already earned and loss of prospects to earn something more. It was held that since compulsory retirement under F.R. 56(c) is not a punishment when resorted to in public interest, Article 311 of the Constitution of India has no application.

8. The whole purpose of the provision made for compulsory retirement is to weed out the worthless without resorting to bona fide extreme process covered under Article 311 of the Constitution. After all the administration to be efficient has to be manned by active and competent prone workers and should not be manned by drones do nothing, incompetent and unworthies. Lack of efficiency by itself does not amount to a misconduct and, therefore, such incumbent may not be delinquent needs to be punished but may prove to be a burden on the administration, if by insensitive, insouciant, unintelligent or dubious conduct impede the floor or promote

stagnation. In a developing country where speed, probity, sensitive, enthusiastic, creativity and non-brevity process are immediately required, callous cadres and paperlogged are the bees setting sin of the administration. Sometimes, reputation or otherwise the information available to the superior officers reflects on the integrity of the employee but there may not be sufficient evidence available to initiate punitive action, but simultaneously conduct and reputation of such person is menace for his continuance in public service is injurious to public interest. In all such cases order of compulsory retirement may be passed by the competent authority.

9. In **Allahabad Bank Officers' Association & another Vs. Allahabad Bank and others (1996) 4 SCC 504**, the Apex Court observed as under:-

" The power to compulsorily retire a government servant is one of the facets of the doctrine of pleasure incorporated in Article 310 of the Constitution. The object of compulsory retirement is to weed out the dead wood in order to maintain efficiency and initiative in service and also to dispense with the services of those whose integrity is doubtful so as to preserve purity in the administration." (para-5)

10. In **S. Ramchandra Raju (supra)** the Apex Court held as under:

" It is thus settled law that though the order of compulsory retirement is not a punishment and the government employee is entitled to draw all retiral benefits including pension, the government must exercise its power only in the public interest to effectuate the efficiency of the service. The dead wood need to be removed to augment efficiency. Integrity in public service need to be maintained. The exercise of power of compulsory retirement must not be a haunt on public servant but must act as a check and reasonable measure to ensure efficiency of service and free from corruption and incompetence. The officer would live by reputation built around him. In an appropriate case, there may not be sufficient evidence to take punitive disciplinary action of removal from service. But his conduct and reputation is such that his continuance in service would be a menace in public service and injurious to public interest."

11. In **Posts and Telegraphs Board Vs. C.S.N. Murthy, (1992) 2 SCC 317,** the Hon'ble Apex Court considered the scope of judicial review as under:-

"An order of compulsory retirement is not an order of punishment. F.R. 56(j) authorizes the government to review the working of its employee at the end of the point of their service referred to therein and to require the servant to retire from service, if in its opinion, public interest calls for such an order. Whether the conduct of the employee is such as to justify such a conclusion is primarily for the departmental authorities to decide. The nature of delinquency and whether it is of such a degree as to require the compulsory retirement of the employee are primarily for the government to decide upon. The Courts will not interfere with the exercise of this power, <u>if arrived at bona fide and on the basis of material available on the record</u>. "*(para 5) (emphasis added)*

12. In **M.S. Bindra Vs. Union of India and others, AIR 1998 SC 3058,** the Hon'ble Apex Court held as under:

" judicial scrutiny of any order imposing premature compulsory retirement is permissible if the order is either arbitrary or mala fide or if it is based on no evidence. The observation that principles of natural justice have no place in the context of compulsory retirement does not mean that if the version of the delinquent officer is necessary to reach the correct conclusion, the same can be obviated on the assumption that other materials alone need be looked into." (para 11)

13. In **State of Orissa and others** Vs. ***Ram Chandra Das (1996) 5 SCC 331,*** the Apex Court held:

" .....It is needless to reiterate that the settled position is that the government is empowered and would be entitled to compulsorily retire a government servant in public interest with a view to improve efficiency of administration or to weed out the people of doubtful integrity or are corrupt but sufficient evidence was not available to take disciplinary action in accordance with the rules so as to inculcate a sense of discipline in the service." (para 3)

14. Thus, compulsory retirement of an employee is actually a prerogative of the Government but it is also true that it should be based on material and on the satisfaction of the authority concerned based on record that the Government servant should not be allowed to continue in public interest and be made to retire.

15. It would be useful to refer certain principles in respect to compulsory retirement, culled out by the Hon'ble Apex Court in **Baikunth Nath Das (supra)** which have been reiterated in **State of Gujarat Vs. Umed Bhai M. Patel AIR 2001 S.C. 1109 held.**

"(i) When the services of a public servant are no longer useful to the general administration, the officer can be compulsorily retired for the sake of public interest.

(ii) Ordinarily, the order of compulsory retirement is not to be treated as a punishment coming under Article 311 of the Constitution.

(iii) For better administration, it is necessary to chop off dead-wood, but the order of compulsory retirement can be passed after having due regard to the entire service record of the officer.

(iv) Any adverse entries made in the confidential record shall be taken note of and be given due weightage in passing such order.

(v) Even uncommunicated entries in the confidential record can also be taken into consideration.

(vi) The order of compulsory retirement shall not be passed as a short cut to avoid departmental enquiry when such course is more desirable.

(vii) If the officer is given a promotion despite adverse entries made in the confidential record, that is a fact in favour of the officer.

Compulsory retirement shall not be imposed as a punitive measure."

16. In ***S. Ram Chandra Raju Vs. State of Orissa,*** AIR 1995 SC 111 the Court held in para 9 of the judgment that the dead wood needs to be removed to augment efficiency. Integrity of public servants needs to be maintained. The exercise of power of compulsory retirement must not be a haunt on public servant but must act as a check and reasonable measure to ensure efficiency of service and free from corruption and incompetence. The officer would live by reputation built around him. In an appropriate case, there may not be sufficient evidence to take punitive disciplinary action of removal from service. But his conduct and reputation is such that his continuance in service would be a menace in public service and injurious to public interest. This has been followed in ***Bishwanath Prasad Singh Vs. State of Bihar and others,*** (2001) 2 SCC 305 wherein with respect to the object, purpose and precaution which are to be taken while writing confidential report, the Court emphasized the need of fairness, justness and objectivity in awarding the entries.

17. A similar question came up before the Hon'ble Apex Court in State of U.P. and another Vs. Lalsa Ram, 2001 (3) SCC 389 wherein the Hon'ble Apex Court considered Fundamental Rule 56, as applicable in U.P. Lalsa Ram was working as Deputy Collector. At the time when he was compulsorily retired in the year 1998 the screening committee considered adverse entries of 1967-68, 1981-82, 1982-83 and 1991-92 as well as censure dated 18.1.86. Although there was no adverse entry in the preceding five years yet considering the constant deterioration in the performance of Shri Lalsa Ram, he was recommended for compulsory retirement. The writ petition filed by Lalsa Ram challenging the aforesaid order of compulsory retirement was allowed on the ground that there being no adverse entry in preceding five years and the adverse entries from 1967 to 1982 being old and stale, only on the basis of one adverse entry of the year 1991-92 it was not justified to retire him compulsorily. The Hon'ble Apex Court allowing the appeal of the State Government considering Fundamental Rule 56 held as under:

"The Uttar Pradesh Fundamental Rules governing the service conditions of the respondent herein, in particular, Rule 56(c) & Explanation 2(a), (b) specifically provide that nothing in the Rules should be construed to exclude from consideration any entry relating to any efficiency bar or he was promoted to any post in an officiating or a substantive capacity or on an ad hoc basis. The important words used are : nothing herein contained shall be construed to exclude from consideration: the exclusion thus is prohibited in terms of the rule. The authority concerned, by reason wherefor has thus a liberty to consider even entries relating to the period before the governmetn servant was allowed to cross any efficiency bar or before he was promoted. It is true that one of the guiding principles as enunciated above in Baikuntha Nath case with regard to performance during the later years ought to be attached more importance but that does not exclude the consideration of the entire record of service."

(para 11) (emphasis added.)

18. Again in para 13 of the judgment, the Hon'ble Apex Court held that Fundamental Rule 56 confers the right absolute to retire an employee on happening of certain event namely, the employee attaining 50 years of age. The only guiding factor is the public interest to retire an employee. It also held that the right being absolute, in the event it is not contrary to the condition, as embodied in Fundamental Rule 56, the question of violation of any legal right of an employee would not arise. It further held where the material is sufficient and conclusion of the authority would have been justified, it cannot be a matter of judicial review, since primarily it is for the departmental authority to decide. The delinquency of the entry and whether it is of such a degree as to reflect on the efficiency of the employees has to be decided by the authorities and the Courts have no authority or jurisdiction to interfere with such exercise of power, if arrived at bona fide on the basis of the material on record. Usurpation of authority is not only unwarranted but contrary to all norms of service jurisprudence. Showing its agreement with the law laid down in **State of Punjab Vs. Gurdas Singh, (1998) 4 SCC 92,** the Hon'ble Apex Court in **Lalsa Ram (supra)** further held as follows :

".....The appointing authority upon consideration of the entire service record as required under the Rules and having formed its opinion that the compulsory retirement of the respondent being in public interest issued the order and in the wake of the aforesaid, question of any interference of this Court does not and cannot arise. Interference in these matter by the courts in exercise of their jurisdiction under the constitutional mandate is very restricted and the courts shall have to tread on the issue with utmost care and caution by reason of very limited scope of interference. The High Court has, in fact, ignored this aspect of the matter and proceeded solely on the basis of the factum of there being no adverse entry in the recent past. Needless to state that adverse entries did not stand extinguished by mere lapse of time but they continued to be on record and it is for the employer to act and rely thereon in the event of there being a rule permitting an order of compulsory retirement.

(para 16) (emphasis added.) "

19. Considering the entire service record of the petitioner and in particular, the aforesaid adverse entries, it cannot be said that the competent authority has acted arbitrarily and there was no material at all to form an opinion that the petitioner deserved to be compulsorily retired under F.R. Rule 56(c). It is not the case of the petitioner that the above entries have been recorded against him by the various authorities on account of any malice or mala fide nor anyone has been impleaded eo-nomine. There is no challenge by the petitioner to the aforesaid entries. This Court will not sit in appeal over the decision of the competent authority based on over all assessment of service record of a Government servant for taking the decision of compulsory retirement of such an officer unless it is arbitrary ex facie. F.R. 56 as enacted in Uttar Pradesh empowers the competent authority to consider the entire service record and the same having been perused, the competent authority, in my view, has rightly held that the petitioner should be compulsorily retired and I do not find any reason to interfere with the said decision. The

contention of the petitioner, thus, that the impugned order has been passed without any material and is arbitrary, is rejected.

20. The writ petition lacks merit and is, accordingly, dismissed. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.12.2010

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE S.S. TIWARI, J.

Civil Misc. Writ Petition No. 66283 of 2010

Dharmendra Kumar Yadav ...Petitioner
Versus
Manager, Commercial Auto Sales (Private) Limited ...Respondent

Counsel for the Petitioner:
Sri M.A. Siddiqui

Counsel for the Respondent:

.....

Constitution of India, Art 226- Maintainability-Writ Petition against Private body-not within meaning of State-nor performing Statutory duty-held-petition against Commercial Auto Sales (Pvt.)-not maintainable.

Held: Para 8 and 12

It is not the case of the petitioner that the Commercial Auto Sales Pvt Ltd. is an authority within the meaning of Article 12 of the Constitution, nor it is alleged that there is any violation of any statutory provisions in the present case. No statutory duty on the respondents have been pointed out which have been violated by it.

In view of the foregoing discussions, we are of the view that no grounds have been made out to issue any mandamus to a purely private body namely; i.e. Commercial Auto Sales Pvt Ltd. in the facts of the present case. We, however, observe that it is open for the petitioner to take such civil or criminal action against the private body which may be permissible under law.

Case law discussed:
AIR 2007 SC 1349; AIR 1977 Alld, 539; AIR 1969, SC 1306; (2003) 10 SCC 733.

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

1. Heard, learned counsel for the petitioner.

By this petition, petitioner has prayed for following reliefs:

"(i) issue a writ, order or direction in the nature of mandamus commanding the respondent not to take forcibly possession of Truck no. UP-70-AT-7959 through their re-possession agents.

(ii) issue any other suitable writ, order or directionwhich this Hon'ble Court may deem fit and proper under the facts and circumstances of the case.

(iii) To award the cost of the writ petition in the favour of the petitioner."

2. The petitioner has taken a loan of Rs. 10 lacs in the month of November, 2007 from the respondent Commercial Auto Sales (Pvt) Ltd for purchase of a Truck which was to be repaid in 44 instalments upto 2011. Petitioner's case is that certain default was committed in depositing the loan, hence the truck which was financed by the respondent was repossessed by the agents of the respondent. Petitioner's case is that a letter

dated 21/9/2010, has been issued by the respondent to all repossession agents that an amount of Rs. 1 lac has been deposited vide Cheque dated 20/10/2010, and the next installment be paid by 02/10/2010. The letter advised that the above vehicle be not held up up to 03/10/2010. Petitioner has also filed an application for impleadment of the State of U.P. through the Collector Allahabad and the Deputy Inspector General of Police as respondent nos. 2 and 3. In the writ petition, allegations have been made against the respondent Commercial Auto Sales Pvt. Ltd and its agent which is a private concerned.

3. Learned counsel for the petitioner on a querry made by the Court that how a writ petition can be entertained against a purely private body, has relied on the judgement of the Apex Court in **Manager, ICICI Bank Ltd. Vs. Prakash Kaur & Ors, AIR 2007 SC 1349,** and Full Bench judgment of this Court reported in **Aley Ahmad Abidi Vs. District Inspector of Schools, Allahabad & Ors, AIR 1977 Alld, 539.**

4. We have considered the submission of the learned counsel for the petitioner and perused the record.

5. As observed above, the only allegations made in the writ petition are against the Commercial Auto Sales Pvt Ltd, which is a private body and its agent who had once repossessed the vehicle. Although, an application for impleadment has been moved for impleading the State of U.P. and D.I.G. of Police, but there are no allegations of any kind made against any State Authorities or Police authorities so as to implead them in this writ petition. No case has been made out for impleading the State of U.P. and D.I.G. of Police, hence the Impleadment application is rejected.

6. The jurisdiction of High Court to issue writ under Article 226 of the Constitution of India has come up for consideration on several occasions before the Apex Court and this Court in **Praga Tools Corporation Vs. C.V. Imanual & Ors, AIR 1969, SC 1306**.The Apex Court considered the issue of issuing writ petition under Article 226 of the Constitution against a registered Company incorporated under the Indian Companies Act, 1913. Following was laid down in paragraphs 6 and 7.

"6. In our view the High Court was correct in holding that the writ petition filed under Art. 226 claiming against the company mandamus or an order in the nature of mandamus was misconceived and not maintainable. The writ obviously was claimed against the company and not against the conciliation officer in respect of any public or statutory duty imposed on him by the Act as it was not he but the company who sought to implement the impugned agreement. No doubt, Art. 226 provides that every High Court shall have power to, issue to any person or authority orders and writs including writs in the nature of habeas corpus, mandamus etc., or any of them for the enforcement of any of the rights conferred by Part III of the Constitution and for any other purpose. But it is well understood that a mandamus lies to secure the performance of a public or statutory duty in the performance of which the one who applies for it has a sufficient legal interest. Thus, an application for mandamus will not lie for an order of restatement to an office which is essentially of a private character nor can

such an application be maintained to secure performance of obligations owed by a company towards its workmen or to resolve any private dispute. [See Sohan Lal v. Union of India,1957 SCR 738=(AIR 1957 SC 529)]. In Regina v. Industrial Court,1965-1 QB377, mandamus was refused against the Industrial court though set up under the Industrial Courts Act, 1919 on the ground that the reference for arbitration made to it by a minister was not one under the Act but a private reference. "This Court has never exercised a general power" said Bruce, J., in R. v. Lewisham Union,1897-1 QB 498,501 "to enforce the performance of their statutory duties by public bodies on the application of anybody who chooses to apply for a mandamus. It has always required that the applicant for a mandamus should have a legal and a specific right to enforce the performance of those duties". Therefore, the condition precedent for the issue of mandamus is that there is in one claiming it a legal right to the performance of a legal duty by one against whom it is sought. An order of mandamus is, in form, a command directed to a person, corporation or an inferior tribunal requiring him or them to do a particular thing therein specified which appertains to his or their office and is in the nature of a public duty. It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. A mandamus can issue, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorising their undertakings. A mandamus would also lie against a company constituted by a statute for the purposes of fulfilling public responsibilities. [CF. Halsbury's Laws of England, (3rd ed.) Vol. 11, p. 52 and onwards].

7. The company being a non-statutory body and one incorporated under the Companies Act there was neither a statutory nor a public duty imposed on it by a statute in respect of which enforcement could be sought by means of a mandamus, nor was there in its workmen any corresponding legal right for enforcement of any such statutory or public duty. The High Court, therefore, was right in holding that no writ petition for a mandamus or an order in the nature of mandamus could lie against the company."

7. The Apex Court in **Federal Bank Ltd. Vs. Sagar Thomas & Ors, (2003) 10 SCC 733,** again considered the scope of issuance of writ under Article 226 of the Constitution against a private Bank. Following was laid down in paras 27 and 33.

"27. Such private companies would normally not be amenable to the writ jurisdiction under Article 226 of the Constitution. But in certain circumstances a writ may issue to such private bodies or persons as there may be statutes which need to be complied with by all concerned including the private companies. For example, there are certain legislations like the Industrial Disputes Act, the Minimum Wages Act, the Factories Act or for maintaining proper environment say Air (Prevention and Control of Pollution) Act, 1981 or Water (Prevention and Control of Pollution) Act, 1974 etc. or statutes of the like nature which fasten certain duties and responsibilities statutorily upon such

private bodies which they are bound to comply with. If they violate such a statutory provision a writ would certainly be issued for compliance of those provisions. For instance, if a private employer dispense with the service of its employee in violation of the provisions contained under the Industrial Disputes Act, in innumerable cases the High Court interfered and have issued the writ to the private bodies and the companies in that regard. But the difficulty in issuing a writ may arise where there may not be any non-compliance or violation of any statutory provision by the private body. In that event a writ may not be issued at all. Other remedies, as may be available, may have to be resorted to.

33. For the discussion held above, in our view, a private company carrying on banking business as a scheduled bank, cannot be termed as an institution or company carrying on any statutory or public duty. A private body or a person may be amenable to writ jurisdiction only where it may become necessary to compel such body or association to enforce any statutory obligations or such obligations of public nature casting positive obligation upon it. We don't find such conditions are fulfilled in respect of a private company carrying on a commercial activity of banking. Merely regulatory provisions to ensure such activity carried on by private bodies work within a discipline, do not confer any such status upon the company nor puts any such obligation upon it which may be enforced through issue of a writ under Article 226 of the Constitution. Present is a case of disciplinary action being taken against its employee by the appellant Bank. Respondent's service with the bank stands terminated. The action of the Bank was challenged by the respondent by filing a writ petition under Article 226 of the Constitution of India. The respondent is not trying to enforce any statutory duty on the part of the Bank. That being the position, the appeal deserves to be allowed."

8. It is not the case of the petitioner that the Commercial Auto Sales Pvt Ltd. is an authority within the meaning of Article 12 of the Constitution, nor it is alleged that there is any violation of any statutory provisions in the present case. No statutory duty on the respondents have been pointed out which have been violated by it. The Full Bench judgment of Aley Ahmad Abidi (supra) relied on by the learned counsel for the petitioner lays down that a writ can also be issued to a person or body which is non-statutory, where such body is entrusted with performance of statutory duties or conferred with statutory powers. Following was laid down in para 28.

"28.Sri Hyder also fairly conceded that in the light of the pronouncement of the Supreme Court in Praga Tools Corporation's case (AIR 1969 SC 1306) (supra) even if the Committee of Management of a recognised Intermediate college is held to be a non-statutory body, such committee will still be amenable to the Writ jurisdiction of the High Court, where such Committee is entrusted with performance of statutory duties or conferred with statutory powers."

9. Judgement on which much reliance has been placed by the learned counsel for the petitioner is Manager ICICI Bank Ltd (supra). The said case arose out of Criminal Misc. Writ Petition No. 11210/2006 filed in the High Court. The allegation of writ petitioner in the aforesaid case was that the Bank and it officials had

systematically conspired to cheat the petitioner by advancing the loan for purchase of the truck. Petitioner claims to have sent an application to the police authorities to register an F.I.R. and when no steps had been taken, criminal writ petition was filed in the High Court for issuing direction to register first information report and with certain other reliefs. The High Court directed the Senior Superintendent of Police to ensure registration of the case by a competent Police Officer. The said order was challenged by the Bank. The Apex Court allowed the appeal by directing that on deposit of Rs. 50,000/- the Bank shall forthwith release the truck of the petitioner which was seized. The apex Court in the said context has made following observation in paragraph 18.

"18. Before we part with this matter, we wish to make it clear that we do not appreciate the procedure adopted by the Bank in removing the vehicle from the possession of the writ petitioner. The practice of hiring recovery agents, who are musclemen, is deprecated and needs to be discouraged. The Bank should resort to procedure recognized by law to take possession of vehicles in cases where the borrower may have committed default in payment of the instalments instead of taking resort to strong arm tactics.

There shall be no order as to costs.

Appeal allowed."

10. There cannot be any dispute to the proposition as laid down by the Apex Court in the above case. The Bank has to resort to the procedure recognised by law to take possession of the vehicle. However, in case the Bank commits any violation or commits an offence, it is always open for an aggrieved person to take such criminal or civil action as permissible under law.

11. In view of the aforesaid, the above case which arose out of criminal writ petition does not help the petitioner in the present case.

12. In view of the foregoing discussions, we are of the view that no grounds have been made out to issue any mandamus to a purely private body namely; i.e. Commercial Auto Sales Pvt Ltd. in the facts of the present case. We, however, observe that it is open for the petitioner to take such civil or criminal action against the private body which may be permissible under law.

13. With the aforesaid observations, writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.12.2010

BEFORE
THE HON'BLE SHASHI KANT GUPTA, J.

Civil Misc. Writ Petition No. 70333 of 2010

Smt. Krishna Devi ...Petitioner
Versus
Additional District Judge, Kanpur Nagar and others ...Respondents

Counsel for the Petitioner:
Sri K.P. Shukla
Sri Arvind Kumar Tewari

Counsel for the Respondents:
Sri Atul Dayal

U.P. Urban Building (Letting and Rent) Act No. 13 of 1972-Section-12, 13-Declaration of Vacancy resisted by petitioner on ground of limitation-

Objection based on possession since 1981 to 2006-as barred by limitation-for all purposes-petitioner is within meaning of unauthorised occupant-No right to obstract the proceeding-view taken by both authorities perfectly justified.

Held: Para 23

The premises in the possession of an unauthorized occupant would be deemed to be vacant for the purposes of Rent Control Act, even if an unauthorized occupant is inducted into the premises contrary to the provisions of the Act by the landlord himself, the legislature has not placed any restriction on the rent control authorities to initiate proceedings under Section 12 of the Act. So far as the release of such premises which are deemed to be vacant under Section 12 (4) of the Act is concerned, the application of release has to be considered on merit in accordance with law by the District Magistrate. The unauthorized/prospective allottee has no right to interfere in the aforesaid proceeding of release.

Case law discussed:

Uttam Namdeo Mahale (supra), AIR 1964 SC 752, 2002 (2) ARC 645, 2008 (2) ARC 264, Rent Case 1982 (585), ARC 1995 1995 (2) 309, Manoj Krishna Shukla Vs. Mahaveer 2007 (2) ARC 209,Nutan Kumar and others Vs. Iind Additional District Judge and others 2002 (2) Allahabad Rent Cases 645, Jamuna Prasad Vs. Incharge, District Judge, Kanpur Nagar and others 2003 (2) ARC 299, 2001 (2) Allahabad Rent Cases 516.

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

1. This writ petition is directed against the judgment and order dated 15.11.2010 passed by the Additional District Judge, Court No. 14, Kanpur Nagar in Revision No. 21 of 2010 upholding the order dated 28.1.2010 passed by the Rent Control and Eviction Officer in Case No. 4 of 2010 whereby the disputed premises was declared vacant and consequently released in favour of the landlord-respondents No. 3 and 4.

2. Brief facts of the case are as follows;

3. Premises in dispute i.e. 119/2766 A Darshanpurwa, Kanpur (hereinafter referred to the as 'disputed premises') was alloted to the petitioner in the year 1957 thereafter, the disputed premises was purchased by one Gaya Prasad who filed a suit No. 1187 of 1966 for arrears of rent and ejectment against the petitioner and the said suit was decreed against the petitioner. In pursuance of the execution proceedings (Execution Case No. 197 of 1968) the petitioner was evicted from the disputed premises and the decree holder got the possession thereof. The petitioner, however, after vacating the premises again forcefully occupied the disputed premises, therefore, a Suit No. 526 of 1976 was filed by Gaya Prasad on 26.8.1981 for possession and damages for the use and occupation. The said suit was decreed on 26.8.1981 but the said decree was not executed, as a result whereof the petitioner continued in the possession over the disputed premises. The said premises was subsequently sold by Gaya Prasad vide sale deed dated 13.12.2006 to the respondents No. 3 and 4, Anil Kumar Agrawal and Smt. Kanchan Agrawal.

4. On 22.5.2007 an allotment application was filed by the respondent No. 2, whereupon and the Rent Control and Eviction Officer (hereinafter referred to as 'the RCEO') called for a report from the Rent Control Inspector. The petitioner submitted his written statement before the Rent Control Inspector wherein he claimed himself to be the tenant of the disputed premises on the rent of Rs. 10/-

per month. By order dated 19.9.2008, the RCO declared the vacancy of the said premises. Consequently, the petitioner filed a Writ Petition No. 63294 of 2008 against the order of the vacancy which was dismissed as not pressed on 15.9.2008. In the meantime, the premises was released on 21.1.2010 in favour of the landlord-respondents No. 3 and 4. Aggrieved and dissatisfied with the order dated 21.8.2010 passed by the RCEO, the petitioner filed a Revision No. 21 of 2010, which was dismissed by the judgment and order dated 15.11.2010 by the Additional District Judge, Court No. 14, Kanpur. Hence, the present writ petition.

5. The learned counsel for the petitioner has submitted that even though the decree was passed against him for possession and damages for use and occupation in the year 1981, the said decree was not executed within the stipulated period, therefore, the petitioner acquired ownership rights by adverse possession. It was further submitted that the provisions of Sections 11, 12 and 13 of the UP Act No. 13 of 1972 (hereinafter referred to as 'the Act') cannot be invoked against the trespasser. Next contention of the learned counsel for the petitioner is that the declaration of vacancy in the year 2008 is time barred, since the petitioner was living in the premises uninterruptedly since 1981 and no attempt was made by the landlords to initiate the vacancy proceedings qua disputed premises.

6. Per contra, learned counsel for the respondents submitted that the petitioner, at no point of time, had ever claimed ownership by adverse possession before the court below and in this connection also referred to the paragraphs No. 3 and 9 of the affidavit dated 6.9.2007, wherein the petitioner claimed himself to be a tenant of the disputed premises on the rent of Rs. 20/- per month with effect from 1971 and also admitted that the petitioner continuously paid rent of the disputed premises upto 5.8.2006 to the erstwhile owner Gaya Prasad and Radha Devi. Learned counsel for the respondents further submitted that Sections 11, 12 and 13 of the Act are fully applicable in the matter since the petitioner is occupying the premises without any allotment order, as such, the petitioner under Section 13 of the Act will be deemed to be an unauthorized occupant of the disputed premises. He further submitted that the Limitation Act is not applicable in the matter. He further contended that the present petition is not maintainable as the previous writ petition No. 63294 of 2008 filed against the declaration of vacancy dated 28.1.2010 was dismissed by this Court as not pressed without granting any liberty to the petitioner to file a fresh writ petition, therefore, the present writ petition is liable to be dismissed on this ground alone.

7. Heard Sri Arvind Kumar Tiwari, learned counsel for the petitioner, Sri Atul Dayal, learned counsel for the Respondents No. 3 and 4 and perused the record.

8. It is not disputed that the petitioner was evicted in execution of a decree (execution case No. 197 of 1968), from the premises in dispute in the year 1969 however the petitioner after vacating the premises again forcefully occupied the said premises, as such, the suit for possession and damages for use and occupation was filed against him in 1976 which was decreed against the petitioner in the year 1981. However, the decree

was not put to execution as a result the petitioner continued in the possession. Later on, the disputed property was sold to the present owners in the year 2006. Thereafter, an allotment application was filed by respondents, as a result whereof the vacancy was declared on 28.1.2010. Aggrieved with the said order, the petitioner filed a writ petition No. 63294 of 2008, however, the said writ petition was dismissed as not pressed and no liberty was granted by this Court to the petitioner to file a fresh petition. Subsequent thereto, the release application filed by the landlords was allowed by the R.C.E.O. Against the said order, revision under Section 18 of the Act was filed which was dismissed by the ADJ, Kanpur. Hence, the present writ petition.

9. The first contention of the petitioner weaves round the argument that the declaration of vacancy is time barred as the petitioner is living in the disputed premises uninterruptedly from 1981 and no effort was made to initiate vacancy proceedings until 2006.

10. Relying upon the principles laid down in the case of **Smt. Brij Bala Jain** (supra), he submitted that even though the said Statute does not provide for any limitation to declare vacancy but it should be exercised within a reasonable time.

11. Per contra, learned counsel for the respondent landlord submitted that the law of limitation will not come in the way in filing the release application as the petitioner is an unauthorized occupant of the premises in dispute and there is a recurring cause of action.

12. The Apex court in the Case of **Uttam Namdeo Mahale** (supra) has held as under:

"Mr. Bhasme, learned counsel for the appellant, contends that in the absence of fixation of rule of limitation, the power can be exercised within a reasonable time and in the absence of such prescription of limitation, the power to enforce the order is vitiated by error of law. He places reliance on the decisions in State of Gujarat vs. Patel Raghav Natha &Ors. [(1970) 1 SCR 335]; Ram Chand & Ors. vs Union of India& Ors.[(1994)1 SCC 44]; and Mohamad Kavi Mohamad Amin vs. Fatmabai Ibrahim [CA No. 5023/85 decided on August 22, 1996]. We find no force in the contention. It is seen that the order of ejectment against the applicant has become final. Section 21 of the Mamalatdar's Court Act does not prescribe any limitation within which the order needs to be executed. In the absence of any specific limitation provided thereunder, necessary implication is that the general law of limitation provided in Limitation Act (Act 2 of 1963) stands excluded. The Division Bench, Therefore, has rightly held that no limitation has been prescribed and it can be executed at any time, especially when the law of limitation for the purpose of this appeal is not there. Where there is statutory rule operating in the field, the implied power of exercise of the right within reasonable limitation does not arise. The cited decisions deal with that area and bear no relevance to the facts."

13. In **The Bombay Gas Co. Ltd. Vs. Gopal Bhiva and Others (AIR 1964 SC 752)**, the Apex Court has held that Court has no power to fix any limitation

where it is not provided in the statute as this would amount to legislate the statute. In this regard the relevant portion of paragraph no.13 of this decision is extracted as under:

"In dealing with this question, it is necessary to bear in mind that though the legislature knew how the problem of recovery of wages had been tackled by the Payment of Wages Act and how limitation had been prescribed in that behalf, it has omitted to make any provision for limitation in enacting s. 33C (2). The failure of the legislature to make any provision for limitation cannot, in our opinion, be deemed to be an accidental omission. In the circumstances, it would be legitimate to infer that legislature deliberately did not provide for any limitation under s. 33C (2). It may have been thought that the employees who are entitled to take the benefit of s. 330 (2) may not always be conscious of their rights and it would not be right to put the restriction of limitation in respect of claims which they may have to make under the said provision. Besides, even if the analogy of execution proceedings is treated as relevant, it is well known that a decree passed under the Code of Civil Procedure is capable of execution within 12 years, provided, of course, it is kept alive by taking steps in aid of execution from time to time as required by art. 182 of the Limitation Act, so that the test of one year or six months' limitation prescribed by the Payment of Wages Act cannot be treated as a uniform and universal test in respect of all kinds of execution claims. It seems to us that where the legislature has made no provision for limitation, it would not be open to the courts to introduce any such limitation on grounds of fairness or justice. The words of s. 33C (2) are plain and unambiguous and it would be the duty of the Labour Court to give effect to the said provision without any considerations of limitation. Mr. Kolah no doubt emphasized the fact that such belated claims made on a large scale may cause considerable inconvenience to the employer, but that is a consideration which the legislature may take into account, and if the legislature feels that fair play and justice require that some limitations be prescribed, it may proceed to do so. In the absence of any provision, however, the Labour Court cannot import any such consideration in dealing with the applications made under s. 33C (2)."

14. The principles laid in the aforesaid decision has been followed by this court in Civil Misc. WP 26826 of 2009, Chandra Mohan Sama Vs.Banwari Lal Ghai and another dated 13.8.2010 wherein this court has held that if the limitation of 12 years as reasonable period is read in the provision of U.P. Act No. 13 of 1972, though there is a definite lack of legislative intent in the Act in this regard, it would amount to permitting illegal occupants to grant legal sanction to their acts. Occupation of building without allotment would frustrate the regulatory provisions of the Act and not germane to the object for which the Act was legislated.

15. Thus, in view of the above, this Court is of the considered opinion that limitation should not be read where it is not specifically provided for.

16. The second contention of the learned counsel for the petitioner that he has acquired ownership rights by way of adverse possession is totally untenable for

the following reasons; firstly, this plea was never taken by the petitioner before the court below. Secondly, the petitioner, in paragraphs 3 and 9 of the affidavit filed before the court below as well as before the Rent Control Inspector, has very categorically claimed himself as a lawful tenant of the disputed premises. He also stated therein that the rent of the disputed premises was paid upto the year 2006 to the erstwhile landlord Gaya Prasad, as such, the petitioner cannot be permitted to take two contradictory pleas at the same time.

17. The third contention of the learned counsel for the petitioner is that the provisions of Sections 11, 12 and 13 of the Act are not applicable in the matter and the proceedings under the Act cannot be in initiated against trespasser. The contention of the learned counsel is totally misconceived and without any foundation The petitioner has claimed himself to be a tenant of the disputed premises on the rent of Rs. 10/- per month and made categorical averment to this effect in paragraphs 3 and 9 of the affidavit filed before the court below.

18. At this stage the relevant provisions of the said Act need to be set out. Sections 11, 12, 13 and 31 read as follows:

"11. Prohibition of letting without allotment order. *- Save as hereinafter provided, no person shall let any buildings except in pursuance of an allotment order issued under Section 16.*

12. Deemed vacancy of building in certain cases.*- (1) A landlord or tenant of a building shall be deemed to have ceased to occupy the building or a part thereof if -*

(a) he has substantially removed his effects therefrom, or

(b) he has allowed it to be occupied by any person who is not a member of his family, or

(c) in the case of a residential building, he as well as members of his family have taken up residence, not being temporary residence, elsewhere.

(2) In the case of non-residential building, where a tenant carrying on business in the building admits a person who is not a member of his family as a partner or a new partner, as the case may be, the tenant shall be deemed to have ceased to occupy the building.

(3) in the case of a residential building, if the tenant or any member of his family builds or otherwise acquires in a vacant state or gets vacated a residential building in the same city, municipality, notified area or town area in which the building under tenancy is situate, he shall be deemed to have ceased to occupy the building under his tenancy;

Provided that if the tenant or any member of his family had built any such residential building before the date of commencement of this Act, then such tenant shall be deemed to have ceased to occupy the building under his tenancy upon the expiration of a period of one year from the said date.

xxx xxx xxx
xxx xxx xxx

(3-A) If the tenant of a residential building holding a transferable post under any Government or local authority

or a public sector corporation or under any other employer has been transferred to some other city, municipality, notified area or town area, then such tenant shall be deemed to have ceased to occupy such building with effect from the thirtieth day of June following the date of such transfer or from the date of allotment to him of any residential accommodation (whether any accommodation be allotted under this Act or any official accommodation is provided by the employer) in the city, municipality,

notified area or town area to which he has been so transferred, whichever is later.

(3-B) If the tenant of a residential building is engaged in any profession, trade, calling or employment in

any city, municipality, notified area or town area in which the said building is situate, and such engagement ceases for any reason whatsoever, and he is landlord of any other building in any other city, municipality, notified area or town area, then such tenant shall be deemed to have ceased to occupy the first mentioned building with effect from the date on which he obtains vacant possession of the last mentioned building whether as a result of proceedings under Section 21 or otherwise.

(4) Any building or part which a landlord or tenant has ceased to occupy within the meaning of sub-section (1), or sub-section (2), or sub-section (3), sub-section (3- A) or sub-section (3-B), shall, for the purposes of this Chapter, be deemed to be vacant.

(5) A tenant or, as the case may be, a member of his family, referred to in sub-section (3) shall, have a right, as landlord of any residential building referred to in the said sub-section which may have been let out by him before the commencement of the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) (Amendment) Act, 1976 to apply under clause (a) of sub-section (1) of Section 21 for the eviction of his tenant from such building, notwithstanding that such building is one to which the remaining provisions of this Act do not apply.

***13. Restrictions on occupation of building without allotment or release.**- Where a landlord or tenant ceases to occupy a building or part thereof, no person shall occupy it in any capacity on his behalf, or*

otherwise than under an order of allotment or release under Section 16, and if a person so purports to occupy it, he shall, without prejudice to the provisions of Section 31, be deemed to be an unauthorised occupant of such building or part.

***31. Penalties.**- (1) Any person who contravenes any of the provisions of this Act or any order made*

thereunder or attempts or abets such contravention, shall be punished on conviction with imprisonment of either description for a term which may extend to six months or with fine which may extend to five thousand rupees or with both.

(2) Whoever demolishes any building under tenancy or any part thereof without

lawful excuse shall be punished, on conviction, with imprisonment of either description for a term which may extend to one year or with fine which may extend to five thousand rupees or with both.

(3) Where a person has been convicted for contravention of sub-section (1) of Section 4, the court

convicting him may direct that out of the fine, if any, imposed and realised from the person so convicted, an amount not exceeding the amount paid as premium of additional payment over and above the rent for admission as a tenant or sub-tenant to any building may be paid to the tenant by whom such payment was made :

Provided that any amount so paid to the tenant shall be taken into account in awarding compensation or restitution to him in any subsequent claim."?

19. The plain reading of Section 13 of the Act clearly goes to show that any person occupying the premises without any allotment order will be deemed to be an unauthorized occupant of the premises and in the present case, neither the petitioner was able to produce any allotment order in his favour nor was entitled for any benefit under section 14 of the Act.

20. In terms of Section 13 of the Act, without an order of allotment, tenants status under the deeming provision is that of an unauthorized occupant and that of trespasser and the suit for getting back possession from the trespasser can also be filed. However, it does not debar the rent control and eviction officer/appropriate authority under the Act from setting in motion the machinery for declaring vacancy of the premises in dispute when he is of the opinion that the premises which comes within the ambit of the rent control act is being occupied by the unauthorized occupant/trespasser without an allotment order. The UP Act No. 13 of 1972 of the Act does not make any distinction between the unauthorized occupant and the trespasser so as to limit the power of the Rent Control Eviction Officer/District Magistrate from initiating the proceedings under Section 12 of the Act particularly when the landlord fails to taken any eviction proceedings against the trespasser.

21. The Apex Court in the case of **Nutan Kumar and others Vs. IInd Additional District Judge and others, 2002 (2) ARC 645** has held that Section 13 of the said Act specifically provides that a person who occupies, without an allotment order in his favour, shall be deemed to be an unauthorized occupant of such premises. As he is in unauthorized occupation he is like a trespasser. A suit for ejectment of a trespasser to get back possession from a trespasser could always be filed.Such a Suit would not be on the contract/agreement between the parties and would thus not be hit by principles of public policy also. However, the Apex Court in the aforementioned case has not said that for ejecting an unauthorized occupant/trespasser only the suit is a remedy. It has not any where put any restriction on the appropriate authority, to seek ejectment of the unauthorized occupant/trespasser by initiating the proceedings under Section 12 of the Act in the light of sections 11 and 13 of the Act.

22. I am fortified in my view by the following decisions which I wish to briefly refer to as follows;

1. Ajay Pal Singh and others Vs. District Judge, Meerut and others 2008 (2) ARC 264

"22- From the provisions of the Act and Rules framed thereunder, it is apparently clear that the legislature is aware of the fact that an unauthorized occupant is necessarily inducted into the premises contrary to the provisions of the Act by the landlord himself and despite such facts being in the knowledge of the legislature, it has nor placed any restriction on the right of the right of the landlord so far as release of such premises. which are deemed to be vacated under Section 12(4) of 1972 Act is concerned, either under the 1972 Act or Rules framed thereunder".

"23. In such circumstances, the intention of the legislature is cleared that the right of the landlord to make an application for release in respect of deemed vacancy covered by Section 12 (4) be not hampered or impaired part in any manner only because of his being inducted an unauthorized occupant. No restriction on his right to make an application under Section 16 (1)(b) has been provided for and therefore no restriction is required to be provided by the Court in such right of the landlord."

2. G. Industrial Syndicated Allahabad Vs. Rent Control and Eviction Officer Allahabad Rent Cases 1982 (585)

"13. From the above, it would appear that in case of an illegal letting or subletting, the view taken was that the contract may be binding on the parties to it, but not on the authorities, which would mean that the possession of a person who has been illegally let in would be unauthorised. Section 11 and 13 of the present Act make that position very clear. No one now can either let out any premises without an allotment order nor can anyone occupy the same. If any one occupies the premises without an allotment order, he would not only be an unauthorized occupant but also liable to prosecution under section 31 of the said, Act. His possession being unauthorised cannot be recognised in the eye of law and if it cannot be recognised in the eye of law, there would be a vacancy. That would entitle the Rent Control and Eviction Officer under Section 16 to pass an allotment order."

"15. Counsel for the petitioner, however, urged that the use of the expression ?where a landlord or a tenant ceases to occupy a building or part thereof? in indicative of the fact that this section will apply only to cases contemplated by Section 12 inasmuch as the words ?cease to occupy? have been used in Sub-section (4) of Section 12. To us, it appears that Section 13 serves the dual purpose. It may apply to a case covered by Section 12 but it has to be read along with Section 11 as well. Section 13 is common to both the provisions. That being so, the applicability of Section 13 cannot be restricted to cases covered by Section 12"

"19. Assuming that Section 13 of the Act applies only to cases contemplated by Section 12, alternatively we find that, as possession of Nizam Shervani was unauthorised and illegal, there was a vacancy even at the time when the house was in his occupation and after it was vacated by him. Section 11 prohibits a person from letting any building except in

pursuance of an allotment order issued under Section 16. Since there is a prohibition imposed on the right of any person, which will include a landlord and tenant both, the person occupying the premises would be in an unauthorised possession. Such a person could not be treated to be a tenant. The authorised possession of a person gives a right or authority to occupy it, whereas unauthorised would mean that the person occupying is not possessed of rightful or legal power and, as such, no legal competency which can have any recognition in the eye of law, as a result of which the premises would be deemed to be unoccupied or unfilled, or empty. It that is so, the Rent Control and Eviction Officer under Section 16 would be entitled to pass an order of allotment. The vancancy talked of in Section 16 takes within its purview also possession of a person which is not recognised in law. If a person without any authority occupies a premises, his possession would be of no value and the premises would be available to the District Magistrate for passing an allotment order under Section 16."

"20. In Murli Dhar Agrawal v. State of U. P. (supra), the Supreme Court found that since there was no prohibition in U. P., Act No. III of 1947 for letting or occupying, the contract arrived at between the two would be binding. The lacuna has not been removed. In Act XIII of 1972, there is a prohibition on the right of any person to let out which will impose a corresponding obligation not to occupy the same. In the absence of a provision like section 11 of the present Act, the Supreme Court held that the contract of letting in that case was binding between the landlord and the tenant. However, what is material to consider is that even in that case the Supreme Court found that such a contract was not binding on the District Magistrate and he could treat the building as vacant and evict therefrom the tenant. Section 11 has made the position crystal clear. The District Magistrate can ignore the contract arrived at between a landlord and the tenant and pass an appropriate order for allotment under Section 16. What he may be required to do is to afford an opportunity of hearing before evicting the tenant."

3. Jamil Ahmad Vs. Additional District Judge ARC 1995 1995 (2) 309

"9. The findings given by Prescribed Authority (Munsif), Dehradun on 13-04-1990 vide Annexure C.A.-13 is a judicial pronouncement after considering all aspect of the case and the present petitioner being a party to it is bound by it. In view of this judgment Annexure C.A.-13 this Court has no hesitation in coming to the conclusion that petitioner Jameel Ahmad son of Safique Ahmad is a rank trespasser. Section 13 of the Act lays down that no person shall occupy a building otherwise than under an order of allotment or release under Section 16 and if he does so he shall be deemed to be an unauthorized occupant of such building. The provisions of Section 13 are in addition to Section 31 which prescribes a penalty for unauthorized occupation of a house. The contention on behalf of the petitioner that even if he is a trespasser he cannot be evicted under the provisions of Act No. 13 of 1972 and a regular suit should have been filed for his ejectment, is not tenable. It is the petitioner himself who in collusion with respondent No. 4 Pradeep kumar brought the matter within the purview of Act No. 13 of 1972. The

petitioner persuaded respondent No. 4 to file an application under the Act and he had succeeded in getting the house allotted in the name respondent No. 4. In revision the matter was remanded by the learned District Judge and it was thin that it came to be released in favour of the landlord. It has also been seen above that petitioner himself filed an application under Section 27 of the Act. It is not, therefore, open to him to argue that the case is not governed by Act No. 13 of the 1972."

"10. A reference in this connection may be made to the case of ***M/s. R.C. Bajpai and Company v. VIIth Additional District Judge, Kanpur Nagar,*** *reported in 1994 (1) ARC 532. In the avobe case an earlier authority of this Court has been relied upon which is 1982(1) ARC 585. A Division Bench has held in the case of* ***Geep Industrial Syndicate Ltd., Allahabad v. R.C. And E.O., Allahabad,*** *as under:-*

"Section 11 of the Act imposes a prohibition restriction against letting without an allotment order. Section 12 contemplates certain contingencies in which a landlord or tenant of a building would be deemed to have ceased to occupy it. Section 13 provides for restriction on occupation of building without allotment order. A conjoint reading of Section 11 imposes prohibition on letting without allotment order. Section 13 places restriction on occupation without an allotment or release. These two sections, it would appear that neither could a landlord let out a premises without an allotment order nor can anyone occupy it. These two provisions were enacted to undo the effect of Full Bench decision of this Court in ***Udho Das v. Prem Prakash.*** *The learned Judge further observed as below ; ? From the above admission it would appear that in case of an illegal letting or sub- letting, the view taken was that the contract may be binding on the parties to it, but not on the authorities which would mean that the possession of a person who has been illegally let in would be unauthorized. Sections 11 and 13 of the Present Act make that position very clear. No one can either let out any premises without an allotment order no can anyone occupy the same. It anyone occupy the premises without an allotment order, he would not only be an unauthorized occupant but also liable to prosecution under 31 of the said Act. His possession being unauthorized can not be recognized in the eye of law and of it cannot be recognized in the eye of law, there would be a vacancy."*

4. Manoj Krishna Shukla Vs. Mahaveer 2007 (2) ARC 209

"13. The revisional Court has also recorded detailed findings regarding service of notice on the petitoner and his father, Sri Lok Nath Shukla. The Rent Control Inspector's report was signed by Sri Manoj Krishna Shukla, petitioner and verified by his Counsel, Sri Mukul Asthana. The procedure prescribed in the relevant rules including Rule 8, was followed by the concerned Rent Control Inspector and other rent control authorities. As far as opportunity of hearing is concerned, the revisional Court recorded detailed findings that written objections were filed by the petitioner opposing the release application no 15.5.2000 and the case was listed on 16.5.2000. Thereafter the case was listed on 20.5.2000. It was open for Manoj

Krishan Shukla, petitoner in this writ petition to put forth his submission on or before 20.5.2000. He was also represented through a legal practitioner. The revisional Court had, thus, found that adequate opportunity of hearing was afforded to the petitioner."

"14. The revisional Court while relying on the judgments as reported in 1997 (2) ARC 592, Suraj Bhan v. Additional District Judge, Agra, 1997 (2) ARC 558; Raj Kumar Kanodiya v. IIIrd Additional City Magistrate, 1998 (1) ARC 153 (SC), Narayani Devi v. Mahendra Kumar Tripathi, 1979 ARC 290, Hardev Upadhyay v. Dr. Laeeq Ahmad, has held that the petitioner, Manoj Krishna Shukla, revisionist was illegally occupying the premises without having any valid allotment order of the premises and, therefore, he had no right to contest the release application or file the revision. There was nothing on record to prove that the petitioner, Manoj Krishna Shukla's father, Sri Lok Nath Shukla was paying rent to the previous landlord, Ram Autar Shukla. No documents have been filed before the Rent Control Officer or the revisional Court and even in this Court to prove that the tenancy existed between Ram Autar Shukla and Lok Nath Shukla. The petitoner has failed to demonstrate before this Court also that he was a lawful occupant, having an allotment order in his favour of this father, Sri Lok Nath Shukla was ever inducted as tenant."

"29. Even otherwise, it is well settled that an illegal and unauthorized occupant without having any right or title and valid allotment order cannot participate in the release proceedings before the trial Court. However, in the present case, the petitioner was afforded opportunity to remain associated with the trial. He has also taken assistance of a legal practitioner, Sr. Mukul Asthana, who had filed his Vakalatnama and the objections. The petitoner has failed to prove before the trial Court, revisonal court and this Court also that he was a lawful, legal tenant of the house in dispute. It is amply clear that the petitioner has failed to establish a case for inference in the judgment and order passed by the lower Court, which has recorded concurrent findings of facts. He has also failed to persuade the Court to take a different view in the matter other than what has been decided by the Courts below"

5. Nutan Kumar and others Vs. IInd Additional District Judge and others 2002 (2) Allahabad Rent Cases 645

..... This Court held by the majority of the Judges that so long as the Act and the Rules continued in force the control of letting vested in the appropriate authority and not in the parties. It was held that agreement of the kind embodied in the compromise petition could not curtail the powers of the appropriate authority. It was held that irrespective of the agreement between the parties the appropriate authority was entitled to exercise the powers of allotment vested in him. It must be mentioned that Justice Bhagwati, as he then was, in his minority and partly dissenting Judgment held that unless the consent decree was held to be invalid it would be binding on the tenant ***and even though the powers of the appropriate authority may not be curtailed****, the tenant would be bound by the terms of the agreement between him and the landlord. This authority therefore also lays down nothing contrary to*

Nanakram's case. This authority merely deals with the right of the appropriate authority to exercise the powers given to him under the Act.

23. The premises in the possession of an unauthorized occupant would be deemed to be vacant for the purposes of Rent Control Act, even if an unauthorized occupant is inducted into the premises contrary to the provisions of the Act by the landlord himself, the legislature has not placed any restriction on the rent control authorities to initiate proceedings under Section 12 of the Act. So far as the release of such premises which are deemed to be vacant under Section 12 (4) of the Act is concerned, the application of release has to be considered on merit in accordance with law by the District Magistrate. The unauthorized/prospective allottee has no right to interfere in the aforesaid proceeding of release.

24. There is one more aspect in this regard which cannot be ignored if the person let out his house ignoring the provisions prohibiting the letting without allotment order or has occupied the premises forcefully without any allotment order would be an unauthorized occupant but also liable to be prosecuted under Section 31 of the Act and his possession being unauthorized cannot be recognized in the eyes of law. There would be a vacancy and that would entitle the Rent Control Eviction Officer under Section 16 to pass an allotment/release order.

25. Learned counsel for the respondents has relied upon the decision of this Court in the case of ***Jamuna Prasad Vs. Incharge, District Judge, Kanpur Nagar and others 2003 (2) ARC 299.*** In my opinion, the case is clearly distinguishable on facts and has no bearing whatsoever on the matter in hand.

26. Learned counsel for the petitioner in support of his contention has also referred to the decision of Uttaranchal High Court in the case of ***Devendra Kumar Pandey Vs. District Supply Officer Prescribed Authority/Rent Control and Eviction Officer, Nainital and another 2001 (2) Allahabad Rent Cases 516.*** For the reasons I have given in this judgment I respectfully disagree with the view taken by the learned Single Judge of the Uttaranchal High Court in the aforementioned case of Devendra Kumar (supra).

27. This Court cannot over look the fact that the petitioner had forcefully occupied the premises without any allotment order, he would not be entitled for any relief from this Court since it is well settled that the remedy of writ petition is a discretionary remedy and the Court will not grant any relief to a person who has not come with clean hands.

28. Thus in view of the above discussions, I do not find any illegality in the judgment and orders passed by the court below.

29. Before parting with this case, it is also relevant to note that the present petition against the declaration of vacancy is not maintainable as the previous Writ Petition No. 63294 of 2008 filed against the declaration of vacancy dated 28.1.2010 was dismissed by this Court as not pressed without granting any liberty to the petitioner to file a fresh petition.

30. In the result, the petition is, accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.12.2010

BEFORE
THE HON'BLE KRISHNA MURARI, J.

Civil Misc. Recall Application No. 295626 of 2007

Dalmir Singh (deceased) and others ...Petitioners

Versus

Deputy Director of Consolidation, Pratapgarh and others ...Respondents

Counsel for the Petitioners:
Sri Rajiv Mishra
Sri A.A. Siddiqui
Sri D.S. Chauhan
Sri Krishan Pal Singh
Sri M.P. Sinha
Sri Rajeev Singh
Sri VM. Zaidi

Counsel for the Respondents:
Sri N.A. Kazmi
Sri A.A. Kazmi
Sri M.N. Bokhari

U.P. High Court, (Amalgamation) order 1948, Section 14-Second Proviso-Writ Petition challenging the order passed by D.D. Pratapgarh dismissed by Allahabad High Court against that S.L.P. also dismissed-considering principle of merger whether recall application be rejected ? held-'No' reasons discussed-recall application allowed-Petition restored on its original number-office to remit the original record before Lucknow Bench

Held: Para 15 and 16

From the pronouncement of the Hon'ble Apex Court, it is clear that dismissal at the stage of special leave by non-speaking order does not constitute res-judicata and does not culminate in merger of the impugned decision and hence it would not by itself preclude the aggrieved party from invoking review jurisdiction. The Hon'ble Apex Court has clarified that rejection of special leave petition without notice even if the order is reasoned or speaking also does not culminate in merger of the impugned decision. In the light of the above ratio laid down by the Hon'ble Apex Court, the order passed in special leave petition being an order of dismissal simplicitor in as much as the Hon'ble Apex Court simply refused to grant leave to convert petition into appeal hence the doctrine of merger is not attracted for application.

In view of the above facts and discussions and the settled law on the subject, the dispute in the present writ petition clearly falls within the territorial jurisdiction of Lucknow Bench of this Court hence the writ petition was wrongly entertained and disposed of by this Court.

Case law discussed:
AIR 1972 (All) 200, AIR 1975 SCC (2) 671, JT 2009 (9) SC 110, 2004 (1) SCC 497

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

1. This is an application with a prayer to recall the judgment and order dated 1st May, 2007 passed by this Court dismissing the writ petition. The basic ground taken in the recall application is that since the dispute pertains to district Pratapgrah which falls within the territorial jurisdiction of Lucknow Bench of this Court as such the order passed is without jurisdiction and liable to be recalled.

2. Writ petition was filed for a writ of certiorari against the order of Deputy Director of Consolidation, Pratapgarh and

was entertained at Allahabad and was finally decided.

3. It is contended that since there was no order as contemplated by second proviso to Article 14 of the U. P. High Courts (Amalgamation) Order 1948 hence writ petition pertaining to jurisdiction of Lucknow Bench of this Court could neither have been entertained muchless decided by this Court. In support of the contention, learned counsel for the petitioner has relied upon Full Bench decision of this Court in the case of ***Nirmal Dass Kathuria Vs. State Transport (Appellate) Tribunal, U. P., Lucknow, AIR 1972 (All) 200,*** wherein following questions were referred for the opinion of the Full Bench:

1.Can a case falling within the jurisdiction of the Lucknow Bench of this Court be presented at Allahabad ?

2.Can the Judges sitting at Allahabad summarily dismiss a case presented at Allahabad pertaining to the jurisdiction of the Lucknow Bench.

3.Can a case pertaining to the jurisdiction of the Lucknow Bench, presented and entertained at Allahabad, be decided finally by the judges sitting at Allahabad, without there being an order as contemplated by the second proviso to Article 14 of the U. P. High Courts (Amalgamation) Order, 1948 ?

4.What is the meaning of the expression "in respect of cases arising in such areas in Oudh" used in the first provision to Article 14of the High Courts (Amalgamation) Order, 1948 ? Has this expression reference to the place where the case originated or to the place of sitting of the last court or authority whose decree or order is being challenged in the proceeding before the High Court ?

5.Whether this writ petition can be entertained and heard by the Judges sitting at Lucknow ?

4. The Full Bench by majority answered the aforesaid questions as follows:

"Question no. 1. A case falling within the jurisdiction of the Judges at Lucknow should be presented at Lucknow and not at Allahabad".

"Question No. 2. However, if such a case is presented at Allahabad the Judges at Allahabad cannot summarily dismiss it only for that reason. The case should be returned for filing before the Judges at Lucknow, and where the case has been mistakenly or inadvertently entertained at Allahabad a direction should be made to the High Court office to transmit the papers of the case to Lucknow."

"Question No. 3. A case pertaining the jurisdiction of the Judges at Lucknow and presented before the Judges at Allahabad cannot be decided by the Judges at Allahabad in the absence of an order contemplated by the second proviso to Article 14 of the of the U. P. High Courts (Amalgamation) Order, 1948."

5. In so far as findings returned on questions no. 4 and 5 are concerned, they are not relevant for the purpose of the present case.

6. The findings given by the Full Bench of this Court on three questions have been affirmed by the Hon'ble Apex Court in the case of ***Nasiruddin Vs. State Transport Appellate Tribunal, AIR 1975 SCC (2)***

671. The Hon'ble Apex Court has observed as under:

"37. To sum up, our conclusions are as follows. First, there is no permanent seat of the High Court at Allahabad. The seats at Allahabad and at Lucknow may be changed in accordance with the provisions of the Order. Second, the Chief Justice of the High Court has no power to increase or decrease the areas in Oudh from time to time. The areas in Oudh have been determined once by the Chief Justice and, therefore, there is no scope for changing the areas. Third, the Chief Justice has power under the second proviso to paragraph 14 of the Order to direct in his discretion that any case or class of cases arising in Oudh areas shall be heard at Allahabad. Any case or class of cases are those which are instituted at Lucknow. The interpretation given by the High Court that the word "heard" confers powers on the Chief Justice to order that any case or class of cases arising in Oudh area shall be instituted or filed at Allahabad instead of Lucknow is wrong. The word "heard" means that cases which have already been instituted or filed at Lucknow may in the discretion of the Chief Justice under the second proviso to paragraph 14 of the Order be directed to be heard at Allahabad. Fourth, the expression "cause of action" with regard to a civil matter means that it should be left to the litigant to institute cases at Lucknow Bench or at Allahabad Bench according to the cause of action arising wholly or in part within either of the areas. If the case of action arises wholly within Oudh areas then the Lucknow Bench will have jurisdiction. Similarly, if the cause of action arises wholly outside the specified areas in Oudh then Allahabad will have jurisdiction. If the cause of action in part arises in the specified Oudh areas and part of the cause of action arises outside the specified areas, it will be open to the litigant to frame the case appropriately to attract the jurisdiction either at Lucknow or at Allahabad. Fifth, a criminal case arises where the offence has been committed or otherwise as provided in the Criminal Procedure Code. That will attract the jurisdiction of the Court at Allahabad or Lucknow. In some cases depending on the facts and the provision regarding jurisdiction, it may arise in either place."

"38. Applications under Article 226 will similarly lie either at Lucknow or at Allahabad as the applicant will allege that the whole of cause of action or part of the cause of action arose at Lucknow within the specified areas of Oudh or part of the cause of action arose at a place outside the specified Oudh area."

"39. The answers given by the High Court to the first three questions are correct save as modified by our conclusions aforesaid."

"40. The answer given by the High Court to the fourth question is set aside. The meaning of cases arising in Oudh areas will be found by appropriate courts in the light of this judgment."

"41. The answer to the fifth question is discharged. The matters are sent back to the High Court for disposal in accordance with this judgment."

7. Admittedly, in the present case the property in dispute is situate in district Pratapgarh which falls within the territorial jurisdiction of the Lucknow Bench of this Court.

8. Challenge has been made to the orders passed by the consolidation

authorities i.e. Consolidation Officer, Deewanganj, Pratapgarh, Settlement Officer Consolidation, Rampur camp at Pratapgarh and Deputy Director of Consolidation, Pratapgarh. Thus, the entire dispute pertains to district Pratapgarh which, admittedly, falls within the territorial jurisdiction of Lucknow Bench of this Court and it cannot be even remotely said that any part of the cause of action arose at Allahabad so as to confer jurisdiction upon this Court to entertain and decide the petition.

9. In reply, it has been submitted that there was no lack of inherent jurisdiction and mere lack of jurisdiction would not vitiate final judgment passed by this Court particularly when the petitioners themselves chose the forum to challenge the order of the consolidation authorities. It has further been submitted that the judgment and order of this Court, sought to be recalled by the present application, was challenged by filing special leave petition before the Hon'ble Apex Court which was dismissed on 31.8.2007 and as such judgment of this Court merged with the order passed by the Hon'ble Apex Court, hence the same cannot be recalled.

10. I have considered the arguments advanced by the learned counsel for the parties and perused the record.

11. Undoubtedly, special leave petition filed against the judgment of this Court, sought to be recall, was dismissed vide order dated 31.8.2007. The order of the Hon'ble Supreme Court is quoted hereunder:

"Heard.

No merit. The special leave petition is dismissed."

The issue which arises for consideration is that whether the order of the Hon'ble Apex Court dated 31.8.2007 amounts to affirmation of the judgment and order dated 1.5.2007 passed by this Court taking away the jurisdiction to entertain a prayer for recall of the order.

12. In ***Kunhayammed & Ors. Vs. State of Kerala & Anr., JT 2009 (9) SC 110,*** the Supreme Court examined the doctrine of merger when a Special Leave Petition is dismissed either by a non-speaking order or a speaking order and when a Civil Appeal is dismissed with a speaking order or a non-speaking order. Considering the doctrine or merger and the right of review, it was observed by the Supreme Court as under :

"The doctrine of merger and the right of review are concepts which are closely inter-linked. If the judgment of the High Court has come up to this Court by way of a special leave, and special leave is granted and the appeal is disposed of with or without reasons, by affirmance or otherwise, the judgment of the High Court merges with that of this Court. In that event, it is not permissible to move the High Court by review because the judgment of the High Court has merged with the judgment of this Court. But where the special leave petition is dismissed - there being no merger, the aggrieved party is not deprived of any statutory right of review, if it was available and he can pursue it. It may be that the review court may interfere, or it may not interfere depending upon the law and principles applicable to interference in the review. But the High Court, if it exercises a power of review or deals with a review application on merits - in a case where the High Court's order had not merged with an order passed by this Court after grant of

special leave - the High Court could not, in law, be said to be wrong in exercising statutory jurisdiction or power vested in it."

13. In Paragraph 34 of the judgment, the Hon'ble Supreme Court sum up the conclusions as follows :

"(i)Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.

(ii)The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. First stage is upto the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and special leave petition is converted into an appeal.

(iii)Doctrine of merger is not a doctrine of universal or unlimited application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a non-speaking order or speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the apex court of the country. But, this order does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as res judicata in subsequent proceedings between the parties.

(vi)Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of

reversal, modification or merely affirmation.

14. The same view has again been reiterated by the Hon'ble Supreme Court in the case of ***Ramnik Vallabhdas Madhvani and others Vs. Tarben Pravinlal Madhvani - 2004 (1) SCC 497,*** wherein it has been held that disposal of special leave petition against judgment of the High Court does not mean that the said judgment is affirmed by such dismissal. The order on a special leave petition at the admission stage also does not operate as res-judicata.

15. From the pronouncement of the Hon'ble Apex Court, it is clear that dismissal at the stage of special leave by non-speaking order does not constitute res-judicata and does not culminate in merger of the impugned decision and hence it would not by itself preclude the aggrieved party from invoking review jurisdiction. The Hon'ble Apex Court has clarified that rejection of special leave petition without notice even if the order is reasoned or speaking also does not culminate in merger of the impugned decision. In the light of the above ratio laid down by the Hon'ble Apex Court, the order passed in special leave petition being an order of dismissal simplicitor in as much as the Hon'ble Apex Court simply refused to grant leave to convert petition into appeal hence the doctrine of merger is not attracted for application.

16. In view of the above facts and discussions and the settled law on the subject, the dispute in the present writ petition clearly falls within the territorial jurisdiction of Lucknow Bench of this Court hence the writ petition was wrongly entertained and disposed of by this Court.

17. In view of the above, the judgment and order dated 1.5.2007 is liable to be recalled and is hereby recalled. The writ petition stands restored to its original number. The office is directed to remit the record of this case to the Lucknow Bench of this Court for disposal.

REVISIONAL JURISDICTIONAL
CRIMINAL SIDE
DATED: ALLAHABAD 22.12.2010

BEFORE
THE HON'BLE AMAR SARAN, J.
THE HON'BLE A.K. ROOPANWAL, J.
THE HON'BLE SURENDRA SINGH, J.

Criminal Revision No. - 1640 of 2001

Father Thomas ...Revisionist
Versus
State Of U.P. and another ...Opposite Party

Counsel for the Revisionist:
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Sri K.D. Tewari
Sri M.K. Shukla
Sri P.R. Maurya
Sri Rajiv Sisodiya
Sri S.S. Chaturvedi
Sri Patanjali Mishra
Sri Dileep Gupta
Sri D.S. Mishra
Sri Gopal S.Chaturvedi

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

Code of Criminal Procedure-Section 397 (2) Revision against order under Section-156(3)-order passed by Magistrate to Register and investigate the case-an interlocutory order-Revision against that-held-not maintainable-view taken otherwise in Ajay Malviya case reported in 2004(41) ACC 435-not correct.

Held: Para 64 and 65

In this view of the matter, the Opinion of the Full bench on the three questions posed is:

A. The order of the Magistrate made in exercise of powers under Section 156(3) Cr.P.C directing the police to register and investigate is not open to revision at the instance of a person against whom neither cognizance has been taken nor any process issued.

B. An order made under Section 156(3) Cr.P.C is an interlocutory order and remedy of revision against such order is barred under sub-section (2) of Section 397 of the Code of Criminal Procedure, 1973.

C. The view expressed by a Division Bench of this Court in the case of Ajay Malviya Vs. State of U.P and others reported in 2000(41) ACC 435 that as an order made under Section 156(3) of the Code of Criminal Procedure is amenable to revision, and no writ petition for quashing an F.I.R registered on the basis of the order will be maintainable, is not correct.

Case law discussed:

2000 (41) ACC 435, AIR 2001 SC 571, (paragraphs 7, 8 and 9), AIR 1976(13) ACC 225 (SC), AIR (1961) ISCR 1, AIR (1963) I.S.C.R 202, 1997 (35) ACC 501, JT 1999 (8) SC 170, 1991 (28) ACC 422, 2001 (1) ACC 342, 1991 (28) ACC 422, 2000 Cri. L.J. 2738, JT 1999 (4) SC 537, AIR 1977 SC 93, 1985 (22) ACC 246 (SC), 1997 (34) ACC 163, 2009 Cri. L.J 1683, 2007 (57) ACC 508: (2007 (1) ALJ (NOC) 7 (All.), 2008 Cri.L.J 2556, 2007 (57 ACC 488, Rakesh Puri v. State (2007 (1) ALJ 169),JT 1999 SC 145, (2009) 1 SCC (Cri) 801, AIR 1977 SC 2185, AIR 1976 SC 1672, 2008 Cri.L.J 1515, 2007 (57) ACC 241, [(2004) 4 SCC 129].

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

1. We have heard Sri. G.S. Chaturvedi Senior Advocate assisted by Sri Samit Gopal, Sri D.S. Mishra and Sri Dileep Gupta Advocates for the private parties and Sri Patanjali Mishra, A.G.A., Sri Neeraj Verma, A.G.A., and Sri D.R. Chaudhari, Governemnt Advocate for the State of U.P. Written arguments and case law were filed by the State. However inspite of time being allowed, no written arguments or case law were filed by the private counsel, except Sri G.S. Chaturvedi, who had filed some case law in 2008 in the leading petition, Crl. Revn. No. 1640 of 2000 on behalf of Father Thomas, and has also supplied us with some additional photocopies of relevant case law.

2. This Full Bench was constituted after an order dated 28.9.01 was passed by the Single Judge (Hon. J.C. Gupta, J), who was examining the power of the Court in a Criminal Revision to question an order of the Magistrate issuing a direction under section 156(3) of the Code of Criminal Procedure (hereafter 'Cr.P.C' or 'the Code') to the police to register an FIR and to investigate the same.

3. The Single Judge was of the view that as the accused has no *locus standi* before an order is passed summoning the accused, and also as the order directing investigation is purely interlocutory in nature, in view of the statutory bar contained in section 397(2) of the Code, the said order was not revisable.

4. However, as it had been held in *Ajay Malviya vs. State of U.P and others, reported in 2000(41) ACC 435* that as an order under Section 156(3) Cr.P.C is a judicial order, hence any FIR registered on its basis could not be challenged by means of a writ petition.

Dissenting from this view the Single Judge without disputing the position that an order under section 156(3) of the Code was a judicial order, observed that the said order was an interlocutory order, which could not be challenged by a prospective accused who had no *locus standi* at the stage of investigation, hence a Criminal Revision was not maintainable for challenging the said order. In this background the Single Judge raised doubts about the correctness of the decision of the division bench in *Ajay Malviya* which based its conclusions on the position that as an order under section 156(3) was a judicial order, hence it was ipso facto revisable, and therefore no FIR pursuant to such an order, could be challenged by means of a criminal writ. The learned single judge thereupon vacated all the stay orders granted in the connected Criminal Revisions, which are before us, and formulated the following three questions for consideration by a larger bench, which are now being examined by the present Full Bench.

5. *A. Whether the order of the Magistrate made in exercise of powers under Section 156(3) Cr.P.C directing the police to register and investigate is open to revision at the instance of a person against whom neither cognizance has been taken nor any process issued?*

B. Whether an order made under Section 156(3) Cr.P.C is an interlocutory order and remedy of revision against such order is barred under sub-section (2) of Section 397 of the Code of Criminal Procedure, 1973?

C. Whether the view expressed by a Division Bench of this Court in the case of Ajay Malviya Vs. State of U.P and others reported in 2000(41) ACC 435 that as an order made under Section 156(3) of the Code of Criminal Procedure is amenable to revision, no writ petition for quashing an F.I.R registered on the basis of the order will be maintainable, is correct?

Opinion of the bench on the three issues

A. *Locus standi* of a prospective accused against whom neither cognizance has been taken nor process issued, to challenge an order under Section 156(3) Cr.P.C in a Criminal Revision.

6. Before examining any of the questions posed in this case, it would be necessary to reproduce the words of section 156 which falls in Chapter XII of the Code.

7. *156. Police officer's powers to investigate cognizable cases.- (1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.*

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under Section 190 may order such an investigation as above mentioned.

8. As pointed out in *Suresh Chand Jain v State of M.P. & Ors., AIR 2001 SC 571*, (paragraphs 7, 8 and 9) that there is a difference in the position of a prospective accused against whom an order is made under section 156(3) of the Code before cognizance is taken by the Magistrate, and an accused against whom investigation has been directed under section 202(1) of the Code. Although the nature of both the investigations is the same, but the former investigation is carried out by the police, essentially under Chapter XII of the Code which deals with: "Information to the Police and Their Powers to Investigate." The police officer-in-charge of the police station has the same powers for carrying out an investigation under section 156(1), without orders of the Magistrate as the Magistrate can direct under section 156 (3) of the Code. Section 154 (1) of the Code prescribes the steps to be taken on receipt of a report of a cognizable offence by such a police officer. 154(3) gives powers to the Superintendent to issue appropriate directions requiring a station officer to conduct investigation into a cognizable offence. This power is parallel to the power of the Magistrate to issue a similar direction to the Station officer under section 156(3) of the Code. The investigation culminates with the submission of the report by the police under section 173 of the Code. The post-cognizance investigation directed by the Magistrate under section 202(1) although it is of a limited nature at the stage of inquiry and is carried out mainly for helping the Magistrate decide whether or not there is sufficient ground for him to proceed further, but it is an investigation which is carried out on directions of the police after cognizance has been taken by the Magistrate on a complaint under sections 190(1)(a) and after examination of the complainant under section 200 of the Code.

9. For showing that a prospective accused has no right of being heard before process is issued or cognizance is taken, and therefore he cannot challenge the order directing investigation under section 156(3) Cr.P.C. in a criminal revision, the learned Single Judge has placed reliance on the following decisions of the Apex Court which speak of the absence of any right of an accused to intervene even in an inquiry under section 202 of the Code, which is conducted after cognizance has been taken, under section 190 (1)(a) and 200 of the Code:

10. In *Smt. Nagawwa v. V.S. Konjalgi, AIR 1976(13) ACC 225 (SC), V.V. Panchal v. D.D. Ghadigaonkar, AIR (1961) ISCR 1, Chandra Deo Singh v. Prakash Chandra Bose, AIR (1963) I.S.C.R 202, Mansukh Lal V. Chauhan v. State of Gujarat, 1997 (35) ACC 501 (SC) and C.B.I. v. V.K. Sahgal & Others, JT 1999 (8) SC 170* it has been held that the scope of enquiry under section 202 of the Code is extremely limited, and it is only meant for adjudging whether prima facie on the basis of the intrinsic reliability of the material placed by the complainant, a case for issuing process against the accused was made out. The accused at this stage has a right only to remain personally present or through his agent

and to be informed about what is going on, but he has no right to participate in the proceedings. At this stage the defence of the accused is not to be considered. Sufficiency of the material for conviction is beyond the scope of an inquiry under section 202 of the Code as the same is a matter for consideration during trial. The accused is only called upon to answer the allegations against him after process has been issued against him. The legislature had deliberately not provided for an accused to intervene at this stage as that would frustrate the object of the inquiry.

11. In *Pratap v. State of U.P., 1991 (28) ACC 422,* it has been observed that merely because process has been issued against a person, it cannot be said that a decision adversely affecting his rights has been taken, as he has merely been asked to face trial in a Court of law. Therefore no principle of natural justice is infringed if a Magistrate issues process against a person without first affording him an opportunity of hearing. The Code does not contemplate holding two trials, one before the issue of process and the other after the process is issued. The legislature has provided an elaborate procedure for hearing an accused after the trial begins in a Court of law.

12. The same view has also been taken in *S.C. Mishra v. State, 2001 (1) ACC 342, and Anil Kumar v. State of U.P., 1991 (28) ACC 422.* The aforesaid views in Pratap (supra) and the other abovementioned authorities have been approved by a Full Bench of this Court in *Ranjeet Singh v. State of U.P., 2000 Cri.L.J 2738.*

13. The thrust of the argument was that if after cognizance when the Court decides to conduct an inquiry under section 200 or 202 Cr.P.C, no right of hearing, beyond the right of the accused to be present personally or through counsel is permitted, where would the question arise of the accused having a right to be heard when an order by the Magistrate only directing the police to investigate a cognizable offence in exercise of powers under section 156(3) Cr.P.C was passed at the pre-cognizance stage.

14. In *Union of India v. W.N. Chaddha, 1993 Cri.L.J 859 (SC*) it has been held in paragraph 93*: ".....More so, the accused has no right to have any say as regards the manner and method of investigation. Save under certain exceptions under the entire scheme of the Code, the accused has no participation as a matter of right during the course of the investigation of a case instituted on a police report till the investigation culminates in filing of a final report under S. 173(2) of the Code or in a proceeding instituted otherwise than on a police report till the process is issued under S. 204 of the Code, as the case may be. Even in cases where cognizance of an offence is taken on a complaint notwithstanding the said offence is triable by a Magistrate or triable exclusively by the Court of Session, the accused has no right to have participation till the process is issued. In case the issue of process is postponed as contemplated under S. 202 of the Code, the accused may attend the subsequent inquiry but cannot participate. There are various judicial pronouncements to this effect but we feel that it is not necessary to*

recapitulate those decisions. At the same time, we would like to point out that there are certain provisions under the Code empowering the Magistrate to give an opportunity of being heard under certain specified circumstances."

15. Illustrative circumstances where the accused has been given a right of hearing during trial are spelt out in paragraphs 93 and 94 in *W.N. Chaddha (supra)*. Thus under S. 227 of the Code dealing with discharge of an accused in a trial before a Court of Session under Chap. XVIII, the accused is to be heard and permitted to make his submissions before the stage of framing the charges. Under S. 228 of the Code, the trial Judge has to consider not only the records of the case and documents submitted with it, but also the submissions of the accused and the prosecution made under S. 227. Similarly, under S. 239 falling under Chapter XIX dealing with the trial of warrant cases, the Magistrate may give an opportunity to the prosecution and the accused of being heard and to discharge the accused for reasons to be recorded in case the Magistrate considers the charge against the accused to be groundless. S. 240 of the Code dealing with framing of charges also requires examination of an accused under S. 239 before the charge is framed. Under S. 235(2), in a trial before a Court of Sessions and under S. 248(2) of the trial of warrant cases, the accused as a matter of right, is to be given an opportunity of being heard. On the other hand the provisions relating to investigation under Chapter XII of the Code do not confer any right of prior notice and hearing to the accused.

16. According to the decision in W.N. Chaddha the prospective accused can also not get any advantage of the principle of *Audi Alteram Partem* at the stage of investigation as no substantive rights of the accused who has not yet been summoned are involved. Moreover the accused will have all rights to be heard and to raise his defence pleas during the course of the trial.

17. In *Bhagwan Samardha Sreepada Vallabha Venkata Vishwandaha Maharaj v. State of A.P. and others., JT 1999 (4) SC 537* it has been held that even after submission of a final report, the police in exercise of powers under section 173 (8) is empowered to further investigate the matter. No obligation is cast at that stage also to hear the accused, as casting such an obligation would unnecessarily place a burden on the Courts to search for all the potential accused and to provide them with an opportunity of being heard before further investigation could be conducted, defeating its purpose.

18. In *C.B.I. and another v. Rajesh Gandhi and another, AIR 1977 SC 93* it has been observed in paragraph 8 that the decision to investigate and the agency which should investigate the offence does not attract the principles of natural justice and the accused has no say in the matter as to who should investigate the offence he is charged with.

19. In *Bhagwant Singh v. Commissioner of Police, 1985 (22) ACC 246 (SC)* it was held that after consideration of the report under section 173(2) of the Code, where the

Magistrate decides not to take cognizance and to drop the proceedings or reaches a conclusion that there was no sufficient ground for proceeding against some of the persons mentioned in the FIR, the Magistrate must give notice to the informant and provide him with an opportunity to be heard at the time of consideration of the report. Here again no right of hearing has been conferred on an accused when the Magistrate decides to hear the informant on receipt of the report under section 173 (2) of the Code, when he is of the opinion that no ground exists for proceeding against the accused.

20. In *Karan Singh v. State of U.P., 1997 (34) ACC 163* it has been held by the referring single judge, Hon'ble J.C. Gupta that neither under the Code, nor under any principle of natural justice is the Magistrate required to issue notice or afford opportunity of hearing to the accused, where the police has submitted a final report, but the Magistrate on consideration of the material on record decides to take cognizance under section 190(1)(b) of the Code and directs issue of process to the accused.

21. In *Karan Singh v. State* it has been observed as follows:.

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

22. Pertinently it has been observed in *Abdul Aziz v. State of U.P., 2009 Cri.L.J 1683* in paragraph 9: *"Thus at the stage of Section 156(3) Cr. P. C. any order made by the Magistrate does not adversely affect the right of any person, since he has got ample remedy to seek relief at the appropriate stage by raising his objections. It is incomprehensible that accused cannot challenge the registration of F.I.R. by the police directly, but can challenge the order made by the Magistrate for the registration of the same with the same consequences. The accused does not have any right to be heard before he is summoned by the Court under the Code of Criminal Procedure and that he has got no right to raise any objection till the stage of summoning and resultantly he cannot be conferred with a right to challenge the order passed prior to his summoning. Further, if the accused does not have a right to install the investigation, but for the limited grounds available to him under the law, it surpasses all suppositions to comprehend that he possesses a right to resist registration of F.I.R."*

23. In the case of *Chandan v. State of U. P. and another 2007(57) ACC 508 : (2007 (1) ALJ (NOC) 7 (All.)* it was

also held that the accused does not have any right to challenge an order passed under Section 156(3) Cr. P. C.

24. Similarly in *Surya Kant Dubey & Ors. v. State of U.P. & Anr., 2008 Cri.L.J. 2556, Rakesh Mohan Sharm v. State of U.P. & Ors., 2007(57 ACC 488, Rakesh Puri v. State (2007 (1) ALJ 169)* it has been held in Single Judge decisions that at the stage of 156(3) of the Code, the prospective accused can not step in before the Magistrate and interfere with the investigation by challenging a direction for registration of the FIR, when he cannot even participate in the investigation, which is conducted ex parte at this stage.

25. The learned Single Judge Hon'ble J.C. Gupta J also referred to *Arun Vyas & others v. Anita Vyas, 1999 (39) SC 170* wherein it was observed that even if a statutory bar for taking cognizance is raised on the ground that the complaint was barred by limitation under section 468 of the Code, the appropriate stage for the accused to raise this objection was at the stage of framing of charges.

26. *State of Punjab v. Raj Singh & Others, JT 1999 SC 145* was cited for the proposition that even where a jurisdictional bar to proceed with a case, in the absence of certain pre-conditions as required under section 195 Cr.P.C is claimed, no embargo can be placed on the power of the police to investigate. The bar, if at all, could only be considered at the stage when the Court decides to take cognizance of the case.

27. Sri D.S. Mishra on the other hand has placed reliance on the decision of the Apex Court in *Raghu Raj Singh Rousha v. Shiva Sundaram Promoters Private limited and another, (2009) 1 SCC (Cri) 801* for making a submission that at the stage of passage of an order under section 156 (3) Cr.P.C, the accused has a right to be heard.

28. It may be noted that the backdrop of *Raghu Raj Singh Rousha's* case was that the complainant company had filed a complaint petition accompanied by an application under section 156 (3) of the Code before the Metropolitan Magistrate alleging commission of offences under sections 323, 382, 420, 465, 471, 120-B, 506 and 34 IPC against the accused. The Magistrate refused to direct investigation in terms of section 156(3) Cr.P.C, but directed the complainant to lead pre-summoning evidence. The High Court however in a criminal revision against the order of the Magistrate, where only the State was impleaded, without giving any opportunity to the accused to be heard set aside the order of the Magistrate and directed the Magistrate to examine the matter afresh after calling for a police report. The High Court's order was set aside by the Apex Court on two counts. One that there was an infringement of section 401 (2) of the Code as the right of hearing to an accused, or any other person who may be aggrieved mandated by the aforesaid provision, was denied to the aggrieved party as a result of the High Court's order. Two, according to the Apex Court the initial order of the Magistrate, who declined to entertain the application under section 156 (3) of the Code, but directed that the procedure of a complaint case be followed, and that the witnesses be

examined under section 200 and 202 Cr.P.C. indicated that cognizance had been taken, hence a right of hearing had accrued to the accused. That would not have been the case, if only a pre-cognizance order of the Magistrate refusing to issue a direction under section 156(3) Cr.P.C. had been challenged in the High Court by the informant, where right of hearing had been denied to the accused in a Criminal Revision. These are the two basic distinctions from a direct order by a Magistrate to the police to investigate an offence. Here the direction under section 156(3) Cr.P.C has not been issued consequent to any direction by the High Court in a criminal revision at the instance of the informant where only the State is made a party, and the aggrieved accused is denied the opportunity of hearing contemplated under section 401(2) Cr.P.C. Also it is a pre-cognizance order only containing a direction of the Magistrate for investigation by the police, where no valuable right has accrued to the prospective accused, which is distinct from the post cognizance order in *Rousha's* cases, where the Magistrate had decided to follow the procedure of a complaint case under section 200 and 202 Cr.P.C. We therefore find that *Rousha's* case is no authority for the proposition that any right of hearing accrues to a prospective accused or that any criminal revision is maintainable against an order of the Magistrate simply directing the police officer in-charge of a police station to investigate a case in exercise of powers under section 156(3) of the Code.

29. From a consideration of the aforesaid authorities, it is apparent that even when a complaint is filed under section 190(1) (a) and the Court decides to take cognizance and to adopt the procedure provided for inquiry under section 200 and 202 Cr.P.C, the accused is only permitted to remain present during the proceedings, but not to intervene or to raise his defence, until the order issuing summons is passed. The right of hearing of a prospective accused at the pre-cognizance stage, when only a direction for investigation by the police is issued by the Magistrate under section 156(3) Cr.P.C., can only be placed at a lower pedestal. It is only during the course of trial that the accused has been conferred rights at different stages to raise his defence. As the authorities show, that in the absence of any statutory right of hearing to the prospective accused at the pre-cognizance stage, when the direction to investigate has only been issued by the Magistrate under section 156(3), the accused cannot be conferred with any right of hearing even under any principle of *audi alteram partem.*

30. We have also seen that during the stage of investigation the accused has no right of intervention as to the mode and manner of investigation and who should investigate.

31. Even after submission of a final report, either when the police decides to order further investigation under section 173(8) Cr.P.C, or before accepting or rejecting the report, only the informant is required to be heard. The accused is not entitled to be heard even at this stage. In this view it would be unrealistic to confer a right of hearing when only an innocuous direction for investigation is passed by

the Magistrate in a case disclosing a cognizable offence., especially when the allied order regarding the decision of a police officer to investigate in exercise of powers under section 156(1) is not vulnerable to challenge in the criminal revision. Also when objections to maintainability of a case are raised on the ground of limitation under section 468 or under section 195 Cr.P.C, the appropriate stage for raising these objections is at the time of cognizance or at the time of framing of charges, and not when a Magistrate issues a direction for investigation under section 156(3) Cr.P.C.

32. In the light of the aforesaid discussion, it is abundantly clear that the prospective accused has no *locus standi* to challenge a direction for investigation of a cognizable case under Section 156(3) Cr.P.C before cognizance or issuance of process against the accused. The first question is answered accordingly.

B. Whether an order under Section 156(3) is an interlocutory order and revision against the said order is barred, under Section 397(2) Cr.P.C.

33. It was observed by the learned Single Judge that as no substantive rights and liabilities of the accused are involved at the stage when an order is passed by the Magistrate directing the police merely to investigate into a cognizable offence in exercise of powers under section 156(3) Cr.P.C. and only the informant and the police are in the picture, the said proceedings are purely interocutory in nature, and are not revisable. It is only after investigation when a report under section 173 (2) of the Code is submitted by the police, that the Magistrate makes up his mind whether to take cognizance or to drop the proceedings.

34. S. 397 (2) of the Code reads as follows.

"The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding."

35. Only if cognizance is taken and process issued that the accused gets a right of hearing. Before that stage according to the learned Single Judge, any order, including an order under section 156(3) Cr.P.C, will be interlocutory in nature.

36. The Statement of Objects and Reasons of s. 397(2) as contained Clause (d) of Paragraph 5 of the accompanying the 1973 Code. runs thus:

"the powers of revision against interlocutory orders are being taken away, as it has untitled folderbeen found to be one of the main contributing factors in the delay of disposal of criminal cases."

37. In support of his contention that a direction by the Magistrate to the police under section 156 (3) Cr.P.C. to register and investigate a criminal offence may not amount to an interlocutory order, but it could at best be described as an intermediate order, Sri D.S. Mishra Advocate has placed reliance on the Apex Court decision in

Madhu Limaye v State of Maharashtra 1978 (15) ACC 184.

38. *Madhu Limaye (supra)* no doubt lays down that orders, such as the order in that case issuing process against the accused could not be described as a final order, but it was also not an interlocutory order, which could have attracted the bar to the maintainability of the criminal revision in view of section 397 (2) of the Code, because if the plea of the accused was rejected on a point which when accepted could have concluded the particular proceedings. Rather according to the said decision it should be described as a type of intermediate order falling in the middle course. In *Madhu Limaye* an objection had been raised by the appellant that the cognizance taken by the Sessions Court without commitment of the case to it in exercise of powers under section 199(2) Cr.P.C, on a complaint under section 500 IPC by the Public Prosecutor based on the sanction by the State government under section 199(4) Cr.P.C was incompetent, as no complaint had been made by the aggrieved person Sri A.R. Antulay, the Chief Minister, and the alleged defamatory statements related to acts done in his personal capacity, and not in the discharge of his public duties. If this contention was accepted, it would have resulted in the order of cognizance passed by the Sessions Judge without the case being committed to him, being set aside. Hence this objection would go to the root of the matter, and could not be ignored only by describing the order as interlocutory in nature.

39. In *Amar Nath v. State of Maharashtra, AIR 1977 SC 2185* interlocutory orders have been described thus in paragraph 6: *"It seems to us that the term "interlocutory order" in S. 397 (2) of the 1973 Code has been used in a restricted sense and not in any broad or artistic sense. It merely denotes orders of a purely interim or temporary nature which do not decide or touch the important rights or the liabilities of the parties. Any order which substantially affects the rights of the accused, or decides certain rights of the parties cannot be said to be an interlocutory order so as to bar a revision to the High Court against that order, because that would be against the very object which formed the basis for insertion of this particular provision in S. 397 of the 1973 Code. Thus, for instance, orders summoning witnesses. adjourning cases, passing orders for bail, calling for reports and such other steps in aid of the pending proceeding, may no doubt amount to interlocutory orders against which no revision would lie under Section 397 (2) of the 1973 Code. But orders which are matters of moment and which affect or adjudicate the rights of the accused or a particular aspect of the trial cannot be said to be interlocutory order so as to be outside the purview of the revisional jurisdiction of the High Court.*

40. In *Amar Nath* the order summoning the appellants in a mechanical manner after the police had submitted a final report against them leading to their release by the Judicial Magistrate, and the revision against that order before the Additional Sessions Judge preferred by the complainant had also failed. Even the subsequent complaint by the complainant had been dismissed on merits. Against the latter

dismissal of the complaint when the complainant preferred a revision, the Sessions Judge set aside the order of the Judicial Magistrate and ordered further inquiry, whereupon the Magistrate straightaway summoned the appellants for trial. This order which appeared to infringe substantial rights acquired by the appellants was considered an order of moment and not a mere interlocutory order, which would invite the bar to entertaining the revision under S. 397(2) of the Code.

41. An order under section 156(3) Cr.P.C. passed by the Magistrate directing the police officer to investigate a cognizable case on the other hand is no such order of moment, which impinges on any valuable rights of the party. Were any objection to the issuance of such a direction to be accepted (though it is difficult to visualize any objection which could result in the quashing of a simple direction for investigation), the proceedings would still not come to an end, as it would be open to the complainant informant to move an application under section 154(3) before the Superintendent of Police (S.P.) or a superior officer under section 36 of the Code. He could also file a complaint under section 190 read with section 200 of the Code. This is the basic difference from the situations mentioned in *Madhu Limaye* and in *Amar Nath's* cases, where acceptance of the objections could result in the said accused being discharged or the summons set aside, and the proceedings terminated. Also the direction for investigation by the Magistrate is but an incidental step in aid of investigation and trial. It is thus similar to orders summoning witnesses, adjourning cases, orders granting bail, calling for reports and such other steps in aid of pending proceedings which untitled folderhave been described as purely interlocutory in nature in *Amar Nath (supra).*

42. In this connection it has been aptly noted in *Devarapalli Lakshminarayana Reddy v Narayan Reddy, AIR 1976 SC 1672,* that *"an order made under sub-section (3) of Section 156, is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation under Section 156 (1)."*

43. The power conferred under section 156(3) Cr.P.C. is of the same nature as the power under section 156(1), which is the power conferred on a police officer in-charge of a police station to investigate any cognizable case to investigate a case, without orders of the Magistrate, which the Magistrate of the local area would have power to inquire into or try. The police officer records an FIR in accordance with the procedure mentioned in section 154(1) of the Code. In the event of the failure of the police officer to record the information, the aggrieved informant has been given a right to approach the Superintendent of Police under section 154(3) for a direction for investigation. Such powers may also be exercised by any officer superior in rank to an officer in-charge of a police station in view of s. 36 of the Code. The powers of a Magistrate for giving directions under section 156(3) is thus allied to the powers of police officers under sections 154(1), 154(3) and 36 of the Code. It would thus be highly illogical to suggest

that the Courts have no jurisdiction to interfere in a criminal revision or other judicial proceedings with the decision of the police officer in-charge of the police station to lodge an FIR under section 154(1) of the Code or by a superior officer under section 154(3), or the actual investigation conducted by the police under the aforesaid provisions, but the initial order of the Magistrate under section 156(3) Cr.P.C peremptorily reminding the police to perform its duty and investigate a cognizable offence could be subject to challenge in a criminal revision or other judicial proceeding.

44. We thus see that the orders for investigation are only an ancillary step in aid of the investigation or trial, and are clearly interlocutory in nature, similar to orders granting bail, or calling for records, or issuing search warrants, or summoning witnesses and other like matters which infringe no valuable rights of the prospective accused, and are not amenable to challenge in a criminal revision, in view of the bar contained in section 397(2) of the Code.

45. Also the situations in *Madhu Limaye* or in *Amar Nath's* cases are clearly distinguishable, where refusal to consider the objections raised on behalf of the accused may have prevented his being discharged and may have caused him to be summoned to face trial, resulting in the orders being described as neither final nor interlocutory, but intermediate in nature. Revisions against the said intermediate orders would therefore not attract the bar under section 397(2). Acceptance of the objection to the direction for investigation under section 156(3) at the pre-cognizance stage, would however not result in the closure of the proceedings against the accused, as the complainant/informant could have sought summoning of the accused by filing a complaint under sections 190(a) read with 200 or by moving an application for investigation before the S.P. or other superior officer under section 154(3) or s. 36 of the Code (if that step had not earlier been taken). From the above discussion it follows that the said orders are clearly interlocutory in nature, and not revisable in view of the bar contained in section 397(2) of the Code.

46. As the direction for investigation passed by the Magistrate under section 156(3) is purely interlocutory in nature, and involves no substantial rights of the parties, we are of the view that the bar under section 397(2) Cr.P.C to the entertainment of a criminal revision can also not be circumvented by moving an application under section 482 Cr.P.C. As observed in *State v. Navjot Sandhu, (2003) 6 SCC 641* in paragraph 29:

47. *"29.....This power should not be exercised against an express bar of law engrafted in any other provision of the Criminal Procedure Code. This power cannot be exercised as against an express bar in some other enactment."*

48. An application under section 482 Cr.P.C would also not lie against an order for investigation under section 156(3) CrP.C., which is an adjunct to the police power to investigate in Chapter XII of the Code, because as held in *Divine Retreat Centre v. State of Kerala & Othrs., AIR 2008 SC 1614*

(paragraph 22, and Nirmaljit Singh Hoon v. State of West Bengal & Anr., AIR 1972 SC 2639, (paragraph 35), whilst conducting an investigation into a offence cognizable offence the police authorities are exercising their statutory powers under sections 154 and 156 of the Code, and even the High Court in its inherent powers under section 482 Cr.P.C cannot interfere with the exercise of this statutory power.

49. Moreover the said inherent power needs to be utilized very sparingly and with circumspection and as held by the Apex Court while considering the jurisdiction of theuntitled folder High Court in *Kurukshetra University vs. State of Haryana, AIR 1977 SC 2229,* (paragraph 2): *"It ought to be realised that inherent powers do not confer an arbitrary jurisdiction on the High Court to act according to whim or caprice. That statutory power has to be exercised sparingly, with circumspection and in the rarest of rare cases."*

50. In para 9 in single judge decision in the case of *Prof. Ram Naresh Chaudhary v. State of U. P., 2008 Cri.L.J 1515* the following observations have been made :-

"At this stage accused does not come into picture at all, nor can he be heard. He has no locus to participate in the proceedings. He can at the most stand and watch the proceedings. It must be remembered that it is pre-cognizance stage. The nature of the order passed by the Magistrate under Section 156(3) Cr. P.C. directing registration and investigation of case is only a peremptory reminder or intimation to the police to exercise its power of investigation under Section 156(1) Cr. P. C, as has been held by Hon'ble Apex Court in the case of Devarappalli Lakshaminarayana Reddy and others vs. Narayana Reddy and others 1976 ACC 230 : (AIR 1976 SC 1672). How such a reminder is subject to revisional power of the Court is something which goes beyond comprehension. From the nature of the order itself, it is clear that it is an interlocutory order, not amenable to revisional power of the Court. Section 397(2) Cr. P. C. specifically bars revision filed against interlocutory orders."

51. Likewise in *Rakesh Puri & Anr. v. State of U.P. (supra), Smt. Rekha Verma and others v. State of U. P. and others 2007 (57) ACC 241 and Abdul Aziz v. State of U.P.,* Paragraph 13 *(supra)* it has been held by single judge decisions of this Court that neither a Criminal Revision nor an Application under section 482 Cr.P.C. would lie against the direction of the Magistrate to register and investigate an FIR in exercise of powers under section 156(3) Cr.P.C. In *Abdul Aziz* it has further been held that only after an FIR can an accused move the High Court in its writ jurisdiction under Article 226 of the Constitution of India for quashing of the FIR, but prior to the registration of the F.I.R., the prospective accused has no right to challenge that order.

52. Piqued by the over flowing dockets of petitions under section 482 Cr.P.C on miscellaneous matters, which have created a huge back log affecting disposal by the High Court of grave matters under section 302 IPC etc.,

because the circumspection and caution required before admitting such petitions under section 482 Cr.P.C is not being exercised, Hon'ble G.P.Mathur J speaking for the bench has expressed his disquiet thus in paragraph 38 of *Hamida V. Rashid, AIR 2007 (Supp) SC 361:*

"38..... Ends of justice would be better served if valuable time of the Court is spent in hearing those appeals rather than entertaining petitions under Section 482 Cr.P.C. at an interlocutory stage which are often filed with some oblique motive in order to circumvent the prescribed procedure, as is the case here, or to delay the trial which will enable the accused to win over the witnesses by money or muscle power or they may become disinterested in giving evidence, ultimately resulting in miscarriage of justice."

53. As we have observed that the direction under section 156(3) of the Code refers to a pre-cognizance stage, it does not strictly relate to proceedings pending in a Court, but as mentioned herein-above it only relates to directions to the police to carry out the investigation in a cognizable case under Chapter XII of the Code. In this context it has been clarified in *State of W.B. and Ors. vs. Sujit Kumar Rana [(2004) 4 SCC 129],* that inherent powers of the High Court come into play only where an order has been passed by the Criminal Court which is required to be set aside to secure the ends of justice or where the **proceedings pending before a court** amounts to abuse of the process of Court.

54. As on the basis of the aforesaid reasoning we have already held the order under section 156(3) Cr.P.C not to be amenable to challenge in a criminal revision or an application under section 482 Cr.P.C, it is not necessary for this Court to go into the further question whether the said order is administrative in nature as urged by Sri G.S. Chaturvedi and the learned Government Advocate or judicial in nature as contended by Sri D.S. Mishra and Sri Dileep Gupta. Following the decision of the Apex Court in *Asit Bhattacharjee v Hanuman Prasad Ojha and Others, (2007) 5 SCC 786,* we are also not inclined to express any opinion on this issue, and leave the question open for decision in a subsequent proceeding where an answer to this question may become necessary.

55. In view of the aforesaid, our answer is that the revision against that the order under section 156(3) of the Code directing the police to investigate is clearly an interlocutory order and a Criminal Revision (as also an order under section 482 Cr.P.C against the same) is barred in view of section 397(2) of the Code.

56. C. Whether the view of the division bench in Ajay Malviya's case(supra) that an order under Section 156(3) Cr.P.C was amenable to revision, no writ petition would lie for challenging an FIR lodged pursuant to the order under Section 156(3) Cr.P.C will be maintainable, is correct.

57. *Ajay Malviya (supra*) relied on the following lines from paragraph 4 in the decision in *Devarapalli Lakshminarayana Reddy (supra) ".....If instead of proceeding under*

Chapter XV, he has, in the judicial exercise of his discretion, taken action of some other kind, such as issuing a search warrant for the purpose of investigation, or ordering investigation by the police under section 156(3), he cannot be said to have taken cognizance of any offence....." On that basis the Division Bench inferred that an order under section 156(3) was a judicial order, hence the said order was amenable to revision, and conversely a writ against an FIR which had been lodged on the basis of such an order was barred. However in view of our answers to the first two referred questions that the learned Single Judge who had not gone into the question whether an order under Section 156(3) Cr.P.C was judicial or administrative in nature, has rightly held that the the said order was not open to challenge by a prospective accused at the pre-cognizance stage, and it was also an interlocutory order which is not revisable in view of the bar contained under section 397(2) of the Code. That being the position, the necessary inference is that the view of the Division Bench in *Ajay Malviya* that the said order is amenable to revision and no writ petition would lie for challenging the FIR can not be held to be correct.

58. However it is made clear that the initial order for investigation under section 156(3) is also not open to challenge in a writ petition, as it is now beyond the pale of controversy that the province of investigation by the police and the judiciary are not overlapping but complementary. As observed by the Privy Council in paragraph 37 in *Emperor v. Khwaja Nazir Ahmad, AIR 1945 PC 18* when considering the scope of the statutory powers of the police to investigate a cognizable case under sections 154 and 156 of the Code, that it would be an unfortunate result if the Courts in exercise of their inherent powers could interfere in this function of the police. The roles of the Court and police are *"complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function."*

59. In *State of Bihar v. J. A. C. Saldanha (AIR 1980 S C 326)* while dealing with the powers of investigation of a police officer as contemplated in Section 156 of the Code of Criminal Procedure the Apex Court has stated thus (at pp. 337-338 of AIR): *"There is a clear-cut and well demarcated sphere of activity in the field of crime detection and crime punishment. Investigation of an offence is the field exclusively reserved for the executive through the police department the superintendence over which vests in the State Government. The executive which is charged with a duty to keep vigilance over law and order situation is obliged to prevent crime and if an offence is alleged to have been committed it is its bounden duty to investigate into the offence and bring the offender to book. Once it investigates and finds an offence having been committed it is its duty to collect evidence for the purpose of proving the offence. Once that is completed and the investigating officer submits report to the Court requesting the Court to take cognizance of the offence under Section 190 of the Code its duty comes to an end."*

60. The Magistrate can not interfere with the investigation so long as the police officer proceeds with the investigation in compliance with the statutory powers mentioned in paragraph XII of the Code. Only in a case where a police officer decides not to investigate an offence, that the concerned Magistrate can intervene and either direct an investigation or in the alternative, if he thinks fit, he himself can, at once proceed or depute any Magistrate subordinate to him to proceed to hold a preliminary inquiry into or otherwise to dispose of the case in the manner provided in the Code. (Vide *S.N. Sharma vs. Bipen Kumar Tiwari and Ors., AIR 1970 SC 786, paragraph 7).*

61. Even where the informant's plea for a direction for investigation under section 156(3) Cr.P.C is refused by the Magistrate, as held by the three judge bench of the Supreme Court in *Aleque Padamsee v. Union of India, AIR 2007 SC (Supp) 684,* the remedy for the informant lies not in filing a writ petition, but in filing a complaint under section 190 (1)(b) read with section 200 of the Code. The legal position after review of the authorities as noted in *Aleque Padamsee* in paragraph 7 was as follows: *"The correct position in law, therefore, is that the police officials ought to register the FIR whenever facts brought to its notice show that a cognizable offence has been made out. In case the police officials fail to do so, the modalities to be adopted are as set out in Section 190 read with Section 200 of the Code.*

62. In *Sakhiri Vasu v State of U.P. and Ors., AIR 2008 SC 907,* it has been observed in paragraph 27:*"The High Court should discourage the practice of filing a writ petitions or petitions under section 482 Cr.P.C. simply because a person has a grievance that his FIR has not been registered by the police. For this grievance, the remedy lies under sections 36 and 154(3) before the concerned police officers, and if that is of no avail, under section 156(3) Cr.P.C. before the Magistrate or by filing a criminal complaint under section 200 Cr.P.C. and not be filing a writ petition or a petition under section 482 Cr.P.C."*

63. It is only at the stage that an FIR has been lodged, and in the rarest cases where the FIR does not prima facie disclose the commission of a cognizable offence, or where there is legal bar to proceeding with the complaint/ FIR or if it is a case of no evidence or the evidence is wholly inadequate for proving the charge, or it is demonstrated that the FIR has been lodged in a mala fide manner, only in those circumstances, with the exercise of extreme circumspection can a writ petition be filed challenging the lodging of the FIR and that too strictly in accordance with the parameters and subject to the restrictions mentioned in *State of Haryana v Bhajan Lal, AIR 1992 SC 604* and the Full Bench decision of this Court in *Ajit Singh @ Muraha v. State of U.P., 2006 (56) ACC 433* and a catena of decisions of the Apex Court and this Court on the issue. In view of what has been stated the view taken in Ajay Malviya's case can not be held to be laying down the correct law and needs to be clarified as above.

64. In this view of the matter, the Opinion of the Full bench on the three questions posed is:

65. A. The order of the Magistrate made in exercise of powers under Section 156(3) Cr.P.C directing the police to register and investigate is not open to revision at the instance of a person against whom neither cognizance has been taken nor any process issued.

B. An order made under Section 156(3) Cr.P.C is an interlocutory order and remedy of revision against such order is barred under sub-section (2) of Section 397 of the Code of Criminal Procedure, 1973.

C. The view expressed by a Division Bench of this Court in the case of Ajay Malviya Vs. State of U.P and others reported in 2000(41) ACC 435 that as an order made under Section 156(3) of the Code of Criminal Procedure is amenable to revision, and no writ petition for quashing an F.I.R registered on the basis of the order will be maintainable, is not correct.

66. As we have recorded a finding that no criminal revision will lie against the orders passed by the Magistrate directing investigation under section 156(3) Cr.P.C., no useful purpose will be served in sending back the said Criminal Revisions to the Single Judge bench hearing criminal revisions. The stay orders have already been vacated by the Single Judge. All the connected criminal revisions accordingly fail and are dismissed. There shall be no orders as to costs.
