ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.02.2010

BEFORE
THE HON'BLE IMTIYAZ MURTAZA, J.
THE HON'BLE S.S. TIWARI, J.

Criminal Contempt No. 09 of 2009

Nisha Srivastava ...Applicant
Versus
Dinesh Kumar ...Opposite Party

Counsel for the Appellants:
A.G.A.

Counsel for the Opposite Party:
Sri R.P. Mishra
Sri S.K. Srivastava

Contempt of Court Act, 1971-Section 2 (c)(1)-Criminal Contempt-a practicing lawyer intimidate the Magistrate to get favorable order-by throwing copy of complaints with certain photo graphs attack made on presiding officer disapproving character and derogatory to her dignity-shake the confidence of public-would be termed as vitriolic attack on judiciary-unconditional apology also imputing the conduct of Magistrate-held-not bona fide-5 months simple imprisonment with fine of Rs.20,000/- punishment imposed.

Held: Para 22 & 23

Now the question arises what would be the appropriate sentence on the point. It is the grossest contempt of court and in the interest of justice and to uphold the majesty of the courts, it is desirable to award jail sentence in addition to fine. The contemnor filed a paper at a last stage styling as unconditional apology although as stated supra, it does indicate clear lack of real contriteness.

We accordingly convict him for offences under section 2 (C) (1) of the Contempt of Courts Act and sentence him to undergo simple imprisonment for five months and to pay a fine of Rs.20,000/-. In default, it may be prescribed, contemnor shall undergo further simple imprisonment for 15 days. However, the punishment so imposed shall be kept in abeyance for a period of sixty days so as to enable the contemnor to approach the Apex Court if so advised. It needs hardly be said that immediately after expiry of sixty days in case no stay order is furnished by the contemnor, he would be taken into custody forthwith to serve out the sentence immediately.

Case law discussed:
(1991) 4 SCC 406, (1994) 4 SCC 687, [1984] 3 SCC 405, (1991) 4 SCC 406, (1991) 3 SCC 600.

(Delivered by Hon'ble Imtiyaz Murtaza J.)

1. Present contempt petition has its genesis in the reference made by Km. Nisha Srivastava, Judicial Magistrate I Allahabad for initiating contempt proceeding under the Contempt of Court Act 1971 against Sri Dinesh Kumar and others for scandalizing the officer by lodging F.I.R which was registered at case crime No. 462 of 2009 under section 384 IPC P.S. Indrapuram District Ghaziabad.

2. In reference made to this Court, the officer recapitulated the facts as under: On 8.3.2009, the officer left for Sonebhadra for her native place for Holi festival. It is alleged that on 13.3.2009 at about 10 a.m, a bunch of papers was thrown inside her house i.e. J-8 situated in judicial officer's colony known as Juhi Colony Rajapur, Allahabad. It is further alleged that her sister was at that time present at the house having returned to Allahabad on 13.3.2009 at 5 a.m. The sister, it is further alleged, untied the bunch of papers which consisted of photo copies of complaint made to Hon. Chief

Justice, paper cuttings and F.I.R dated 28.2.2009 lodged at Ghaziabad naming one lady SO and the officer and one person (male) of Mahila Thana Allahabad. The complaint substantially mentioned that two ladies accompanied by one male had visited the complainant house on 22.2.2009 demanding illegal gratification to the extent of Rs. 2 lac from him in exchange for favour of expunging the case lodged at case crime No. 68 of 2007. The allegation further is that the Lady S.O gave her identity and conveyed to him that she had come in connection with investigation of the case. It is further alleged that when the complainant rang up the local police, both the ladies with accompanying male left the place. In her reference, the officer explained that 22.3.2009 being Sunday, and 23.3.2009 being also holiday on account of Shivratri, she was present at Allahabad and there was no occasion for her to have left the station and further that she had no acquaintance with Leena Srivastava the lady S.O.

3. On the reference the office of this Court scripted a note in which it was opined that the act of Sri Dinesh Kumar complainant of District Ghaziabad falls within the ambit of Criminal Contempt of Court. The matter ultimately reached the end of Hon. Chief Justice who vide order dated 6.5.2009 referred it to the appropriate Bench on judicial side.

4. It would transpire from the record that a criminal case was already pending against the complainant Dinesh Kumar at case crime No. 68 of 2007 registered at P.S. Mahila Thana Allahabad at the instance of the wife of younger brother of the complainant on 4.12.2007 under sections 498 A, 323, 504, 506, 406, 420, 376, 511 IPC and ¾ of the Dowry Prohibition Act. It brooks no dispute that the officer being posted at Allahabad as judicial Magistrate was seized of the matter. The police had submitted Final report in the case and after weighing up the materials on record in all its pros and cons, the officer passed the order dated 27.1.2009 whereby she did not accept the final report and directed the matter to be reinvestigated. It is in this backdrop that the complainant embroidered the story in order to lend colour to the contents in the F.I.R.

5. On the case being called out to day, an objection having complexion of preliminary objection has been raised by way of an application seeking discharge from contempt proceeding. In his application, he has raised three fold questions firstly that the officer has cited certain decisions of the Apex Court the ratio of which has been misinterpreted to screen herself from departmental enquiry and criminal acts. The second question canvassed is that acts done in discharge of duties do not include cases of abuse of powers and to prop up this contention, he has relied upon a decision of the Apex Court reported in AIR 2009 SC 1404. The third point canvassed is that the officer prevailed upon the investigating officer investigating case at case crime no. 462 of 2009 under section 384, 120 B IPC lodged at P.S. Indirapuram Ghaziabad naming the officer and lady S.O of Police Station Mahila Allahabad. All the questions have been dealt with at length in the order dated 23.10.2009 and the relevant part of the order is excerpted below.

"The case referred i.e. AIR 2009 SC 1404 upon being scrutinized, appears to

be one relating to police officer and therefore, the ratio of that case cannot be imported for application to a judicial officer who is protected by separate Act called Judicial officer Protection Act. Besides, it may be stated that the position is well settled by a stream of decisions that there would be no court without a presiding officer and therefore, the word court used in the Contempt of Courts Act has the meaning of a Court with a presiding officer and not the empty court room. Under the circumstances, abusing or scandalizing the Presiding officer of the Court is really the crux of the matter and constitutes contempt of Court under the Act.

The third point canvassed before us is that the officer prevailed upon the investigating officer to scuttle the investigation. To bolster up this contention, he stated that the investigation was taken to finality within a span of six days which is unheard of in history. The learned counsel has also referred to conversation allegedly recorded by the complainant Dinesh Kumar which is annexed as Annexure R.10 to his Discharge Application. We have gone through the Annexure R. 10. It refers to conversation between Dinesh Kumar complainant and one S.C. Sharma, the investigating officer of the said case i.e. case crime No. 462 of 2009 lodged at Ghaziabad. We have searched the entire conversation translated in English which is contained in Annexure R-10 for reference to the officer. The crux of what has been stated therein is that there was pressure upon the person describing himself as S.C. Sharma to file final report in the matter. However, there is not an iota therein bespeaking that the officer was involved or she tried to prevail upon the investigating officer. Even otherwise, the truthfulness of the conversation whether the person speaking as S.C. Sharma was the same person or someone was impersonating himself as S.C. Sharma, remains untested. The officer is a judicial officer who could not leave the station without permission to leave the station. The contemnor has not brought on record anything which could evince that the officer had left Allahabad for Ghaziabad on and around the date alongwith lady S.H.O. Come what may, it is not the stage at which the veracity of the allegations can be gone into."

6. It is settled position in law that any conduct by which the course of justice is perverted either by a party or a stranger is a contempt. Acts which are calculated to undermine the authority of the court and disturb the confidence of the citizen in the efficacy of its order will have to be considered as contempt. It is obvious from the record that the officer had passed the order on 29.1.2009 rejecting the final report which annoyed the contemnor and ostensibly, in an an attempt to avenge for the orders he embroidered the story and filed the F.I.R. This conduct of the contemnor offends the majesty of law and undermines the dignity of the court.

7. Be that as it may, it would suffice to say that there are catena of decisions on the point by which the judicial officers have been amply protected for harassment either from the executive or by the public at large for the acts done in the discharge of judicial functions. Besides the decision of **Delhi Judicial Service Association v. State of Gujarat** (1991) 4 SCC 406, there is ex-cathedra decision of the Apex Court in **U.P. Judicial Officers Association v.**

Union of India (1994) 4 SCC 687 wherein the Apex Court added to the guidelines issued in Delhi Judicial Service Association v. State of Gujarat (supra). While laying down guidelines, the Delhi Judicial Officers Association v. State of Gujarat, the Apex Court had spelt out that the above guidelines were not exhaustive but these were minimum safeguards which must be observed in case of arrest of a judicial officer. These guidelines should be implemented by the State Government as well as by the High Courts. In U.P. Judicial officers Association v. Union of India the para 3 being germane to the issue involved in this matter is abstracted below.

"In Delhi Judicial Service Association v. State of Gujarat this Court issued the following guidelines: (SCC pp 411- 12)
"(A) AJjudicial Officer should be arrested for any offence under intimation to District Judge or the High Court as the case may be.
(B) In case of necessity for immediate arrest of a Judicial Officer only a technical or formal arrest may be effected.
(C) The fact of such arrest should be immediately communicated to the District and Sessions Judge of the concerned District and the Chief Justice of the High Court.
(D) The Judicial Officer so arrested shall not be taken to a police station, without the prior order or directions of the District and Sessions Judge of the concerned district, if available.
(E) Immediate facilities shall be provided to the Judicial Officer for communication with his family members, legal advisers and Judicial officers, including the District and Sessions Judge.
(F) No statement of a Judicial Officer who is under arrest be recorded nor any panchnama be drawn up nor any medical tests be conducted except in the presence of the Legal Adviser of the Judicial Officer concerned or another Judicial Officer of equal or higher rank, if available.
(G) Ordinarily there should be no handcuffing of a Judicial Officer.
The above guidelines are not exhaustive but these are minimum safeguards which must be observed in case of arrest of a Judicial officer. These guidelines should be implemented by the State Government as well as by the High Courts."
The aforesaid guidelines were in regard to all offenses generally; but when any criminal conduct is attributed to a judicial officer in discharge of his duties or in purported exercise or discharge of his duties, we direct that in addition, no crime for investigation should be registered pursuant to any FIR without the permission of the Chief Justice of the High Court concerned."

8. Reverting to the facts of the present case, it would appear, as stated supra, the officer had not accepted the Final Report submitted in the criminal case registered by the wife of younger brother of Dinesh Kumar on 27.1.2009 and aggrieved by the order aforesaid, the F.I.R naming the officer as one of the accused in the matter was lodged. Therefore, the F.I.R against the officer ex facie appears to be the off-shoot of order dated 27.1.2009 whereby the final report had not been accepted by the officer. The object of the contempt proceeding is that the authority of the court is not lowered and the confidence of the people in the administration of justice is not weakened. In the instant case, the action of lodging

the F.I.R, it would appear, is fraught with the consequence of undermining the confidence of the public in the competence and integrity of the officer and it cannot be ruled out that it is likely to deflect the court itself from a strict and unhesitant performance of its duties.

9. We however indicate to ourselves the piece of advice that the Court while dealing with contempt matter should not be over or hypersensitive and should not exercise this jurisdiction on any exaggerated notion of the dignity of the Judges and must act taking a dispassionate view of the entire matter. It is the settled principles that the rule of contempt is not to be lightly invoked and is not to be used as a cloak to cow down somebody into submission on the basis of fancied claim. It is intended to offer protection to the court itself or to a party in judicial proceeding whose interest may be affected or the authority of the court is lowered and the confidence of the people in the administration of justice is weakened. At the same time, it should be borne in mind that the Court is the protector of public justice and it has a stake in the dignity and protection of those who man the court.

10. In the affidavit filed by the contemnor alongwith application seeking discharge. The prayer for discharge has already been disallowed. In para 2, the contemnor averred that after passing order dated 27.1.2009 officer stood transferred to Lucknow and therefore she was not seized of the file of crime no. 68 of 2007 and therefore, the plea that the contemnor filed FIR at case crime no. 462 of 2009 dated 28.2.2009 to put pressure on her for favourable order in crime no. 68 of 2007, is false. It is also averred that the contemnor and his brother do not practise law at Allahabad and therefore, the question of interference as alleged does not arise. In the self same para, the contemnor reiterated the contents of the F.I.R stating that some lady of the same complexion and stature personating herself as Magistrate posted at Allahabad approached him and demanded gratification. In para 3, the contemnor denied that he knew the Magistrate from before or that he ever appeared before her or before any court till filing of the counter affidavit. In para 4, it is averred that the contempt has been initiated against the contemnor as a counter blast to criminal action sought against her through complaint dated 14.3.2009 which it is alleged is already pending before Chief Justice and before Director General of Police Lucknow. In para 6, it is averred that the crime received wide publicity in newspaper on 2.3.2009 and he had no role and explained that he inquired from the news agency and he was informed that the news was collected from the police station before being published in the news papers. In para 7 of the affidavit, it is averred that he verified personally from Allahabad and he was satisfied that the lady personating herself as Magistrate who had tried to extort money from him was in fact posted as Magistrate at Allahabad and her name was Nisha. In para 8, the contemnor averred that on enquiry made in the first or second week of March 2009 from Allahabad he surfaced that the case at case crime No. 68 of 2007 fell within the jurisdiction of the self same Magistrate who had approached her and had demanded money and thereafter he made complaint to Hon. Chief Justice for taking necessary department and criminal action under section 384, 218, 219 120 B IPC followed

by complaints to the Governor of U.P. D.G.P Lucknow. He also explained that had he known the Magistrate from before he would have certainly mentioned her name in the F.I.R instead of saying that one of the ladies told her name as Ms. Nisha Magistrate on being asked. In para 9, he averred that he received letter dated 4.4.2009 and 14.4.2009 from C.O. Police V Allahabad to come over to Allahabad to assist him in the investigation of the complaint dated 14.3.2009. In para 11 the contemnor averred that to frustrate actions yet to be taken by the High Court administration, Ms. Nisha intentionally filed contempt application dated 17.4.2009 and succeeded in getting notice issued on 20.5.2009 and such course of action amounted to grave misconduct on her part. In para 12, he denied to have knowledge whether any final report was filed by the police or what orders were passed on final report by the concerned Magistrate and he termed efforts to link order dated 27.1.2009 with case crime no. 68 of 2007 as baseless. In para 13, it is averred that the proceeding in case crime No. 68 of 2007 were taken in challenge in writ petition in which Division Bench of the High Court stayed the proceeding. It would transpire from the record that in the proceeding challenged before the High Court, the Division Bench passed the order referring the matter to Mediation Centre on account of the case being one relating to dowry dispute and the stay order against arrest was limited subject to report of mediation centre. It is further averred that Ms. Nisha after passing order dated 27.1.2009 in case crime no. 68 of 2007 has been transferred to Lucknow. This averment does not commend to us for acceptance as the officer has not been transferred on any administrative ground by way of punishment as a result of complaint made by the contemnor. The office has not reported whether the complaint preferred by the contemnor against the officer addressed to Chief Justice is still in active consideration. However, it would suffice to say that we are dealing with contempt proceeding and we are not concerned with any action if any being taken on administrative side by this Court.

11. An application anointed as Unconditional apology has been filed by the contemnor which is not either accompanied with any affidavit nor does it appear to be proper application as it does not bear any registration number or does it appear to have been processed and filed by adopting procedure prescribed. However, in the said application, it is stated that he was not aware of any statutory law or case law reported till date which bars reporting of crime/registration of FIR for the offence of extortion as defined under section 384 IPC against a Judicial Magistrate. However, he canvassed that the aforesaid case law does not bar reporting of extortion to the police against the judicial officer. In para 3 it is stated that reporting of crime to the police against the officer at Ghaziabad was neither intention nor deliberate. In para 4 it is stated that the contemnor undertakes not to report such offence ever against judicial officer and tender his unconditional apology for reporting of such offence/incident to the local police at Ghaziabad against Ms. Nisha Srivastava Judicial Magistrate.

12. Before we proceed further with the matter, we would also not flinch from saying that the apology is not to be used as a weapon of defence forged always to be used as a shield to protect the

contemnor as a last resort. It is intended to be evidence of real contriteness. The apology, in order to dilute the gravity of the offence, it has repeatedly been ruled in catena of decisions, should be voluntary, unconditional and indicative of remorse and real contrition and it should be tendered at the earliest opportunity. We have to administer caution to ourselves that we should not be inveigled into accepting apology from those who are addicted to using contemptuous language and making scurrilous attacks and have to their discredit, earlier instance of misfeasance. From the apology tendered by the contemnor, there is discernible lack of contriteness inasmuch as in para 2 it is stated that the case law cited does not bar reporting of offence of extortion to the police against the judicial Magistrate. In the counter affidavit as discussed above, it clearly transpires that the contemnor at no stage was repentant for his conduct and instead, split up the facts in order to show that the officer approached him at Ghaziabad alongwith lady police officer and demanded illegal gratification for showing favour in the criminal case pending in her court.

13. In **L.D. Jaikwal v. State of U.P.**, [1984] 3 SCC 405, the Apex Court described the apology as a 'paper apology and refused to accept it in the following words:

"We do not think that merely because the appellant has tendered his apology we should set aside the sentence and allow him to go unpunished. Otherwise, all that a person wanting to intimidate a Judge by making the grossest imputations against him has to do, is to go ahead and scandalize him, and later on tender a formal empty apology which costs him practically nothing. If such an apology were to be accepted, as a rule, and not as an exception, we would in fact be virtually issuing a 'licence' to scandalize courts and commit contempt of court with impunity. It will be rather difficult to persuade members of the Bar, who care for their self-respect, to join the judiciary if they are expected to pay such a price for it. And no sitting judge will feel free to decide any matter as per the dictates of his conscience on account of fear of being scandalized and persecuted by an advocate who does not mind making reckless allegations if the Judge goes against his wishes. If this situation were to be countenanced, advocates who can cow down the Judges, and make them fail in line with their wishes, by threats of character assassination and persecution, will be preferred by the litigants to the advocates who are mindful of professional ethics and believe in maintaining the decorum of courts."

14. In the above perspective, it cannot be ruled out that the contemnor set up the entire theory in order to save his skin. In this view of the matter, the apology offered does not commend to us for acceptance and it is turned down.

We would like to quip here that if the judiciary has to perform its function in a fair and free manner, the dignity and authority of the court has to be respected by all concerned failing which the very constitutional scheme and public faith in the judiciary would run the risk of being eroded. Since the contemnor is an Advocate practising law as reported by the office in its note dated 2.5.2009, the matter requires to be considered with a little more seriousness. We feel called to say that the contemnor who is stated to be

an Advocate is not exempt from ordinary disability which the law imposes and his position is not inviolable and his privileges cannot extend to interfere with the administration of justice. On the other hand he is expected to help in sub-serving the course of justice and not impede it in any manner. Any departure would be construed to be violative and neglecting his duties and obligations. A lawyer is a person educated and trained in law. There are barriers which must be known to a lawyer and it should not be crossed. He should not overstep the limits of decency and ethics in the matter of his behavior towards the court.

15. In **Delhi Judicial Service Association v. State of Gujrat,** (1991) 4 SCC 406, the Apex Court held as under.

"The definition of criminal contempt is wide enough to include any act by a person which would tend to interfere with the administration of justice or which would lower the authority of court. The public have a vital stake in effective and orderly administration of justice . The Court has the duty of protecting the interest of the community in the due administration of justice and so, it is entrusted with the power to commit for contempt of court, not to protect the dignity of the Court against insult or injury, but to protect and vindicate the right of the public so that the administration of justice is not perverted, prejudiced, obstructed or interfered with."

16. In **N.B. Sanghvi v. High Court of Punjab and Haryana** (1991) 3 SCC 600 the Apex Court observed as under:

"The tendency of maligning the reputation of Judicial Officers by disgruntled elements who fail to secure the desired order is ever on the increase and it is high time it is nipped in the bud. And, when a member of the profession resorts to such cheap gimmicks with a view to browbeating the Judge into submission, it is all the more painful. When there is a deliberate attempt to scandalize which would shake the confidence of the litigating public in the system, the damage caused is not only to the reputation of the concerned judge but also to the fair name of the judiciary. Veiled threats, abrasive behaviour, use of disrespectful language and at times blatant condemnatory attacks like the present one are often designedly employed with a view to taming a Judge into submission to secure a desired order. Such cases raise larger issues touching the independence of not only the concerned Judge but the entire institution. The foundation of our system which is based on the independence and impartiality of those who man it will be shaken if disparaging and derogatory remarks are made against the Presiding Judicial Officers with impunity. It is high time that we realise that the much cherished judicial independence has to be protected not only from the executive or the legislature but also from those who are an integral part of the system. An independent judiciary is of vital importance to any free society. Judicial independence was not achieved overnight. Since we have inherited this concept from the British, it would not be out of place to mention the struggle strong-willed judges like Sir Edward Coke, Chief Justice of the Common Pleas, and many others had to put up with the Crown as well as the Parliament at considerable personal risk. And when a member of the profession like the appellant who should know better so

lightly trifles with the much endeared concept of judicial independence to secure small gains it only betrays a lack of respect for the martyrs of judicial independence and for the institution itself. Their sacrifice would go waste if we are not jealous to protect the fair name of the judiciary from unwarranted attacks on its independence."

17. The foundation of judicial system which is founded on the independence and impartiality of those who man it will be shaken if every disgruntled litigant is permitted to proceed against the Presiding judicial officers with impurity in the manner as has been done by the contemnor, the much cherished judicial independence which is of vital significance to any free society has to be protected not only from the executive or the legislature but also from those who are an integral part of the system. The tendency of browbeating the judicial officers into submission is on the increase and when there is deliberate attempt to scandalise, it not only shakes the confidence of the litigating public in the system but causes damages to the reputation of the presiding judge and brings disgrace to the fair name of the judiciary.

18. A Judge or Magistrate has a duty to discharge his judicial functions and he passes order in the manner as he likes fit to the best of his capability in the facts and circumstances of the case. The courts cannot be intimidated to seek favourable orders or to make the court run on his dictate. In the present case, the conduct of the contemnor amounts to intimidating the court and lowering the authority and it clearly amounts to interference with due course of judicial proceedings which were being conducted by the Presiding officer. The power of the High Court of superintendence and control over the subordinate judiciary under Article 235 of the Constitution includes within its ambit the duty to protect members of the subordinate courts. In the above conspectus, the charge related to criminal contempt framed against the contemnor is fully established.

19. In the above conspectus, we have no hesitation to say that the charges of criminal contempt established against a practising lawyer cannot be taken lightly who carries the trapping of an officer of the Court whose duty is to assist the Court and uphold the majesty of law and dignity of the person manning the court. No judicial system can tolerate such ignoble act and conduct of a practising Advocate. The crucial question that remains is what would be the appropriate punishment to the contemnor.

20. Reverting to the case in hand, we are of the firm opinion that the apology tendered by the contemnor does not exude bona fide or manifest genuineness ostensibly for the reasons that the apology has been tendered at a stage when the contemnor sensed that his goose was cooked. As stated supra, he has set out his own version referring to various acts of omission and commission by the presiding officer and lastly stated that she has made reference actuated by malice against him. It would clearly transpire that aggrieved by the order passed by the Magistrate, the contemnor set up falsely plea and lodged the F.I.R. As a lawyer, it does not appeal to us that he was not aware of the statutory provision or the latest law on the point. It must also be noticed that a judicial officer in case he or

she has to leave the station, she has to obtain permission indicating the place where he or she wishes to visit but in the instant case, no such document was brought to our notice suggesting that on the date indicated by the contemnor, the officer was in fact at Ghaziabad demanding illegal gratification to the extent of Rs. 2 lacs to protect the contemnor and his brother from further criminal action. There is a felt need to curb such incidence. To cap it all, the majesty and dignity of the court has to be preserved. It should not be forgotten that frequent attacks on the dignity of the courts would shake the very foundation of the judiciary. The courts have to perform judicial functions in responsible yet disagreeable ambiance and they require utmost protection. The attack made on presiding officers disparaging in character and derogatory to his/her dignity would vitally shake the confidence of the public in him/her. The entire story set up by the contemnor may well be termed as vitriolic attack on the officer. The vitriolic attacks made on the officer were much more than mere insult and in effect the contemnor scandalized the officer who manned the court in such a way as to create distrust in the popular mind and impair confidence of the people in court. The administration of justice must remain independent, clean, fearless and impartial. If an Advocate uses the vile of browbeating the Presiding officer by his toxic vitriolic attack, it is indeed disquieting and should not be viewed with equanimity.

21. As a result of foregoing discussion, the reference made to this Court is allowed and the contemnor Dinesh Kumar is held guilty of criminal contempt.

22. Now the question arises what would be the appropriate sentence on the point. It is the grossest contempt of court and in the interest of justice and to uphold the majesty of the courts, it is desirable to award jail sentence in addition to fine. The contemnor filed a paper at a last stage styling as unconditional apology although as stated supra, it does indicate clear lack of real contriteness.

23. We accordingly convict him for offences under section 2 (C) (1) of the Contempt of Courts Act and sentence him to undergo simple imprisonment for five months and to pay a fine of Rs.20,000/-. In default, it may be prescribed, contemnor shall undergo further simple imprisonment for 15 days. However, the punishment so imposed shall be kept in abeyance for a period of sixty days so as to enable the contemnor to approach the Apex Court if so advised. It needs hardly be said that immediately after expiry of sixty days in case no stay order is furnished by the contemnor, he would be taken into custody forthwith to serve out the sentence immediately.

24. The matter shall be listed before this Court on 11.5.2010 for ensuring compliance.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.02.2010

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

Special Appeal No.807 of 2008

Kuldeep Kumar Tripathi ...Petitioner
Versus
Rang Bahadur and others ...Respondents

Counsel for the petitioner:
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Sri Arvind Kumar Mishra,
Sri R.P. Mishra

Counsel for the Respondent:
Sri M.C. Chaturvedi
Dr. Y.K. Srivastava
C.S.C.

High Court Rules Chapter VIII Rule 5- Special Appeal against the order passed by single judge during summer vacation-matter cognizable by Division Bench-Whether special appeal maintainable? - held-Yes.

Held: Para 38

In view of the foregoing discussions and conclusions, we answer two questions referred, in following manner:

(I) Against the order and judgment of one Judge passed during vacation exercising jurisdiction in cases which are cognizable by Division Bench, special appeal under Chapter VIII Rule 5 of the Rules of the Court is maintainable.
(II) The Division Bench judgment in Allahabad Galla Tilhan Vyapari (supra) does not lay down the correct law. The view expressed by Division Bench in State of U.P. Vs. Meera Sankhwar (supra) is approved.

Case Law discussed:
1985 UPLBEC1064,2004(4) AWC 3162, 1952 (2) A.C. 109, AIR 1955 S.C. 661, (1979) 4 SCC 204, (2000) 2 SCC 699, (2003) 1 UPLBEC 496, (2004) 11 SCC 672, (2002) 4 SCC 578, 1994 AWC 1137.

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

1. This Full Bench has been constituted to answer the following two questions referred by a Division Bench noticing conflict in two Division Benches of this Court-

"(1) Whether against the order/judgement of one judge passed in vacation exercising jurisdiction in cases which are cognizable by a Division Bench an special appeal under Chapter VIII Rule 5 of the Rules of the Court is maintainable?

(2) Whether the Division Bench judgement in **Allahabad Galla Tilhan Vyapari Sangh,** 25, Muthiganj and others, 1985 UPLBEC1064 (supra) or Division Bench Judgement in **State of U.P. And others Vs. Smt. Meera Sankhwar and others,** 2004(4) AWC 3162, lays down the correct law?"

2. The fact of the case necessitating the reference briefly noted are that writ petition no. 26716 of 2008 was files by the respondent no. 1 during summer vacations praying for order and direction in the nature of certiorari, quashing the notice dated 13/14th may, 2008 convening meeting of Kshetra Panchayat for consideration of no confidence motion against Pramukh of Kshetra Panchayat, Rang Bahadur Panday. A mandamus was also sought for directing the opposite parties not to interfere in the working of the petitioner as Pramukh. The writ

petition was a Misc. writ petition cognizable by a Division Bench. However, since the writ petition was filed during the summer vacation, it was taken up by a Hon'ble Single Judge, who had jurisdiction to hear such writ petitions during summer vacations under orders of Hon'ble the Chief Justice. A limited interim order was passed by Hon'ble Single Judge on 2.6.2008. The present Special Appeal under Chapter VIII Rule 5 of the Rules of the Court has been filed by Kuldeep Kumar Tripathi alongwith an application for leave to Appeal, stating that the applicant had moved the no confidence motion signed by 72 members on the basis of which District Magistrate Allahabad issued notice dated 13/14th May,2008.

3. When the special appeal was being heard, a preliminary objection was raised by learned counsel for the respondents/writ petitioner that the order dated 2.6.2008 being an order passed by a Vacation Judge, exercising the jurisdiction of the Division Bench, the Special Appeal did not lie. Reliance was placed on a Division Bench, the Special Appeal did not lie. Reliance was placed on a Division Bench judgement reported in 1985 UPLBEC 1064 **Allahabad Galla Tilhan Vyapari Sangh, 25 Muthiganj and others Vs. Krishi Utpadan Mandi Samiti, Allahabad and others.** The preliminary objection was refuted by learned counsel for the appellant relying on another Division Bench judgment of this Court reported in 2004(4) AWC 3162 **State of U.P. & others Vs. Smt. Meera Sankhwar and others** for the proposition that an order passed by learned single judge during vacations exercising the jurisdiction of Division Bench, does not become order of Division Bench and Special Appeal is maintainable. The Division Bench hearing the Special Appeal vide its detailed order dated 14.7.2008 referred above noted two questions for consideration of larger Bench.

4. We have heard Sri A.N. Tripathi, learned Senior Advocate appearing for the appellant and Sri M.C. Chaturvedi, learned Chief Standing counsel assisted by Dr. Y.K. Srivastava, learned Standing Counsel for the respondents.

5. Before we proceed to consider various aspects of the issues raised, it is relevant to have quick look on the relevant provisions of Rules of the Court pertaining to jurisdiction of Single Judges, Division Benches and the provisions if Intra-court Appeal (Letters Patent Appeal) termed as Special Appeal under Rules of the Court. Allahabad High Court Rules, 1952 referred to hereinafter as 'High court Rules' made by High Court of Judicature at Allahabad in exercise of the powers conferred by Article 225 of the Constitution of India and all other powers enabling it in that behalf. Rule 3 which is interpretation clause provides: (1) In these rules unless the context otherwise requires “Bench” includes a Judge sitting alone; “Judge” means a Judge of the Court; “Special Appeal” means an appeal from the judgement of one Judge. Chapter V of the Rules of the Court deals with the jurisdiction of judges sitting alone or in Division courts. Chapter V Rules 1,2,3,4,5 and 10 which are relevant for the present controversy are quoted below:

“1.Constitution of Benches:- *Judges shall sit alone or in such Division Courts*

as may be constituted from time to time and do such work as may be allotted to them by order of the Chief Justice or in accordance with his directions.

***2. Jurisdiction of a single Judge**:- Except as provided by these Rules or other law, the following cases shall be heard and disposed of by a Judge sitting alone, namely---*

(I) a motion for the admission of a memorandum of appeal or cross objection or application or for ex parte interim order on an application.
[(ii)(a) a civil [***] Second Appeal from a decree, including an appeal arising out of a case instituted in a revenue court, in which the value of appeal for the purpose of jurisdiction does not exceed [one lakh] rupees;
(aa) A Civil first Appeal instituted before[or after] the commencement of the U.P. Act No. 17 of 1991) from a decree including an appeal arising out of a case instituted in a revenue court in which the value of appeal for the purpose of jurisdiction does not exceed five lakh rupees.

First Appeal instituted before or after the commencement of the [U.P. Civil Laws Amendment Act of 1991 (U.P. Act No. 17 of 1991) from a decree including an appeal arising out of a case instituted in a revenue court in which the value of appeal for the purpose of jurisdiction does not exceed [five lakh rupees;

(b) an appeal under Section 28 of the Hindu Marriage Act, 1995;
(c) any other civil appeal in which the value of the appeal does not exceed two lakh rupees;

Provided that where an ad valorem court-fee has been paid such value shall be deemed to be the amount on which such court-fee has been paid;
(iii) a civil revision;
(iv) an application for the withdrawal of an appeal or application, or for a consent decree or order, which is uncontested or which is made in a case which be heard under these Rules by a judge sitting alone;
(v) Any other application which is not---

(a) an application[***] under Section 5 of the limitation Act, 1963 in a case which cannot be heard by a judge sitting alone;

(b) [***]
(c) an application 53 other than an application for interim order to which Chapter XXII, Part IV applies.
(d) an application other than an application for interim order which by these Rules or other law is required to be heard by a Bench of two or mote Judges;
(e) an application other than an application for interim order under chapter IX, Rule 10; or
(f) [***]

(vi) a suit or a proceeding in the nature of a suit coming before the Court in the exercise of its ordinary or extraordinary original civil testamentary or matrimonial jurisdiction including a proceeding under the Indian Trusts Act, 1882 the Companies Act, 1956 or the Indian patents and Designs Act, 1911;
(vii) a criminal appeal, application or reference except-

(a) an appeal or reference in a case in which a sentence of death or imprisonment for life has been passed

from the stage of admission including consideration of bail onwards;
(b) "an appeal under section 378 of the code of criminal procedure, 1973 from an order of acquittal in respect of an offence for which the maximum punishment is either life imprisonment or death."
(c) (***)
(d) a case in which notice has been issued under 58 Section 401 of the code of criminal procedure, 1973 to an accused person to appear and show cause why his sentence should not be enhanced;
(e) [***]
(f) an application to which Chapter XXI part IV applies;

(viii)a case coming before the Court in the exercise of its ordinary or extraordinary original criminal jurisdiction;
(ix) an appeal or revision from an order passed under Section340, 341 or 343 of the Code of Criminal Procedure, 1973:

Provided that:-

(a) the Chief Justice may directed that any case or class of cases which may be heard by a Judge sitting alone shall be heard by a Bench of two or more Judges or that any case or class of cases which may be heard by a bench of two or more Judges, by a Judge sitting alone;

(b) a Judge may, if he thinks fit, refer a case which may be heard by a Judge sitting alone or any question of law arising therein for decision to a larger Bench; and
(c) a Judge before whom any proceeding under the Indian Trusts Act, 1882, the Companies Act, 1956 or the Patents and Designs Act, 1911, is pending may with the sanction of the Chief Justice, obtain the assistance of one or more other Judge for the hearing and determination of such proceeding or of any question or questions arising therein;

3. Case to be decided by three Judges:- *A reference under Section 57 or 60 of the Indian Stamp Act, 1899 shall be heard and disposed of by a Bench of not less than three Judges.*
4. Proceedings under the Legal Practitioners Act, 1879:-
(1) A proceeding under Legal Practitioners Act, 1879, against a pleader or Mukhtar with respect to any misconduct or his conviction for any criminal offence shall be heard and disposed of; by a Bench of not less than two Judges
(2) An enquiry under Section 36 of the Legal Practitioners Act, 1879, shall be made by Bench or not less than two Judge.
5. Cases withdrawn under Act. 228 of the Constitution:- *A case withdrawn from a court subordinate to the Court under Art. 228 of the Constitution shall be heard by a Bench of two or more Judges specially appointed by the Chief Justice."*

*"**10. Judge on duty during vacation:-** (1) Criminal work shall continue to be dealt with during the vacation by such Judges as may be appointed for the purpose by the Chief Justice.*
They may also exercise original, appellate, revisional, civil or writ jurisdiction vested in the Court in fresh matters which in their opinion require immediate attention.
Such Jurisdiction may be exercised even in cases which are under the Rules

cognizable by two or more Judges, unless the case is required by any other law to be heard by more than one Judge.
(2) Subject to any general or special order of the Chief Justice, the senior most vacation Judge at Allahabad or Lucknow, as the case may be, shall in the absence of the Chief Justice, exercise jurisdiction at Allahabad or Lucknow, as the case may be, in connection with the arrangement of Benches, listing of cases and other like matters."

6. Chapter VIII which deals with Misc. provisions contains Special Appeal in Rule 5. Chapter VIII Rule 2 provides that any function which may be performed by the Court in the exercise of its original or appellate jurisdiction may be performed by any judge or by any Division Court Appointed or constituted for such purpose in pursuance of Article 225 of the Constitution. Chapter VIII Rules 2 and 5 are quoted below:

"2. Powers of a single Judge and Division Court:- *Any function which may be performed by the court in the exercise of its original or appellate jurisdiction may be performed by any judge or by any Division Court appointed or constituted for such purpose in pursuance of Article 225 of the constitution."*

"5. Special appeal:- *An appeal shall lie to the Court from a judgment (not being a judgment passed in the exercise of appellate jurisdiction) in respect of a decree or order made by a court subject to the superintendence or the Court and not being an order made in the exercise of revisional jurisdiction or in the exercise of its power of superintendence or in the exercise of criminal jurisdiction or in the exercise of the jurisdiction conferred by article 226 or Article 227 of the constitution in respect of any Judgment, order or award- (a) of a tribunal, Court or statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any or the matters enumerated in the State list or the Concurrent List in the Seventh Schedule to the Constitution, or (b) or the Government or nay officer or authority, made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act of one Judge."*

Chapter IX deals with appeals and applications. Chapter IX Rule 10(i) is quoted as below:

"10. Special Appeal:-*(1) A person desiring to prefer a Special Appeal from the judgment o one Judge passed in the exercise or original jurisdiction shall present a duly stamped memorandum of appeal accompanied by a copy of the judgment appealed from within thirty days from the date of the judgement. The time requisite for obtaining the copy shall be excluded in computing the said period of thirty days."*

7. The provisions as quoted above, provides that judges shall sit alone or in Division Courts as may be constituted to them by order of the Chief Justice or in accordance with his directions. Chapter V Rule 2 provides jurisdiction of a Single Judge. The proviso to Rule 2 also provides that Hon'ble the Chief may direct that any case or class of cases which may be heard by a judge sitting alone shall be heard by a Bench of two or more Judges or that any case or class of cases which may be heard by a Bench of two or more

Judges, By a Judge sitting alone. A perusal of Chapter V Rule 10 also indicated=s that during summer vacations, the judges appointed for the purpose by the Hon'ble the Chief Justice may also exercise the original, appellate, revisional, civil or writ jurisdiction vested in the Court in fresh matters, even in the cases which are under the Rules cognizable by two or more judges, unless the case is required by any other law to be heard by more than one judge. The provisions clearly indicate that during summer vacations, a judge sitting alone can exercise jurisdiction as appointed by Hon'ble the Chief Justice even in cases which are under rules cognizable by two or more judges.

8. Before we proceed to examine the submission in detail, it is useful to refer the legislative history of the High Court, jurisdiction exercised by Single Judges, Division Benches, Power of the Chief Justice and the extent of the power of the Chief Justice to allocate the jurisdiction to Judges of the High Court.

9. The High Court Act, 1861, which received the Royal assent on 6.8.1961, the present legislation which authorised the establishment of the High Court of Judicature in India. Section 13 of the Act, 1861 provided as follows;

"Subject to any laws or regulations which may be made by the Governor-General in Council, the High Courts established in any Presidency under this Act may, by its own rules, provide for the exercise, by one or more Judges or by Division Courts constituted by two or more Judges of the said High Court of the original and appellate jurisdiction vested in such Court, in such manner as may appear to such Court to be convenient for the due administration of justice."

10. The High Court of Judicature at Allahabad was established by letters Patent were subject to Legislative power of the Governor General in Legislative council and also the Governor General in council.

The government of India Act, 1915 section 108 provided as follows:-

"108.(1) Each High Court may by its own rules provide as it thinks fit for the exercise, by one or more judges or by division Courts constituted by two or more judges of the High Court of the original and appellate jurisdiction vested in court.
(2) The Chief Justice of each High court shall determine what judge in each case is to sit alone, and what judges of the court, whether with or without the Chief Justice, are to constitute the several division courts."

11. The Government of India Act, 1935 repealed Government of India Act 1915 and re-enacted with modification. Section 223 of the said Act reads as follows:

"223. Subject to the provisions of this part of this Act, to the provisions of any order in Council made under this or any other Act, to the provision of any order made under the Indian Independence Act 1947, and to the provisions of any Act of the appropriate Legislature enacted by virtue of powers conferred on that legislature by this Act, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the judges

thereof in relation to the administration of justice in the court, including any power to make rules of Court and to regulate the sitting of the Court and of members thereof sitting alone or in division courts, shall be the same as immediately before the establishment of the Dominion."

12. Clause 10 of the Letters Patent provided for the appeal to the High Court from a judgement of one Judge. Clause 27 provides for power of single Judge and Division Courts. Clauses 10 and 27 are quoted herein below.

"10. and we do further ordain that an appeal shall lied to the said High Court of judicature at Allahabad from the judgment (not being a judgment passed in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court and not being an order made in the exercise of revisional jurisdiction, not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of Section 107 of the Government of India Act, or in the exercise of Criminal jurisdiction) of one judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act, and that notwithstanding anything herein before provided an appeal shall lie to the said High court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act, made on or after the first day of February one thousand nine hundred and twenty nine in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a court Subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal; but that the right of appeal from other judgments of judges of the said High Court or of such Division Court shall be to us. Our Heirs or successors or Our on their Privy Council, as hereinafter provided."

"27. And We do hereby declare that any function which is hereby directed to be performed by the said High Court of Judicature at Allahabad in the exercise of its original or appellate jurisdiction may be performed by any judge or by any Division Court thereof appointed or constituted for such purpose in pursuance of Section one hundred and eight of the Government of India Act 1915, and if such Division Court is composed of two or more Judges and the Judges are divided in opinion of the majority of the judges if there shall be a majority by if the judges should be equally divided they shall state the point upon which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges, who have heard the case including those who first heard it."

13. The Constitution of India provides that jurisdiction of law administered in by any High Court and the respective powers of the judges including the power to make rules of Court and to regulate the sitting of the Court and principles thereof sitting alone or in division Courts, shall be same as immediately before the commencement of the constitution. Article 225 of the constitution of India is quoted as below:

*"**225. jurisdiction of existing High courts.-** Subject to the provisions of this Constitution and to the provisions of any law of the appropriate Legislature made by virtue of powers conferred on that Legislature by this Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective power of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution:*

Provided that any restriction to which the exercise of original jurisdiction by any of the High Courts with respect to any matter concerning the revenue or concerning any act ordered or done in the collection thereof was subject immediately before the commencement of this constitution shall no longer apply to the exercise of such jurisdiction."

14. The Rules of the Court, 1952 have been framed in exercise of the powers under Article 225 of the Constitution. Hon'ble the chief Justice of the Court is master of rolls and judges sitting alone or in Division Courts of two or more exercising the jurisdiction as allotted to them by Hon'ble the Chief Justice, is a scheme which flows from the above noted provisions. Although the rules have been framed as to what matters shall be heard by single judge but the Chief Justice is empowered under the Chapter V Rule 2 that any case or class of cases which may be heard by Judge sitting alone shall be heard by a Bench of two or more Judges, by a judge sitting alone. Chapter V Rule 10 is expression of the same very power. The vacation judges appointed for the purpose can exercise jurisdiction in cases which are required to he heard by more than one Judge. There is no dispute of the fact that Hon'ble Single Judge who entertain the writ petition during vacations on 2.6.2008 was appointed by Hon'ble the Chief Justice for the purpose of hearing a writ petition which was otherwise cognizable by Division Bench.

15. Under Chapter VIII Rule 5 of the Rules of the Court which provides for special appeal, the appeal is provided to the Court from a ***judgement of one Judge.*** The issue which has to be answered by us is as to whether against the order dated 2.6.2008, passed by a vacation judge sitting alone, special appeal under Chapter VIII Rule 5 shall lie or special appeal is not competent since the jurisdiction exercised by the Hon'ble Single Judge was of the Division Bench and the order dated 2.6.2008 is to be assumed to be order of Division Bench. The Division bench Judgement which has been relied for the proposition that special appeal is not maintainable against an order of judge sitting alone during summer vacation exercising jurisdiction of Division Bench is a judgement reported in 1985 UPLBEC1064 **Allahabad Galla Tilhan Vyapari Sangh Vs. Krishi Utpadan** (supra). The Division Bench in the said case considered sub rule (1) of Rule 10 of Chapter V. The writ petition of the case was otherwise cognizable by Division Bench but it was present during summer vacations before vacations judge sitting singly. The Division Bench after noticing sub rule(1) of Rule 10 of Chapter V gave following reasons in paragraph 2 for taking the view that special appeal was not maintainable:

*"**2.** Apart from the rules of Court no other law e.g. Section 57(2) of the Stamp Act which requires a reference under that Act to be heard by three Judges has been brought to our notice which required such a writ petition to be heard by more than one Judge. Under the Rules of court, the jurisdiction which the learned Vacation Judge exercised in deciding the writ petition by the order appealed against was, however, a jurisdiction which ordinarily was exercisable only by a division Bench. In view of the provisions contained in Chapter V, Rule 10 of the Rules of the court referred to above it will, therefore, have to be assumed that even though the order appealed against was passed by a learned Single Judge it was passed by a Division Bench, the same having been passed by him as vacations judge, for otherwise a writ petition cognizable by a Division Bench could not be entertains by a Single Judge. As a necessary corollary no special appeal will lie against that order before another Division Bench. In this connection reference may be made to following observations of Lord Asquith in East End Dwellings Consolidation Officer. Ltd. V Finsbury Borough council, 1952 Appeal Cases 109 page 132:*

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative State of affairs had in fact existed, must inevitably have flowed from or accompanied if..... The Statute says that you must imagine a certain state of affairs, it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

Reference may also be useful made to the decision of the Supreme Court in Bengal Immunity consolidation Officer. V. State of Bihar, AIR 1995 SC 661, wherein paragraph 33it was held:

"When we apply a fiction all we do is to assume that the situation created by the fiction is true. Therefore, the same consequences must flow from the fiction as would have flown had the facts supposed to be true been the actual facts from the start."

16. The reason given by Division Bench for coming for coming to the conclusion is contained in following one line.

"In view of the provisions contained in Chapter V Rule 10 of the Rules of the court referred to above it will, therefore, have to be assumed that even though the order appealed against was passed by a learned Single Judge it was passed by a Division Bench, the same having been passed by him as vacations judge, for otherwise a writ petition cognizable by a Division Bench could not be entertained by a Single Judge."

17. The Division Bench also relied on two judgements, one of the House of Lords 1952(2) A.C. 109 **East End Dwellings co. LD. Vs. Finsbury Borough Council** and another judgement of the apex court reported in AIR 1955 S.C. 661 **Bengal Immunity co. Vs. State of Bihar.** The Division Bench proceeded to decide the controversy taking the view that by legal fiction it has to be assumed that the order passed by Hon'ble Single

Judge during vacations is that of a Division Bench.

18. The two cases relied by Division Bench were cases of legal fiction. It is relevant to note the cases relied by Division Bench in detail. In East End Dwelling co. LD. Vs. Finsbury Borough Council, the Provisions of Section 53 of Town and country Planning Act, 1947 came up for consideration. Section 53 of the aforesaid Act provided as follows:

"(1) Where an interest in land the value of which is to be ascertained in accordance with the provisions of section 51 of this Act is an interest in a hereditament or part of a hereditament, which has sustained war damage, and any of that damage has not been made good at the date of the notice to treat, then if the appropriate payment under the War Damage Act, 1943, would, apart from the compulsory purchase or apart from any direction given by the Treasury under paragraph (b) of subsection(2) of section 20 of that Act, be a payment of cost of works- (a) the value of the interest for the purpose of the compensation payable in respect of the compulsory purchase shall, subject to the provisions of this section, be taken to be the value which it would have if the whole of the damage had been made good before the date of the notice to treat; and (b) the right to receive any value payment or share of a value payment which, under the War Damage Act, 1943, is payable in respect of the interest which is compulsorily acquired(including any interest payable thereon) shall, notwithstanding anything in that Act, vest in the person by whom the interest is so acquired."

19. The above provision, contemplated taking of the value which it would have if the whole of the damage had been made good before the date of the notice to treat. The provision dearly assumed certain situation for determining the valuation, which was a case of a legal fiction. Lord Asquith whose opinion was relied by the Division Bench laid down following in his opinion:

"If you are bidden to treat an imaginary state of affair as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed form or accompanied it. One of these in this case emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs: it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

20. The opinion of House of Lord, Lord Asquith was also relied in Bengal Immunity Case (supra), the Constitution Bench judgement of the apex Court. The Bengal Immunity Company Ltd. Case was a case where Article 286 provides that no law of a State shall impose, or authorise the imposition of a tax on the sale or purchase of the goods where such sale or purchase takes place (a) out side the State or(b) in the course of the import of the goods into, or export of the goods our of, the territory of India.

21. The explanation provided a deeming clause for the purpose of such clause (a).

"Explanation.- For the purpose of sub-clause (a), a sale or purchase shall be deemed to have taken place in the State in which the goods have actually been delivered as a direct result of such sale or purchase for the purpose of consumption in that State, notwithstanding the fact that under the general law relating to sale of goods the property in the goods has by reason of such sale or purchase passed in another State.

(2) Except in so for as Parliament may by law otherwise provided, no law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of any goods where such sale or purchase take place I the course of inter-State trade or commerce:

Provided that the President may by order direct that any tax on the sale or purchase of goods which has being lawfully levied by the Government of any state immediately before the commencement of this constitution shall, notwithstanding that the imposition of such tax is contrary to the provisions of this clause, continue to be levied until the thirty-first day of march, 1951.

(3) No law made by the Legislature of a State imposing, or authorising the imposition of, a tax on the sale or purchase of any such foods as have been declared by Parliament by law to be essential for the life of the community shall have effect unless it has been reserved for the consideration of the President and has received his assent."

Justice S.R. Das C.J. In his opinion in paragraph 31 laid down following:

31. *As we have already stated, we do not desire, on this occasion, to express any opinion on the validity claimed for or the infirmities imputed to any of these several views, for, in our opinion, it is not necessary to do so for disposing of this appeal. Whichever view is taken of the Explanation it should be limited to the purpose the Constitution makers had in view when they incorporated it in cl.(1). It is quite obvious that it created a legal fiction. Legal fiction are created only for some definite purpose. Here the avowed purpose of the Explanation is to explain what an outside sale referred to in Sub-cl.(a) is.*

The judicial decision referred to in the dissenting judgement in 'State of Travancore-Cochin v. Shanmugha Vilas Cashew Nut Factory (U)' (Supra) at pp. 342 and 343 and the case of- "East End Dwelling Co. Ltd. v. Finsbury Borough Council,' 1952 AC 109 at p. 132(z) clearly indicate that a legal fiction is to be limited to the purpose for which it was created and should not be extended beyond that legitimate field. It should further be remembered that the dominant, if not the sole, purpose of. Art. 286 is to place restrictions on the legislative powers of the States, subject to certain conditions in some cases and with that end in view Art. 286 imposes several bans on the taxing power of the State in relation to sales or purchases viewed from different angles and according to their different aspects.

In some cases the ban is absolute as, for example, with regard to outside sales covered by cl.(1) (a) read with the Explanation, or with regard to imports and exports covered by cl. (1) (b) and in some cases it is conditional , e.g., in the cases of inter-State sales or purchases under cl.(2) which is, in terms, made subject to the proviso thereto and also to the power of Parliament to lift the ban. Again, in some cases the bans may overlap but nevertheless, they are distinct

and independent of each other. The operative provisions of the several parts of Art. 286,namely, cl.(1)(a), cl.(1)(b), cl. (2) and cl.(3) are manifestly intended to deal with different topics and, therefore, one cannot be projected or read into another.

On a careful and anxious consideration of the matter in the light of the fresh arguments advanced and discussions held on the present occasion we are definitely of the opinion that the Explanation in cl..(1) (a) cannot be legitimately extended to cl.(2) either as an exception or as a proviso threto or read as cirtao;ing or limiting the ambit of cl.(2). Indeed, in 'State of Bombay v. United Motors(India) Ltd.(b)' (supra) at p.258 and again at p.259 the majority judgment also accepted the position that the Explanation was not an exception or proviso either to Cl.(1)(a) or to Cl.(2).

If, therefore, the Explanation cannot be read into Cl.(2) because of the express language of the Explanation and also because of the different in the Subject-matter of the operative provisions of the two clauses, then it must follow that, except in so far as Parliament may be law provide otherwise, no State law can impose or authorise the imposition of any tax on sales or purchases when such sales or purchases take place in the course of inter-state trade or commerce and irrespective of whether such sales or purchases do or not fall within the Explanation.

It is not necessary, for the purpose of this appeal, to enter upon a discussion as to what is exactly meant by inter-state trade or commerce or by the phrase "in the course of"', for, it is common ground that the sales or purchases made by the appellant company which are sought to be taxed by the State of Bihar actually took place in the course of inter-State trade or commerce.

Parliament not having by law otherwise provided, no State law can, therefore, tax these sales or purchases that is to say, Bihar cannot tax by reason of Cl.(2) although they fall within the explanation and other States cannot tax by reason of both Cl.(1)(a) read with the Explanation and Cl. (2) This Conclusion leads us now to consider the arguments by which the respondent State and the intervening states which support the respondent State seek to get over this position."

22. The apex Court referred the decision of the House of Lords in East End Dwelling Co. Ltd. Stating that it clearly indicate that legal fiction is limited to the purpose for which it was created and should not be extended beyond that legitimate field. Again in paragraph 33 following was laid down:

"We find no cogent reason in support of the argument that a fiction created for certain definitely expressed purposes, namely, the purposes of Cl.(1) (a) can legitimately be used for the entirely foreign and collateral purpose of destroying the intra-state sale or purchase. Such metamorphosis appears to us to be beyond the purpose and purview of cl. (1) (a) and the Explanation thereto. When we apply a fiction all we do is to assume that the situation created by the fiction is true. Therefore, the same consequences must flow from the fiction as would have flown had the facts supposed to be true been the actual facts from the start."

23. Bhagwati J. taking the same view laid down following in paragraph 107:

"107. As to reason (5): the argument totally ignores the purpose and efficacy of a legal fiction. A legal fiction pre-supposes the correctness of the state of facts on which it is based and all the consequences which flow from that state of facts have got to be worked out to their logical extent. But due regard must be had in this behalf to the purpose for which the legal fiction has been created. If the purpose of this legal fiction contained in the Explanation to Article 286(1)(a) is solely for the purpose of sub-clause(a) as expressly stated it would not be legitimate to travel beyond the scope of that purpose and read into the provision any other purpose howsoever attractive it may be."

24. Both the judgements relied by Division Bench in Allahabad Galla Tilhan Vyapari (supra) where the case of express legal fictions, which had came up for consideration, the Division Bench applying the aforesaid two decisions assumed that by legal fiction, the order passed by learned Single Judge during vacation is to be treated as order of Division Bench. The provisions of Chapter V Rule 10 of the Rules of the court does not indicate any legal fiction in exercise of the jurisdiction by one judge in a writ petition cognizable by Division Bench rather Single , who exercises jurisdiction during vacations is appointed for the purpose by the Chief Justice . Single Judge thus is vested with the jurisdiction by the Chief Justice to hear the writ petitions cognizable by Division Bench. Thus, there is no occasion of any deeming clause or assuming a legal fiction nor any provision of the Rules of the court or any other law provides for legal fiction. Legal fiction is the legislative device which is clearly expressly provided in any enactment for different purpose. Normally legal fiction is not inferred by construction unless the provisions so indicate. In view of the above, the very basis on which the Division Bench in Allahabad Galla Tilhan Vyapari (Supra) Proceeded to assume the legal fiction was unfounded. The two cases which were relied by the division Bench were cases of express legal fiction created by Act of 1947 and Article 286 of the constitution of India respectively.

25. The apex Court had clearly laid down in Bengal Immunity case (supra) that legal fiction are created only for some definite purpose. In the present case, learned Single Judge exercising the jurisdiction during vacations in writ petition cognizable by Division Bench is authorized to do so by order of Hon'ble the chief Justice. The purpose of any assumed fiction can at best confine to exercise of jurisdiction by one judge in a case which was cognizable by Division Bench. The assumption of nay legal fiction cannot be for any other purpose. There can be no assumption that order passed by Hon'ble Single judge during vacation is to be treated as an order of division court. The apex court in several cases after Bengal Immunity case (supra) has laid down that legal fiction cannot be assumed beyond the purpose for which it was created. The apex court in (1979) 4 SCC 204 **K.S. Dharmadatan vs. Central Government and others** had occasion to consider the legal fiction. Following was laid down by the apex court in paragraphs 11, 12,13&14:

"11. In the case of commissioner of Sales Tax Uttar Pradesh v. Modi Sugar Mills Ltd.(1961)2 SCR 189: (AIR 1961 SC 1047) while laying down the principles on the basis of which a deeming provision

should be construed this Court observed as follows:-

"A legal fiction must be limited to the purposes for which it has been created and cannot be extended beyond its legitimate field."

"12. Similarly in the case of Braithwaite and co.(India) Ltd. V. Employees' State Insurance corporation (1968 1 SCR 771: (AIR 1968 SC 413) this court further amplifying the principle of the construction of a deeming provision observed thus:

"A legal fiction is adopted in law for a limited and definite purpose only and there is no justification for extending it beyond the purpose for which the legislature adopted it."

In the Bengal Immunity Co. Ltd. V. State of Bihar (1955)2 SCR 603: (AIR 1955 SC 1016) this court pointed out that "explanation should be limited to the purpose the Constitution-makers had and legal fictions are created only for some definite purpose."

13. In the case of Commr. of Income tax Bombay City v. Elphinstone Spinning and weaving Mills Co. Ltd. 40 ITR 142: (AIR 1960 SC 1016) this Court observed as follows:-

"As we have already stated, this fiction cannot be carried further than what it is intended for.

14. Thus, it is well settled that deeming fiction should be confined only for the purpose for it is meant. In the instant case, the order of the President reinstating the appellant and creating a legal fiction regarding the period of suspension must be limited only so far as the period of and the incidents of suspension where concerned and could not be carried too for so as to project if even in cases where actions had already been taken and closed. In other words, the position seems to be that at the time when actual cognizance by the Court was taken the appellant had ceased to be a public servant having bee removed from service. If some years later he had been reinstated that would not make the cognizance which was validly taken by the Court in October, 1970 a nullity or render it nugatory so as to necessitate the taking of fresh sanction. We, therefore, entirely agree with the view taken by the High Court that in the facts and circumstances of the present case legal diction arising out of the presidential Order cannot be carried to nullify the order of cognizance taken by the Special Judge. The argument of the learned counsel for the appellant is, therefore, overruled. No other point was pressed before us. The appeal being without merit is accordingly dismissed. The Special Judge would now hear the arguments of the parties and dispose of the case as expeditiously as possible. Let the records be sent back to the special Judge immediately."

26. Again the apex Court in (2000)2 SCC 699 **State of Maharashtra Vs. Laljit Rajshi shah and others** laid down that by construing the fiction, it is not to be extended beyond the language of the section for which it was created. Following was laid down in paragraph 6:

"It is a well-known principle of construction that in interpreting a provision creating a legal fiction, the court is to ascertain for what purpose the

fiction is created, and after ascertaining this, the Court is to assume all those facts and consequences which are incidental or inevitable corollaries to giving effect to the fiction. But in so construing the fiction it is not to be exte3nded beyond the language of section by which it is created. A legal fiction in terms enacted for the purposes of one Act is normally restricted to that Act and cannot be extended to cover another Act."

27. There are other reasons apart from what has been stated above, in support of the view that the order passed by vacation Judge sitting singly exercising the jurisdiction of Division Bench cannot be treated an order of Division Bench. As noted above, Section 13 of the Charters Act, 1861 provided that High Court may provide for the exercise, by one or more Judges or by division Courts constituted by two or more judges of the original and appellate jurisdiction vested in such court. The exercise of power by Single judge and Division Court was also contemplated in clause 27 of the letters Patent, as quoted above.

28. Chapter VIII Rule 2 of the Rules of the court also provided that any function which may be performed by the court in the exercise of its original or appellate jurisdiction may be performed by any Judge or by any Division court appointed or constituted for such purpose. The sitting of the court singly, in Division Court containing more than two judges have been contemplated under the Rules of the Court. Clause 10 of the Letters patent contemplated letters patent appeal to the same High Court against the judgement of one Judge. Chapter VIII Rule 5 as extracted above also provides that appeal shall lie to the court from a judgement of one Judge. Thus, the right of appeal has been given against the judgement of one Judge. The one Judge exercising the jurisdiction as a vacations judge in a writ petition which was cognizable by a Division Bench shall still remain one judge. One judge exercising of such jurisdiction cannot be held to be Division Court. The division Court is a court which consists of more than one Judge. The Distinction between one Judge and Division court is number of Judges constituting the bench. The appeal has been provided against the judgement of one judge to the same high Court to a Division bench with the object that a Division court may hear the appeal against one Judge.

29. Apart from exercise of jurisdiction by one Judge during vacation in a case cognizable by Division Bench, under Chapter V Rule 2 proviso (a) the Chief Justice is empowered to direct that any case or class of cases which may be heard by a judge sitting alone shall be heard by a bench of two or more judges or that any case or class of cases which may be heard by a bench of two or more Judges, by a judge sitting alone. The judgement rendered by such reading of the proviso indicates that cases to be heard by Bench can be directed to be heard by a Judge sitting alone. Judge sitting alone in such circumstance, will remain one judge. Can it be said that in such a circumstance where Hon'ble the Chief Justice in exercise of power under Chapter V Rule 2 proviso (a) has made such a nomination, the Single Judge deciding a case cognizable by Division Bench shall be treated to have been decided by a Division Bench? The express language of the proviso reveals such construction by express word "a

judge sitting alone". Whether special appeal against such a judgement shall be entertainable by a Division Bench? Thus, the Scheme of the rules as delineated in Chapter V Rule 2 and Chapter V Rule 10 clearly indicates that judgment rendered by such judge shall remain judgment by one Judge. The definition of special Appeal as an appeal from the judgment of one Judge.

The next reason for taking the aforesaid view is further to be noted. Chapter VIII Rule 5 of the Rules of the Court contained a provision excluding the appeal in large number of cases. Some of the exclusion of appeal was made under the letters Patent itself and some of the exclusions were made by the U.P. High Court (Abolition of Letter Patent) Appeal Act 1962 as amended in 1981. A Division Bench of this Court had occasion to consider (of which one of us was a member, Hon. Ashok Bhushan, J.) in (2003) 1 UPLBEC 496 **Vajara Yajna Seed Farm Kalyanpur Vs. Presiding Officer, Labour Court-II U.P. Kanpur** the various categories of appeal which were excluded from Chapter VIII Rule 5. Following was laid down in paragraph 64 of the judgements.

"64. From the above discussion and looking into the provisions of U.P. Act No. 14 of 1962 as amended by amendment Act of 1981 and Chapter VIII, Rule 5 of the Rules of the Court, 1952, special appeal is excluded from a judgment of one Judge of this Court in following categories:-

(i) Judgment of one Judge passed in the exercise of appellate jurisdiction in respect of a decree or order made by a court subject to the superintendence of the Court.

(ii) Judgment of one Judge in the exercise of revision jurisdiction.

(iii) Judgement of one Judge made in the exercise of its power of superintendence.(iv) Judgment of one Judge made in the exercise of criminal jurisdiction.

(v) Judgement of order of one Judge made in the exercise of jurisdiction conferred by article 226 or Article 227 of the Constitution in respect of any judgement, order or award of a Tribunal, court or Statutory Arbitrator made or purported to be more in the exercise of purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in State List or Concurrent List.

(vi) judgment or order of one Judge made in exercise of jurisdiction conferred by Article 226 or Article 227 or the Constitution in respect of any judgment, order or award by the Court or any officer or authority made or purported to be made in the exercise or purported exercise or appellate or revisional jurisdiction under any Uttar Pradesh Act or under any Central Act."

The Constitution Bench of this court had occasion to consider the provisions of section 100-A as inserted in 1976 and amended in 2002 regarding exclusion of letters Patent Appeal in **P.S. Sathappan Vs. Andhra Bank Ltd. & others**(2004)11 SCC 672. The apex court laid down in the said case that when the Legislature wanted to exclude Letters Patent appeal it specifically did so. Following was observed by the apex court in paragraph 30:

"It is thus to be seen that when the legislature wanted to exclude a Letters

Patent Appeal is specifically did so. The words used in Section 100 A are not by way of abundant caution. By the Amendment Acts of 1976 and 2002 a specific exclusion is provided as the Legislature knew that in the absence of such words a Letters Patent Appeal would not be barred. The Legislature was aware that it had incorporated the saving clause in Section 104(1) and incorporated Section 4 in the C.P.C. thus now a specific exclusion was provided. After 2002, section 100A reads as follows:

"100A. No further appeal in certain cases.-Notwithstanding anything contained in any Letters Patent for any High Court or in any other instrument having the force or law or in any other law for the time being in force, where any appe4al from an original or appellate decree or order is heard any decided by a single judge of a High Court, no further appeal shall lie from the judgment and decree of such single Judge."

To be noted that here again the Legislature has provided for a specific exclusion. It must be stated that now by virtue of Section 100A no Letters Patent Appeal would be maintainable.. However, it is an admitted position that the law which would prevail would be the law at the relevant time. At the relevant time neither Section 100A nor Section 104(2) barred a Letters Patent Appeal."

31. In the present case, certain category of special appeals have been excluded from the purview of Chapter VIII Rule 5 but there is no exclusion with regard to judgment of one Judge deciding a writ petition which is to be entertained by Division Bench. Had the Legislature intended to exclude the said appeal also, the same could have been specifically provided.

32. When the Right of appeal has been conferred to the High court against the judgment of one Judge, the exclusion of the right to appeal is not to be readily infer. The exclusion of right to appeal has to be specifically provided for or should flow from necessary implication. This is another reason for us to take the view that appeal against the judgement of one Judge passed during vacations exercising the jurisdiction in a case or Division bench is maintainable.

33. There is one more reason which supports our view. The law of precedent is well established in our country. The principle of precedent is same for all judicial court. Constitution Bench in (2002) 4 SCC 578 **P. Ramachandra Rao Vs. State of Karnataka**, while considering the doctrine of precedent laid down that precedent which has crystallized into a rule of law is that a bench of lesser strength is bound by the view expressed by a bench of larger strength. Following was laid down by the apex Court.

"The other reason why the bars of limitation in common Cause (I), Common Cause (II) and Raj Deo Sharma(I) and Raj Deo Sharma(II) cannot be sustained is that these decisions though two or three-Judge Bench decisions run counter to that extent to the dictum of constitution Bench in A.R. Antulay's case: (1992 AIR SCW 1872: AIR 1992 SC 1701: 1992 Cri LJ 2717) and therefore cannot be said to be good law to the extent they are in breach of the doctrine of precedents. The well settled principle of precedents which has crystallized into a rule of law is that a bench of lesser strength is bound by the view expressed by a bench of larger

strength and cannot take a view in departure or in conflict therefrom."

34. The question may be asked as to when a judge sitting singly decides a writ petition which is cognizable by division Bench whether such judgement can be assumed to be judgement of division bench for the purpose of presidential value? Whether the judgement of one judge shall be equivalent to precedent given by a Division Bench? The answer obviously shall be No. the hierarchy of the court and the doctrine of precedent recognizes the strength of Bench i.e. quorum as relevant factor for determining its precendential value. Before us, not a single case has been referred to or relied where the judgment of one judge deciding a writ petition which was cognizable by division Bench has been given any higher precedential value than the precedential value of one Judge. This reason also reinforces our view that judgement of one Judge which has been appealed in the present case cannot be assumed to be judgement of Division Bench.

35. The Division Bench Judgement in **Meera Sankhwar's** case (supra) which reiterates the other view now has to be noted. The said judgment is reported in (2004) 4 AVC 3162. In the said case also an interim order was passed by Hon'ble Single Judge on 1.7.2004 i.e. during vacations. Special Appeal was filed against the said interim order by the state of U.P. A preliminary objection was raised before the Bench hearing special appeal that the order passed by learned Single judge was an order in a Writ Petition Cognizable by Division Bench hence, the said order is to be treated as an order of Division Bench. The said preliminary objection was overruled. Following was laid down in paragraphs 3,4 and 5:

*"**3.**A preliminary objection has been taken by the learned counsel for the respondents in this appeal that the impugned interim order dated 1.7.2004, was passed by a learned Single judge during the summer vacations and hence in view of Chapter V Rule 10(1) of the Allahabad High Court Rules the said interim order amounts to an order of a Division Bench of this Court, and hence no special Appeal will lie against it. We do not agree.*

4. *Chapter V Rule 10 States:*

"Criminal work shall continue to be dealt with during the vacation by such judges as may be appointed for the purpose by the Chief Justice.

They may also exercise original, appellate, revisional civil or writ jurisdiction vested in the Court in fresh matters which in their opinion require immediate attention.

Such jurisdiction may be exercised even in cases which are under the rules cognizable by two or more Judges, unless the case is required by any other law to be heard by more than one Judge."

5. *The provision in the said Rule that the jurisdiction of a Division Bench can be exercised by a learned single Judge does not mean that the order of a learned single Judge becomes an order of a Division Bench. It only means that the learned single Judge can excise the jurisdiction which normally a Division Bench exercises. This does not mean that the Single Judge becomes a Division Bench. Hence in our opinion the order remains an order of a learned single Judge, and hence a special appeal will lie*

under Chapter Viii Rule 5 of the High court Rules."

36. Although the Division Bench in the **State of U.P. and others Vs. Smt. Meera Sankhwar and others** (supra) did not notice the earlier Division Bench but we having ourselves examined the two divergent view expressed in the aforesaid two Division Benches, non reference of earlier Division Bench by subsequent Division Bench is not of much significant. There is another Division Bench of this court reported in 1994 AWC 1137, **State of U.P. and another Vs. Smt. Dayavati Khanna.** In the said case, an order was passed by learned Single Judge on Stay Application in a case which was entertainanble by Division Bench. The determination of the jurisdiction as was prevalent at the relevant time by Chief Justice was that Division Bench matters were placed before Single Judge for consideration of the Stay application, the stay application was decided by single Judge against which State filed Special Appeal. An objection was raised by counsel for the writ petitioner that special appeal would be competent only from an order passed in writ petition which is required to be heard by single Judge but not when an order is passed by Single Judge in writ petition cognizable by Division Bench. Repealing the said submissions, following was laid down in paragraphs 9,10,and 11.

*"**9.** Faced with this situation, Mr. L.P. Naithani, counsel for the Dayavati Khanna, sought to put forth the wholly untenable contention, that no special appeal lay against the impugned order. The argument being that a special appeal would be competent only from an order passed in a writ petition which is required to be heard by a Single Judge but not when an order is passed by a Single Judge in a writ petition cognizable by a Division Bench. In other words, in a writ petition, cognizable by a Division Bench no special appeal lies against an order passed by a Single Judge while dealing with interim matters. Counsel could, however, point no rule or judicial precedent to support this contention which on the face of it has no reason or principle to support it.*

***10.** As is well know, it is in the exercise of powers vested in the Chief Justice that the Single Judges have been conferred jurisdiction to deal with matters pertaining to interim relief, in writ petitions, cognizable by a Division Bench. While dealing with such a matter the Single Judge does not function as a delegate of the Division Bench nor there is any warrant for deeming an interim order passed by the single Judge in a matter cognizable by the Division Bench, as being that of the Division Bench so as to bear special appeal against it.*

***11.** Further, there is nothing in the language of Rule 5 of chapter VIII of the Allahabad High Court Rules 1952 to lend itself to any such interpretation, namely, barring an appeal from an order passed by the Single Judge in such matters, rather a reading of it would show that an appeal against the order of the Single Judge is in no way barred. There is thus no ground to hold that the present Special appeal was not competent."*

37. The Division Bench judgment in **State Vs. Dayavati Khanna** (supra) also takes the correct view of the matter.

In view of the following discussion our conclusion is that:

(1) There is no legal fiction provided for in the Rules of the court or any other law for assuming order of a Single Judge passed during vacation in a writ petition cognizable by Division Bench to be an order of Division Bench.

(2) The Single Judge when exercises the jurisdiction in a writ petition cognizable by Division Bench, he exercises the jurisdiction in accordance with the determination made by Hon'ble the chief Justice and while exercising such jurisdiction, he remains a single Judge and order passed by judge sitting singly, cannot be treated to be an order of Division Bench.

(3) Chapter VIII Rules 5 of the Rules of the Court read with definition of the special appeal as provided in interpretation clause 3 of the Chapter I of the Rules provided that Special Appeal is maintainable against an order of one Judge. The Division Bench in **Allahabad Galla Tilhan Vyapari Sangh** wrongly assumed a legal fiction under chapter V Rule 10, whereas no such legal fiction is discernable from the said proviso. The Division Bench in **Allahabad Galla Tilhan** placed its reliance on two decisions namely; **East End Dwelling Co. LD.** (supra) and **Bengal Immunity** case (supra) which were cases of express legal fiction and were neither applicable not attracted in the said case.

(4) The judgment of a Judge sitting singly in vacation exercising jurisdiction of writ petition cognizable by the Division Bench shall have precedential value of only one judge.

(5) Chapter VIII Rule 5 mentions several categories of special appeals which are barred/ excluded whereas there is no such exclusion of the case of the present nature. Right of appeal which has been provided has to be expressly excluded or by necessary implications which exclusion we do not find in the present case.

38. In view of the foregoing discussions and conclusions, we answer two questions referred, in following manner:

(i) Against the order and judgment of one Judge passed during vacation exercising jurisdiction in cases which are cognizable by Division Bench, special appeal under Chapter VIII Rule 5 of the Rules of the Court is maintainable.

(ii) The Division Bench judgment in **Allahabad Galla Tilhan Vyapari** (supra) does not lay down the correct law. The view expressed by Division Bench in **State of U.P. Vs. Meera Sankhwar** (supra) is approved.

39. Let our above answer be placed before the appropriate Division Bench hearing special appeal. The reference is accordingly decided.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.02.2010

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

Civil Misc. Writ Petition No. 4781 of 2010

Naresh Kumar ...Petitioner
Versus
Director U.P. Local Body, U.P. Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri Ashfaq Ahmad Ansari

Counsel for the Respondent:
C.S.C.

Constitution of India. Art 226-Illegal appointment-continued for long time-appointment of petitioner directly on promotional post of Safai Nayak-such illegality can not be cured-considering long period of working appointment on post of Safai Employer can be considered.

Held: Para 9 & 10

The Apex Court subsequently in the case of State of U.P. Vs. Neeraj Awasthi & others, reported in 2006 Volume 1 AWC Page 175 has clarified the aforesaid position and held that an irregularity can be cured but an illegality cannot be cured through judicial intervention. The Apex Court has held that a person who has been appointed completely de-hors the rules, such appointment on equities cannot be sustained. Reference be had to paras 52 and 57.

In the instant case the petitioner has been admittedly appointed against a promotional post on which no direct recruitment could have taken place. The Court is supported in its view by the decision in the case of Hiraman Vs. State of U.P., 1997(11) SCC Page 630. In thissss view of the matter the impugned order cannot be interfered in view of the findings recorded therein.

Case Law discussed:
1993 Volume 3 SCC Page 591, 2006 Volume-1 AWC Page 175, 1997(11) SCC Page 630.

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

1. Heard learned counsel for the petitioner.

2. The challenge is to the impugned order dated 21st January, 2010 passed by the Executive Officer, Nagar Panchayat, Meerapur, District Muzaffarnagar on the ground that the dispensation of the service of the petitioner is illegal and unjust.

3. The contention raised is that the petitioner has worked for more than 10 years, therefore, his services could not have been dispensed with. It is further submitted that his services were confirmed.

4. The charge against the petitioner is that he was appointed directly on the post of Safai Nayak which post is a promotional post and no direct recruitment can be made on the said post. The complaint was made earlier and learned counsel for the petitioner contends that his services were confirmed by the order dated 11th of January, 2003.

5. It is further submitted that not only this the second complaint has been made on the same grounds and as such the same could not have been entertained.

6. A perusal of the second complaint demonstrates that the same has emanated on the strength of a letter issued by the National Commission for Safai Karmcharis, Ministry of Social Justice

and Empowerment, wherein, it has been indicated that the claim of the petitioner does not come within the fourcorners of the Rules and he has obtained employment against a post which could not have been filled by direct recruitment. Thereafter, the matter was inquired into and the impugned order has been passed.

7. Learned counsel contends that after having continued and having been confirmed in service, the petitioner could not have been removed from the post.

8. It is true that the Apex Court in case of Dr. M.S. Mudhol & another Vs. Halegkar & others, reported in 1993 Volume 3 SCC Page 591 has indicated that even if a person has continued in service for long on the basis of some deficiency in initial appointment then such appointment should not be dispensed with. However, the case at hand is distinguishable on facts.

9. The Apex Court subsequently in the case of State of U.P. Vs. Neeraj Awasthi & others, reported in 2006 Volume 1 AWC Page 175 has clarified the aforesaid position and held that an irregularity can be cured but an illegality cannot be cured through judicial intervention. The Apex Court has held that a person who has been appointed completely de-hors the rules, such appointment on equities cannot be sustained. Reference be had to paras 52 and 57.

10. In the instant case the petitioner has been admittedly appointed against a promotional post on which no direct recruitment could have taken place. The Court is supported in its view by the decision in the case of Hiraman Vs. State of U.P., 1997(11) SCC Page 630. In this view of the matter the impugned order cannot be interfered in view of the findings recorded therein.

11. On equities petitioner has worked for almost 18 years. The Executive Officer, Nagar Panchayat may sympathetically consider the petitioners engagement as a Safai Karmchari. Keeping in view the aforesaid position explained herein above the petition is dismissed with the aforesaid observations.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.02.2010

BEFORE
THE HON'BLE RAKESH SHARMA,J.

Second Appeal No.156 of 2010

Hodil Singh ...Appellant
Versus
Bhagwant Singh ...Respondent

Counsel for the Appellant:
Sri Anil Kumar Aditya

Counsel for the Opposite Party:
Sri Manish Chandra Tiwari
Sri A.T. Kulsreshtha

Code of Civil Procedure- Section 100-Suit for specific performance-dismissed by Trail Court-Lower Appellate court decreed the Suit with specific finding about readiness and willingness of Respondent's father-common tendency developed to rescile from contract after receiving handsome amount- person who paid money found cheated after getting involved in unwanted litigations-Primary duty of court to enforce such promise-Court must rescine to encourage such dishonest tendency-appeal dismissed-no substantial question of law.

Held: Para 16

Now a days, it has become a regular tendency that first enter into an agreement or a contract in respect of immoveable property or some other contractual affairs or business with an ulterior motive and thereafter rescile from the promise made through the agreement or contract by entering into litigation. It is a new device invented just in order to get the execution of terms and conditions contained in an agreement or contract frustrated. The person, who has paid the money or consideration on execution of an agreement or contract feels cheated after getting involved in an unexpected and unsavoury situation of unwanted litigation so initiated by a dishonest person. Thus, the primary duty of a Court of law is to enforce a promise, which the parties have made and to uphold the sanctity of a contract or an agreement entered into between the parties, which form the basis of a society, though there may be exception. The Courts must exercise extreme restraint in holding a contract or an agreement to be void as it would encourage dishonesty and cheating.

Case Law discussed:

2009(2) AWC 1546, AIR 2003 SC 1391, AIR 2004 SC 3504, 2008 (105) RD 739, 2009(4) AWC 3613, AIR 2009 SC 1819, AIR 1959 SC 781.

(Delivered by: Hon'ble Rakesh Sharma, J.)

1. Heard Sri Anil Kumar Aditya, learned counsel for the appellants and Sri Manish Chandra Tiwari, holding brief of Sri A.T. Kulsreshtha, learned counsel for the respondents as well as perused the materials on record, including the judgments of the courts below.

2. This Second Appeal has been preferred against the judgment and decree dated 21.11.2009, passed by the Additional District Judge, Court No.12, Aligarh, in Civil Appeal No.130 of 2004, Bhagwant Singh Vs. Holdil Singh, allowing the Appeal preferred by respondent no.1 by which the judgment and decree dated 22.5.2004, passed by the Trial court has been set aside.

3. It emerges from the record that an agreement to sell (a lease deed as alleged by the appellant) was executed by one Hodil Singh, now represented through his legal heirs and legal representatives, on 27.4.1994 for selling of his Bhumidhari agricultural land measuring 8 Bigha 13 Biswa and 15 Biswansi, situate in Village Bajrangpur, Majra Vijay Garh, Pargana Akrabad, Tehsil Sikandra Rao, now Tehsil Koil, District Aligarh. The said deed was duly registered in the office of the Sub Registrar Sikandra Rao, District Aligarh. Lateron, two Suits were filed in the Civil Court, that is, one being Suit No. 375 of 1995, preferred by Hodil Singh against Bhagwant Singh, seeking a relief that the said agreement to sell, registered on 27.4.1994, be declared null and void. He had challenged this deed on various grounds as mentioned in the plaint. According to him, a document which was registered on 27.4.1994, was, in fact, a lease deed for cultivating the land in dispute. Neither adequate consideration or price of the land was given to him nor he ever intended to transfer his agricultural land. Another Suit, that is, Suit No. 855 of 1998, Bhagwant Singh Vs. Hodil Singh was filed by Bhagwant Singh, now represented through his legal heirs and legal representatives, against Holdil Singh seeking specific performance of the contract entered into between the parties.

4. It was pleaded by Bhagwant Singh that the said agreed to sell was

executed by Hodil Singh agreeing to sell the aforesaid land for a total sum of Rs.1,55,000/= for which a written agreement/contract was prepared, executed and registered on 27.4.1994 in the office of the Sub Registrar. A sum of Rs.30,000/- was paid as an advance amount to Hodil Singh. According to him Rs.26,000/- was paid before to Hodil Singh before registration of the agreement to sell and Rs.4,000/- was paid at the time of registration of the agreement to sell in the office of the Sub Registrar. These events were noted in the agreement to sell. The parties were agreed that the sale deed would be executed by 27.10.1995. In the meantime, vendee, that is, Bhagwant Singh, was required to make arrangements of the remaining amount to be paid to vendor at the time of execution of the sale deed.

5. In furtherance of the agreement to sell, Bhagwant Singh, sent a written notice to Hodil Singh, vendor, on 3.7.1995 for execution of the sale deed, indicating therein that he had arranged the money, but Hodil Singh did not turn up to execute the sale deed. Thereafter, notices were sent on 25.10.1995 and 27.10.1995 by Bhagwant Singh for execution of the sale deed in the office of the Sub Registrar. It was pleaded by Bhagwant Singh in the plaint of Suit No. 855 of 1998 that through notices he had indicated to Hodil Singh that he was will to pay the remaining balance amount towards sale consideration and was ready to get the sale deed executed to discharge his part of contract. On refusal of Hodil Singh, he was compelled to file Suit No. 855 of 1998, which was ultimately decided by the judgment and decree dated 22.5.2004.

6. The Trial court had decided these two Suits by one and common judgment. It had dismissed the Suit preferred by Hodil Singh, declining to hold that the document/deed, which was registered on 27.4.1994 was a lease deed. It was held by the Trial court that Hodil Singh had executed an agreement to sell in favour of Bhagwant Singh, which was registered on 27.4.1994. Following findings and conclusions have been recorded by the Trial court in its judgment:-

"UKT TATHYON SE SPASHT HAI KI YADI HODIL SINGH DWARA PATTA NISHPADIT KIYA GAYA TO NISHCHIT ROOP SE SAMPATI KA KABJA BHI BHAGWANT SINGH KO DE DIYA HOTA AUR YADI KABJA NAHI DIYA GAYA TO VADI HODIL SINGH YAH SPASHT KARTA KI KIN PARISTHITYON MEIN PATTA NISHPADIT KARANE KE BAAD BHI USKE DWARA BHAGWANT SINGH KA SMPATI PAR KABJA NAHIN DIYA GAYA THA. UPROK PARICHARHA SE SPASHT HAI KI VADI HODIL SINGH DWARA DASTAVEJ KO IKRARNAMA SAMAJHATE HUE HI NISHPADIT KIYA GAYA THA."

7. Ultimately, the Trial court had dismissed Suit NO. 375 of 1995, filed by Hodil Singh and the Suit filed by Bhagwant Singh was partly decreed, directing the vendor to return Rs.4,000/- receiving by him as advance money. This decree was challenged by Bhagwant Singh by filing a First Appeal, which was registered as Civil Appeal No. 130 of 2004. The lower Appellate court has allowed he appeal preferred by Bhagwant Singh, represented by his legal heirs and legal representatives. The judgment and

decree passed by the Trial court, while deciding, Suit no. 855 of 1998, preferred by Bhagwant Singh was set aside. The lower Appellate court has held that Hodil Singh could receive the balance amount of sale consideration of Rs.1,25,000/- and execute sale deed in favour of legal representatives of Bhagwant Singh. This judgment is under challenge in this Second Appeal.

8. Sri Anil Kumar Aditya, learned counsel for the appellants, has assailed this judgment on various grounds. According to him, the document registered on 27.4.1994 was merely a lease deed. It was not an agreement to sell. The total advance amount of Rs.30,000/= as alleged was not paid to Hodil Singh. The Trial court has rightly held that he was only paid Rs. 4,000/- at the time of registration of agreement to sell. Much stress has been laid that there was no willingness or readiness shown by Bhagwant Singh in arranging the money and getting the sale deed executed within time. Hodil Singh was not paid the entire agreed amount within time. Suit N. 855 of 1998 was preferred beyond time of three years of the deed of execution of agreement to sell. This shows that Bhagwant Singh never intended to get the sale deed executed within the stipulated period of time and he was only taking advantage of the situation. In support of his submissions, he has placed reliance on the judgments reported in 2009(2) AWC 1546, Azhar Sultana Vs. B. Rajamani and others, AIR 2003 SC 1391, Manjunath Anandappa Urf Shivappa Hansi v. Tammanasa and others, AIR 2004 SC 3504, Pukhraj D. Jain and others v. G. Gopalakrishna and 2008 (105) RD 739, Shambhu Prasad Vs. Smt. Shamim Jahan to strengthen his submissions as put-forth in the grounds of appeal and during arguments. He led the Court to chronology of events and facts to show that the element willingness and readiness was absent in the present case. The delay in approaching the court itself reflects on the conduct of the respondent. He has further submitted that there were two Suits, that is, Suit No. 375 of 1995 and Suit No. 855 of 1998 and it can be said that there were two judgments deciding two Suits. Therefore, Bhagwant Singh should have filed two Appeals which has not been done in the present case. Principles of Res Judicata have also not been followed in the present case. In this regard, he has placed reliance on the judgments reported in AIR 2009 SC 1819, Harbans Singh and others Vs. Sant Hari Singh and others and 2009(4) AWC 3613, Hradeshwar Nath v. Nandlal and another. In addition, the other grounds were also highlighted in the memo of Appeal.

9. On the other hand, Sri Manish Chandra Tiwari, learned counsel for the respondents, has opposed the motion. According to him, Bhagwant Singh, had one and half years' time to get the sale deed executed. It was stipulated in the agreement to sell itself that the sale deed could be executed by 27.10.1995. He had arranged the money and indicated his intention, willingness and readiness by sending notice firstly on 3.7.1995 and thereafter on 25.10.1995 and 27.10.1995 requiring Hodil Singh to come in the office of the Sub Registrar and execute the sale deed. There is also a reference of a Panchyat being held in the Village which could not yield any result. In these compelling circumstances, Bhagwant Singh was left no option but to file Suit No. 855 of 1998 for specific performance of the contract. Sri Tiwari has supported

the judgment rendered by the lower Appellate court and drawn attention of the Court on various findings recorded by the Appellate court and the conclusions drawn.

10. Having heard learned counsel for the parties and carefully gone through the materials available on record as well as the judgments of the courts below.

11. In the present case, the Trial court has already dismissed the Suit No. 375 of 1995, filed by the appellant, Hodil Singh, the vendor, against Bhagwant Singh, the vendee. It has categorically recording findings and concluded that there existed an agreement to sell not a lease deed. The findings recorded by the Trial court, as mentioned in the foregoing paragraphs, have remained unchallenged and uncontested. These findings and conclusions certainly operate against the appellants. Even this Court itself has perused the findings recorded by the Trial court and the lower Appellate court. Here is a case where the Trial court itself had held that Hodil Singh was conversant with the procedure for execution of the deeds. It was not the case that he was an illiterate person or insane person having no knowledge of execution of deeds. This fact finds support from the fact that in the agreement to sell photographs of both the parties, that is, vendor, Hodil Singh and Bhagwant Singh were affixed, which were duly identified by the witnesses, terms and conditions were stipulated in writing and it was also signed by the vendee, Hodil Singh and as such it cannot be said that Hodil Singh was not aware of the contents of the agreement to sell or unware of the execution of the agreement to sell or that it was a lease deed. He was paid Rs.26,000/- before registration of the agreement to sell and Rs.4,000/- was paid to him at the time of registration of the agreement to sell in the office of the Sub Registrar. Thus, by no stretch of imagination it can be presumed that he was not aware that he had executed an agreement to sell. Therefore, there is no reason to form a different opinion during the course of hearing of Second Appeal on admission to take another view in the matter. There is no allegation against the Sub Registrar or the Deed Writer that incorrect facts were mentioned in the agreement to sell. The Trial court has already held agreement to sell to be a valid and legal document and this Court while examining the matter in the Second Appeal is in full agreement with this finding recorded by the Trial court and the lower Appellate court as this is a concurrent finding of fact.

12. As far as the intention to perform the part of the contract by Bhagwant Singh is concerned, in the present set of circumstances, this Court has taken note of the fact that the respondent-Bhagwant Singh had filed 12 documents, which were placed as Paper 7-Ga. These 12 documents included the registered notice sent by Bhagwant Singh, requiring Hodil Singh to come to the office of the Sub Registrar for execution of the sale deed and the receipts issued by the Sub Registrar that the vendee, Bhagwant Singh, had appeared before the Sub Registrar. Thus, on the basis of documentary and oral evidence produced by the vendee, Bhagwant Singh, the lower Appellate court has formed the opinion that there was every intention, willingness and readiness available on the part of Bhagwant Singh to show that he was always prepared to get the sale deed executed. The notices were sent by

Bhagwant Singh to Hodil Singh within the stipulated period on 3.7.1995, 25.10.1995 and 27.10.1995 for getting the sale deed executed. There was specific mention in the plaint also that such intention, willingness and readiness were existed at the time of filing of the Suit.

13. It is noteworthy that the appellant had failed to demolish these 12 documents and testimony of the witnesses. No document to the contrary was produced by Hodil Singh before the courts below. The lower Appellate court, in the light of these documents and oral testimony of witnesses has rightly recorded its opinion that these evidences remained uncontroverted and unchallenged. While deciding the Suits, the Trial court has ignored all these documents. It is relevant to mention here that the lower Appellate court has followed the law laid down in the judgments reported in AIR 1997 SC 463, AIR 2006 SC 2172, Sugani v. Rameshwar Daw and others and AIR 2009 SC 2408, Moti Lal Jain v. Ramdasi and others while recording its findings and conclusions. Even this Court, from the factual matrix of the case, is of the opinion that the vendor, Bhagwant Singh, had proved his case before the courts below that he was always willing and ready to get the sale deed executing after the remaining balance sale consideration. His willingness and readiness finds support from the notices sent by him on 3.7.1995, 25.10.1995 and 27.10.1995 and from other documentary evidence.

14. As far as application of principles of Res Judicate and other arguments of Sri Anil Kumar Aditya, learned counsel for the appellants, are concerned, both the Suits, that is, Suit Nos. 375 of 1995 and 855 of 1998 were clubbed together by the Trial court and both were decided by one common judgment and decree dated 22.5.2004, after hearing learned counsel for the parties and with their consent as the very genesis and the subject matter of both the Suits were same. By the said judgment and decree, Suit No. 375 of 1995, filed by the vendee, Hodil Singh against the vendor, Bhagwant Singh, was dismissed and Suit No.855 of 1998, filed by the vendor, Bhagwant Singh, was partly decreed. The Trial court, while deciding the Suits, framed separate issues which were dealt with, findings and conclusions were recorded and evidence adduced were appreciated. Both the parties agreed for clubbing of the Suits, thus, one and common judgment was rendered as the issues and subject matter of both the Suits were common and same. Thus, rightly a single Appeal was preferred by Bhagwant Singh, which was rightly dealt with by the lower Appellate court. It appears that no serious objection was raised either before the Trial court or before the lower Appellate court and, therefore, at the Second Appellate stage it is not permissible to raise this issue. Since there was a common judgment, the lower Appellate court did not add anything new, while dealing with the appeal and decided the issues and concluded the controversy.

15. While dealing with Second Appeals, this Court is regularly noticing that the parties entering into agreement to sell or contract or sale deeds are approaching the Court taking the dishonest pleas that either they have not executed agreement to sell or contract or they do not have knowledge about the contents or terms and conditions of the agreement to sell or the contract entered

into just in order to escape to perform their part of contract and to frustrate performance of the contract thereby showing extreme dishonesty and cheating to the sanctity of the agreement or contract or sale deeds, which, in fact they have entered into and received money in part performance thereof. In the process of execution of agreements, contract or sale deed how it could be possible that the persons executing these documents/deeds was unaware of the contents or terms and conditions of the documents/deeds on which he put his signature or thumb impression, as the case may be. In most of the cases of challenging the documents/deeds, it is the dishonesty of the person, who has executed the agreement to sell, contract or sale deed as well as it is high degree of cheating and fraud with the other party. In the present days, if it is permitted it will create a chaos in the Banking, finance and other economic affairs, which may result irreparable damage to the economy as well. In the execution of the agreements, contracts or sale deeds, it is the faith and confidence of the parties which plays the important role. If this faith and confidence in execution of agreements, contracts and sale deeds is permitted to be shaken, it will convey very bad indication for the economy and the promises reduced by way of these documents. Thus, the sanctity of agreement must be respected and preserved.

16. Now a days, it has become a regular tendency that first enter into an agreement or a contract in respect of immovable property or some other contractual affairs or business with an ulterior motive and thereafter resile from the promise made through the agreement or contract by entering into litigation. It is a new device invented just in order to get the execution of terms and conditions contained in an agreement or contract frustrated. The person, who has paid the money or consideration on execution of an agreement or contract feels cheated after getting involved in an unexpected and unsavoury situation of unwanted litigation so initiated by a dishonest person. Thus, the primary duty of a Court of law is to enforce a promise, which the parties have made and to uphold the sanctity of a contract or an agreement entered into between the parties, which form the basis of a society, though there may be exception. The Courts must exercise extreme restraint in holding a contract or an agreement to be void as it would encourage dishonesty and cheating.

17. My this view finds support from the judgment reported in AIR 1959 SC 781, Gherulal Parakh v. Mahadeodas Maiya.

18. In view of the discussions made above, no substantial question arises to be considered in the present Second Appeal. Accordingly, the Second Appeal is dismissed. The judgment and decree of the Lower Appellate court is affirmed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 05.02.2010

BEFORE
THE HON'BLE IMTIYAZ MURTAZA, J.
THE HON'BLE S.S. TIWARI, J.

Criminal Contempt Petition No. 11 of 2007

In Re: (Om Prakash Dixit) ...Applicant
Versus
Shiv Raj Singh Chauhan ...Contemnor

Counsel for the Applicant:
A.G.A.

Counsel for the Contemnor:
Sri S.S. Upadhyaya

Contempt of Courts Act, 1971 Section 2 (c)-Criminal Contempt-contemnor a practicing advocate repeated interference with functioning of Court-threat in case desired record of the case not summoned and heard not aware what would be apposed-on reference-the contemnor instead of tendering un conditional apology-repeated the entire history accusing the presiding judge-held-conduct of contemnor amounts interference with due course of justice undermining the dignity of court-reference allowed-conviction of 3 months simple imprisonment with fine of Rs.20,000/-imposed.

Held: Para 24 & 25

As a result of foregoing discussion, the reference made to this Court is allowed and the contemnor Shiv Raj Singh Chauhan, Advocate is held guilty of criminal contempt.

We accordingly convict him under section 12 of the Contempt of Courts Act and sentence him to undergo simple imprisonment for three months and to pay a fine of Rs.20,000/-. In default, it may be prescribed, contemnor shall undergo further simple imprisonment for two weeks. However, the punishment so imposed shall be kept in abeyance for a period of sixty days so as to enable the contemnor to approach the Apex Court if so advised. It needs hardly be said that immediately after expiry of sixty days in case no stay order is furnished by the contemnor, he would be taken into custody forthwith to serve out the sentence immediately.

Case law discussed:
(1991) 4 SCC 406, (1991) 3 SCC 600, 1993 (1) SCC 529, [1984] 3 SCC 405.

(Delivered by Hon'ble Imtiyaz Murtaza J.)

1. The contempt proceeding in the instant case has its genesis in the Reference made by Sri Om Prakash Dixit, Special Judge, Etawah vide letter dated 19.1.2007 which was duly forwarded by District Judge vide letter dated 20.1.2007 whereby reference has been made to this Court for initiation of contempt proceeding against the contemnor namely Shiv Raj Singh Chauhan Advocate Civil Court Etawah.

2. According to the facts contained in reference made to this Court, on 12.1.2007 at 10.35 a.m when the Court was busy recording the statement in a final enquiry No. 6 F/2006 Stae v. Rakesh Kumar Saxena, the contemnor advocate interrupted the proceeding and insisted with the officer to send for the file and his case be got called out forthwith. When the officer asked him to wait for the proceeding to end, upon which he became furious and **in terrorem**, remarked which if translated into English would read that perhaps the officer was not aware as to what would happen if the request of the contemnor was not immediately attended to. It is further mentioned in the reference that again the contemnor came to the court at 11.20 a.m and perused the order sheet of Special Case no. 693 of 2004 and burst out angrily using words couched in derogatory and undignified language which if translated in English would agreeably read that the contemnor had set right even the most intractable Judges and the officer stands no where qua them. It is further mentioned that the contemnor again came to the court at 12.30 p.m and moved an application whereupon the court passed the order thereon. When the contemnor read the contents of the order,

he again became furious and remarked which if translated in English would agreeably read that he would make such a strong complaint that the officer would remember for all time to come. In the reference, previous incidents of unruly conduct of the contemnor in the court of the then Addl. Civil Judge (J.D.) Etawah presided over by Sri Rajiv Kumar, contained in letter dated 14.11.2003, in the court of the then Civil Judge (S.D.) presided over by Sri Pradeep Kumar Gupta contained in letter dated 5.4.2005, in the court of then then Addl. District Judge presided over by Sri S.P.Singh and also the notice issued to him on 18.8.2006 under section 228 I.;P.C., in the court of Special Judge (E.C.Act) presided over by Sri O.P. Dixit vide letter dated 12.1.2007, in the court of Addl. Civil Judge (J.D.) presided over by Sri Mohd. Rafi vide letter dated 16.2.2007, Vigilance Bureau enquiry no. 28 of 2002 in which notice was issued by the High Court dated 22.3.2003 and 22.5.2003 and the letter dated 20.1.2008 written by contemnor to the High Court in which he has prayed for not initiating any action on the complaints against him.

3. On 304.2007, upon a note of the office the Administrative Judge Etawah passed the following orders.

"I have seen the report/complaint of the Special Judge (E.C.Adt) Etawah , note of the office and other documents on record.
It appears that the special Judge (E.C.Act), Etawah was recording the statement of a witness in a case when Sri Shiv Raj Singh Chauhan, Advocate entered the court room and interfered with the judicial proceedings. I have carefully gone through the record and, in my opinion, the alleged actions of Sri Shiv Raj Singh Chauhan, Advocate, can be defined as 'contempt of court' within the meaning of section 2 (C) of the Contempt of Courts Act, 1971. Prima facie there is sufficient material to proceed against him under the said Act.
Let appropriate proceedings be initiated against Sri Shiv Raj Singh Chauhan, Advocate for his alleged acts under the Contempt of Courts Act."

4. Thereafter, the matter came to be put up before Hon. Chief Justice and on 25.5.2009 the Chief Justice approved the opinion of the Administrative Judge.

5. Sri S.S. Upadhaya, learned counsel appeared for the contemnor and pleaded for merciful view in the matter. On being called upon to argue the case on merit of the case, he referred to unqualified apology stating that the contemnor has already tendered the unqualified apology and prayed for discharge taking a lenient view further urging that that the contemnor was fairly senior having been enrolled as Advocate in the year 1979 attended with further submission that he can not be said to be addicted to using contemptuous language and making scurrilous attacks nor is there any previous instance of his showing disrespect to the court and whatever has happened in Court was in a spontaneity. Ultimately, he stated that he should be given a chance to expiate his unruly conduct.

6. We are anguished that we have to deal with a case involving a lawyer again under the Contempt of Court Act. We however indicate to ourselves the piece of advice that the Court while dealing with contempt matter should not be over or

hypersensitive and should not exercise this jurisdiction on any exaggerated notion of the dignity of the Judges and must act taking a dispassionate view of the entire matter. It is the settled principles that the rule of contempt is not to be lightly invoked and is not to be used as a cloak to cow down somebody into submission on the basis of fancied claim. It is intended to offer protection to the court itself or to a party in judicial proceeding whose interest may be affected or the authority of the court is lowered and the confidence of the people in the administration of justice is weakened. At the same time, it should be borne in mind that the Court is the protector of public justice and it has a stake in the dignity and protection of those who man the court.

7. We would also not flinch from saying that the apology is not to be used as a weapon of defence forged always to be used as a shield to protect the contemnor as a last resort. It is intended to be evidence of real contriteness. The apology, in order to dilute the gravity of the offence, it has repeatedly been ruled in catena of decisions, should be voluntary, unconditional and indicative of remorse and real contrition and it should be tendered at the earliest opportunity. We have to administer caution to ourselves that we should not be inveigled into accepting apology from those who are addicted to using contemptuous language and making scurrilous attacks and have to their discredit, earlier instance of misfeasance.

8. In the affidavit filed by the contemnor alongwith application seeking discharge, the contemnor in para 3 has set out the life sketch stating that he was enrolled as Advocate in the year 1979 and he has never been involved in any contempt case. In Para 5 of the affidavit, it is averred that he had drawn attention of the court that at one time, the officer should do only one work as at that time, the Reader was recording statement and the officer was busy hearing cases. In paras 7 and 8, he has divulged the details as to what happened in the matter resulting in launching of criminal proceeding against him. In para 9 and 10, the contemnor has dwelt upon the details of the proceeding initiated by the Bar Council on the basis of complaint. In para 12 of the affidavit, the contemnor has referred to circular of this Court in which it is postulated that the statement should be recorded by the presiding officer and not by the Reader. In para 13, the contemnor has alleged that the reference has been made by the officer with ulterior motive to harass him. In para 14, it is averred that in case the Court is of the opinion that the contemnor is guilty of contempt of Court Act, he seeks unconditional apology with the assertion that he will not repeat the alleged misconduct in future.

9. In the affidavit filed by the contemnor in reply to the affidavit sworn by Om Prakash Dixit, the Presiding officer of the Court, he refuted each and every allegations levelled against him stating that the allegations have been made out of malice and just to malign him. He has either denied the existence of any complaint imputing to him scandalous acts or tried to explain in which such complaints or orders were rendered. In totality, he has alleged that the presiding officer was prejudiced towards him and despite all sort of arrogance and provocations from the side

of Presiding officer, he always remained polite submissive and courteous honouring the dignity of the court (vide para 4 of the counter affidavit sworn on 19th Sept 2007).

10. The crux of the entire episode is that this fact is admitted that while the court was busy hearing the cases and the Reader was busy recording the statements of the witnesses, he interrupted the proceeding of the court demurring to the fact that at one time, two proceedings were going on in the court and that he also adverted attention of the Presiding officer to the circular of the High Court in which it is clearly postulated that the statement of witnesses should be recorded in the handwriting of the presiding officer. The presence of the contemnor at the time of incident does indicate that he must have gone there in connection with his case and he must have interrupted the proceedings by asking the court to take up his case as alleged in the reference. Now the question arises whether the contemnor could interrupt the proceeding of the court even if the proceeding of the court interfered with any direction of the High court issued on administrative side. It brooks no dispute that the court was busy hearing the cases as admitted by the contemnor himself. Then the question arises whether the contemnor was justified in interfering with the proceeding which by all reckoning was judicial proceeding. Even assuming that the court was acting contrary to the direction issued by the High Court on administrative side, it was not open to the contemnor to have interfered with the judicial proceeding. It is stated at various places in his affidavit by the contemnor that he adverted attention of the court to the directions contained in circular issued by the High Court **as an officer of the court**. The contemnor is a lawyer and trained in law. He has certain duties towards the court bearing in mind the dignity and prestige of the court. The sequence of events given by the contemnor itself raises a natural inference that at the time of incident, the contemnor must have interrupted the proceedings of the court and uttered words as complained of in the Reference. The contempt becomes graver when the contemnor is an Advocate- well trained in law and acquainted with the niceties and intricacies of legal proceeding and the aura and majesty of law court. Excepting this counter affidavit, there is nothing on record having complexion of an apology tendered by the contemnor. It is at this belated stage that the contemnor expressed oral apology through his counsel though he was present. From the counter affidavit, it leaves no manner of doubt that the contemnor made all out efforts to put the blame on the officers and did not seem to be repentant for his acts which scandalized the court and undermined the dignity in the public estimation.

11. Before we proceed further, we would like to quip here that if the judiciary has to perform its function in a fair and free manner, the dignity and authority of the court has to be respected by all concerned failing which the very constitutional scheme and public faith in the judiciary would run the risk of being eroded. Since the contemnor is an Advocate, the matter requires to be considered with a little more seriousness. An Advocate, we feel called to say, is not exempt from ordinary disability which the law imposes and his position is not inviolable and his privileges cannot extend to interfere with the administration

of justice. On the other hand he is expected to help in sub-serving the course of justice and not impede it in any manner. A legal practitioner has no doubt his duties towards his client but at the same time he has equally important duty and obligation upon him to cooperate with the court in the orderly and pure administration of justice. Any departure would be construed to be violative and neglecting his duties and obligations. A lawyer is a person educated and trained in law. The use of language has to be balanced and in fitness of things within the framework of the law of the land. He cannot and should not be reckless in the use of language. There are barriers which must be known to a lawyer and it should not be crossed. He should not overstep the limits of decency and ethics in the matter of his behavior towards the court.

12. In **Delhi Judicial Service Association v. State of Gujrat**, (1991) 4 SCC 406, the Apex Court held as under.

"The definition of criminal contempt is wide enough to include any act by a person which would tend to interfere with the administration of justice or which would lower the authority of court. The public have a vital stake in effective and orderly administration of justice. The Court has the duty of protecting the interest of the community in the due administration of justice and so, it is entrusted with the power to commit for contempt of court, not to protect the dignity of the Court against insult or injury, but to protect and vindicate the right of the public so that the administration of justice is not perverted, prejudiced, obstructed or interfered with."

13. In **N.B. Sanghvi v. High Court of Punjab and Haryana** (1991) 3 SCC 600 the Apex Court observed as under:

"The tendency of maligning the reputation of Judicial Officers by disgruntled elements who fail to secure the desired order is ever on the increase and it is high time it is nipped in the bud. And, when a member of the profession resorts to such cheap gimmicks with a view to browbeating the Judge into submission, it is all the more painful. When there is a deliberate attempt to scandalize which would shake the confidence of the litigating public in the system, the damage caused is not only to the reputation of the concerned judge but also to the fair name of the judiciary. Veiled threats, abrasive behaviour, use of disrespectful language and at times blatant condemnatory attacks like the present one are often designedly employed with a view to taming a Judge into submission to secure a desired order. Such cases raise larger issues touching the independence of not only the concerned Judge but the entire institution. The foundation of our system which is based on the independence and impartiality of those who man it will be shaken if disparaging and derogatory remarks are made against the Presiding Judicial Officers with impunity. It is high time that we realise that the much cherished judicial independence has to be protected not only from the executive or the legislature but also from those who are an integral part of the system. An independent judiciary is of vital importance to any free society. Judicial independence was not achieved overnight. Since we have inherited this concept from the British, it would not be out of place to mention the struggle strong-willed judges

like Sir Edward Coke, Chief Justice of the Common Pleas, and many others had to put up with the Crown as well as the Parliament at considerable personal risk. And when a member of the profession like the appellant who should know better so lightly trifles with the much endeared concept of judicial independence to secure small gains it only betrays a lack of respect for the martyrs of judicial independence and for the institution itself. Their sacrifice would go waste if we are not jealous to protect the fair name of the judiciary from unwarranted attacks on its independence."

14. The precise words attributed to the contemnor to have been uttered in the court may be quoted below.

"Abhi Jante Nahi Ho, Shiv Raj Singh Chauhan Se Kahne Ke Agrah Na Man Ne Ka Kya Phal Hota Hai"

Thereafter, the contemnor again came back to the court at 11.20 a.m and uttered the following words.

"Maine Bade Bade, Jajon Ko Fit Kar Diya Hai Aap Kya Cheez Hai."

Again, the contemnor is stated to have returned at 12.30 p.m and uttered the following words.

"Aise Shikayat Karoonga Ki Jeevan Bhar Yaad Rakhega."

The contemnor, as would transpire from the averments made in the affidavit sworn by him, has denied to have uttered those words in court and instead, remorselessly set out his own version stating that he adverted attention of the court to the circular issued by the High Court as the presiding officer was busy hearing the cases while the Reader of the Court was recording the statement of the witnesses. It brooks no dispute that as to the incident that happened in court, the version of presiding officer is entitled to pre-eminence and obvious acceptance and only in rarest case it may be disregarded. Nothing has been brought on record to warrant the belief that the contemnor was repentant or showed real contriteness at any stage during the proceeding except at the last stage of the proceeding when he expressed his oral apology that too, through his counsel.

15. The officer namely Om Prakash Dixit has filed affidavit in which he has vehemently denied the allegations. He has also denied that he entertained any prejudices against the contemnor or that he made reference against him actuated by malice against him. He also denied the allegations that the contemnor was threatened at any stage as alleged. He also stated that the contemnor was issued notice under section 228 Cr.P.C. The officer has also referred to his aberrant behaviour indulged in by him in other courts and has given details of the proceeding initiated against him.

16. As stated supra, from the sequence of events, it is quite natural that he indulged in scurrilous attack. He has admitted that he drew attention of the court to the circulars of the High Court when the court was busy hearing the case. Although he denied to have uttered the words attributed to him but in totality of circumstances, it does appear to us that he must have uttered those words and in order to screen himself against possible action, he as a last resort, tendered unqualified apology.

17. The foundation of judicial system which is founded on the independence and impartiality of those who man it will be shaken if disparaging and derogatory remarks are made against the Presiding judicial officers with impurity, the much cherished judicial independence which is of vital significance to any free society has to be protected not only from the executive or the legislature but also from those who are an integral part of the system. The tendency of browbeating the judicial officers into submission is on the increase and when there is deliberate attempt to scandalise, it not only shakes the confidence of the litigating public in the system but causes damages to the reputation of the presiding judge and brings disgrace to the fair name of the judiciary.

18. A Judge or Magistrate has a duty to discharge his judicial functions and he passes order in the manner as he likes fit to the best of his capability in the facts and circumstances of the case. The courts cannot be intimidated to seek favourable orders or to make the court run on his dictate. In the present case, the conduct of the contemnor amounts to intimidating the court and lowering the authority and it clearly amounts to interference with due course of judicial proceedings which were being conducted by the Presiding officer. The power of the High Court of superintendence and control over the subordinate judiciary under Article 235 of the Constitution includes within its ambit the duty protect members of the subordinate courts. In the above conspectus, the charge related to criminal contempt framed against the contemnor is fully established.

19. In the above conspectus, we have no hesitation to say that the charges of criminal contempt established against a practising lawyer cannot be taken lightly who carries the trapping of an officer of the Court whose duty is to assist the Court and uphold the majesty of law and dignity of the person manning the court. No judicial system can tolerate such ignoble act and conduct of a practising Advocate. The crucial question that remains is what would be the appropriate punishment to the contemnor.

20. In connection with whether the apology commends itself for acceptance or not, we may refer to the decision of the Apex Court in **Preetam Pal v. High Court M.P.** 1993 (1) SCC 529 in which the Apex Court observed as under:

"To punish an advocate for contempt of court, no doubt must be regarded as an extreme measure, but to preserve the proceedings of the courts from being deflected or interfered with, and to keep the streams of justice pure, serene and undefiled, it becomes the duty of the court though painful to punish the contemnor in order to preserve its dignity. No one can claim immunity from the operation of the law of contempt if his act or conduct in relation to court or court proceedings interferes with is calculated to obstruct the due course of justice."

21. Reverting to the case in hand, we are of the firm opinion that the apology tendered by the contemnor does not exude bona fide or manifest genuineness ostensibly for the reasons that the apology has been tendered at a stage when the contemnor sensed that his goose was cooked. As stated supra, he has set out his own version referring to various acts of

omission and commission by the presiding officer and lastly stated that he has made reference actuated by malice against him. It is on record that the contemnor after committing contempt for the first time at10.35 a.m, returned to the court at 11.20 and thereafter at 12.30 p.m and each time, he interrupted the court proceeding by shouting land uttering words as quoted above which were not only disrespectful but manifested his aggressive behaviour. By his conduct, he created obstacle in the functioning of the court which was performing judicial function and therefore, it leaves no manner of doubt in our mind that the conduct of the contemnor interfered with due course of administration of justice, undermining the dignity of court. It is in this conspectus, we feel compelled to say that the apology submitted by him does not seem to inspire a real contriteness on his part but is used as a device to screen himself from the rigours of law. The Apex in the aforesaid judgment in M.S. Singhvi has rightly observed that the incidence of contempt is ever on the increase. There is a felt need to curb such incidence. To cap it all, the majesty and dignity of the court has to be preserved. It should not be forgotten that frequent attacks on the dignity of the courts would shake the very foundation of the judiciary. The courts have to perform judicial functions in responsible yet disagreeable ambiance and they require utmost protection. The attack made on presiding officers disparaging in character and derogatory to his/her dignity would vitally shake the confidence of the public in him/her. The vitriolic attacks made on the officer were much more than mere insult and in effect they scandalized the court in such a way as to create distrust in the popular mind and impair confidence of the people in court. The administration of justice must remain independent, clean, fearless and impartial. If an Advocate uses the vile of browbeating the Presiding officer by his toxic vitriolic attack, it is indeed disquieting and should not be viewed with equanimity.

22. In **L.D. Jaikwal v. State of U.P.**, [1984] 3 SCC 405, the Apex Court described the apology as a 'paper apology and refused to accept it in the following words:

"We do not think that merely because the appellant has tendered his apology we should set aside the sentence and allow him to go unpunished. Otherwise, all that a person wanting to intimidate a Judge by making the grossest imputations against him has to do, is to go ahead and scandalize him, and later on tender a formal empty apology which costs him practically nothing. If such an apology were to be accepted, as a rule, and not as an exception, we would in fact be virtually issuing a 'licence' to scandalize courts and commit contempt of court with impunity. It will be rather difficult to persuade members of the Bar, who care for their self-respect, to join the judiciary if they are expected to pay such a price for it. And no sitting judge will feel free to decide any matter as per the dictates of his conscience on account of fear of being scandalized and persecuted by an advocate who does not mind making reckless allegations if the Judge goes against his wishes. If this situation were to be countenanced, advocates who can cow down the Judges, and make them fail in line with their wishes, by threats of character assassination and persecution, will be preferred by the litigants to the advocates who are mindful of

professional ethics and believe in maintaining the decorum of courts."

23. In the above perspective, it cannot be ruled out that the contemnor set up the entire theory in order to save his skin. In this view of the matter, the apology offered does not commend to us for acceptance and it is turned down.

24. As a result of foregoing discussion, the reference made to this Court is allowed and the contemnor Shiv Raj Singh Chauhan, Advocate is held guilty of criminal contempt.

25. We accordingly convict him under section 12 of the Contempt of Courts Act and sentence him to undergo simple imprisonment for three months and to pay a fine of Rs.20,000/-. In default, it may be prescribed, contemnor shall undergo further simple imprisonment for two weeks. However, the punishment so imposed shall be kept in abeyance for a period of sixty days so as to enable the contemnor to approach the Apex Court if so advised. It needs hardly be said that immediately after expiry of sixty days in case no stay order is furnished by the contemnor, he would be taken into custody forthwith to serve out the sentence immediately.

26. The matter shall be listed before this Court in the second week of May 2010 for ensuring compliance.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.02.2010

BEFORE
THE HON'BLE VINOD PRASAD, J.

Criminal Appeal No. 2174 of 2007

Shami Ullah ...Appellant
Versus
State of U.P. ...Respondent

Counsel for the Appellant:
Sri A.B. Saran
Sri C.B. Mishra
Sri Anil Kumar Srivastava
Sri Apul Mishra
Sri D.S. Yadav
Sri Kamol Krishna
Sri S.K. Chandel
Sri S.K. Chandra
Sri Sudhir Kumar

Counsel for the Respondent:
Sri R.C. Tewari
G.A.

Criminal Appeal-offence under section 376/506 IPC and 3 (1)(12) SC/ST Act-conviction of 7 years R.I. with fine of Rs.2000/- victim a 12 years girl-while returning from guana grove-near the house of appellant-engaged in conversation and latter on taken her fodder room-outraged her modesty by gagging her mouth-plea of consent-not available in case of minor-moreover in absence of eye witness-victim could have concealed very conventionally so far delay in lodging FIR-cogent and sufficient acceptable explanation given-held-conviction justified.-appeal dismissed.

Held: Para 21 & 22

Above view regarding age takes me to another important aspect of the appeal that once victim was a minor, her

consent to Rapuit carnalitor cognovit, was of no consequence in judging the offence committed by the appellant. Albeit not much argument was advanced by Sri Saran on this aspect but by making submissions that the victim did not sustain any injury on her private part and her person he has advanced two submissions firstly that it was a consent case and secondly that no rape was committed at all. In view of above discussion, the case of consent is an impossibility, moreso when there was no eye witness to the said indecent act and victim could have concealed it very conveniently, but she has not done so. The two counter productive arguments can not be coalesced to accept defence suggestion.

Turning towards delay in lodging of the FIR, I find that the same was lodged without any delay, which has been explained by cogent, sufficient and acceptable explanation. Now turning towards some of the decisions of the apex court, I find that the decision relied upon by the appellant's counsel reported in AIR 2009 SC 858: Rajoo And Others versus State Of M.P. is of no help to him . That was a case which had entirely different fact scenario all together in number of accused, in manner of happening of the incident, victim going with the accused on a scooter without rising any alarm etc. and more over that was a case of gang rape without any supporting medical evidence. The facts of that decision as are referred to in para 2 of the said judgement by the apex court are not in consonance with the facts of the present appeal. Here, there was no reason for the victim, a young girl of 14 years of age, to cook up an false story and narrate it to her mother and then to her father to blemish her own self. Serologist report establishes her allegations in full.

Case law discussed:

AIR 2006 SC 1267, AIR 2009 SC 858**,** AIR 2006 SC 1267, AIR 2006 SC 2214, AIR 2005 SC 222.

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

1. Challenge in this appeal by the appellant accused Shamiullah is to the judgement and order of his convictions under sections 376/506 IPC and imposed sentences of 7 years RI with fine of Rs. 5000/ and in default of payment of fine to under go six months further imprisonment on the first score, and one year RI with fine of Rs. two thousand and in default of payment of fine to under go further two months imprisonment on the second count, with additional direction that both the sentences shall run concurrently, recorded by Additional Session's Judge, Fast track court No. 2, district Kaushambi in S.T. No. 279 of 2003, State versus Shamiullah, under sections 376/ 506 IPC and section 3(1) (12) SC/ST Act, P.S. Mohammadpur Paisa, District Kaushambi.

2. Background facts of the appeal are that victim, PW2, aged about 14 years, is the daughter of informant Mohan agriculturist, PW1, resident of village Jagannathpur, PS Mohammadpur Paisa, district Kaushambi with the appellant as her co villager. On the unfortunate day 23.12.2001 at 5 p.m., when the victim PW2, was returning to her house from the guava grove of Mian Baba, and reached near the house of the appellant, she was engaged in a conversation by the appellant who then took her to his fodder room, where he outraged her modesty by gagging her mouth from a piece of cloth and intimidating her with life, when she attempted to raise alarm. On her coming back to her house, victim divulged the faux pas to her mother, and later on to the informant father Mohan, PW1, on his return after irrigating his field. Informant PW1 got a written report, Ext. Ka 1,

scribed by Bachchi Lal and then lodged it at police station Mohammadpur Paisa, following day of the incident on 24.12.2001 at 4.15 p.m. measuring a distance of 6 km from his village. Ram Bahadur Yadav, HCP, PW 4, registered the crime, prepared the chik FIR, Ext. Ka 4 and the relevant GD entry Ext. Ka 5. An attir (underwear) of the victim was also seized by him and it's recovery memo Ext. Ka 2 was also prepared.

3. Banwari Lal, Circle Officer, Sirathu, district Kaushambi, PW 6, commenced the investigation of the crime, copied the chik FIR and GD entry, interrogated the victim and the informant and recorded their statements. Arriving at the spot and conducting spot inspection C.O. PW6, prepared the site plan Ext. Ka 8 and thereafter penned down the statements of Smt. Kalpati, victim's mother, and those of Indra pal and Rakesh, two witnesses of attir seizure memo. PW6 , thereafter copied injury report and x-ray report of the victim, and then copied 164 Cr.P.C. statement of the victim in the case diary. Investigating Officer had also sent for serologist examination the under wear of the victim, which report by the serologist is Ext. Ka 10. Prima facie offences being disclosed against the appellant accused, that the C.O. Investigating Officer, charge sheeted the appellant vide his report/ charge sheet, Ext. Ka 9 dated 16.1.2002.

4. Medical examination of the victim was done at district Hospital Allahabad, by Dr. Usha Singh, PW5, on 25.12.2004 at 11.40 a.m, vide Ext. Ka 6, who was brought to her by Const. Pyare Lal. In general examination doctor found her teeth 7+7 / 7+7, weight 38 kg and height 5 ½ , breasts developed, pubic and axillary hair scanty, and no mark of injury over any part of her body.

5. On internal examination doctor noted no mark of injury or blood stains on the private part of the victim, whose vaginal smear slid was prepared and sent for pathological examination to MLN hospital for noting presence of spermatozoa. Insertion of two fingers was made easy. Uterus was of normal size with no pain and tenderness present in it. Mensturation had not occurred. Doctor also advised for x-ray of wrist, elbow and knee joints and reserved her final opinion to be given after those test reports. Pathologist report dated 27.12.2001 indicated that no spermatozoa was detected in the vaginal smear of the victim where as Radiologist report dated 26.12.2001(Ext. Ka 3) indicated that Radius and Ulna Bones of the victim were not united (fused), the epiphysis of medial epicondyle head of Radius and old cranor process of ulna bones have not completely united with their respective shafts. The epiphysis of lower end of femer and upper end of Tibia and Fibula bones have not completely united with their respective shafts. According to the supplementary report Ext. Ka 7, by the doctor PW 5, based on Radiologists and Pathologist reports, victim was found to be a minor aged about 14 years, however no defenite opinion about rape could be given by her.

6. Serologist report by Forensic science laboratory, Lucknow, dated 15.5.2002, Ext. Ka 10, indicated that on the underwear of the victim, semen and human sperm, both were found.

7. Civil Judge, (JD)/ AJM, Kaushambi, took cognizance of the offence on the basis of charge sheet, Ext.

ka 9 and summoned the accused appellant on 20.1.2002 and thereafter finding his case triable by court of Session's, committed it on 6.10.2003 and resultantly before the Session's Court S.T. No. 279 of 2003, State versus Samiullah was registered against the accused appellant.

8. Additional Session's Judge, Kaushambi, charged the accused appellant for offences under sections 376, 506 I.P.C. and 3 (1) (XII) SC/ST Act, which charges were abjured by the accused appellant hence trial proceeded against him.

9. In an effort to cement appellant's guilt prosecution examined six witnesses in all, out of whom Mohan informant PW 1 and Victim, PW 2 were the fact witnesses. Rest of the formal witnesses included Senior Radiologist Dr. V.K.Sahu PW3, HCP Ram Bahadur Yadav, PW4, Dr. Usha Singh, PW5, and C.O. Banwari Lal, Investigating Officer PW6.

10. PW1 informant Mohan narrated his FIR allegations during his examination in the court and deposed further that he had returned to his house after an hour of the incident and victim was 14 years of age at that time and he had gone to the police station next day because of the falling of night. He has proved his written report as Ext Ka 1 which he had got scribed at Mohammadpur Painsa. He has also proved his signature on the recovery memo of the under wear of his daughter. He had also testified that the victim was sent for her medical examination to Allahabad accompanied by a constable, where she was medically examined and her x-ray was done on the subsequent day. This witness was subjected to a very lengthy cross examination which is woefully pathetic. Majore portion of it centers round developing some or the other unappealing reasons for him to falsely implicate the appellant on a false charge of rape. It was suggested firstly that to get financial aid from the government that he had implicated the appellant, then on the caste line the suggestion was taken and then it was endevoured that he had falsely implicated the appellant because of one Ishtiaq Ahmad, grand son of Mian Baba, whose quava grove victim was guarding. It was also suggested to him that because of saw machine enemity with the appellant and Istiaq Ahmad because appellant had complained about sawing of green woods by Istiaq Ahmad and had got it seized by the DFO, that the informant has falslely implicated the appellant. PW 1 further evidenced that he was irrigating his wheat field and at the time of the incident the members of appellant's house were at their fields. He had further deposed that he had gone to the police station on a jeep of village Pradhan, who was a muslim. He has denied categorically the suggestion that victim was never subjected to any rape by the appellant.

11. PW2, victim, in her deposition before the court narrated the incident described in the FIR and testified that appellant had dragged her inside his fodder room where he had raped her against her consent on gun point by gagging her mouth and threatening her entire family with life. She also narrated that at the time of the incident she was wearing frock and an underwear. She narrated the incident to her mother on her return to her house and later on the same was also divulged to the informant after his return from the field. She has also

testified that her 164 Cr.P.C. statement was recorded by a Magistrate. On being cross examined in bits and pieces at the interval of many days, she deposed that she is the youngest of the three sisters and she had gone to guard guava grove and after the incident she could move with difficulty. She confirmed informant's version of irrigating his field at the time of the incident. She further evidenced that the house of accused is at a distance of three bighas from her house. She showed her ignorance regarding map of appellant's house as she was dragged inside the room straight way. There are some embellishment in her statement regarding sustaining of some abrasions in dragging and actual raptus carnal cognovite and oozing out of blood. She has further disclosed that she was undressed and thereafter sexually molested. She has further deposed that after her returned to her house she had changed her cloths and had worn sari and petticot. She further testified that she had not washed her under wear but had washed her rest of attires next day morning when she had bathed herself. She had gone to the police station after bathing. She had accepted that she had received some money from the government but denied the defence suggestion that she was not ravished of her prestige and that no such incident as narrated by her ever took place and she had falsely implicated accused appellant because of rapacity under pressure of leader because of harbingered enemity.

12. The two doctors formal witnesses, Senior radiologists DR. V.K Sahu PW3 and Dr. Usha Singh PW5, had evidenced and proved their x-ray report (Ext Ka 3), and the medical examination report Ext. Ka 6 and Ext. Ka 7, and have confirmed their findings already mentioned above and hence, for the sake of brevity, the same are not being repeated here. PW 5 had testified that the victim was 14 years of age and she has denied the suggestion that she has reduced the age of the victim by five years. There is also a serologist report dated 15.5 2002, Ext. Ka 10, which indicates that human semen and sperm were found on the underwear of the victim alleged to have been worn by her at the time of the incident.

13. HCP, Ram Bahadur (PW4) has proved registration of case and preparation of Chik FIR, Ext.Ka 4 and GD entry Ext. Ka 5. He has also proved siezure memo of under wear as Ext. Ka 2.He has further disclosed that the victim was sent for medical examination in company of a femal constable. Investigating officer Banwari Lal, PW 6 testified various investigatory steps taken by him. He has further deposed that in her statement under section 161 Cr.P.C., victim had stated gagging of her mouth by the accused. This witness has confirmed some of the contradictions and omissions occurred in the testimony of the victim. Major part of his cross examination is regarding absence of blood and sperm on the victim's corpus and her drappers.

14. Trial Judge found the case of the prosecution proved to the hilt and guilt of the appellant established beyond any shadow of doubt, consequently it convicted and sentenced him by the impugned judgement and order, as is already mentioned above, hence this appeal questioning the sustainability of the said judgement.

15. I have heard Sri A.B. Saran learned senior counsel in support of this appeal and Sri Patanjali Misra, learned AGA in opposition.

16. Learned counsel for the appellant threw challenge to the conviction and sentence of the appellant by canvassing that the whole prosecution story is false and bogus and no rape was committed upon the victim. He submitted that medical report interdict the charge of rape and the appellant has been falsely implicated to settle the scores of rivalry. Learned senior counsel further harangued that victim is not a reliable witness and her testimony does not inspire any confidence at all and therefore it is very unsafe to act on her testimony. Neither her conduct is natural nor the medical report of internal examination establish the framed charges against the appellant. No hue and cry was raised by the victim and there was no external mark of injury detected on her person, although she has stated that she was dragged pulling from the hand and she had sustained abrasions. It was submitted that probably for the lust of economic gains that the appellant was roped in this false charge and the present crime was never committed .It was further argued that the FIR was lodged belatedly with false allegations. Lastly, it was concluded by contending that the instant appeal deserves to be allowed and the appellant be acquitted of the charges levelled against him and his conviction and sentence be set aside.

17. Per contra, learned AGA submits that the impugned judgement is sustainable and the guilt of the appellants is proved beyond doubt and therefore instant appeal by the appellant sans merit and be dismissed.

18. I have considered the advanced submissions and have perused the trial court record as well as file of this appeal. Rape is not only a social crime but is an ignominy for the victim and faux pas for the whole family. In our society, false accusation of rape by a damsel, who is not a trollop, risking her most esteemed honour and self prestige with further risk of ostracization or social spitness, still, is abhorred with temerity. Seldom such extreme steps are taken where a young girl anoint a false rape charge on her person, that too, by such a rapist, who had no valentine or cupid connection with her. Countenancing such a contention that the victim has done so to settle a dispute, by her father, is so gibberish a submission that it deserves rejection without a further pondering thought. In the decision of **Dinesh @ Budha versus State of Rajasthan AIR 2006 SC 1267** Supreme Court has observed thus:-

"6.Sexual violence apart from being a dehumanizing act is an unlawful intrusion on the right of privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity - it degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical injuries but more indelibly leaves a scar on the most cherished possession of a woman i.e. her dignity, honour, reputation and not the least her chastity. Rape is not only a crime against the person of a woman, it is a crime against the entire society. It destroys, as noted by this Court in Shri Bodhisattwa Gautam v. Miss Subhra Chakraborty (AIR 1996 SC 922), the entire psychology of a woman and pushes her into deep emotional crisis. It is a

crime against basic human rights, and is also violative of the victim's most cherished of the Fundamental Rights, namely, the Right to Life contained in Article 21 of the Constitution of India, 1950 (in short the 'Constitution'). The Courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. A socially sensitized Judge, in our opinion, is a better statutory armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and provisos."

19. Present appeal is one such example. Victim, PW2, a young girl of 14 years is alleged to have been ravished physically by the appellant, when she was returning to her house after guarding a guava grove taken on lease by her informant father PW1. According to the prosecution allegations, both victim and the accused, were co villagers, which fact has not been thrown open to challenge by the accused hence identity of the appellant is not in doubt and has not been challenged as well by the appellant. This rules out a case of false identity.

20. The report by the doctor regarding age of the victim is well established as she was found to be a minor aged about 14 years. Her physical examination with ossification test materials farther such an opinion. Learned counsel for the appellant also did not question the deposition of doctor Usha Singh, where she is categorical in her statement that the victim was only 14 years of age and has denied the defence suggestion that she was 19 years of age. Victim also disclosed her age to be 18 years at the time of her testimony in the trial court , which was recorded four years after the incident and hence at the time of the incident she must have been 14 years of age. It is very significant to note that the accused did not seriously questioned the victim on this aspect of the matter and her cross examination is woefully deficient in that respect. Attour, father PW 1, has also not been tested seriously by the accused on the said aspect. In such background evidences it is not difficult to conclude that the victim was a minor at the time when she was deprived of her most precious honour.

21. Above view regarding age takes me to another important aspect of the appeal that once victim was a minor, her consent to Rapuit carnalitor cognovit, was of no consequence in judging the offence committed by the appellant. Albeit not much argument was advanced by Sri Saran on this aspect but by making submissions that the victim did not sustain any injury on her private part and her person he has advanced two submissions firstly that it was a consent case and secondly that no rape was committed at all. In view of above discussion, the case of consent is an impossibility, moreso when there was no eye witness to the said indecent act and victim could have concealed it very conveniently, but she has not done so. The two counter productive arguments can not be coalesced to accept defence suggestion.

Turning towards another argument that the incident did not occur at all and both the facts witnesses are deposing falsely against the accused appellant, it is to be noted that both PW 1 and PW 2 have supported their case well. Victim is the sole witness of actual outraging of her modesty. Why she will squatt on her own

honour without any animous towards the appellant is impossible to perceive. To her it was suggested that to get the money and to settle her father's score that she has falsely implicated the appellant in this false case of rape. To say the least this is adding insult to injury. Victim categorically denied having any relation with the accused. Both of them belonged to two different castes with out any thing in common. It was not suggested to her that she was having an affair with the accused. Residence of the two are also a part. There has been no love labour lost between them. Sri Saran also failed to bring any convincing reason for the victim to depose falsely against the appellant. The suggestion that for fiscal benefit she cooked up a false charge of ignominy ruining her self prestige is totally codswallop. PW2 victim was cross examined very minutely on details of intercourse, to which she has replied convincingly. No doubt, there are natural aberrations and embellishments in her description of sexual act and some contradictions has creeped in her evidence, but they were bound to occur, because observations and memory of an adolescent of 14 years after an interval of four years are bound to fade. Over and above, the record of the trial court reveals that victim was cross examined in bits and pieces on many dates after long intervals. This must have hampered her memory by efflux of time. Had she been a tutored witness, there would not have been such contradictions in her testimony in describing rape being committed on her. The natural contradictions makes her even more reliable and truthful witness, whose testimony is confidence inspiring. Omissions and contradictions in her depositions are not of such a degree as to whither out the entire prosecution version as was contended by learned counsel for the appellant. Additionally, victim's evidence finds it's corroboration in the serologist report, Ext. Ka 10, where on her underwear semen and spermatozoa were detected. Accused appellant has failed to question this report for it's genuineness and acceptability. If there was no rape, there would not have been any such report by an independent agency, having no animous with the appellant. There was no earthly reason for the victim and her father to concoct a false charge against the appellant. They could have got money, even without naming the appellant as the culprit. Both father and daughter have stood the test of their cross examinations on the anvil of probability and I find them reliable and trustworthy witnesses. The second part of argument raised by appellant's counsel is also therefore repelled.

22. Turning towards delay in lodging of the FIR, I find that the same was lodged without any delay, which has been explained by cogent, sufficient and acceptable explanation. Now turning towards some of the decisions of the apex court, I find that the decision relied upon by the appellant's counsel reported in **AIR 2009 SC 858: Rajoo And Others versus State Of M.P.** is of no help to him . That was a case which had entirely different fact scenario all together in number of accused, in manner of happening of the incident, victim going with the accused on a scooter without rising any alarm etc. and more over that was a case of gang rape without any supporting medical evidence. The facts of that decision as are referred to in para 2 of the said judgement by the apex court are not in consonance with the facts of the present appeal. Here, there was no reason for the victim, a young girl

of 14 years of age, to cook up an false story and narrate it to her mother and then to her father to blemish her own self. Serologist report establishes her allegations in full.

23. In **Dinesh @ Budha versus State of Rajasthan : AIR 2006 SC 1267** it has been observed by the apex court as follows:-

"11..In the Indian Setting refusal to act on the testimony of the victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the society and when in the face of these factors the crime is brought to light, there is inbuilt assurance that the charge is genuine rather than fabricated. Just as a witness who has sustained an injury, which is not shown or believed to be self-inflicted, is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of sex offence is entitled to great weight, absence of corroboration notwithstanding. A woman or a girl who is raped is not an accomplice. Corroboration is not the sine qua non for conviction in a rape case. The observations of Vivian Bose, J. in Rameshwar v. The State of Rajasthan (AIR 1952 SC 54) were:

"The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge...".

24. In **Om Prakash Versus State of U.P.: AIR 2006 SC 2214**; apex court has observed thus:-

"13. It is settled law that the victim of sexual assault is not treated as accomplice and as such, her evidence does not require corroboration from any other evidence including the evidence of a doctor. In a given case even if the doctor who examined the victim does not find sign of rape, it is no ground to disbelieve the sole testimony of the prosecutrix. In normal course a victim of sexual assault does not like to disclose such offence even before her family members much less before public or before the police. The Indian women has tendency to conceal such offence because it involves her prestige as well as prestige of her family. Only in few cases, the victim girl or the family members has courage to go before the police station and lodge a case. In the instant case the suggestion given on behalf of the defence that the victim has falsely implicated the accused does not appeal to reasoning. There was no apparent reason for a married woman to falsely implicate the accused after scatting her own prestige and honour."

25. In yet another decision **State of M.P. Versus Balu: AIR 2005 SC 222**; it has been held by the supreme court as follows:-

"The Trial Court, in our opinion, rightly rejected this contention of the respondent herein. The prosecution during the course of investigation had seized the clothes worn by the victim as

well as the underwear worn by the respondent which also on examination by the Serologist was found to contain blood which also supported the prosecution case that the respondent had sexual intercourse with the victim. PW2 who knew the respondent prior to the incident had no difficulty in identifying the respondent as the person who committed rape on her, also stated that the respondent had covered her mouth with a towel to prevent her from shouting for help. Having perused the evidence like the trial Court, we also find no reasons to disbelieve her evidence. Hence, the so-called consent alternatively pleaded by the counsel for the respondent cannot be accepted. The argument of non-consideration of the statement of the accused recorded under Section 313, Cr.P.C. to the effect that there was animosity between the family of the victim and the accused is liable to be rejected because one of the defences of the accused is that there was consent on the part of the victim to have sex with him. These two stands being self-contradictory, cannot be accepted.

15. Thus, having considered the material on record and having heard the arguments addressed on behalf of the parties, we find no merit in the argument of the learned counsel for the respondent that the Trial Court erroneously convicted the respondent."

26. No other argument was advanced by learned senior counsel for the appellant in support if this appeal, which I find to be devoid of merits and is hereby dismissed and the conviction and sentence of the appellant as has been implanted by the trial court in the impugned judgement and order is hereby confirmed. Appellant is in jail. He shall remain in jail to serve out remaining part of his sentence.

27. Let a copy of this judgement be certified to the trial court for it's intimation and further action.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.02.2010

BEFORE
THE HON'BLE SATYA POOT MEHROTRA, J.
THE HON'BLE KASHI NATH PADNEY, J.

Civil Misc. Writ Petition No. 3287 of 2010

Dr. Ramesh Chandra Agarwal ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri K.K. Srivastava
Sri K.P. Tiwari

Counsel for the Respondents:
S.C.

Constitution of India, Article 226- Benefits of G.P.F. and Pension Scheme petitioner a reader in P.G. College-had - opted-contributory Provident Fund Scheme-retirement due on 30.6.2012 getting benefit of academic session-19.11.2007 applied for charge of option from C.P.F. to G.P.F. Scheme in terms of G.O. dated 25.08.1999-refusal by placing reliance upon G.O. 12th July 2000 -not sustainable keeping in view of judgment of Shir Gopal Gupta-offered by Apex Court.

Held: Para 17 & 18

We may mention that in *Civil Misc. Writ Petition No. 13169 of 2008 (Kirti Chand Gupta and others Vs. State of U.P. and others)* connected with various other Writ Petitions, similar controversy was involved. A Division Bench of this Court

by its Judgment and Order dated 16th April, 2009 (Annexure 8 to the Writ Petition) decided the said Writ Petitions following the decision of this Court in Dr. Shri Gopal Gupta (supra), and gave directions to the respondents in the said Writ Petitions for extending the benefit of the said Government Order dated 25th August, 1999 to the petitioners in the said Writ Petitions.

Respectfully following the above decisions, we decide the present Writ Petition giving similar directions.

Case law discussed:

Writ Petition No. 25140 of 2001, Writ Petition No. 13169 of 2008.

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

1. Heard Sri K.K. Srivastava, learned counsel for the petitioner and Sri Pankaj Saxena, learned Standing Counsel appearing for the respondents.

2. The learned counsel for the parties are agreed that the controversy involved in the present Writ Petition is covered by the earlier decisions of this Court, referred to hereinafter in the present Judgment, and therefore, the present Writ Petition may be decided at this stage itself.

3. As per the averments made in the Writ Petition, the petitioner is working on the post of Reader in the Department of Chemistry in D.N. (P.G.) College, Meerut. The date of birth of the petitioner is 11.11.1949, and he is to attain the age of superannuation on 10.11.2011, and is due to retire on 30.6.2012 after getting Session benefit.

4. It appears that initially the petitioner opted for Contributory Provident Fund Scheme (CPF). However, by the Option Letter dated 19.11.2007 (Annexure 4 to the Writ Petition), the petitioner sought to change his option from Contributory Provident Fund Scheme (CPF) to General Provident Fund Scheme (GPF) with Pension. The said Option Letter was submitted by the petitioner pursuant to the Government Order dated 25.8.1999 (Annexure 3 to the Writ Petition).

5. It is, interalia, prayed in the Writ Petition that writ, order or direction in the nature of mandamus be issued directing the respondents to accord the benefit of GPF plus Pension Scheme to the petitioner in accordance with the Government Order dated 25.8.1999, and various decisions of this Court.

6. Facts relevant for deciding the present Writ Petition are as under.

7. The State Government from time to time has issued Government Orders permitting the teachers to exercise their options for switching over from Contributory Provident Fund Scheme (CPF) to General Provident Fund Scheme (GPF) with Pension.

8. The last such Government Order was issued on 25.8.1999 (Annexure 3 to the Writ Petition) which permitted the teachers to exercise their options before one year of their retirement. However, by the Government Order dated 5/6.5.2000, a clarification was issued that option could be exercised only by such teachers, who were governed under the General Provident Fund Scheme and not under the Contributory Provident Fund Scheme.

9. It appears that this Court in ***Civil Misc. Writ Petition NO. 25140 of 2001***

(Dr. Shri Gopal Gupta and others Vs. State of U.P and others) considered the aforesaid Government Orders dated 25.8.1999 and 5/6.5.2000, and held by the Judgment and Order dated 26th October, 2006 as follows:

"....The policy of the Government providing benefit of GPF plus pension Scheme at no point of time denied the benefits to those teachers who had not opted for the said scheme prior to 25th August, 1999 or during the period prescribed either in the Government Order of 1980 or 1982. Since the scheme remained in existence and time for giving option was extended from time to time, the interpretation given by the State to the aforesaid Government order dated 25th August, 1999 and the clarifications dated 5th June, 2000 and 12th July, 2000 cannot be sustained in the eyes of law.

The petitioners who had applied/opted for GPF plus pension scheme though they were covered under the CPF scheme, one year before their date of retirement i.e. during the extended period as per the Government Order dated 25th August, 1999 could not have been refused the said benefit on the ground that the aforesaid scheme/option was open only for those teachers who are covered by the GPF scheme....."

10. Copy of the said Judgment and Order dated 26th October, 2006 has been filed as Annexure 2 to the Writ Petition.

11. It further appears that the State Government filed a Special Leave Petition before the Supreme Court being Petition for Special Leave to Appeal (Civil) No. 722 of 2008.

12. By the Order dated 3.11.2008 (Annexure 6 to the Writ Petition), their Lordships of the Supreme Court dismissed the said Special Leave Petition.

13. Thus, the aforesaid Judgment and Order dated 26th October, 2006 became final.

14. This position has not been disputed by the learned Standing Counsel.

15. In our opinion, the petitioner in the present Writ Petition, who exercised his option by the Option Letter dated 19.11.2007 (Annexure 4 to the Writ Petition) in terms of the Government Order dated 25.8.1999, is entitled to the benefit of GPF Scheme with Pension.

16. As noted earlier, the petitioner is due to retire on 30th June, 2012, and therefore, the option exercised by the petitioner by the Option Letter dated 19.11.2007 has been exercised as per the requirement of the said Government Order dated 25.8.1999.

17. We may mention that in ***Civil Misc. Writ Petition No. 13169 of 2008 (Kirti Chand Gupta and others Vs. State of U.P. and others)*** connected with various other Writ Petitions, similar controversy was involved. A Division Bench of this Court by its Judgment and Order dated 16th April, 2009 (Annexure 8 to the Writ Petition) decided the said Writ Petitions following the decision of this Court in Dr. Shri Gopal Gupta (supra), and gave directions to the respondents in the said Writ Petitions for extending the benefit of the said Government Order dated 25th August, 1999 to the petitioners in the said Writ Petitions.

18. Respectfully following the above decisions, we decide the present Writ Petition giving similar directions.

The Writ Petition is accordingly allowed.

19. The respondents are directed to give benefit of the Government Order dated 25th August, 1999 in terms of the option exercised by the petitioner within three months of the filing of the certified copy of this Order before the Director of Higher Education, Uttar Pradesh, Allahabad.

20. On the facts and in the circumstances of the case, the parties will bear their own costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 23.02.2010

BEFORE
THE HON'BLE VIJAY KUMAR VERAMA, J.

Criminal Misc. Application No. 4273 of 2010

Amit Kumar and others ...Appellants
Versus
State of U.P. and another. ..Opposite party

Counsel for the Applicants:
Sri Brij Lal Shukla

Counsel for the opposite party:
Sri S.K. Upadhyay
A.G.A.

Code of Criminal Procedure- Section 482- Quashing of Criminal proceeding-offence under section 498A, 323, 504 I.P.C. With ¾ D.P. Act matrimonial dispute informant already got rejected her maintenance proceeding after having Rs.100000/-towards one time maintenance- the object of introducing Chapter XX-A to present the torture of a woman- if the criminal proceeding allowed to continue-would be a pediment in settlement of dispute apart from harassment -proceeding quashed.

Held: Para 9

In view of the discussion made herein-above, I am of the considered opinion that it would be an abuse of the process of the Court, if the criminal proceeding of the aforesaid criminal case is allowed to continue. Therefore, to do the complete justice, the proceedings of the said criminal case should be quashed by this Court in its inherent jurisdiction under section 482 Cr.P.C.

Case law discussed:
2003(46)ACC779, 2006(30JIC 135 (Alld.), 2005(51)ACC217.

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

1. By means of this application under section 482 Cr.P.C. of the Code of Criminal Procedure (in short, 'the Cr.P.C.'), the applicants (1) Amit Kumar, (2) Smt. Mahendri, (3) Smt. Savita, (4) Smt. Rajnees, (5) Smt. Mamchandra, (6) Amrish, (7) Rajesh and (8) Suneel have invoked inherent jurisdiction of this Court for quashing of the proceedings of criminal case no. 2603 of 2009 (State Vs. Amit Kumar and others) under section 498A, 323, 504 I.P.C. and 3/4 D.P. Act arising out of crime no. 242 of 2008, P.S. Mahila Thana, Meerut pending in the Court of Chief Judicial Magistrate, Meerut.

2. Shorn of unnecessary details, the facts leading to the filing of the application under section 482 Cr.P.C., in brief, are that marriage of applicant no. 1 Amit Kumar and opposite party no. 2 Smt. Aadesh Kumari took place on

06.03.2006, but subsequently some misunderstanding and disputes were developed between the couple, as a result of which Smt. Aadesh Kumari lodged an FIR against the applicants at P.S. Mahila Thana, Meerut on 24.02.2008, where a case under section 498-A, 323, 504 I.P.C. and 3/4 D.P. Act was registered at crime no. 242 of 2008. After investigation, charge sheet has been submitted against the applicants, on which cognizance has been taken and on the basis of that chargesheet, criminal case no. 2603 of 2009 was registered against the applicants, which is pending in the Court of Chief Judicial Magistrate, Meerut. An application for granting maintenance under section 125 Cr.P.C. was also moved by opposite party no. 2 Smt. Aadesh Kumari against her husband Amit Kumar (applicant no. 1) in Family Court, Meeurt, which was registered as case no. 44 of 2009. During the pendency of these cases, due to intervention of some well-wishers and relatives, the parties settled their dispute, in consequence whereof the applicant no. 1 paid Rs.1,00,000/- to Smt. Aadesh Kumari as lumpsum maintenance, on the basis of which, the application under section 125 Cr.P.C. has been rejected vide order dated 23.08.2009 (annexure-5) passed by the Family Court, Meerut. As a result of the compromise entered into between the parties, the applicants have invoked the inherent jurisdiction of this court to quash the proceeding of criminal case referred in para (1) above.

3. I have heard arguments of Sri Brij Lal Shukla, learned counsel for the applicants, Sri S. K. Upadhyay, learned counsel appearing for the opposite party no. 2 and learned AGA for the State of U.P.

4. The parties have filed joint affidavit annexing therewith a photostat copy of the compromise entered into between them. In para 5 of the compromise, it is stated that the parties would get criminal case no. 2603 of 2009 arising out of case crime no. 242 of 2008 pending in the court of CJM, Meerut dismissed. In the joint affidavit, which has been filed by the applicant no. 1 Amit Kumar and Smt. Aadesh Kumari (opposite party no. 2), it is stated that the parties have settled their matrimonial dispute amicably out of the court.

5. Drawing my attention towards the case of ***B.S. Joshi and others Vs. State of Haryana and another 2003(46) ACC 779*****,** it was submitted by the learned counsel for the applicants that in view of the compromise entered into between the parties, this Court should invoke its inherent jurisdiction to quash the entire proceedings of criminal case no. 2603 of 2009 (State Vs. Amit Kumar and others) under section 498A, 323, 504 I.P.C. and 3/4 D.P. Act arising out of crime no. 242 of 2008, P.S. Mahila Thana, Meerut pending in the Court of Chief Judicial Magistrate, Meerut, as matrimonial dispute has been settled by the parties and with their consent, they have separated themselves and whole time maintenance also been paid to opposite party no. 2 Smt. Aadesh Kumari in the proceeding under section 125 Cr.P.C.

6. Since the parties have settled their matrimonial dispute amicably, hence this Court can quash the proceedings of aforesaid criminal case in its inherent jurisdiction under section 482 Cr.P.C. The Hon'ble Apex Court in the case of **B. S. Joshi Vs. State of U.P** (supra) has made

the following observations in para 12 of the report at page 784:-

"There is no doubt that the object of introducing Chapter XX-A containing section 498-A in the Indian Penal Code was to prevent the torture to a woman by her husband or by relatives of her husband. Section 498-A was added with a view to punishing a husband and his relatives who harass or torture the wife to coerce her or her relatives to satisfy unlawful demands of dowry. The hyper-technical view would be counter productive and would act against interests of women and against the object for which this provision was added. There is every likelihood that non-exercise of inherent power to quash the proceedings to meet the ends of justice would prevent women from settling earlier. That is not the object of Chapter XXA of Indian Penal Code."

7. It is also held by the Hon'ble Apex Court in para 13 of the report of **B. S. Joshi Vs. State of U.P** (supra) that the High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint and section 320 of the Code does not limit or affect the powers under section 482 of the Code.

8. In the case of ***Ausaf Ahmad Abbasi vs. State of U.P. And another 2006 (30 JIC 135 (Alld.))***, the proceeding of criminal case under section 498A, 323, 504, 506 IPC and 3/4 D.P. Act was quashed on the basis of the compromise entered into between the parties. Reference in this regard may be made to the case of ***Ruchi Agarwal vs. Amit Kumar Agrawal & others 2005 (51) ACC 217*** also, in which the Hon'ble Apex Court quashed the proceedings of the criminal case under section 498A, 323, 506 IPC and 3/4 D.P. Act, due to the compromise entered into between the parties in the proceeding under section 125 Cr.P.C.

9. In view of the discussion made herein-above, I am of the considered opinion that it would be an abuse of the process of the Court, if the criminal proceeding of the aforesaid criminal case is allowed to continue. Therefore, to do the complete justice, the proceedings of the said criminal case should be quashed by this Court in its inherent jurisdiction under section 482 Cr.P.C.

10. Consequently, the application under section 482 Cr.P.C. is allowed. The proceeding of criminal case no. 2603 of 2009 (State Vs. Amit Kumar and others) under section 498A, 323, 504 I.P.C. and 3/4 D.P. Act arising out of crime no. 242 of 2008, P.S. Mahila Thana, Meerut pending in the Court of Chief Judicial Magistrate, Meerut is hereby quashed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.02.2010

BEFORE
THE HON'BLE RAKESH TEWARI, J.
THE HON'BLE RAJESH CHANDRA, J.

Criminal Appeal No.4458 of 2003

Jeesan and others ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri P.N. Misra
Sri Apul Misra
Sri R.P. Yadav
Sri R.P.S. Chauhan
Sri Raghubans Sahai

Sri Amrish Sahai
Sri Dilip Kumar
Sri Rajeev Gupta

Counsel for the Opposite Party:
A.G.A.,
Sri Manish Tiwari
Sri Shivajee Srivastava
Sri A.B. Maurya
Sri Kayoom Ahmad
Sri Amir Khan

Code of Criminal Procedure Section 374, 389 readwith High Court Rules 1952-Chapter XVIII Rule 8 and 18-Criminal Appeal-separate Bail Application not filed-held can not be considered-practice can not prevail over statutory provisions-criminal appeal heard u/s section 374 where as the bail application can be considered only under section 389-hence separate bail application supported with affidavit must be there-accordingly direction issued to Registry.

Held: Para 14

In view of the above entire discussions, we are of this opinion that a separate bail application has to be filed along with the appeal and that bail application shall also be supported with an affidavit setting out in the form of paragraphs the material facts and grounds upon which the applicant relies.

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

1. The appellants have filed this appeal against the judgment and order dated 10.9.2003 passed in S.T.No.486 of 2000, State V. Jeesan & Others convicting the appellants for the offences under Sections 147,148,307, read with Section 149 IPC and for the offence under Section 302, read with Section 149 IPC with imprisonment of one year, one and a half years, 7 years and life imprisonment respectively. The appellants have further been sentenced with a fine of Rs.3,000/- each for the offence under Section 307/149 IPC and a fine of Rs.6,000/- each for the offence under Section 302/149 IPC with default stipulation. The appellant Jeesan and Israr have further been convicted and sentenced with imprisonment of two years for the offences under Section 25 Arms Act.

2. In the grounds of appeal, a prayer has been made that the appellants may be released on bail and the realisation of fine may be stayed.

3. A preliminary objection has been raised by the learned AGA that the prayer made in the appeal for grant of bail cannot be treated as a separate application for bail which is to be granted on different considerations under Section 389 Cr.P.C. He submits that an application for bail filed along with the memorandum of appeal is to be treated as first bail application and any subsequent bail application has to be numbered as second, third and fourth etc which would be in consonance with clause (4) of Rule 18 of Chapter XVIII of the High Court Rules.

4. We have heard the learned AGA and the learned counsel for the appellants and have perused the record and the relevant rules etc placed before us. We have also requested the Registry to place all the relevant record with regard to this controversy referred to later in this judgment. The question arises for consideration is whether a separate application for bail is required to be filed and marked as first bail application along with the petition of appeal in terms of Rules 8 (2) (4), 18(1), 18(3) (a), 18(3) (b) and 18 (4) of Chapter XVIII of the Allahabad High Court Rules. In this

connection Rules 8 and 18 of Chapter XVIII of the Allahabad High Court Rules may be referred, which are as under:

"8. Cases to be registered and numbered-----(1) After an appeal or revision has been admitted it shall be registered and numbered.

(2) The following application shall be registered and numbered after presentation as Criminal Miscellaneous cases, namely-
(a) application for bail;
(b) application for cancellation for bail;
(c) application for transfer of a case;
(d) application for withdrawal of a case from a subordinate Court;
(e) [***];
(f) application under Section 96 of the Code of Criminal Procedure, 1973;
(g) application for stay of operation of order of, or proceedings in, lower court. Such application must be accompanied by the certified copy of the order assailed, including all other documents, if any, on the basis of which a particular order has been challenged;
(h) application for the issue of a direction, order or writ under Article 226 of the Constitution in a criminal matter;
(i) [application under sub-section (1) or sub-section (2) of Section 340 of the Code of Criminal Procedure, 1973];
(j) application for the taking of proceedings in contempt of court;[and]
(k) application under Section 378(4) of the Code of Criminal Procedure, 1973];
Provided that an application for transfer of cases, shall be accompanied by a copy of the order passed by the Session Judge, if any];

(3) Cases in which the Court takes proceedings under Section 340(1) or 340(2) of the Code of Criminal Procedure, 1973 or issue notice for contempts of Court otherwise than on an application and references under Section 318 of the Code of Criminal Procedure, 1973 shall also be registered and numbered as Criminal Miscellaneous Cases.

(4) The application aforesaid shall set out the prayer stating clearly the exact nature of the relief sought supported by an affidavit setting out in the form of paragraphs the material facts and grounds upon which the applicant relies.

18. Application for bail.-- [(1) No application for bail shall be entertained unless accompanied by a copy of judgment or order appealed against or sought to be revised and a copy of order passed by the Sessions Judge on the bail application for the applicant and unless the accused has surrendered except where he has been released on bail after conviction under Section 389(3) of the Code of Criminal Procedure, 1973.
Explanation:- The copy of the order refusing bail passed by the Sessions Judge shall either be a certified copy or the copy furnished by the Sessions Judge free of charge to the accused.]
(2) Every application for bail in a case, which is under investigation or which is pending in a Lower Court shall state whether application for bail had or had not been previously made before the Magistrate and the Sessions Judge concerned and the result of such applications, if any.
(3) Save in exceptional circumstances:
(a) No order granting bail shall be made on an application unless notice thereof has been given to the Government Advocate and not less than days have elapsed between the giving of such notice and the hearing of such application.

(b) If the application for bail has not been moved within two days after the expiry of the aforesaid period of ten days, the applicant or his Counsel shall give two days previous notice to the Government Advocate as to the exact date on which such application is intended to the moved.

(c) Where the prayer of bail is contained in a petition of appeal or application for revision, notice thereof may be given to the Government Advocate the same day prior to the hearing of such petition or application and the fact of such previous notice having been given, shall be endorsed on such petition or application. Along with such notice a certified copy or one attested to be true by the Counsel, of the Judgment appealed from or sought to be revised shall also be given to the Government Advocate.

(4) Every application for bail shall show prominently in the first page thereof the crime number, the police station by which, and the section or sections and the Act or Rules under which the applicant is being prosecuted or has been convicted and whether such application in the first, second or any such subsequent application moved by him before this Court, and shall be accompanied by a copy of the first information report. It shall also state the following particulars, namely:

(a) The date of the alleged occurrence;

(b) The date of applicants arrest;

[The Bench Secretary shall while entertaining a bail application for presentation to the Court Check every page thereof and shall affix a rubber stamp containing his initials on every page of the bail application and all the annexures thereto before putting it up before the Court in token of his having checked, every page of the application and he shall, thereafter, make the following endorsement on the bail application:

" Moved before Hon'ble .....J on.....(date)."

Similarly, the officials whose duty it is to received the bail application from the court after orders, shall affix a rubber stamp containing his initials on the first page of the bail application in token of his having checked that all the pages of the bail application bear the rubber stamp for the Bench Secretary.

The rubber stamps containing the initials of the Bench Secretary and the official or officials authorised to receive the fresh bail application from the Court shall be supplied to the Bench Secretaries and the officials by the Registrar of the Court.

The application shall not be returned to the applicant or his counsel after the above endorsement has been made].

(5) Every page of the application and every page of the annexures thereto shall bear the full signature of the applicant or his counsel.

(6) In every such application shall be stated the full particulars of the previous applicant or applications, if any, moved in this Court by same application in respect of the same crime and the date or dates on which such previous application or applications had been rejected."

5. A perusal of clause (1) and (2) (a) of Rule 8 makes it clear that after the appeal is admitted it shall be registered and numbered and the application for bail shall be registered and numbered after presentation as Criminal Miscellaneous Case. Thus sub-clause (2) (a) requires the filing of an application for bail. Sub-clause (4) of Rule 8 lays down that:-

"(4) The application aforesaid shall set out the prayer stating clearly the exact nature of **the relief** sought supported by an affidavit setting out in the form of paragraphs the material facts and grounds upon which the applicant relies.

Thus under Rule 8 not only an application for bail is required but it has to be supported by an affidavit setting out in the form of paragraphs the material facts and grounds upon which the applicant relies.

6. Opening sentence of Rule 18 is " No application for bail shall be entertained unless accompanied by a copy of judgment or order appealed against of sought to be revised ....."

7. The Section presupposes that there shall be an application for bail which will be entertained only when it is accompanied by a copy of judgment. Rule 18 (3) (a) provides " **No order granting bail shall be made on an application....**....." Rule 18 (3) (b) provides " **if the application for bail has not been moved..**....." These wordings again confirm that there should be an application for bail. The above Rules then provide as to how the notice of the bail application shall be given to the Government Advocate. Again sub-clause (4) of Rule 18 says that every application for bail shall show prominently in the first page as to whether such application is first, second or any such subsequent application moved by the appellant before this Court (i.e. the High Court.)

8. Learned counsel for the appellants would submit that normally in this High Court prayer for bail in the appeal is considered as the first bail application and, therefore, in case where a prayer for bail in appeal is rejected, second or third bail application is filed without there being a separate application along with appeal as first application for bail. This argument of the learned Advocate for the appellants is wholly fallacious. We have been informed at the Bar that this practice has developed lately. An instance in this regard is of Sri P.C.Chaturvedi, Advocate who used to file bail applications along with the appeal. It appears that this practice of filing separate bail application has withered with the passage of time and now survives only in the memory lanes of the past era. The fact in reality is that the first bail application now a days is not filed separately along with the appeal in which such a prayer is made. Hence bail application can neither be numbered nor can be marked as first or second bail containing the distinct and specific grounds for bail. The general grounds mostly taken in the appeal cannot be taken aid of in place of specific grounds required to be taken by the appellant for consideration of his prayer in the application for grant of bail.

9. We would like to take notice of law at this juncture that the appeal is filed under Section 374 of the Code of Criminal Procedure whereas the bail application is considered under Section 389 of the Code. This arrangement of Sections further suggests that a separate bail application should be moved seeking indulgence of the court under Section 389 of the Code of Criminal Procedure for grant of bail. This would also be in conformity with Rules 8 and 18 quoted above. In any case provisions of the Act would prevail over the Rules if there is any regugnancy between the two. However, there does not appear to be any such situation here.

10. If the prayer for bail is contained in the grounds of appeal and no bail application is filed with it, then there will be no first application and this will violate the provisions of Rules 8,18(1) and 18(4) of the Allahabad High Court Rules, 1952 when second bail application is filed by the counsel on rejection of the prayer for bail in memo of appeal.

11. The Registry was requested to provide all papers/resolutions/committee reports etc. on the subject as to whether this matter is pending consideration on administrative side. We have been informed that a committee consisting of Hon'ble Justice Sunil Ambwani, Hon'ble Justice Ashok Bhushan and Hon'ble Justice Dilip Gupta is considering the feasibility of reporting of appeals and applications under Section 482 Cr.P.C. but the present matter is not before their Lordships for consideration. However, the Joint Registrar (I) has reported that Rule 8 of Chapter XVIII contemplates a separate application for bail but at the same time he has also reported that in sub-clause (c) of clause (3) of Rule 18, it has been mentioned that " Where the prayer for bail is contained in a petition of appeal", which indicates that a prayer for bail can be made in the petition of appeal itself.

We have given our considered thought to this situation.

12. Sub-clause (c) of clause (3) of Rule 18 referred to by the Registry does not deal with the question as to whether a separate application for bail has to be filed along with the appeal or not. Sub-clause (c) of clause 3 of rule 18 runs as under:-

"(c) Where the prayer of bail is contained in a petition of appeal or application for revision, notice thereof may be given to the Government Advocate the same day prior to the hearing of such petition or application and the fact of such previous notice having been given, shall be endorsed on such petition or application. Along with such notice a certified copy or one attested to be true by the Counsel, of the Judgment appealed from or sought to be revised shall also be given to the Government Advocate."

13. It is thus clear that sub clause (c) deals with the requirement of giving notice to the Government Advocate etc. The availability of the words " Where the prayer for bail is contained in a petition of appeal" cannot and does not obliterate the provisions of Rule 8, 18(1) and 18(4) of Chapter XVIII, which specifically require that there shall be an application for bail. There is no conflict between the provisions of sub clauses (3)(a), 3(b) of Rule 18 on the one hand and Rules 8, 18(1) and 18(4) of Chapter XVIII on the other. A prayer for bail may be mentioned in the petition of appeal if the appellant so desires but that does not mean that the appellant is not obliged to move a bail application as required under Rules 8,18(1) and 18(4) of Chapter XVIII. The Report of the Joint Registrar (I) is misconceived. If the wordings in sub clause (c) of clause (3) of Rule 18 are interpreted to mean that a prayer for bail may be contained in a petition of appeal and no separate application is required then Rule 8 (2) (a) and Rules 18 (1), 18 (3) (a), 18 (3) (b) and 18(4) shall become redundant. Hence the interpretation of Rule 18(3) (c) vis a vis Rule 8 (2) (a), Rule 18(1), 18(3) (a), 18(3) (b) and 18(4)

must be harmonious so that one is not rendered redundant. The harmonious construction can therefore be that a prayer for bail may be contained in a petition of appeal together with a prayer made in a separate bail application. In the spirit of Rule 18(1), 18 (3) (a) and 18 (3) (b), read with Rule 18(4), it is clear that an application for bail has to be moved and the same will show as to whether it is the first or second or subsequent bail application and there cannot be any second or subsequent bail application without there being a first bail application.

14. In view of the above entire discussions, we are of this opinion that a separate bail application has to be filed along with the appeal and that bail application shall also be supported with an affidavit setting out in the form of paragraphs the material facts and grounds upon which the applicant relies.

15. In view of the above, the appellants are directed to move a separate bail application within two weeks if they so desire.

List after two weeks.

16. Registry of the High Court shall also publish in the cause list dated 8.2.2010 for information to all concerned that separate bail application would be required along with the petition of criminal appeal even though prayer for bail is made in the grounds of appeal concerned.

APPELLATE JURISDICTIION
CIVIL SIDE
DATED: ALLAHABAD 26.02.2010

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 4570 of 2010

Suresh Giri and others ...Petitioners
Versus
Board of Revenue & others. ..Respondents

Counsel for the Petitioner:
Sri S.N. Panday
Sri A.K. Panday

Counsel for the Respondent:
Sri D.D. Chauhan
C.S.C.

U.P. Zamindari and Land Reform Act. Section 158 (b)-suo motu action taken by collector without notice, opportunity to petitioner held- even exercise power- Notice is must.

Held: Para 20 & 21

In view of above, it is held that the period of limitation prescribed under Section 198(6) of the Act for issuance of notice before cancellation of the allotment of the land/lease is applicable even to *suo motu* proceedings. However, the Collector is not forbidden to initiate proceedings for cancellation even after the expiry of limitation prescribed, provided he has reason to believe that the allotment is likely to vitiate on account of fraud but in exercise of such power has to act with great circumspection as observed above and not in a routine or a causal manner.

In the facts of present case and circumstances that the Collector has expressed satisfaction with regard to fraud, I am not inclined to interfere with the orders passed and the writ petition is disposed of accordingly with liberty to

the collector to proceed in the matter, if considered proper, in accordance with law keeping in mind the directions/observations made above.

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

1. The facts giving rise to this writ petition lies in a narrow campus.

2. A resolution was passed by the Land Management Committee village Kaseru, Tehsil Gabhana, District Aligarh on 27.2.1993 proposing to allot and lease out the land in dispute as Bhumidhari with non-transferable rights in favour of the petitioners. The said resolution was approved by the competent authority vide order dated 18.4.1993 and the names of petitioners were recorded in revenue records. A complaint was made after about 15 years on 11.2.2008 that the aforesaid allotment is irregular and as such is liable to be cancelled. On the said complaint, Case No.57 under Section 198(4) of the U.P. Zamindari Abolition and Land Reforms Act (hereinafter referred to as the 'Act') was registered. Petitioners submitted an application/ objection dated 18.8.2008 alleging that complaint is patently barred by time and cannot be entertained. However, ignoring the application/objection of the petitioners dated 18.8.2008 notice dated 16.7.2009 was issued to them to show cause why the allotment made in their favour be not cancelled. Petitioners preferred a revision against the order of issuance of the said notice before the Board of Revenue and the same was decided on 1.9.2009 with the observation that the question of limitation as raised vide application dated 18.8.2008 be decided in accordance with law before proceeding on merits. Accordingly, the issue of limitation was considered vide order dated 16.11.2009 and the Collector without actually deciding the same directed for suo motu action for cancellation of the allotment/lease of the petitioners. Aggrieved by the aforesaid direction a revision was preferred by the petitioners which was dismissed by the Board of Revenue on 24.12.2009.

3. The order of the Collector dated 16.11.2009 for initiating suo motu action for cancellation of the allotment/lease of the petitioners and the order of the Board of Revenue dated 24.12.2009 dismissing the revision have been assailed in this writ petition.

4. I have heard Sri S.N. Pandey, learned counsel for petitioners, learned Standing Counsel for respondents no.1 and 2 and Sri D.D. Chauhan who has appeared for respondent no.3 and with their consent proceed to decide the writ petition on merits at this stage itself.

5. The only submission of Sri Pandey is that the Collector even in exercise of suo motu powers cannot initiate proceedings for cancellation of allotment/lease after expiry of period of limitation prescribed for issuing notice under Section 198(6) of the Act.

6. According to the learned Standing Counsel the limitation provided under Section 198(6) of the Act is applicable only where proceedings for cancellation have been initiated on the application of the person aggrieved and the same would not be applicable where Collector proceeds to take suo motu action for the cancellation of allotment.

7. In order to consider the above submission, it would be appropriate to

first have a look on the relevant provisions of Section 198 of the Act, which are reproduced herein below:

"198. Order of preference in admitting persons to land under Sections 195 and 197.

(1) .....
(2) .....
(3) .....
(4) The Collector may of his own motion and shall on the application of any person aggrieved by an allotment of land inquire in the manner prescribed into such allotment and if he is satisfied that the allotment is irregular, he may cancel the allotment and the lease, if any.
(4-A) .....
(5) No order for cancellation of an allotment or lease shall be made under Sub-section (4), unless a notice to show cause is served on the person in whose favour the allotment or lease was made or on his legal representatives:

Provided that no such notice shall be necessary in proceedings for the cancellation of any allotment or lease where such proceedings were pending before the Collector or any other court or authority on August 18, 1980.
(6) Every notice to show cause mentioned in Sub-section (5) may be issued:
(a) in the case of an allotment of land made before November 10, 1980 (hereinafter referred to as the said date), before the expiry of a period of seven years from the said date; and
(b) in the case of an allotment of land made on or after the said date before the expiry of a period of five years from the date of such allotment or lease or up to November 10, 1987, whichever be later.
(7) .....
(8) .....
(9) ....."

8. The aforesaid Act is a social piece of legislation which not only abolishes the *zamindari* system and brings the tiller of soil and state in direct contact but also envisages to provide land to the landless agricultural labourers and to protect the possession of the landless persons of scheduled castes and scheduled tribes.

9. Sections 195 and 197 of the Act accordingly provides for admission of persons as enumerated under Section 198 (1) of the Act as *Bhumidhar* with non-transferable rights or *Asami* over *Gaon Sabha* land with the approval of the competent authority and the procedure for such admission has been provided under the Rules framed under the Act.

10. The Collector is empowered under Section 198(4) of the Act of his own motion or on the application of any person aggrieved to cancel the allotment of the *Gaon Sabha* land made in favour of any person as well as the lease, if any, if he is satisfied that the allotment made is irregular. The power of cancellation of allotment of land so made cannot obviously be exercised in violation of the principles of natural justice and it is imperative to provide an opportunity of hearing to the person concerned i.e. the allottee of the land before passing an order of cancellation. It is with this view that section 198(5) of the Act specifically provides for issuing/sending a show cause notice upon the person concerned before passing an order of cancellation of allotment or lease.

11. The time in which the notice for cancellation of allotment of land/lease can

be issued by the authority concerned is provided in Section 198(6) of the Act which lays down that in cases where allotment is made before 10th November, 1980 notice may be issued within a period of seven years of said date and in cases where allotment is made on or after 10th November, 1980 before the expiry of five years from such allotment or up to 10th November, 1987 whichever be later. In short, the limitation for issuing a show cause notice is five years from the allotment where it is made on or after 10th November, 1980.

12. The provisions of sub-section (4), (5) and (6) of Section 198 of the Act are to be construed in conjunction with one another and cannot be read in-isolation. The aforesaid provisions are unambiguous and the language used therein is plain and simple which makes no distinction between proceedings for cancellation of allotment initiated *suo motu* or on the application of a person aggrieved. Therefore, they have to be construed in the ordinary sense and in no other way. Sub-Section (4) of Section 198 of the Act provides for cancellation of allotment/lease by the Collector on his own motion as well as on the application of the person aggrieved. In both the cases, allotment/lease can not be cancelled without affording an opportunity of hearing to the allottee or the person concerned, as otherwise the action of cancellation would be termed arbitrary and violative of principles of natural justice. Sub-section (6) of Section 198 of the Act follows Section 198(4) of the Act which as such covers both the types of proceedings for cancellation viz. *suo motu* as well as on application of person aggrieved.

13. Accordingly, in my opinion, the inevitable conclusion is that the time frame prescribed for issuing notice before cancelling the allotment/lease of a land provided under sub-section (6) of Section 198 of the Act is applicable to both *suo motu* proceedings as well as proceedings on the application of the person aggrieved.

14. In examining the above point, one cannot lose sight of Rule 338 of the Rules framed under the aforesaid Act which provides that the suits, applications and other proceedings under the Act shall be instituted within the time specified in Appendix III to the aforesaid Rules. It reads as under:-

"338. The suit applications and other proceedings specified in Appendix III shall be instituted within the time specified therein for them, respectively."

15. Entry 24 of Appendix III prescribes a period of six months for moving an application raising objection against any irregular allotment of land and three years for *suo motu* action by the Collector for setting aside the allotment of land. Therefore, the limitation for initiation of proceedings for cancellation of allotment by the Collector on *suo motu* action is three years whereas notice for such purpose can be issued within 5 years as provided under Section 198(6) of the Act. Thus, the legislator clearly intend to provide limitation even for *suo motu* action and the submission that the limitation has no application for initiation of *suo motu* action for cancellation of allotment of land/lease is baseless and is to be rejected.

16. It may be remembered that if anything has to be done by an authority it has to be done in the manner prescribed in the Statute and in no another manner. Therefore, as the Act itself provides for a period of three years for initiation *suo motu* proceedings for cancellation of allotment/lease and a period of 5 years for issuance of notice for the purpose it leaves the authority concerned with no scope to act beyond the time frame so provided.

17. Moreover, allowing the Collector to initiate *suo motu* proceedings for cancellation of allotment/lease at any time would mean that the allotment would never be final and there would always be danger of its cancellation. This perhaps could never be the intention of the legislator. The limitation of three years as contained in Appendix III of the Rules and five years provided under Section 198(6) of the Act is a well thought of as the aforesaid period of time is sufficient enough either for the person aggrieved to make a complaint against the irregular allotment or for the authorities to examine and verify the record and to take action for cancellation *suo motu,* if necessary.

18. The last limb of the argument of Standing Counsel is that it is a case of fraudulent allotment of land and therefore, irrespective of limitation provided, the Collector is well within its jurisdiction to draw proceedings for cancellation of such allotment even if the time prescribed has expired.

19. It is well known that fraud vitiates every solemn act and an act of fraud is always to be viewed seriously. The observation of Lord Justice Denning in **Lazarus Estates Ltd. Vs. Beasley (1956) 1 All E.R. 341** which is quoted below works as a lighthouse even today for those dispensing justice. "No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand, if it has been obtained by fraud. Fraud unravels everything." In view of the above, there is no room to doubt that an order of allotment of land, if obtained by collusion or fraud cannot be allowed to stand and the court would not intervene in such matters so as to permit squandering of the property of the State which vests in the *Gaon Sabha*. Protection of the State property from such fraud by initiation of action for cancellation of allotment/lease would however, be independent of the power of cancellation of such allotment envisaged under Section 198(4) of the Act for the reason that Section 198(4) comes into play in the limited sphere where the allotment is found to be irregular and not otherwise. Accordingly, in my considered opinion cancellation of allotment/lease on account of fraud is altogether an separate exercise which can be undertaken by the authorities concerned irrespective of Section 198(4) of the Act. However, proceedings for cancellation of allotment of land/lease on the ground of fraud has to be exercised with great care & caution and not blindly or on unilateral version. It is only when the concerned authority on the basis of relevant material has a reason to believe that the allotment is based upon fraud it may proceed in the matter. In so determining the stand, a distinction has to be made between fraud played by the beneficiary or the fraud committed by the officers or the authorities. Where the authority is of the opinion that the allottee is responsible for the alleged fraud it can initiate proceedings for cancellation of the

allotment/lease and after giving opportunity of hearing to him may cancel the same. In the event the authority feels otherwise and the involvement of the allottee is not found and the needle of suspension is upon some employee/officer action it must take appropriate action first against such employee/officer and simultaneously if considered proper for cancellation of allotment/lease.

20. In view of above, it is held that the period of limitation prescribed under Section 198(6) of the Act for issuance of notice before cancellation of the allotment of the land/lease is applicable even to *suo motu* proceedings. However, the Collector is not forbidden to initiate proceedings for cancellation even after the expiry of limitation prescribed, provided he has reason to believe that the allotment is likely to vitiate on account of fraud but in exercise of such power has to act with great circumspection as observed above and not in a routine or a causal manner.

21. In the facts of present case and circumstances that the Collector has expressed satisfaction with regard to fraud, I am not inclined to interfere with the orders passed and the writ petition is disposed of accordingly with liberty to the collector to proceed in the matter, if considered proper, in accordance with law keeping in mind the directions/observations made above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.02.2010

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

Civil Misc. Writ Petition No. 5110 of 2010

Mohd. Maruf Ahamad ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri B.D. Sharma

Counsel for the Respondents:
C.S.C.

<u>Constitution of India Art. 226</u>- Cancellation of appointment-dated of birth recorded in High School-held-conclusive proof-unless altered on modified by the Board-date of birth as recorded in school register-on basis of information of the Principal of institution the authorities came to the conclusion that on the date of advertisement-age of petitioner was less 7 days than 20 years-without giving any opportunity without notice to the petitioner-held-order impugned on erroneous assumption can not sustain.

Held: Para 6

Further it is evident that the impugned order has been passed relying on the information given by the Principal of the institution on 19.11.2009. The said information was received and the order was passed without putting the petitioner to notice or calling upon him to rebut the said contention. In this view of the matter, the impugned order is also invalid as being in violation of principles of natural justice.

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

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

2. The petitioner contends that he could not have been eliminated from his service inasmuch as he was fully eligible qualified and he had appeared in the selections which were held in the year 2006.

3. From a perusal of the facts on record, it is evident that on an earlier occasion, the claim of the petitioner had been non-suited on account of an incorrect inquiry having been made with regard to the genuineness of the High School Certificate of the petitioner. The said claim was allowed by this Court vide order dated 9.7.2009 passed in Writ Petition No.59329 of 2007 where after the claim of the petitioner was re-examined and it is evident that the last date of the application under the Advertisement was 30.8.2005 and the maximum age permissible under the Advertisement was 20 years as on 1.7.2005. The petitioner's date of birth, according to the High School Certificate, is 10.7.1985. In view of the age limit as prescribed in the Advertisement, the petitioner was 9 days less than 20 years and, therefore, the claim of the petitioner appears to have been incorrectly assessed by the respondents - authorities.

4. The impugned order records that some information was received from the Principal of the institution on 19.11.2009 and on the strength thereof, it is alleged that the petitioner's date of birth is 1.4.1987.

5. It is by now well settled by a series of decisions that the date of birth as recorded in the matriculation examination is conclusive proof unless the same is demolished by some other material that too even by the competent authority. In the instant case, the date of birth of the petitioner as recorded in the High School and as admitted to the respondents is 10.7.1985. Any alteration in the date of birth of the High School Certificate can be done in accordance with the regulations framed under the U.P. Intermediate Education Act, 1921. In the event any other date is recorded in the institution, the same would not be applicable in the case of the petitioner once his date of birth has been initially recorded as 10.7.1985 in the High School Certificate. The authorities have to raise a presumption in favour of the date of birth as recorded in the High School Certificate and not on the basis of any information received from the institution or the Principal of the institution.

6. Further it is evident that the impugned order has been passed relying on the information given by the Principal of the institution on 19.11.2009. The said information was received and the order was passed without putting the petitioner to notice or calling upon him to rebut the said contention. In this view of the matter, the impugned order is also invalid as being in violation of principles of natural justice.

7. Learned Standing Counsel could not successfully dispute the said position.

8. Accordingly, the writ petition is allowed and the impugned order dated 21.1.2009, which proceeds on an erroneous assumption of law, is hereby

quashed without calling for any counter-affidavit. The authority shall pass a fresh order in the light of the observations made herein above within 3 weeks from the date of production of a certified copy of this order before him.

ORIGINAL JURISDICION
CIVIL SIDE
DATED: ALLAHABAD 08.02.2010

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

Civil Misc. Writ Petition No. 6277 of 2010

Rama Shankar ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Anil Kumar Bajpai

Counsel for the Respondents:
Sri Ramendra Pratap Singh
C.S.C.

Civil Services Regulation-Regulation 59 (8)-Revocation of suspension order-petitioner after grant of Bail-can approach before the disciplinary authority for revocation of suspension order after alter grant of Bail.

Held: Para 6

Sub-Regulation 5 of Regulation 59 clearly provides for the power to the authority to revoke the suspension order in any of the contingency including the contingencies of deemed suspension. It is, therefore, clear under the Rules itself that there is a provision of deemed suspension but simultaneously the authority has been given the discretion to revoke such deemed suspension.

Case law discussed:
(1998) 8 SCC 578.

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

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

2. The petitioner is a Junior Assistant with the respondent - NOIDA. He was taken into custody on account of being involved in a criminal case and was put behind bars. The petitioner moved an application before the authority for revoking the suspension order after his release from detention. Having failed to get any relief, he has filed this writ petition for quashing of the suspension order dated 20.8.2007 on the ground that the Service Regulations 1981 clearly mandate the authorities to pass appropriate orders in such a situation.

3. Sri Anil Kumar Bajpai, learned counsel for the petitioner, has relied on the decision of this Court in the case of Radhey Shyam Vs. The Chairman, NOIDA, and another, Writ Petition No.17132 of 2002, decided on 25.4.2002 and the subsequent decision in relation to the same employee in Writ Petition No.42220 of 2002, decided on 30.9.2002. Sri Bajpai, on the strength of the said decisions, contends that the respondent - authority has to consider the representation of the petitioner, apply its mind and pass a reasoned order for either accepting or rejecting the request of the petitioner. He submits that even though under the Regulations, the petitioner will be deemed to have been suspended, yet the respondents still continue to enjoy the power to revoke the same and which power has to be exercised in accordance with the Regulations aforesaid.

4. Sri Ramendra Pratap Singh, on the other hand, contends that the

petitioner has several criminal cases on his head and he has been placed under suspension keeping in view the aforesaid facts. He further submits that there is no occasion for the authority to revoke the suspension order and that the nature of the crime in which the petitioner is involved, does not entitle him for any such relief.

5. Having heard learned counsel for the parties, Regulation 59, which undisputedly governs the aforesaid issue, is quoted herein below:-

"59. (1) The Authority or the Appointing Officer or any officer empowered by the Authority in that behalf may place an employee under suspension.

(a) Where a disciplinary proceeding against him is contemplated or is pending; or

(b) Where a case against him in respect of any criminal offence involving moral turpitude is under investigation or trial;

Provided that where the order of suspension is made by an Officer lower than the appointing Officer such Officer shall forthwith report to the Appointing Officer the circumstances in which the order was made.

(2) An employee who is detained in custody, whether on a criminal or other charge for a period exceeding forty eight hours, shall be deemed to have been suspended with effect from the date of detention by an order of the Appointing Officer and shall remain under suspension until further orders.

(3) Where an employee has been placed under suspension and the inquiry into his conduct results in his dismissal or removal from services, the order of the dismissal or removal shall take effect from the date of such suspension.

(4) Where a penalty of dismissal or removal from service imposed upon an employee under suspension is set aside in appeal under these regulations and the case is remitted for further inquiry or action or with any directions the order of suspension shall be deemed to have continued in force on and from the date of the original order of dismissal or removal and shall remain in force until further orders.

(5) **An order of suspension made or deemed to have been made under this regulation may at any time be revoked by the Officer who made or is deemed to have made the order or by an officer to whom that officer is subordinate or by the Authority."**

6. Sub-Regulation 5 of Regulation 59 clearly provides for the power to the authority to revoke the suspension order in any of the contingency including the contingencies of deemed suspension. It is, therefore, clear under the Rules itself that there is a provision of deemed suspension but simultaneously the authority has been given the discretion to revoke such deemed suspension.

Notice may be taken of the Apex Court decision in the case of Union of India Vs. Rajiv Kumar, (2003) 6 SCC 516. In paragraph nos. 14 to 17 of the said decision, the Apex Court has clarified that once a person has been placed under deemed suspension then the same does

not get automatically revoked upon release and a fresh order has to be passed. The view expressed by the Full Bench in the case of Chandra Shekhar Saxena and etc. Vs. Director of Education (Basic), U.P., Lucknow and another, 1997 ALJ 963, to the effect, that the legal fiction by which the deemed suspension operates will cease to be effective upon release, was reversed.

7. Keeping in view the aforesaid position of law, there is no occasion for this Court to interfere with the suspension order but the respondent - authorities are obliged to pass an appropriate order keeping in view the provisions of Sub-Regulation 5 of Regulation 59.

8. Sri Ramendra Pratap Singh relied on the decision in the case of Deputy Inspector General of Police Vs. G. Pandian, (1998) 8 SCC 578, to contend that the provision of deemed suspension applies and the petitioner has no right to get the suspension order revoked. I have perused the said judgment and the same in paragraph no.5 considers the impact of a Rule under Tamil Nadu Subordinate Services (Discipline and Appeal) Rules, 1955. The said decision was nowhere concerned with the power given to the authority to revoke the suspension as in the present case under sub-regulation 5 of Regulation 59. The aforesaid decision, therefore, does not apply on the rules that are presently under consideration and on the facts and circumstances of the present case.

9. Having concluded as above, the writ petition is disposed of with a direction to the respondent No.2 to pass appropriate orders on the application of the petitioner within a period of 2 months from the date of production of a certified copy of this order before him.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.02.2010

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

Civil Misc. Writ Petition No. 9684 of 2003

Dr. P.L. Sharma ...Petitioner
Versus
Director of Higher Education and another ...Respondents

Counsel for the Petitioner:
Sri K.K. Arora
Sri A.N. Srivastava
Sri Awadhesh Kumar
Sri N.K. Srivastava
Sri P.K. Srivastava
Sri V.C. Dixit
Sri V.K. Dixit

Counsel for the Respondent:
C.S.C.

Constitution of India Art 226- Change of option-petitioner working as P.G. College as lecturer opted C.P.F. Scheme-in view of G.O.25.08.99 applied for change of option G.P.F. With Pension benefit-on 19.07.2001-retirement due after academic Session benefit-can not be refused.

Held: Para 19

In view of the above decisions, we are of the opinion that the petitioner in the present Writ Petition, who exercised his option by the Option Letter dated 19.07.2001 (Annexure-5 to the Writ Petition) in terms of the Government Order dated 25.08.1999, was entitled to the benefit of GPF Scheme with Pension, and the respondent no.1 acted illegally

in issuing the Order dated 22.04.2002 declining to accept the option exercised by the petitioner by the said Option Letter dated 19.07.2001.

Case law discussed:

Writ Petition No. 25140 of 2001, Writ Petition No. 13169 of 2008.

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

1. We have heard the learned counsel for the petitioner and the learned Standing Counsel appearing for the respondent nos. 1 and 2, and perused the record.

2. The present Writ Petition was filed on 27.02.2003. Counter affidavit, sworn on 02.07.2004, has been filed on behalf of the respondent no.1.

3. Learned counsel for the parties are agreed that the controversy involved in the present Writ Petition is covered by various decisions of this Court, referred to hereinafter in the present judgment, and therefore, the present Writ Petition may be decided at this stage itself.

4. From the averments made in the Writ Petition, it appears that the petitioner Dr. P.L. Sharma was appointed as a Lecturer in S.M. Inter College, Chandausi in the year 1966; and that in December, 1972 the petitioner was absorbed as Lecturer in S.M. (P.G.) College, Chandausi. The initial appointment of the petitioner was on probation, however, on 09.10.1974 the petitioner was confirmed. The date of birth of the petitioner being 01.09.1942, the petitioner attained the age of superannuation on 31.08.2002 and was due to retire on 30.06.2003 after getting session benefit.

5. It appears that in the year 1984 the petitioner opted for Contributory Provident Fund Scheme (CPF). However, on 19.07.2001, the petitioner submitted his Option Letter exercising his option in terms of the Government Order dated 25.08.1999 for switching over from Contributory Provident Fund Scheme (CPF) to General Provident Fund Scheme (GPF) with Pension. Copy of the said Option Letter dated 19.7.2001 has been filed as Annexure-5 to the Writ Petition. As the approval of the Director Higher Education, U.P., Allahabad (respondent no.1) in regard to the said Option Letter was not received, the Principal, S.M. (P.G.) College, Chandausi sent a Communication dated 31.08.2001 (Annexure-6 to the Writ Petition) to the Director, Higher Education, U.P., Allahabad (respondent no.1) requesting the latter to provide approval in the matter.

6. It appears that by the Order dated 22.04.2002, the Assistant Accounts Officer acting on behalf of the Director, Higher Education, U.P., Allahabad (respondent no.1) declined to give approval for the option exercised by the petitioner for switching over from Contributory Provident Fund Scheme (CPF) to General Provident Fund Scheme (GPF) with Pension.

7. It was, interalia, observed that the scheme contemplated in the Government Order dated 25.08.1999 was applicable to the teachers and employees covered under the General Provident Fund Scheme (GPF), and was not applicable to the teachers and employees covered under the Contributory Provident Fund Scheme (CPF). Copy of the said Order dated

22.04.2002 has been filed as Annexure-1 to the Writ Petition.

8. In view of the above, the petitioner has filed the present Writ Petition, interalia, praying for issuance of writ, order or direction in the nature of certiorari quashing the said Order dated 22.04.2002 (Annexure-1 to the Writ Petition), and further, for issuance of writ, order or direction in the nature of mandamus directing the respondent nos. 1 and 2 to accept the option exercised by the petitioner and accord the benefit of GPF+Pension Scheme to the petitioner in accordance with the Government Order dated 25.08.1999.

9. In the counter affidavit filed on behalf of the respondent no.1, the said Order dated 22.04.2002 was sought to be justified on various grounds.

10. For deciding the controversy involved in the present Writ Petition, it is necessary to notice certain further facts.

11. The State Government from time to time has issued Government Orders permitting the teachers to exercise their options for switching over from Contributory Provident Fund Scheme (CPF) to General Provident Fund Scheme (GPF) with Pension.

12. The last such Government Order was issued on 25.8.1999 (Annexure 2 to the Writ Petition) which permitted the teachers to exercise their options before one year of their retirement. However, by the Government Order dated 5/6.5.2000, a clarification was issued that option could be exercised only by such teachers, who were governed under the General Provident Fund Scheme and not under the Contributory Provident Fund Scheme. Similar stand, as noted above, was taken in passing the said Order dated 22.04.2002 (Annexure-1 to the Writ Petition).

13. It appears that this Court in ***Civil Misc. Writ Petition NO. 25140 of 2001 (Dr. Shri Gopal Gupta and others Vs. State of U.P and others)*** considered the aforesaid Government Orders dated 25.8.1999 and 5/6.5.2000, and held by the Judgment and Order dated 26th October, 2006 as follows:

"....The policy of the Government providing benefit of GPF plus pension Scheme at no point of time denied the benefits to those teachers who had not opted for the said scheme prior to 25th August, 1999 or during the period prescribed either in the Government Order of 1980 or 1982. Since the scheme remained in existence and time for giving option was extended from time to time, the interpretation given by the State to the aforesaid Government order dated 25th August, 1999 and the clarifications dated 5th June, 2000 and 12th July, 2000 cannot be sustained in the eyes of law.

The petitioners who had applied/opted for GPF plus pension scheme though they were covered under the CPF scheme, one year before their date of retirement i.e. during the extended period as per the Government Order dated 25th August, 1999 could not have been refused the said benefit on the ground that the aforesaid scheme/option was open only for those teachers who are covered by the GPF scheme....."

14. It further appears that the State Government filed a Special Leave Petition before the Supreme Court being

Petition for Special Leave to Appeal (Civil) No. 722 of 2008.

15. By the Order dated 3.11.2008, their Lordships of the Supreme Court dismissed the said Special Leave Petition.

16. Thus, the aforesaid Judgment and Order dated 26th October, 2006 became final.

17. This position has not been disputed by the learned Standing Counsel.

18. We may mention that in ***Civil Misc. Writ Petition No. 13169 of 2008 (Kirti Chand Gupta and others Vs. State of U.P. and others)*** connected with various other Writ Petitions, similar controversy was involved. A Division Bench of this Court by its Judgment and Order dated 16th April, 2009 decided the said Writ Petitions following the decision of this Court in ***Dr. Shri Gopal Gupta (supra)***, and gave directions to the respondents in the said Writ Petitions for extending the benefit of the said Government Order dated 25th August, 1999 to the petitioners in the said Writ Petitions.

19. In view of the above decisions, we are of the opinion that the petitioner in the present Writ Petition, who exercised his option by the Option Letter dated 19.07.2001 (Annexure-5 to the Writ Petition) in terms of the Government Order dated 25.08.1999, was entitled to the benefit of GPF Scheme with Pension, and the respondent no.1 acted illegally in issuing the Order dated 22.04.2002 declining to accept the option exercised by the petitioner by the said Option Letter dated 19.07.2001.

20. It is noteworthy that the petitioner was due to retire on 30.06.2003, and therefore, the above option exercised by the petitioner by the Option Letter dated 19.07.2001 was exercised as per the requirement of the said Government Order dated 25.08.1999.

21. In view of the above discussion, we are of the view that the present Writ Petition deserves to be allowed quashing the said Order dated 22.04.2002, and giving directions similar to those given in the above decisions.

The Writ Petition is accordingly allowed.

22. The Order dated 22.04.2002 (Annexure-1 to the Writ Petition) is quashed, and the following directions are given:

1. Within four weeks from today, the petitioner will file an application before the concerned authority (Director of Higher Education, Uttar Pradesh, Allahabad) along-with a certified copy of this Order. Within six weeks of the filing of such application along-with certified copy of this Order, the concerned authority will inform the petitioner regarding the amount of contribution made by the employer in respect of the Contributory Provident Fund Scheme (CPF) together with interest thereon to be deposited by the petitioner as well as the necessary formalities to be completed by the petitioner.
2. On receipt of necessary information from the concerned authority as mentioned in the direction no. 1 above, the petitioner will, within two months of the date of receipt of such

information, deposit the aforementioned amount together with interest thereon and also complete the necessary formalities.

3. On the deposit being made and the formalities being completed by the petitioner as mentioned in the direction no. 2 above, the respondents within three months thereafter will give benefit of the Government Order dated 25.8.1999 to the petitioner in terms of the option exercised by the petitioner by the Option Letter dated 19.7.2001.

23. On the facts and in the circumstances of the case, the parties will bear their own costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.02.2010

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No.10196 of 2010

Radhey Shyam Tiwari ...Petitioner
Versus
Registrar General High Court of Judicature at Allahabad and others ...Respondents

Counsel for the Petitioner:
Mr. Yashwant Singh

Counsel for the Respondent:
Sri Amit Sthalekhar

<u>Constitution of India Art- 14, 16-read with Allahabad High Court officers and Staff(conditions of Service and conduct) Rules 1976- Rule 4</u>-Appointment on class 4th employees on daily wages basis-without advertisement without taking recommendation from employment exchange-tendency of appointment of High Court administrations for the last 30 years-prove the proverb "it is darkest beneath the candle"-court expressed its great concern-direction not to engage any further daily wager without publication of vacancy in two news papers having vide circulation- such daily wages will not be paid salary without leave of court no preference at the time of regularisation available .

Held Para 27

In these set of circumstances and in view of the admitted position that the appointment of respondents no. 04 to 16 have been made without there being any advertisement and without there being any process of selection and consideration amongst similarly situate candidates like the petitioner, it is the duty of the Court to ensure that injustice is set at rest. The Court is of the opinion that what has been practised for more than three decades brought to a halt. The infringement of Article 14 and 16 of the Constitution of India cannot be permitted to continue any further, therefore, appropriate steps are to continue any further, therefore, appropriate steps are required to be taken. A stitch in time saves nine. Illegality cannot be perpetuated nor it is appropriate for the highest Court of the State to act in a manner so as to shake the confidence of the public at large.

Accordingly, the following directions are being issued at this interim stage:

a. In view of the conceded position by the High Court through its counsel as noted above, no further appointment on Class IV posts covered by Rule 4(a) of the Rules, 1976 in the establishment of the High Court both at Allahabad and at Lucknow, shall be made in any capacity except after due publication in newspapers having wide and adequate circulation.

b. It shall be open to the High Court to take work or not to take work either from the respondents no. 04 to 16 or any such engagements that have been made along with the said respondents or on any date subsequent to the date of their appointment in the establishment of the High Court. However they shall not be paid their salary without the leave of the Court.

c. Respondents no. 04 to 16 and similarly situate persons shall not be regularized nor they shall be granted any preference in terms of Rule 4 at the time of regular appointment.

Issue notice to respondents no. 4 to 16. The said respondents may be served through the Registrar General of this Court who may also inform similarly situate persons, if any, of the pendency of this writ petition, for putting in their appearance. Steps may be taken within ten days.

Case law discussed:
AIR 1997 SC, 2210, 2000 (4) ESC, 2682.

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

1. ***"The darkest place is under the candle stick"*** *or more appropriately* ***"It is darkest beneath the candle"*** is a proverb that was taught at elementary school. Nothing can be more apt to describe the prevailing situation with regard to appointment of Class IV employees in the establishment of the High Court both at Allahabad as well as Lucknow. The Court has been informed on behalf of the Registrar General of the High Court that there exists no record of any advertisement having been published for appointment on Class IV posts. At least for the last 25 to 30 years, no advertisement has been published and to put it more exactly, the rule has been observed in its fullest breach since the promulgation of the **Allahabad High Court Officers and Staff (Conditions of Service & Conduct) Rules, 1976 (herein after referred to as Rules, 1976).**

2. What logically follows is that for last nearly three decades, appointments in the establishment of High Court at Allahabad as well as Lucknow against Class IV posts have been made without any advertisement and without an invitation for participation to the public at large in the process of selection.

3. From the record pertaining to the appointment of respondents no. 04 to 16 to the present writ petition as produced before this Court, it is clear that all 13 persons have been appointed on one and the same date under orders of the Hon'ble The Chief Justice. Out of these, 03 have been appointed on making of an application duly recommended by Hon'ble sitting Judges of this Court, On the left hand side corner of the application of 04 candidates, names of officers/employees already working in the High Court has been hand written and endorsed. Two appointees are from the State of Bihar and one each from the districts of Azamgarh and Jaunpur. One is the son of an employee of this Court and another is a resident of the Colony of the employees of this Court. No selection of any kind has been held. The basis for appointment is, therefore, the recommendation of the Hon'ble Judge or the affinity to the officers/employees already working in the establishment of the High Court. Such a recommendation/closeness is available to a selected few and not to a common citizen.

4. To put it simply the manner of selection and appointment is per se

violative of Article 14 and 16 of the Constitution of India.

What is the mandate of Article 14 and 16 of the Constitution of India?

5. According to the Court, the lifeline of a democratic country is governance by the rule of law. The Hon'ble Supreme Court of India in the case of State of Bihar vs. **Upendra Narayan Singh & others** reported in **2009 (5) SCC, 65** describes appointments without advertisement and regularization thereafter as 'spoiled system'. There is no dearth of judgements of the High Court at Allahabad on the judicial side setting aside appointments made in public employment at various offices/departments under its power of judicial review, only on the ground that Article 14 and 16 of the Constitution of India prohibit appointment without proper advertisement being made so as to enable the public at large to participate in the process of selection.

6. What the High Court preaches vide its judgments it does not follow in practice when it comes to appointment on Class IV posts in the establishment of the High Court at Allahabad as well as Lucknow. It is dispressing and disturbing. The petitioner reminds the Court through this petition to practice what it preaches.

7. Two decades ago the Supreme Court of India, perturbed by the unabated exercise of powers under Article 229 of the Constitution of India, had to painfully remind the High Court of Karnataka about the width and expanse of the powers so conferred and to be exercised by the Hon'ble The Chief Justice of the High Court. The judgment describes the powers so conferred by the Constitution to be bounded by solid embankments of legal principles cherished by our system with a strong cautionary that the exercise of administrative independence should not overflow the parameters of the fundamental rights guaranteed under the Constitution. The same is preserved for posterity in **Putta Swamy H.C. vs. High Court of Karnataka (1991) Suppl. (2) SCC, 421** and still holds the field.

8. Learned counsel for the petitioner submits that we function in a democracy where the principles of equality are zealously protected which tell us not to discriminate, and to deliver justice both on the judicial side and administratively in a way that our actions are transparently beyond doubt. There should be no misgiving that the High Court or its authorities are Aladdin with some magical lamp which has the capacity to generate employment riches at will. Our minds should be plainly reflected in our outward actions with no scope for doubt in our intents. Judges are not outsiders or intruders immune from the mandate of the Constitution and any accusation should not partake the nature of a permanent blot. The stains, if any, should be removed by a careful application of the legal broom sweeping away any infection that might eat at the roots of this institution.

9. The petitioner contends that he has been treated with an unequal hand, and he too intends to join the same bandwagon of "Recomendees of Hon'ble Judges" as narrated in his petition. This 'sudden' activity which gained popularity as a traditional source of employment, in spite of the advent of the Constitution, has been continuing for a fairly long period without advertisement. This fact is

admitted to the High Court that as far as memory reflects, no Class IV appointment has been initiated through an advertisement. This probably impelled the petitioner to carry a mistaken belief about a fair chance of his success through the same door open for recommendees/relatives etc. only. Not only this, his pleadings and prayer are both tailored to suit this purpose even though there is a direct complaint about a wrong procedure having been adopted by the High Court for selections.

10. In reply it is submitted by Shri Neeraj Upadhyaya, learned counsel for the High Court that -

(a) appointments in question have been made as Daily Labourer referable to Rule 4 of the Rules, 1976 under the orders of the Hon'ble The Chief Justice.

(b) Rules, 1976 lay down no procedure for appointment of Class IV employees by direct recruitment.

(c) The Hon'ble The Chief Justice has not issued any orders under Rule 45 of the Rules, 1976 for laying down the mode and manner of appointment by direct recruitment on Class IV posts.

(d) For several decades there has been a constant practice of engagement of daily labourers on Class IV posts and thereafter to offer regular appointment to them. At no point of time the process of advertisement of the vacancies was adopted.

11. Shri Upadhyaya specifically stated that an error of procedure has crept in due to past practice that had been adopted and it is for this reason that there is non-adherence to the rule of advertisement of vacancies before appointments as enshrined under Article 14 and 16 of the Constitution of India. He has been fair enough to state that Rules, 1976 have to be read in a manner to be in consonance with Article 14 and 16 of the Constitution of India and not in derogation thereof. He submits that the wrong practice followed shall be rectified appropriately in future about which he has specifically been instructed to inform the Court on behalf of the administrative side of the High Court. He stated that **all future appointments on Class IV posts to be filled by direct recruitment under Rule 4 of Rules, 1976_(with whatever nomenclature) shall be made only after advertisement of the vacancies and this Court may not interfere with the appointments made till date treating the same to be the last exercise as per the old practice.**

12. This petition is a union of sorrows mildly narrated as a resentment on account of discrimination. It is a combination of a claim and a complaint which in my opinion serves a larger purpose, giving the High Court a golden opportunity to rectify its errors. Edmund Burke said **"our antagonist is our helper".**

13. Rule 4 (a) of the Rules, 1976 provides for the appointment on Class IV posts by direct recruitment and reads as follows:

"Source of recruitment to Class IV posts:- The sources of recruitment to the various class IV posts in the establishment shall be as follows :

(a) Peon, farrash collied, bhisti, sweeper, mali, fireman chowkidar and liftman:- By direct recruitment as provided in Rule (Provided that in making such recruitment preference shall first be given to suitable persons already engaged by the High Court as daily Labourers. **If after making recruitment from this source** some vacancies are left unfilled for want of suitable persons, the remaining vacant posts shall be filled by inviting applications through Employment Exchange.)
(b) **Jamadar:-** By promotion from amount permanent peons.
(c) **Daftari**:- By promotion from amongst permanent peons, farrashes and liftman; Provided that for the post daftari only such persons shall be eligible who, to the satisfaction of the appointing authority, possess requisite knowledge and experience of the work of book binding.
(d) **Bundle Lifter**:-By promotion from amongst permanent peon, farrashes and liftmen.
(e) **Head Mali:-** By promotion from amongst permanent malis, provided a suitable person is available; otherwise, by direct recruitment of a person possessing requisite knowledge and experience of gardening and ability to supervise the work of malis."

14. The Rules, 1976 does not lay down any procedure to be followed for making appointment by direct recruitment on Class IV posts. The Hon'ble The Chief Justice has also not issued any order laying down the procedure in exercise of his powers under Rule 45 of the Rules, 1976 (as per the statement of the counsel for the High Court).

15. The words 'preference shall first be given to suitable persons already engaged by the High Court as Daily Labourer ....." in Rule 4, has been subject matter of consideration in a recent order of the High Court dated 24.02.2010 passed in Civil Misc. Writ Petition No. 7212 of 2010 (Diwakar Singh vs. Registrar General, High Court of Judicature at Allahabad and others) and it has been held as follows :

"There is no separate procedure provided for the engagement of a daily labourer or a daily labourer driver. Rule 4 of the 1976 Rules and the proviso to Rule 14 of the 2000 Drivers Rules both refer to a preference being given to daily labourers/ daily labourers drivers at the time of making recruitment to permanent posts. There is one distinction namely that in Rule 4 of the 1976 Rules the word preference has been qualified by the word "shall first be given to suitable persons already engaged by the High Court as daily labourers" whereas in Rule 14 of 2000 Drivers Rules, the word "first" is missing. None-the-less both the Rules indicate that recruitment of other candidates shall be made only if some of the posts remain unfilled after making recruitment from these preferential sources as indicated here inabove.

Thus there is no doubt that the rules create an embargo for making selections by direct recruitment against class IV posts, and preferentially and primarily limit it to be a selection from amongst the already engaged daily labourers/daily labourers drivers. This preferential right, as indicated in the Rules, therefore, creates a legitimate expectation in favour of such candidates, who are already engaged as daily labourers/daily labourer drivers. It is on the strength of such a qualification that they become the feeding source of recruitment and it is only when

they are found unsuitable, that persons from the open market have to be considered. The rule, therefore, creates a strong caveat in favour of the power to be exercised by the High Court and the Hon'ble Chief Justice for making appointment against class IV and Class III vacancies, as referred to in the Rules from such special category candidates to the exclusion of others. If the rules are spelt out, then the administration is bound by it. As long as a word remains unspoken, you are its master; once you utter it, you are its slave.

The Rules, create a special category of candidates for direct recruitment with a substantial preferential right which places them in a special class as against the candidates from the open market. This right created in favour of such a candidate compels the selecting authority to choose within the same category first and in the event the posts remain unfilled then the general rule has to be followed. The language of the aforesaid rules is, therefore, couched in a language that creates a protective shield which is almost impregnable. The expectation is not merely legitimate but is almost in the nature of a cast iron provision. It is thus clear that a daily labourer or a daily labourer driver is engaged not merely for continuing on a casual daily wage basis but he is engaged so as to form the pool of candidates who have a right to be considered preferentially in the first place to the exclusion of the candidates from the open market. This rule, therefore, is a shirt of iron clothed with which a daily labourer/daily labourer driver of the High Court prevents and rather prohibits the consideration of any of the candidates from open market. This right to pre empt the open market candidates almost to their exclusion places such daily labourers/drivers on a higher pedestal thereby creating a class within a class.

Can such a right so created under Rules be construed to be a mere formality which does not require to be in conformity with Articles 14 & 16 of the Constitution of India? The answer to this question will be required to be given keeping in view the mandate of this Court and the Supreme Court which has time and again been reiterated to the effect as to whether such a Rule can be pressed into service in teeth of Articles 14 & 16 of the Constitution of India.

In the instant case there is no doubt that the rules, as discussed aforesaid, have to conform to Articles 14 & 16 of the Constitution of India as they create a right even in favour of a daily labourer or a daily labourer driver. One of the facets of Article 14 in service jurisprudence has been to include the process of publication and advertisement as part of the process of selection that conforms to the aforesaid provisions of the constitution. There is no dearth of authorities to that extent and the following judgment would suffice for the same:-

State of Bihar Vs. Upendra Narayan Singh & others 2009 (5) SCC Page 65.

Apart from the aforesaid judgment the Supreme Court has very lately upheld a similar view taken by a Division Bench of our Court in the case of Rajesh Kumar Srivastava Vs. State in Writ Petition No. 3790 of 2004 decided on 29.4.2007. The SLP against the same was dismissed by a speaking order being Civil Appeal No. 1139 of 2010 decided on 29.1.2010.

The argument at first flush that the engagement of daily labourer does not require advertisement may appear to be attractive but the same is totally unfit for the occasion at hand. Apart from this the

constitution bench decision in the Case of **Secretary, State of Karnataka Vs. Uma Devi and others, reported in 2006 (4) SCC 1** further whittles down the engagements of daily wagers through side lanes and then their regularization through back door methods. The decision has deprecated the same".

16. This Court is in respectful agreement with what has been said in the case of Diwakar Singh (supra).

17. The requirement of advertisement in the matter of direct recruitment on Class IV posts under Rule 4(a) of Rules, 1976 is even more imperative inasmuch as in the case of Class IV employees under Rule 4(a), the word "preference" has been prefixed with the word 'first' while in the case of Driver, only preference has been provided to daily labourers. Words 'first preference' shall necessarily exclude other categories of candidates namely the persons available in the open market from consideration so long as the list of daily labourers is not exhausted. No person from open market can be considered so long as a suitable daily labourer is available. Precisely this is what has happened in the last 3 decades in the High Court. Persons appointed as daily labourers alone have been adjusted against substantive post with the help of Rule 4(a) of Rules, 1976 leading to a situation where the public at large has been completely excluded even from an opportunity to participate and be considered in the process of selection. This Court has no hesitation to hold that if 'first preference' is to be given to daily labourers in regular appointment, then their appointment has to be initiated by a proper advertisement published in widely circulated newspaper throughout the State so that Article 14 and 16 are not diluted in any manner. The High Court has to act on the administrative side in the manner it preaches vide its judgment on the judicial side. After all Law is an orderly way of discovering what you cannot do as you wish.

18. The importance of publishing an advertisement before proceeding to make any appointment is to bring it to the knowledge of the proposed recipients; namely the public at large the opportunity available for engagement as an employee. The matter, therefore, requires wide publicity as it relates to public employment which has to be proceeded by fair steps being taken for the same. The conclusion, which can be drawn on the basis of reasoning given by the learned single Judge in the case of Diwakar Singh (Supra) is clearly to the effect that once it is held that the engagement of a daily labourer carries with it, the right to be considered to the exclusion of others en bloc, then it necessarily requires the engagement through an advertisement.

19. The rule of first preference is clearly meant to exclude others from the zone of consideration. This is fortified by the language used in Rule 4 of the Rules, 1976. Thus, those who get a berth as a daily labourer, also have a guarantee of further being offered permanent appointment as Class IV employee before any other person can even be considered. This in essence is the interpretation that can be given to the Rule 4 of Rules, 1976 and once this is so, there is no gainsaying that Articles 14 and 16 will not apply.

20. The rules, therefore, have to be reasonably construed so as to make the scheme workable in conformity with the constitutional mandate. In my considered opinion, the engagements for such daily labourers have to be scrutinized only after inviting applications through a publicised advertisement in widely circulated newspapers throughout the State.

21. This Court may clarify that the last line of Rule 4(a) of Rules, 1976 in so far as it provides that the remaining vacant posts shall be filled by inviting applications through Employment Exchange cannot be read in a manner to suggest that by necessary implication advertisement of the vacancies in newspapers is excluded. The Hon'ble Supreme Court of India has held that invitation of applications from Employment Exchange can be only in addition to the mode of advertisement in newspapers and not to the exclusion thereto. (**Ref. Raj Kumar & others vs. Shashi Raj & others reported in AIR 1997 SC, 2210).** The legal position in that regard has been explained in the Division Bench judgment of the Calcutta High Court in the case of **Bhaskar Ranjan Ghosh vs. Kamal Sen & others reported in 2000 (4) ESC, 2682.**

22. There is another aspect which has to be taken care of, lest it should invite complications i.e. about applications being received on recommendations of Hon'ble Judges. If an advertisement is resorted to recommendation by Judges can be easily avoided without causing any embarrassment to any Hon'ble Judge who might be persuaded for some reason to make a recommendation. This will also save the administration from resorting to any permutation or combination for entertaining preferences.

23. Rules 41 and 45 are general powers conferred on the Hon'ble The Chief Justice. Such conferment of powers are not unusual and are also necessary as it is not possible to foresee every situation. The grant of power is, therefore, to meet unforeseen or unprecedented situations where there are no rules or guidelines or even otherwise in almost impossible situations. While entering upon a judicial review in such matters, the unreasonableness is to be found in its exercise and not in its existence. Rule 45, even though commences with a non-obstante clause, it does not and cannot override the constitutional limitations. Article 229 itself is subject of Articles 14 and 16 of the Constitution of India and, therefore, as a natural logical conclusion the powers under the Rules, 1976 are also subject to such limitations. Rule 45 has no absolute immunity from law under the Constitution.

24. The vesting of the discretionary power in a high public dignitary is by itself a guarantee that the power will be exercised on the basis of reasonable standards for the purpose intended under the rule. Reference: D.K. Pandey vs. Hon'ble High Court of Judicature at Allahabad reported in 2007 (4) AWC, 3448 (paragraph 16) relevant portion whereof reads as follows:

"It is difficult to conceive that a high constitutional functionary vested with the powers to protect the right of the citizen of the State would violate these rights in exercise of his extraordinary powers. All such powers are conferred to carry out the

purpose of the rules and must be used only for that purpose."

25. The issue now which remains for consideration before this Court is as to whether such illegal appointments which are under consideration before this Court should be permitted to go unnoticed merely because it has been the practice of this Court to act de hors the constitutional provisions.

26. The petitioner before this Court alleges that he had made applications containing recommendations of the Hon'ble Judges as early as on 03.01.2006 and 11.01.2007 respectively, for being appointed as Class IV employee. He further submits that on 11.01.2010, he made another application before the Registrar General for being appointed as a daily labourer. Copies of the applications have been brought on record as Annexure-1 and 2 to the writ petition. He submits that his case was not considered and no reason apparently exists for non consideration of the application of the writ petitioner specifically when applications of similarly situate persons including those residing in other States and in other places outside Allahabad have been considered.

27. In these set of circumstances and in view of the admitted position that the appointment of respondents no. 04 to 16 have been made without there being any advertisement and without there being any process of selection and consideration amongst similarly situate candidates like the petitioner, it is the duty of the Court to ensure that injustice is set at rest. The Court is of the opinion that what has been practised for more than three decades brought to a halt. The infringement of Article 14 and 16 of the Constitution of India cannot be permitted to continue any further, therefore, appropriate steps are required to be taken. A stitch in time saves nine. Illegality cannot be perpetuated nor it is appropriate for the highest Court of the State to act in a manner so as to shake the confidence of the public at large.

Accordingly, the following directions are being issued at this interim stage:

a. In view of the conceded position by the High Court through its counsel as noted above, no further appointment on Class IV posts covered by Rule 4(a) of the Rules, 1976 in the establishment of the High Court both at Allahabad and at Lucknow, shall be made in any capacity except after due publication in newspapers having wide and adequate circulation.

b. It shall be open to the High Court to take work or not to take work either from the respondents no. 04 to 16 or any such engagements that have been made along with the said respondents or on any date subsequent to the date of their appointment in the establishment of the High Court. However they shall not be paid their salary without the leave of the Court.

c. Respondents no. 04 to 16 and similarly situate persons shall not be regularized nor they shall be granted any preference in terms of Rule 4 at the time of regular appointment.

Issue notice to respondents no. 4 to 16. The said respondents may be served through the Registrar General of this Court who may also inform similarly situate persons, if any, of the pendency of

this writ petition, for putting in their appearance. Steps may be taken within ten days.

28. Further since the matter pertaining to daily labourer Drivers similarly appointed without advertisement, is being considered in Civil Misc. Writ Petition No. 7212 of 2010 ***(Diwakar Singh vs. Registrar General, High Court of Judicature at Allahabad)***, it would be appropriate that this writ petition may also be tagged along with the said writ petition so that all issues pertaining to appointment in the establishment of the High Court both at Allahabad and Lucknow are adjudicated under one common judgment.

29. Tag and list with Civil Misc. Writ Petition No. 7212 of 2010 on 22.03.2010.

30. The records of the applications of respondents no. 04 to 16 are being returned to Shri Neeraj Upadhyaya, counsel for the High Court.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.02.2010

BEFORE
THE HON'BLE AMAR SARAN, J.

Criminal Misc. Bail Application No.22094 of 2009

Pintoo and others ...Applicants
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Mr. L.K. Pandey
Mr. P.C. Pandey

Counsel for the Opposite Party:
Govt. Advocate

Code of Criminal Procedure-Cancellation of Bail-offence under Section 302/341 IPC-on ground-main prosecution witness-turned hostile and facing Notice u/s 181 I.P.C.-disclosed the reason of threat to kill the son of such witness-trail court rightly come to the conclusion for cancellation of bail-approach made by learned Trail Court in accordance with verdict of Apex Court.

Held: Para 18 & 19

For all the aforesaid reasons I see no illegality in the order of the learned Additional Sessions Judge dated 29.7.09 cancelling the bail of the applicants. The prayer for bail on behalf of the applicants is also rejected. The trial is however expedited. The Court concerned shall conclude the trial within three months of filing of the certified copy of this order.

Before parting I would like to record my appreciation of the Additional Sessions Judge/ FTC-2, Kaushambi , Dr. Bal Mukund, who passed the impugned order for his timely and pro-active attempt at dispensing justice in the wake of the determined bid of the mischievous accused to subvert the course of justice. With this objective on the very date that the witness turned hostile, the Court issued notice to the witness as to why he should not be punished under section 181 IPC, encouraging the witness to come out with the true reason for his hostility, and thereafter by issuing notice to the accused asking them to explain why their bail be not cancelled, and eventually by cancelling their bail. This appears to have emboldened the subsequent witness PW-2 Ramraj to affirm his earlier version in the First Information Report, and to have prevented him from also turning hostile. The judge thereby fulfilled the mandate of the Supreme Court in letter and spirit,

by not functioning as a passive tape recorder and by affirmatively searching for the truth.

Case law discussed:

AIR 2001 SC 330, AIR 1976 SC 202, AIR 1977 SC 170, (1977 Cri LJ 173, 2006 (1) U.P. Criminal Ruling(SC) 519, AIR 2006 SUPREME Court 1367, (1972 (1) All ER 1006), AIR 2000 SC 1851, 2004 (2) SCC 362, 2005 (8) SCC 21, 2004(7) SCC 528.

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

1. The prayer for bail has been made on behalf of the applicants Pintoo, Ajai and Indal Dhobi in case crime no.34/2002 under Section 302/341 I.P.C. P.S. Saini, district Kaushambi after the bail of the applicants was cancelled by an order dated 29.7.2009 passed by the Additional Session Judge/F.T.C.-2 in S.T.No.243 of 2002.

2. The brief facts of this case were that on 17.1.2002 at about 8 p.m., the informant Ram Raj, his brother Bhairo Prasad, and nephews Suraj Pal and Ram Kripal were going to the west of the village for loading onions on a D.C.M. vehicle. As soon as they reached near a pond at the side of the road, the applicants who were lying in wait with country made pistols surrounded them. The accused Pintoo cried out that Suraj Pal should not be allowed to escape and he fired on Suraj Pal with his country made pistol which hit Suraj on his stomach causing him to fall down. Then the brother-in-law (sala) of Pintoo, namely the applicant Indal also fired on him with his country made pistol, but this fire missed. When the witnesses tried to intervene, the accused Ajay threatened them that if anyone intervened in the matter, they would meet the same fate as Suraj Pal. The FIR was registered under section 307 I.P.C but later when Suraj Pal died, the case was converted to one under Section 302 and 307 I.P.C.

3. The accused persons were however granted bail by the then Session Judge by orders dated 1.2.2002 and 16.3.2002. The statement of PW1 Bhairo Prasad was recorded on 21.11.2008 in which he affirmed the version mentioned in the F.I.R. But as his examination could not be completed on that date hence the recording of the evidence was postponed. Further, examination of this witness could only take place on 24.6.2009. On this date when the counsel for the accused cross examined him, PW1 Bhairo Prasad turned hostile, and the prosecution was granted permission to cross examine him.

4. As this witness had turned hostile in his cross examination, the Court issued a written notice to him on 24.6.09 itself to show cause why he should not be prosecuted for an offence under section 181 I.P.C. for having made contradictory depositions on different dates.

5. In reply to the notice, Bhairo Prasad gave a written reply on 8.7.2009 in which he mentioned that he had earlier deposed on 21.11.2008, but then the accused persons Pintoo, Ajay and Indal began to threaten him repeatedly, that if he did not change his version in Court they would murder his son Ram Kripal. His son Ram Kripal used to go to Ajuwa as he had a shop there for ironing clothes, hence out of fear for the life of his son, Bhairo Prasad claimed to have given a wrong statement on 24.6.2009. He said that the earlier version given on 26.11.2008 was the correct version of the incident and that he had given this version without any pressure. In view of this he prayed for withdrawal of the notice.

6. In the background of the reply submitted by Bhairo Prasad PW1 to the show cause notice, the Court issued a notice to the accused applicants in exercise of powers under section 439(2) Cr.P.C as to why the bail granted to them be not cancelled. The accused applicants gave a joint written reply on 15.7.2009 in which they pleaded that the claim of Bhairo Prasad for changing his version at the instance of the accused persons was false. He had voluntarily given the new statement. He had never set up the version of being threatened by the accused until he was called upon to give a reply to the notice under section 181 I.P.C. The subsequent witness Raja Ram P.W. 2, the informant had also not deposed that the accused persons had given any threat to the witnesses that unless they resile from their earlier testimony, they would kill the son of Bhairo Prasad and that the applicants had never abused the bail granted to them.

7. The Session Judge however after examining the matter, recorded a finding in his order dated 29.7.2009 that the accused applicants had extended grave threats to the witness that his other son would meet the same fate as Suraj Pal. In such circumstances no witness could freely depose in Court without fear or pressure and the contention of the accused that PW1 Bhairo Prasad had given this explanation because he was facing a prosecution for giving false testimony in view of the notice under Section 181 I.P.C did not appear to be correct. Significantly it was pointed out that after the notice had been issued to the accused persons as to why their bail should not be cancelled because they were tampering with the witnesses, when the witness PW 2 Ram Raj appeared in Court for his deposition he has fully supported the F.I.R. version in his examination in chief on 8.7.09. It was further observed in the impugned order that if the accused applicants had not threatened Bhairo Prasad PW1 that they would kill his other son Ram Kripal then he would definitely not have changed his version. In these circumstances the Trial Court withdrew the notice under section 181 I.P.C. issued to the witness and cancelled the bail of the accused applicants and directed that the applicants be taken into custody. This order is under challenge in the present case.

8. It is argued by the learned counsel for the applicants that as the notice dated 24.6.2009 called upon the witness Bhairo Prasad to show cause why he should not be prosecuted under section 181 I.P.C. for giving a false testimony during the earlier examination on 26.11.08, the Court was debarred from holding in its order dated 29.7.09 that the earlier version dated 26.11.08 and not the latter statement dated 24.6.09 gave out the correct version.

9. In my view it is not material whether the Court gave a notice considering the first statement or the later testimony dated 26.4.09 to be false, because when a witness gives contradictory versions in his testimony then a per se conclusion can be reached by the Court that one of the versions is false. It is for the Court to finally evaluate at the trial as to which of the two versions, the initial version consistent with the FIR or the changed version that a witness deposes to after turning hostile gives the true picture, and there is no fetter on the Court accepting any part of the testimony of a witness that it considers reliable.

10. In *Gura Singh v. State of Rajasthan, AIR 2001 SC 330* it has been observed in paragraph 11:

"11. There appears to be misconception regarding the effect on the testimony of a witness declared hostile. It is a misconceived notion that merely because a witness is declared hostile his entire evidence should be excluded or rendered unworthy of consideration. This Court in Bhagwan Singh v. State of Haryana, AIR 1976 SC 202 : (1976 Cri LJ 203), held that merely because the Court gave permission to the Public Prosecutor to cross-examine his own witness describing him as hostile witness does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base conviction upon the testimony of such witness. In Rabindra Kumar Dey v. State of Orissa, AIR 1977 SC 170 : (1977 Cri LJ 173) , it was observed that by giving permission to cross-examine nothing adverse to the credit of the witness is decided and the witness does not become unreliable only by his declaration as hostile. Merely on this ground his whole testimony cannot be excluded from consideration. In a criminal trial where a prosecution witness is cross-examined and contradicted with the leave of the Court by the party calling him for evidence cannot, as a matter of general rule, be treated as washed off the record altogether. It is for the Court of fact to consider in each case whether as a result of such cross-examination and contradiction the witness stands discredited or can still be believed in regard to any part of his testimony. In appropriate cases the Court can rely upon the part of testimony of such witness if that part of the deposition is found to be creditworthy." (Emphasis added)

11. The learned counsel for the applicants has also contended that the witness had resiled from his statement voluntarily and only when he faced impending prosecution under section 181 IPC, he resiled from his later version, and re-affirmed his earlier version. This contention does not appear to be acceptable. In my view if the Court was of the opinion that ordinarily the father or uncle would not resile from his version mentioned in the F.I.R. and earlier deposition in the Court, unless some strong pressure was brought to bear on him, the Court cannot be faulted for this reasoning. In this back ground if the Court is of the opinion that no useful purpose would be served in directing prosecution of a witness for an offence under section 181 IPC or any allied provision, and decides to discharge such a witness and instead to issue notice to the accused as to why their bail be not cancelled, there is no illegality in the said direction.

12. Another submission of the learned counsel was that as the witness had deposed on oath on being cross examined on 24.6.2009 that the applicants were innocent and that he had denied that he had colluded with the accused on being cross examined by the prosecution. This version should have been preferred to the version contained in his reply dated 8.7.2009 to the show cause notice that he had resiled from the earlier version on account of the threat of the accused-applicants. Reliance was placed in this connection by the learned counsel for the applicant on the case of *Zahira Habibullah Sheikh and another Vs. State of Gujarat and others* reported in *2006 (1)*

U.P. Criminal Ruling(SC) 519, particularly to some passages therein for keeping the stream of justice pure and transparent. Learned counsel for the applicant submits that in that case Zahira Habibullah Sheikh who had changed her version was punished by the Apex Court and was not discharged.

13. I may mention that the Apex Court had been constrained to prosecute and punish Zahira Sheikh because she had been changing her version at different stages, and had caused great anguish to the Court in a case in which no witnesses were coming forward to depose to the true facts as to how the grave crime had been committed. The present case is clearly distinguishable on facts. Here, immediately after the show cause notice was issued to the witness PW-1 Bhairo Prasad as to why he should not be punished under section 181 IPC for giving conflicting versions, he had immediately made a clean breast of the matter in his reply dated 8.7.09 that because he had been subjected to undue pressure as threats were extended to him that his other son would also meet the same fate as the deceased Surajpal, that he had given the incorrect version on 24.6.2009 and that his earlier version 26.11.08 brought out the correct position.

14. It is significant that the learned AGA also relied upon the case of Zahira *Habibullah Sheikh* which emphasizes that in order to keep the stream of justice pure and unsullied the Court must not function like a tape recorder and it must pro-actively search for the truth. Wide powers have been given for this purpose also under section 311 Cr.P.C, which empowers the Court to summon a witness or to recall any person in attendance and to re-examine him. Section 165 of the Evidence Act also confers wide powers on the Court to question a witness or to order the production of any person that the Judge considers necessary. It was to abide by the spirit and import of the decision of the Apex Court in *Zahira Sheikh's* case that the learned trial Judge had issued a notice to Bhairo Prasad as to why he should not be prosecuted, on the same date that the witness had turned hostile, whereupon the witness submitted a reply to the notice on 8.7.09 as to how on account of threats to the life of his son, he had been forced to turn hostile. The Court thereafter issued notice to the accused as to why their bail be not cancelled in such circumstances. The result of the notice to the accused was that the next witness, PW 2 Raja Ram was prevented from turning hostile.

In this connection it has been sagely observed in paragraph 22 in *"Zahira Habibullah Sheikh v. State of Gujarat"AIR 2006 SUPREME Court 1367* :

"It was significantly said that law, to be just and fair has to be seen devoid of flaw. It has to keep promise to justice and it cannot stay petrified and sit non-challantly. The law should not be seen to sit by limply, while those who defy it go free and those who seek its protection loose hope (See Jennison v. Backer (1972 (1) All ER 1006). Increasingly, people are believing as observed by SALMON quoted by Diogenes Laertius in "Lives of the Philosophers" laws are like spiders' webs: if some light or powerless thing falls into them, it is caught, but a bigger one can break through and get away". Jonathan Swift, in his "Essay on the Faculties of the Mind" said in similar lines: "Laws are

like cobwebs, which may catch small flies, but let wasps and hornets break through".

15. Because of these observations in Zahira Sheikh, that Courts are required not to sit limply but to pro-actively search for truth, I find no merit in another submission of the learned counsel for the applicant that as the prosecution had not given any application for getting the bail cancelled or for declaring the witness hostile nor had the witness himself given any statement on oath that some pressure had been made to bear on him, the Court was not justified in issuing a notice to the witness why he should not be prosecuted under section 181 IPC or for proceeding against the accused for cancelling their bail. Such a complaint is rarely likely to be made by a witness whose life or the life of whose dear one is under threat from the accused, as presently there is no effective system of witness protection in place. Learned AGA has also rightly placed reliance on the case of *R. Rathinam Vs. State and another, AIR 2000 SC 1851* that not only are the State, the complainant or the witness entitled to move an application for cancellation of the bail, but an application for this purpose can be moved under section 439(2) Cr.P.C by any third party and even suo motu by the Court, if it is satisfied that the accused persons were trying to tamper with the witnesses and the Court can also in such circumstances pass an order cancelling the bail of the accused.

16. The importance of the Court not shutting its eyes to reality and being proactive in the dispensation of justice has been emphasized by Fali S. Nariman, in his pithy little book, *"India's Legal System, Can it be Saved?"* Nariman contrasts the architect's impression of two stone images carved out on towers of the Bombay High Court. The Southern tower carries the stone image of Mercy, the British (Victorian) hand maiden of justice who is shown as blind, *"performing her task without fear or favour and does not go by the appearance of the parties arraigned before her."* He however prefers the Indian ideal of justice with her flowing robes, a sword in her right hand and a pair of scales in the left, and the blind folds removed portrayed on the Northern tower. "*With clear eyes and a clear head, she sees things with unbiased vision, looking intently at the ever-tilting scales in her left hand. The tip of the sword is resting on the ground near her feet, so that after considering the evidence, she can wield the sword swiftly and strike the guilty party: being clear-eyed she cannot by mistake or accident hurt the innocent one*!"

17. In fact in *Mubarak Dawood Shaikh v. State of Maharashtra: 2004 (2) SCC 362, State of U.P. v. Amarmani Tripathi:2005 (8) SCC 21, and Kalyan Chandra Sarkar v. Rajesh Ranjan: 2004(7) SCC 528* it was observed that even when there is a prima facie apprehension of the likelihood of an attempt to derail the course of justice by tampering with the witnesses, the Court would be fully justified in cancelling the bail. Here as we have seen the eye witness, had actually turned hostile, and it was not only a case of an apprehension that an attempt would be made to tamper with the witnesses.

18. For all the aforesaid reasons I see no illegality in the order of the learned Additional Sessions Judge dated 29.7.09 cancelling the bail of the applicants. The prayer for bail on behalf of the applicants

is also rejected. The trial is however expedited. The Court concerned shall conclude the trial within three months of filing of the certified copy of this order.

19. Before parting I would like to record my appreciation of the Additional Sessions Judge/ FTC-2, Kaushambi, Dr. Bal Mukund, who passed the impugned order for his timely and pro-active attempt at dispensing justice in the wake of the determined bid of the mischievous accused to subvert the course of justice. With this objective on the very date that the witness turned hostile, the Court issued notice to the witness as to why he should not be punished under section 181 IPC, encouraging the witness to come out with the true reason for his hostility, and thereafter by issuing notice to the accused asking them to explain why their bail be not cancelled, and eventually by cancelling their bail. This appears to have emboldened the subsequent witness PW-2 Ramraj to affirm his earlier version in the First Information Report, and to have prevented him from also turning hostile. The judge thereby fulfilled the mandate of the Supreme Court in letter and spirit, by not functioning as a passive tape recorder and by affirmatively searching for the truth.

20. In view of the aforesaid remarks about the Judge, let a copy of the judgment be placed before the Inspecting Judge of Kaushambi.

21. Let the copy of the order also be sent to the Judicial Training and Research Institute and the Legal Services Authority for communication to the concerned judicial authorities within a month as a guidance on how to act in a timely and proactive manner when dealing with situations where attempts are being made to brow beat witnesses and to compel them to turn hostile, as hostility of witnesses by threats or inducements is becoming the bane of our judicial system.

22. The copy of this order should be sent to the Additional Sessions Judge/ FTC-2, Kaushambi within a week for compliance.

The Registrar is also directed to circulate copies of the judgment before all the subordinate Courts within two months.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.02.2010

BEFORE
THE HON'BLE IMTIYAZ MURTAZA, J.
THE HON'BLE S.S. TIWARI, J.

Civil Misc. Habeas Corpus Writ Petition
No. 27725 of 2009

Shera ...Petitioner
Versus
Union of India Thru' Secy. and others ...Respondent

Counsel for the Petitioner:
Sri Sudhakar Shukla

Counsel for the Respondents:
A.S.G.I., G.A.

Constitution of India Art. 226-Habeas Corpus-detention order-inordinate delay in disposal of representation-delay of 40 days-explanation the dealing clerk on medical leave-can not be plasible -and justified explanation in such vitally important of fundamental right-order quashed.

Held: Para 16

It brooks no dispute that it was a matter involving the vitally important fundamental right of a citizen. There is a delay of more than forty days. The explanation that the dealing assistant was on long medical leave, hence the delay occurred cannot be said to be plausible and justifiable. All the decided cases discussed above, yield the conclusion that the representation must be decided with utmost expedition. Merely because the dealing assistant was on leave, the representation could not be processed is unacceptable when it involves the vitally important fundamental right of a citizen. Hence, the explanation offered for the delay does not commend for acceptance and on this ground alone, the detention is clearly unsustainable and is liable to be set aside and the petition deserves to be allowed.

Case law discussed:

1999 SCC (Crl.) 93, (AIR 2008 SCW 2189), (2006 (5) SCC 676, (1981(3) SCC 317, (1980) (2) SCC 275, (1991) (1) SCC 128, (1993) (1) SCC 272.

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

1. The present petition has been preferred against the detention order dated 17.12.2008 passed by District Magistrate, Agra, district Agra (arrayed as respondent no.3 in the instant petition).

The reliefs sought herein are as under:

(i) issue a writ, order or direction in the nature of habeas corpus commanding the opposite parties to release the petitioner forthwith ;

(ii) issue a writ, order or direction in the nature of certiorari quashing impugned detention order dated 17.12.2008 passed by opposite party no.3.

2. The brief facts giving rise to the present petition are that the petitioner has been slapped with detention order after he was falsely implicated in a criminal case under section 302, 307 I.P.C and 3 (2)(v) of SC/ST (Prevention of Atrocities) Act vide case Crime No.926 of 2008 registered at P.S. Etmaddaula, Agra, pursuant to F.I.R. dated 18.12.2008. The informant Radhey Lal Jatav submitted a written report at police station Etmaddaula to the effect that on 02.03.2009 at about 6.00 p.m. the son of the informant Lokesh alongwith his friend Praveen was going to drop Praveen at his residence and when he reached near Tedhi Baghiya Bazar, he found Bolero vehicle No. UP-83L-5953 standing on the middle of the road with Shera and Sonu and two others sitting inside the vehicle Lokesh asked Shera to remove the vehicle from the middle of the road, Shera was annoyed and after casting aspersions by addressing the caste of his father refused to remove the vehicle from the middle of road. Lokesh and Praveen protested to it. Shera took out his country made pistol and threatened them. When Lokesh and Praveen started going back on their motorcycle, the person inside the Bolero vehicle hit that motorcycle on the 100 Ft. road with the result Lokesh and Praveen fell down on the road and they were repeatedly crushed down by the Bolero vehicle. In the meantime, one Ram Das and Suleman passed through that road and they were also hit by that vehicle. Consequently, Lokesh and Ram Das succumbed to the injuries and Praveen and Suleman were seriously injured. The respondents escaped away in that vehicle from the spot. The incident was seen by several persons of the locality.

3. We have also traversed upon the impugned order of detention in which it is stated that due to this incident the traffic was completely stopped due to fear of the accused persons and the persons of the locality hide themselves inside their houses. Drivers of the vehicles ran away leaving the vehicles on the road. Public order was fully disturbed. Additional police force was called on the spot. The public peace was fully disturbed and normalcy could be restored with great difficulty in that locality.

4. We have heard learned counsel for the petitioner and also the learned AGA. They have argued at length bandying their respective contentions.

5. The arguments advanced across the bar in nut shell are that the petitioner has falsely been implicated i this case. The father of the deceased Radhey Lal Jatav is a local leader of ruling party and due to his influence the petitioner has been detained under section 3/2 of the National Security Act. The petitioner has got no previous criminal history. He was still detained in jail and only on the basis of conjectures and surmises he has been detained in this case. The Station Officer of Police Station concerned has submitted the report for detention of the petitioner in the aforesaid Act only under the political influence. The higher authorities including the respondent no.3 did not apply their mind. They have passed the orders in a mechanical way and in a routine manner. However, the main brunt of the argument advanced across the bar is that there was inordinate delay in the disposal of representation dated 14.3.2009 which was decided on 14.5.2009 at the hand of the Union Government.

6. From the submissions advanced across the bar, it would crystalize that there was no unreasonable delay in disposing of the above representation on the part of the State Government. The main grievance of the petitioner pivots on inordinate delay in disposing of the representation by the Union Government.

7. We have scrutinised the counter affidavit filed by Sri L.P. Srivastava, Under Secretary, Ministry of Home Affairs, Government of India, New Delhi. In paragraph-5 of the counter affidavit it is averred that the representation of the detenue dated 14.3.2005 was received by the Central Government in the concerned Desk of Ministry of Home Affairs on 2.4.2009 through State of U.P. vide their letter No.108/2/80/2009-CX-7 dated 24.3.2009. The same was considered together with report under section 3(5) of the National Security Act and the matter was processed at the level of Under Secretary and Joint Secretary and was placed before the Union Home Secretary on 13.5.2009 (who has been delegated with powers of the Central Government to decide such cases). The Union Secretary, it is averred, considered the representation along with connected papers. The Union Home Secretary after careful consideration of the matter through the material on record including the grounds for the same, the representation of the detenue and the comments of the detaining authority thereon found that the detenue has been unable to bring forth any material cause or grounds in his representation to justify revocation of the order by exercising of powers of the Central Government under Section 14 of the Act, and accordingly rejected the representation on 14.5.2009 and the file was sent for onward transmission of the

order of Joint Secretary. The file reached the concerned Desk in the section on 15.5.2009. Accordingly, a wireless message No.II/15028/259/09 NSA dated 15.5.2009 was sent to the Home Secretary, Government of U.P. and Superintendent, District Jail, Agra informing that the representation of the detenue Sonu was considered and rejected by Union Government Home Secretary on 14.5.2009. It is further averred that the matter could not be processed earlier, as the dealing hand concerned proceeded on medical leave and after his return he could put up the case only on 11.5.2009. The section had received large number of representations during the period especially from U.P. The work of the dealing hand could not be fully attended to due to non availability of alternative arrangements.

8. Keeping in view that fresh cases continued to be received, there was resultant backlog of a large number of cases, hence, it took further 3-4 weeks time to clear the backlog.

9. It would thus transpire that whatever has occurred is attributable to explanation that the dealing assistant had proceeded on long leave i.e. on medical ground and also that during that period large number of representations had been received and there was accumulation of work. Now the question remains whether the explanation offered for the delay is plausible one and was occasioned due to permissible reasons and unavoidable causes.

10. Under the constitutional scheme, the representation of the detenue has to be considered without any delay. Article 22 of the Constitution does not envisage any specific period constituting the delay. The phrase used in clause (5) of Article 55 is "as soon as may be" In Rajammal v. State of T.N. And another 1999 SCC (Crl.) 93, the Apex Court observed that the "test is not the duration or range of the delay but how it is explained by the authority concerned." In para 9 of the said decision the Apex Court recapitulating the facts of that case observed as under:

"In the present case, the representation was sent by the detenue on 13.1.1998 which reached the Secretary to the Government of Tamil Nadu on 5.2.1998. The Government which received remarks from different authorities submitted the relevant file before the under secretary for processing it on the next day. The under Secretary forwarded it to the Deputy Secretary on the next working day. Thereafter, the file was submitted before the Minister who received it while he was on tour. The Minister passed the order only on 14.2.1998. Though there is explanation for the delay till 9.2.1998 there is no explanation whatsoever as for the delay which occurred thereafter. Merely stating that the Minister was on tour and hence he could pass orders only on 14.2.1998 is not a justifiable explanation when the liberty of a citizen guaranteed under Article 21 of the Constitution is involved. **Absence of the Minister at the Headquarters is not sufficient to justify the delay** since the file could be reached the Minister with utmost promptitude in cases involving the vitally important fundamental right of a citizen.?

11. Per contra, the decision cited is Union of India v. Laishram Lincola Singh (AIR 2008 SCW 2189). It is a decision of the Apex Court in which ratio of various

other decisions have been noticed with approval. The first decision noticed is Senthamilselvi v. State of T.N. And Anr (2006 (5) SCC 676 in which it was substantially held ?there can be no hard and fast rule as to the measure of reasonable time and each case has to be considered from the facts of the case and if there is no negligence or callous inaction or avoidable red tapism on the facts of a case, the Court would not interfere.? The Apex Court further observed that ?It needs no reiteration that it is the duty of the Court to see that the efficacy of the limited, yet crucial, safeguards provided in the laws of preventive detention is not lost in mechanical routine, dull casualness and chill indifference on the part of the authorities entrusted with their application. When there is remissness, indifference or avoidable delay on the part of the authority, the detention becomes vulnerable."

12. Another decision noticed with approval is L.M.S. Ummju Saleema v. B.B. Gujarat (1981(3) SCC 317 in which it was quintessentially held that there can be no doubt that the representation made by the detenue has to be considered by the detaining authority with the utmost expedition but as observed in Frances Coralie Mullin v. W.C. Khambra (1980(2) SCC 275 "the time imperative can never be absolute or obsessive. Likewise other decisions relied upon are Kamarunnissa v. Union of India (1991) (1) SCC 128, Birendra Kumar Rai v. Union of India (1993(1) SCC 272) etc.

13. A brief survey of all the decided cases considered in judicial crucible yield the conclusion the representation has to be decided with utmost expedition.

14. In the light of the above decision the question that remains is whether the explanation offered for the delay by the Government was such from which an inference of inaction or callousness on the part of the authorities could be inferred.

15. Reverting to the facts of the present case, the explanation substantially is that the dealing assistant was on leave for about 38 days on medical ground and also that in or about the time, large number of representations had been received which led to accumulation.

16. It brooks no dispute that it was a matter involving the vitally important fundamental right of a citizen. There is a delay of more than forty days. The explanation that the dealing assistant was on long medical leave, hence the delay occurred cannot be said to be plausible and justifiable. All the decided cases discussed above, yield the conclusion that the representation must be decided with utmost expedition. Merely because the dealing assistant was on leave, the representation could not be processed is unacceptable when it involves the vitally important fundamental right of a citizen. Hence, the explanation offered for the delay does not commend for acceptance and on this ground alone, the detention is clearly unsustainable and is liable to be set aside and the petition deserves to be allowed.

17. The other grounds urged by the learned counsel for the petitioner are that no public order was disturbed by the aforesaid incident. The concerned authorities did not apply their mind to the facts and circumstances of the case and the incident was not within the category of cases to invoke provisions of National

Security Act. The District Magistrate rejected the representation on hyper-technical ground and not on merits. Since we are allowing the petition on the ground of unjustifiable delay, we do not propose to go into other aspects in detail.

18. In view of the foregoing discussions, the petition is allowed and it is directed that the petitioner shall be set at liberty forthwith unless wanted in any other case.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.02.2010

BEFORE
THE HON'BLE RAJESH CHANDRA, J.

Criminal Misc. Application No. 33249 of 2009

Mohd. Yameen and another ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri S.D. Kautilya

Counsel for the Respondents:
Govt. Advocate

Code of Criminal Procedure-Section 362- Power to recall the order-once the judgment singed in open Court-except clerical error-court has no power to recall/alter the same in garb of correction.

Held: Para 5

A perusal of the said section makes it clear that once the judgment or final order disposing of a case has been signed by a court, it will not be altered or reviewed except for correcting a clerical or arithmetical error. The Hon'ble Apex Court in Suraj Devi Vs. Pyare Lal, 1981 Cr.L.J, 269 has observed that a clerical or arithmetical error is an error occasioned by an accidental slip or omission of the court. It represents that which the court never intended to say. It is an error apparent on the face of the record and does not depend for its discovery on argument or disputation. An arithmetical error is a mistake of calculation, and a clerical error is a mistake in wring or typing. In view of the above observations, it is clear that under Section 482 Cr.P.C. only clerical or arithmetical errors can be corrected.

Case law discussed:
AIR 1990 SC 1605, AIR 2001 SC 2145, AIR 2001 SC 43, (2005)12 SCC 361, (2008) 2 SCC 705, (2008) 8, SCC 673.

(Delivered by Hon'ble Rajesh Chandra, J.)

1. This Criminal Misc. Correction Application No. 26950 of 2010 has been moved with a prayer that the order dated 23.3.09 passed in Criminal Misc. Application No.33249/09, Mohd. Yameen & another Vs. State of U.P. & another may be recalled.

2. A perusal of the record shows that after the filing of the charge sheet in Crime no.390/08 under Sections 420,467,471 and 120B IPC, PS Civil Lines, District Meerut in the court of Addl. CJM Ist, Meerut, the applicants filed Criminal Misc. Application No. 33249/09, under Section 482 Cr.P.C. to quash the said charge sheet. That petition was finally disposed of vide order dated 23.3.09.

3. Now the counsel for the applicants by way of this correction application no.26950/10 wants that the said order may be recalled.

4. I have heard learned counsel for the applicants as well as the learned AGA.

In respect of the said controversy, a reference made be made to Section 362 of Cr.P.C., which runs as under:-

"Court not to alter judgment.- Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct or clerical or arithmetical error."

5. A perusal of the said section makes it clear that once the judgment or final order disposing of a case has been signed by a court, it will not be altered or reviewed except for correcting a clerical or arithmetical error. The Hon'ble Apex Court in Suraj Devi Vs. Pyare Lal, 1981 Cr.L.J, 269 has observed that a clerical or arithmetical error is an error occasioned by an accidental slip or omission of the court. It represents that which the court never intended to say. It is an error apparent on the face of the record and does not depend for its discovery on argument or disputation. An arithmetical error is a mistake of calculation, and a clerical error is a mistake in wring or typing. In view of the above observations, it is clear that under Section 482 Cr.P.C. only clerical or arithmetical errors can be corrected.

6. In another judgment of the Hon'ble Apex Court in Mosst.Simrikhia Vs. Dolly Mukherjee, AIR 1990 SC 1605, it has been laid down as under:-

"Section 362 of the Code expressly provides that no court when it has signed its judgment or final order disposing of a case shall alter or review the same except to correct a clerical or arithmetical error save as otherwise provided by the Court. Section 482 enables the High Court to make such order as may be necessary to give effect to any order under the Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. The inherent powers, however, as much are controlled by principle and precedent as are its expressed powers by statute. If a matter is covered by an express letter of law, the court cannot give a go bye to the statutory provisions and instead evolve a new provision in the garb of inherent jurisdiction."

7. In another judgment of the Apex Court, State of Kerala Vs. M.M. Manikantan Nair, AIR 2001 SC 2145, the three Judges of Hon'ble Supreme Court have held as under:-

"The Code of Criminal Procedure does not authorize the High Court to review its judgment or order passed either in exercise of its appellate, revisional or original jurisdiction. Section 362 of the Code prohibits the Court after it has signed its judgment or final order disposing a case from altering or reviewing the said judgment or order except to correct a clerical or arithmetical error. This prohibition is complete and no criminal Court can review its own judgment or order after it is signed. By the first order dated 31.5.2000, the High Court rejected the prayer of the respondents for quashing the criminal proceeding. This order attained its finality. By the impugned order, the High Court reversed its earlier order and quashed the criminal proceedings for want of proper sanction. By no stretch of imagination it can be said that by the impugned order, the High Court only corrected any clerical or

arithmetical error. In fact the impugned order is an order of review, as the earlier order was reversed, which could not have been done as there is no such provision under the Code of Criminal Procedure, but there is an interdict against it."

8. In another judgment Hari Singh Mann Vs. Harbhajan Singh Bajwa, AIR 2001 SC 43, the Supreme Court has again laid down as under:-

"Section 362 of the Code mandates that no Court, when it has signed its judgment or final order disposing of a case shall alter or review the same except to correct a clerical or arithmetical error. The Section is based on an acknowledged principle of law that once a matter is finally disposed of by a Court, the said Court in the absence of a specific statutory provisions becomes functus officio and the disentitled to entertain a fresh prayer for the same relief unless the former order of final disposal is set aside by a Court of competent jurisdiction in a manner prescribed by law. The Court becomes functus officio the moment the official order disposing of a case is signed. Such an order cannot be altered except to the extent of correcting a clerical or arithmetical error. The reliance of the respondents on Talab Haji Hussain's case (A.I.R. 1958 SC 376 : 1958 Cri. L.J. 701) (supra) is misconceived. Even in that case it was pointed that inherent powers conferred on High Courts under Section 561 A (Section 482 of the new Court) has to be exercised sparingly, carefully and with caution and only where such exercise is justified by the tests specifically laid down in the Section itself. It is not disputed that the petition filed under Section 482 of Code had been finally disposed of by the High Court on 07.01.1999. The new Section 362 of Code which was drafted keeping in view the recommendations of the 41st Report of the Law Commission and the Joint Select Committees appointed for the purpose, has extended the bar of review not only to the judgment but also to the final orders that than the judgment."

9. The other judgments of Hon'ble the Apex Court on the same controversy are the following:-

1. Suredra Singh Vs. State of Bihar (2005)12 SCC 361.
2. Sunita Jain Vs. Pawan Kumar Jain, (2008) 2 SCC 705.
3. State Vs. K.V.Rajendran & Others, (2008) 8, SCC 673.

In view of the above pronouncements, the present application is not maintainable.

The application is therefore, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.02.2010

BEFORE
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No. 36117 of 2009

Sri Sunil Kumar Verma ...Petitioner
Versus
Devendra Prakash Bansal and another ...Respondents

Counsel for the Petitioner:
Sri K.K. Arora

Counsel for the Respondents:
Sri K.M. Garg

U.P. Urban Building (Regulation of Letting Rent & Eviction Act 1972-Section 2, 12-Eviction on ground of sub letting and default in rent-after receiving notices entire amount deposited first date of hearing-and prior that the rent on refusal of land lord deposited under section 30-held- proper-so far sub letting concern land lord has to prove first that the person occupying the premises or selling on shop is neither family member nor partner-No such prove given nor any finding is more-held-order passed by courts below illegal-suit for eviction dismissed.

Held: Para 18

Though, the judgement cited on behalf of petitioner to this effect that burden was upon the landlord to prove that it was a case of sub letting. As soon as landlord discharges the burden, immediately the burden shifted upon the tenant to prove that premises in occupation of some one else or a person sitting in the shop in question is a member of the family of the tenant and not a partner and if he is not able to prove the same, then he is liable for ejectment. There is no dispute to this effect that if it is established that tenant carrying on business in a building admits a person who is not a member of a family as a partner or a new partner, immediately the vacancy will be there. But from the perusal of the judgement passed by courts below, in my opinion, the burden has not been discharged properly by the landlord, therefore, in my opinion, the order passed by the respondents is not sustainable in law.

Case law discussed:

(2005) 1 Supreme Court Cases 31, Allahabad Rent Cases, 1990(1) 93, 2000 (2) Allahabad Rent Cases, 103, (1988) 3 Supreme Court Cases, 57, Allahabad Rent Cases, 1992(2) 456, AIR 1999 Supreme Court, 3087, 7. (1987) 4 Supreme Court Cases 161, A.I.R. 1977 Supreme Court, 2262, 2006(1) AWC 256, 2005(1) AWC 138 (SC), Allahabad Rent Cases, 1999 (2), 1992 (2) ARC 456, (2005) 1 Supreme Court Cases 31, 2003 (2) ARC 347, AIR 1998 Supreme Court, 1240, (1989) 1 Supreme Court Cases 19, AIR 1988 Supreme Court 396, AIR 1976 SC 712, AIR 1981 Supreme Court 2235, 2003 (2) ARC 347, 1982 ARC 647, (2003) 12 Supreme Court Cases 728, 2003 (1) AWC 126 (SC), 2005(1)AWC 138 (SC), 1995 (1) ARC, 220, AIR 1999 SC, 3087.

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

1. This writ petition has been filed for quashing the order passed by respondent dated 6.9.2008 (Annexure 15 to writ petition) and order dated 2.3.2009 (Annexure 17 to writ petition).

2. The facts arising out of present writ petition are that dispute relates to a shop situated in Mohalla Kajijadgan, Qasba and Tehsil Chandpur, District Bijnor. The defendant-petitioner is a tenant on monthly rent of Rs.425/-. The shop in dispute is under tenancy for more than 30 years. Initially rent was Rs.145/- but subsequently it has been enhanced to Rs.425/-. There is no dispute to this effect that plaintiff-respondent No.1 is the landlord. On 3.1.2007, a notice was issued by respondent no.1 with an averment that defendant-petitioner has committed default in payment of rent from 12.2.2004 to 11.4.2006 amounting to Rs.14,450/- and further has sublet the aforesaid shop to his brother Sri Rakesh Kumar Verma, respondent No.2, hence he is liable for eviction from shop in dispute. In order to create a ground for eviction, plaintiff-respondent had been refusing to receive rent from petitioner. In that circumstances, petitioner after making an application deposited rent under Section 30(1) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972. The said application was registered as Misc. Case No.73 of 2006 and on being issued notices, respondent-

landlord appeared and stated that he has never refused to accept rent and said to have been sent him through money order and he was still ready and willing to accept rent and to issue rent receipt. On the aforesaid statement the application was rejected by order dated 15.9.2006. Before giving notice in question, plaintiff-respondent no.1 has served another notice dated 23.9.2006 through which tenancy of petitioner has been determined on account of non-payment of rent. After receiving of notice, a reply refuting the allegations made was done and it was specifically stated that there is no default on the part of petitioner as money-orders were refused by landlord sent by petitioner time and again. A reference to proceedings under Section 30 was also made. It was also stated that there was no sub-letting. Sri Rakesh Kumar Verma was engaged in the business of supply of jewellery items and in this connection used to visit the shop of defendant-petitioner. Petitioner again tried to pay rent due up-to-date through money orders but it was refused. A suit was filed which was numbered as SCC Suit No. 6 of 2007 on the averment that defendant-petitioner has defaulted in payment of rent from 12.2.2004 to 11.12.2006 and has also sub-letted the shop in dispute to defendant-respondent no.2. A written statement was filed and an application was made on 6.4.2007 depositing rent to the tune of Rs.22,185/- for the purposes of claiming benefit under Section 20(4) of the Act No. XIII of 1972. The said amount was deposited on the aforesaid date. In the written statement filed by petitioner, a specific averment was made that he has never committed any default and he was sending rent through money-orders but after refusal, petitioner tried to deposit it under Section 30(1) of the Act but on the statement made by respondent-landlord that he is ready to accept rent, the application was dismissed. But anyhow, claiming benefit of Section 20 Sub Section 4, the amount has already been deposited. Respondent no.2 was also engaged in the business of manufacturing and selling of jewellery items and in this connection he often visits the shop of petitioner, therefore, there cannot be any presumption that it has been sub-let to respondent No.2. Petitioner is an exclusive owner of shop in dispute and doing business. Certain photographs has been filed by respondents showing therein that respondent no.2 is sitting in the shop and two cash memos of M/s Rakesh Jewellers have been filed. Petitioner denied the factum of this fact that photographs which have been filed does not belong to disputed shop. Nor has the petitioner ever put any Board in the name of Meerut Jewellers thereof. Petitioner has also brought on record an application duly supported by his affidavit bringing therewith on record photographs which was also result of trick photography and which showed Sri Man Mohan, son of plaintiff- landlord to be sitting in the shop in dispute. In such situation, petitioner wanted to prove that such photographs cannot be an exclusive prove for the said purpose.

3. It has been submitted that in support of the plaint case plaintiff Sri Devendra Prakash Bansal did not examine himself and instead in his place his son Sri Manmohan Bansal was examined who alleged himself to be a power of attorney and only his statement was recorded as P.W.-1. Therefore, in view of Section 120 of the Evidence Act, the statement of son who deposed as P.W.-1 cannot be taken into consideration. Petitioner also in

support thereof has produced himself as D.W.-1 and his brother as D.W.-2 and one Sri Anil Kumar as D.W.-3 and Sri Chandra as D.W.-4 who deposed and supported the case of petitioner. Sri Rakesh Kumar Verma, respondent No.2 has clearly deposed before the Court as D.W.2 as he never did any business from the shop in dispute and supported the case of petitioner that petitioner is doing business from the shop in question but in spite of aforesaid fact though it was fully established from the record, the Judge Small Causes Court vide its judgement and order dated 6.9.2008 (Annexure 15 to writ petition) has decreed the suit. Petitioner feeling aggrieved by the judgement and decree filed a revision but revisional court without considering these questions raised by petitioner has dismissed the revision vide its judgement and order dated 2.3.2009. Hence, the present writ petition.

4. It has been submitted by Sri K.K. Arora, learned counsel appearing for petitioner that while recording a finding on the question of sub-tenancy, courts below has failed to appreciate that photographs brought on record by landlord cannot be taken into consideration for the said purpose. Further presence of Sri Rakesh Kumar Verma in the shop in dispute does not lead to this conclusion that he was in exclusive possession of the shop in dispute. It was also proved from the record that Rakesh Kumar Verma having his own shop and doing his exclusive business. Further, court below has erred in holding that shop in dispute is treated to be vacant within the meaning of Section 12 of Act No.13 of 1972 due to sub-letting to respondent No.2. There is no default on the part of petitioner, therefore, petitioner is entitled to get benefit under Section 20 Sub Clause 4 of the Act. One of the point raised by petitioner is that plaintiff himself has not come before the witness box and his son being power of attorney has made statement, he was not a competent person to make a statement on behalf of landlord because he cannot have any personal knowledge and averment made in the plaint does not show or establish that shop in question has been sub-let to respondent No.2. There must be two ingredients for the purpose of subletting the premises in question, one is that it has been permanently given to another person and second is that there is some prove regarding transaction between the parties. No finding to this effect has been recorded. Only it has been stated that respondent No.2 has been found sitting in the shop. This cannot lead to the fact that shop in question has been sub-letted. Further submission has been made that there is no pleading in the plaint as regards subletting. Respondent's case is not in consonance to the provision of Section 12 of the Act No.13 of 1972. The three ingredients mentioned under Section 12 has to be fulfilled while declaring vacancy in certain cases (a) that tenant is substantially removed his effects (b) he has allowed it to be occupied by any person who is not a member of his family and (c) in the case of residential building, he as well as members of his family have taken up residence, not being temporary residence, elsewhere. Sub-Section 2 states that in a 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 as a new partner, as the case may be, the tenant shall be deemed to have ceased to occupy the building. Further submission has been made that in view of Section 25,

there is a prohibition of sub-letting, it can only with the permission of the landlady and District Magistrate.

5. In such situation, learned counsel for petitioner submits that in view of settled position of law and in view of facts of this case, there cannot be any opinion to this effect that there is any subletting and admittedly on the first date of hearing total rent has been deposited, therefore, it cannot be held that ingredients of Section 12 as mentioned above has been fulfilled and petitioner in any means have sub-let the shop in question. The finding contrary to this effect is against the evidence on record. Learned counsel for petitioner on various issues has relied upon various judgements of this Court as well as the Apex Court which is being reproduced below:-

1. **(2005) 1 Supreme Court Cases 31 Joginder Singh Sodhi Vs. Amar Kaur**

"22. It was then contended by the learned counsel for the appellant that Respondent No.2 was the son of Respondent 1 and since he was not a stranger, no presumption could be raised that he was a sub-tenant. We are unable to uphold even that contention. In our judgment, for deciding the question whether the tenant had created sub-tenancy, the relationship between the tenant and sub-tenant is not material. There is no privity of contract between the landlady and Respondent 2. He was, therefore, a "stranger" to the landlady. She let the property to Respondent 1 who was the tenant. Respondent 1 was bound to occupy the property as per the rent note executed by him wherein even undertaking was given by him that he would not part with possession or allow any other person to occupy the property. In spite of the rent note and undertaking, if without the written consent of the landlady, Respondent 1 had inducted Respondent 2 as his tenant or had parted with possession in favour of Respondent 2, who was staying separately and yet found to be in exclusive possession of the shop, sub-tenancy was established."

2. **Allahabad Rent Cases, 1990(1) 93 Badri Nath Garg Vs. Sheo Prasad Tandon**

"22. *Further it is borne out from the record that the "Standard Book Depot" and "Adarsh Pustak Bhandar" are being run from the accommodation in question. It has come in evidence that the "Standard Book Depot" was incepted some time in the year 1965 in the accommodation in question, though the rent receipts were issued by the opposite-party in the name of the applicant Badri Nath Garg. It is on this premise that the opposite-party has alleged that Badri Nath Garg has sub-let the accommodation to Kailash Nath Garg. The allegation of the opposite-party that Kailash Nath Garg is the sub-tenant of the applicant (Badri Nath Garg) is incredulously abhorrent and is unworthy of acceptance. It smacks of the lack of understanding of relationship amongst the Hindus. Joint family was the bane of Hinduism. Assimilation and not separation was the key-note of Indian culture. Brothers have lived in harmony, thus, culogising the precepts of Hinduism. One amongst such members being the head was the 'karta' of the family. He was the patriarch, who looked after the interest and comfort of each and every member of the family. He was Machiavellian sovereign, whose word and dictate was resounding and acceptable to*

each and every one in the family. With the passage of time modern environment plagued the Hindu society and individual interest tarnished the very sanctity of joint Hindu family system. Badri Nath Garg was the karta of the family as is emerging from the record and if the rent receipts are issued only in his name it would not tentamount that the other brothers had no interest in the business carried by the family. Members of family start various business which are looked after by one of them. Opposite-party was well aware about the fact that Kailash Nath Garg is the real brother of Badri Nath Garg, applicant. The opposite -party still camouflaged this fact by initial concealment but later on admitting it. There is nothing on record to suggest that at the time or even today family is not well knit or is not united. It does not happen looking tot he present day background that for the advancement of the business as has been stated, one of the brothers is directed to look after one business. There is not an iota of evidence even to suggest that Badri Nath Garg has in any case parted with the possession and that too with a permanent intention. A presumption cannot be raised in such circumstances that Badri Nath Garg has nothing to do with the business or has lost all interest therein. It was incumbent on the opposite-party to have established and proved to the hilt that the alleged occupant is the sub-tenant enjoying possession exclusively and secondly that sub-tenancy has been created for valuable consideration. Sub-tenancy can neither be presumed not inferred. It has to be proved to the satisfaction of the Court that the two cardinal ingredients as enumerated above has been satisfied. Instantly the opposite-party has failed to prove to the hilt that the alleged sub-tenant Kailsh Nath Garg is exclusively enjoying the possession of the accommodation in question. Kailash Nath Garg might have been directed to transact the business for the benefit of the family. Even assuming that Kailash Nath Garg is sitting on the shop in question it cannot be safely assumed nor presumed that he is enjoying exclusive possession in lieu of a valuable consideration. It would be a sad day to infer that one of the real brothers would be the sub-tenant of the other brother in the absence of any evidence or weighty material. It is an imaginative and fanciful allegation, which cannot throne truth that brother cannot be sub-tenant. Agreements are not arrived at between the brothers often but the mutual understanding pervades showing affinity and kinship. The oral dictate of the karta of the family is more than an agreement in writing. The opposite-party has failed to discharge the burden which lay heavily on him to show that he profits of the Firm do not go to the family. It could have been shown by documentary evidence that Kailash Nath Garg is the sole occupant of the accommodation in question enjoying its possession exclusively for his benefit but such a proof is utterly wanting. An inference in such circumstances cannot be raised much to the detriment of the applicant. In the case of Ajit Singh v. Naresh Chand Gupta and others, 1981 ARC 332, it has been held as stated above that onus of proving sub-letting is on the landlord who has to establish that the occupant is the alleged sub-tenant and is in exclusive possession of the tenanted accommodation and that too for a valuable consideration. I respectfully agree to this view. The first essential ingredient for holding that the person, who is an occupant as a sub-tenant is in exclusive possession of the

accommodation in question. This could have been proved by the opposite-party but in vain. The second ingredient that the person has occupied the accommodation in question for some valuable consideration may be established by the circumstances from the relationship of lessor and lessee between the tenant and the alleged sub-tenant found to be in exclusive possession may be inferred. It is, thus, clear that the first ingredient that the person is in exclusive possession as a sub-tenant has to be established beyond doubt. The opposite-party has miserably failed to establish such a cardintal fact. Further in the absence of such a categorical finding of exclusive possession, the trial court's order finding Kailash Nath Garg to be sub-tenant is manifestly erroneous and is not in accordance with law. Even if, as discussed above, Kailash Nath Garg is in exclusive possession then the element of having exclusive possession over the accommodation in question for a valuable consideration is utterly lacking. The Court below vaguely proceeded that it is not possible to extract the reality as regards of valuable consideration. It was liable to be investigated. In the case of Smt. Krishnavati v. Sri Hansraj, AIR 1974 SC 280, it was held that onus to prove sub-letting is on the landlord. It is only after the landlord prima facie satisfies that the occupant, who was in exclusive possession of the accommodation in question let out for valuable consideration. It is only after such satisfaction that the tenant would be required to rebut the allegation. The onus in any case in absence of the twin consideration unless satisfied cannot be shifted to the tenant. The learned Counsel for the opposite-party tried to support the finding recorded by the trial Court I am unable to agree as to how such finding can be deemed to be sacrosanct. I am clearly of the opinion that the Court below did not approach the issue on correct legal principle. The Court below has lost sight of factual common sense and has drawn inference in the teeth of the view taken in the case of Smt. Krishnavati."

3. **2000 (2) Allahabad Rent Cases, 103 Suraj Mukhi and another Vs. IInd ADJ, Shahjahanpur and others**.

*"6. The question was whether, the tenant had sub-let the accommodation, the Apex Court emphasised that it is not mere possession but there must be other relevant circumstances particularly exclusive possession of such person. In **Resham Singh v. Raghubir Singh and another, AIR 1999 SC 3087: 1999 SCFBRC 372**, where the brother of the tenant was carrying on the business and it was found that he was only looking after the business particularly when his brother was involved in a criminal proceeding and absconding, it was held that sub-letting was not proved. In **Ram Prakash v. Shambhu Dayal, AIR 1960 All 395**, where the parties were close relations and one of them came from Pakistan to take shelter with the other, there was no presumption that a sub-tenancy was crated merely because the host and his wife allowed the refugee guest to live with them and then, for the sake of enlarging available accommodation shifted to another house but left a part of their family in the old house.*

***7.** The Court has to examine the nature of possession of such person who is alleged not be a member of the family of the tenant. If his possession is in the nature of a licence without putting him in exclusive*

possession, it cannot be taken that it was sub-letting by the tenant to him. Respondent No.1 has to examine the matter afresh in accordance with law."

4. **(1988) 3 Supreme Court Cases, 57 Jagan Nath (deceased) through Lrs. Vs. Chander Bhan and others**

***"6.** The question for consideration is whether the mischief contemplated under S. 14(1)(b) of the Act has been committed as the tenant had sublet, assigned, or otherwise parted with the possession of the whole or part of the premises without obtaining the consent in writing of the landlord. There is no dispute that there was no consent in writing of the landlord in this case. There is also no evidence that there has been any subletting or assignment. The only ground perhaps upon which the landlord was seeking eviction was parting with possession. It is well settled that parting with possession meant giving possession to persons other than those to whom possession had been given by the lease and the parting with possession must have been by the tenant, user by other person is not parting with possession so long as the tenant retains the legal possession himself, or in other words there must be vesting of possession by the tenant in another person by divesting himself not only of physical possession but also of the right to possession. So long as the tenant retains the right to possession there is no parting with possession in terms of Cl. (b) of S. 14(1) of the Act. Even though the father had retired from the business and the sons had been looking after the business in the facts of this case, it cannot be said that the father had divested himself of the legal right to be in possession. If the father has a right to displace the possession of the occupants, i.e., his sons, it cannot be said that the tenant had parted with possession. This court in Smt. Krishnawati v. Hans Raj, (1974) 1 SCC 289 : (AIR 1974 SC 280) had occasion to discuss the same aspect of the matter. There two persons lived in a house as husband and wife and one of them who rented the premises allowed the other to carry on business in a part of it. The question was whether it amounted to sub-letting and attracted the provisions of subsection (4) of S. 14 of the Delhi Rent Control Act. This Court held that if two persons live together in a house as husband and wife and one of them who owns the house allows the other to carry on business in a part of it, it will be in the absence of any other evidence a rash inference to draw that the owner has let out that part of the premises. In this case if the father was carrying on the business with his sons and the family was a joint Hindu family, it is difficult to presume that the father had parted with possession legally to attract the mischief of S. 14(1)(b) of the Act."*

5. **Allahabad Rent Cases, 1992(2) 456 Gur Dayal Khanna and others Vs. Smt. Malti Devi and others**

***"11.** In the cases involving sub-letting it is difficult for the landlord to produce direct evidence in this regard showing the existence of the relationship of tenant-in-chief and the alleged sub-tenant because the matter is specially within their knowledge, therefore, in order to prove sub-letting the landlord has to rely on attending circumstances. It is in this view of the matter that the Legislature has provided for a presumption of fact about coming into existence of sub-tenancy taking recourse*

to a legal fiction. Once a sub-letting takes place the impediment in the way of the landlord to recover possession stands removed inducing him to go to Court and ask for recovery of possession. The tenant's liability to eviction arise once the fact of unlawful sub-letting is proved.

12. *It cannot, however, be overlooked that while the initial onus of proving sub-letting or a transfer of the lease holding is upon the landlord yet once the Court is satisfied that there has been a transfer of possession, the onus may shift and within whose special knowledge the facts emplaining the manner in which such possession has been transferred lie, may have to bear the burden thereafter. It is, therefore, clear that when once the parting of possession is proved, the burden shifts on to the tenant to show that the possession is proved, the burden shifts on to the tenant to show that the alleged sub-tenant is in occupation not as a sub-tenant but only as a licensee or as a person in permissive occupation. The initial onus to prove the ground of eviction, thus, rests on the landlord. But the facts which are in the special knowledge of the tenant must be proved by tenant and the tenant cannot take advantage of the onus of proof to withhold the best evidence in his possession or power to satisfy the Court with regard to the correctness of the case set up by him.*

16. *The word 'occupy' as used in Section 12 (1)(b) and Section 12 (2) of the Act referred to above is quite significant. This word is a word of uncertain meaning and sometimes denotes legal possession in the technical sense. However, at other times, occupation denotes nothing more than the physical presence in a place for a substantial period of time. Its precise meaning in any particular statute must depend on the purpose for which and the context in which it is used. As observed by the Apex Court, the modern positive approach is to have a purposeful construction that is to effectuate the object and purpose of the Act.*

17. *Under the scheme of the U.P. Act No.13 of 1972 the word 'occupy' as used in Sections 12(1) and 12(2) of the said Act appears to have been made connoting different meanings. This word so far as Section 12 (2) (b) is concerned denotes physical possession while this word as used in Section 12(2) of the Act denotes legal possession in the technical sense. In order to attract Section 12 (1)(b) it has to be established that the tenant has allowed the demised premises or any part thereof to be physically occupied by any person who is not a member of his family and once the fact of the demised premises or any part thereof being physically occupied by a person contemplated under Section 12 (1)(b) is established as indicated above the presumption of fact about the sub-tenancy having come into existence becomes available to the landlord by virtue of the legal fiction envisaged under explanation to Section 25 of the Act."*

6. **AIR 1999 Supreme Court, 3087 Resham Singh Appellant v. Raghbir Singh and another, Respondents**

"9*. As stated above, it is settled position of law that burden of making a case of subletting is on the landlord/landlady. In the present case there is no evidence regarding parting of possession of the suit premises by respondent No. 1-Raghbir Singh in favour of his brother respondent*

No. 2-Kuldip Singh and that said Kuldip Singh was in an exclusive possession of the suit premises. There is also no evidence of relationship of lessee and lessor between the two brothers. For the reasons stated above we do not find any merit in the present appeal and accordingly dismissed."

7. (1987) 4 Supreme Court Cases 161 Dipak Banerjee Vs. Lilabati Chakraborty

*"**7.** The question in this case is whether the alleged subtenant was in exclusive possession of the part of the premises and whether the tenant had retained no control over that part of the premises. There is no evidence on the fact that the alleged subtenant was in exclusive occupation of any part of the premises over which the tenant had not retained any control at all. On this aspect neither was there any pleading nor any evidence at all. No court gave any finding on this aspect at all. In that view of the matter one essential ingredient necessary for a finding, the case of subtenancy has not been proved. If that is so, the trial court, the first appellate court and the High Court were in error in holding that the subtenancy was proved."*

8. **A.I.R. 1977 Supreme Court, 2262 Smt. Chander Kali Bail and others V. Jagdish Singh Thakur and another**.

9. **2006(1) AWC 256 J.C.Thind Vs. Union of India and others**

*"**27**. In Navinchandra N. Majithia v. State of Maharashtra and others, 2000 (4) AWC 3040 (SC): AIR 2000 SC 2966, the Hon'ble Supreme Court while considering the provisions of Clause (2) of Article 226 of the Constitution, observed as under:*

"In legal parlance the expression 'cause of action' is generally understood to mean a situation or state of facts that entitles a party to maintain an action in a Court or a Tribunal; a group of operative facts giving rise to one or more basis for suing ; a factual situation that entitles one person to obtain a remedy in Court from another person..... Cause of action is stated to be the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact, which, if traversed, the plaintiff must prove in order to obtain judgment..... the meaning attributed to the phrase 'cause of action' in common legal parlance is existence of those facts which given a party a right to judicial interference on his behalf."

10. **2005(1) AWC 138 (SC) Janki Vashdeo Bhojwanti and another Vs. Indusind Bank Ltd. and others**

***13. Order III, Rules 1 and 2, C.P.C.,** empowers the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order III, Rules 1 and 2, C.P.C., confines only in respect of "acts" done by the power-of-attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power-of-attorney holder has rendered some "acts" in pursuance to power-of-attorney holder has rendered some "acts" in pursuance to power-of-attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which*

only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined."

11. **Allahabad Rent Cases, 1999 (2) Vishwanath Singh Vs. Special Judge (E.C.Act), Varanasi and others**

"11. *Section 12(1)(b) provides that the building shall be deemed to have been ceased to be occupied if the landlord or the tenant has allowed to be occupied by any person who is not a member of his family. The word used is "occupation". This occupation must be on transfer of possession by the tenant. If the possession is not transferred to another person it cannot be treated as occupation of such third person. If a servant, guest or relative lives together with the tenant, they cannot be said to have occupied the accommodation in their own right on transfer of possession by the tenant.*

14. *In Jagdish Prasad v. Smt. Angori Devi, 1984 (1) ARC 679, interpreting the provisions of Sections 12 (1) (b), 1292) and 20 (2)(e) the Court held that merely from the presence of a person other than the tenant in the shop, subletting cannot be presumed. There may be several situations in which a person other than the tenant may be found sitting in the shop; for instance, he may be a customer waiting to be attended to; a distributor who may have come to deliver his goods at the shops for sale; a creditor coming for collection of the dues; a friend visiting for some social purpose or the like. As long as control over the premises is kept by the tenant and the business run in the premises is of the tenant, subletting flowing from the presence of a person other than the tenant in the shop cannot be assumed."*

6. On the other hand, Sri K.M.Garg, learned counsel for respondents submits that in view of allegation made in para 5 of the plaint, a specific averment has been made that petitioner has sub-let the shop in question, and therefore, a deemed vacancy as provided under Section 12(1)(2) of the Act has been created. Petitioner has deliberately filed forged photograph which is apparent from the application dated 19.8.2008. Further finding recorded by courts below are finding of fact and needs no interference by this Court. It is well settled in law that the point which has not been raised before the court below cannot be raised before this Court first time. There was no suggestion before the court below that it is not the photograph of respondent No.2. The Judge, Small Causes Court as well as revisional court has recorded a cogent finding on the basis of evidence on record that shop in question has been sub-leted to respondent No.2 and petitioner is living and doing business in Kankhal and it is away from district Meerut and having shop in Kankhal in front of Ram Krishna Mission Hospital. In such situation, it cannot be inferred by any means that shop in question has not been sub-let by petitioner to respondent No.2 and therefore the order passed by court below is perfectly legal and based on evidence on record.

7. Learned counsel for respondents has placed reliance upon paras 11 to 20 of the case in **Gur Dayal Khanna and others Vs. Smt. Malti Devi and others** reported in **1992 (2) ARC 456**. He has further placed reliance upon paras 13 to 22 in the case of **Joginder Singh Sodhi**

Vs. Amar Kaur reported in **(2005) 1 Supreme Court Cases 31**, reliance has also been placed upon paras 98 to 101 reported in **2003 (2) ARC 347 Kashi Nath Vs. Sushila Rastogi**. Learned counsel for respondents has also placed reliance upon the following judgments which are quoted below:-

AIR 1998 Supreme Court, 1240 M/s. Bharat Sales Ltd. v. Life Insurance Corporation of India.

*"**4.** Sub-tenancy or sub-letting comes into existence when the tenant gives up possession of the tenanted accommodation, wholly or in part, and puts another person in exclusive possession thereof. This arrangement comes about obviously under a mutual agreement or understanding between the tenant and the person to whom the possession is so delivered. In this process, the landlord is kept out of the scene. Rather, the scene is enacted behind the back of the landlord, concealing the overt acts and transferring possession clandestinely to a person who is an utter stranger to the landlord, in the sense that the landlord had not let out the premises to that person nor had he allowed or consented to his entering into possession over the demised property. It is the actual, physical and exclusive possession of that person, instead of the tenant, which ultimately reveals to the landlord that the tenant to whom the property was let out has put some other person into possession of that property. In such a situation, it would be difficult for the landlord to prove, by direct evidence, the contract or agreement or understanding between the tenant and the sub-tenant. It would also be difficult for the landlord to prove, by direct evidence, that the person to whom the property had been sub-let had paid monetary consideration to the tenant. Payment of rent, undoubtedly, is an essential element of lease or sub-lease. It may be paid in cash or in kind or may have been paid or promised to be paid. It may have been paid in lump-sum in advance covering the period for which the premises is let out or sub-let or it may have been paid or promised to be paid periodically. Since payment of rent or monetary consideration may have been made secretly, the law does not require such payment to be proved by affirmative evidence and the Court is permitted to draw its own inference upon the facts of the case proved at the trial, including the delivery of exclusive possession to infer that the premises were sub-let.*

***5.** In Rajbir Kaur v. S. Chokesiri and Co. (1989) 1 SCC 19 : (AIR 1988 SC 1845), it was held that it was not necessary for the landlord in every case to prove payment of consideration. It was laid down that if exclusive possession was established, it would not be impermissible for the Court to draw an inference that the transaction was entered into with the monetary consideration in mind. The Court further observed that transactions of sub-letting in the guise of licences are in their very nature clandestine arrangements between the tenant and the sub-tenant and there cannot be furnished direct evidence in every case. It will be noticed that in this case it was established as a fact that the tenant had parted with a part of the demised premises in favour of an ice-cream vendor who was in exclusive possession of that part of the premises and, therefore, the Court drew an inference that the transaction must have been entered into for monetary consideration. This decision has since been followed in many cases, as, for*

example United Bank of India v. Cooks and Kelvey Properties (P) Ltd. (1994) 5 SCC 9 : (1994 AIR SCW 4579), upon which, as we shall presently see, reliance has been placed by the petitioner also."

(1989) 1 Supreme Court Cases 19 Smt. Rajbir Kaur and another Vs. M/s S.Chokesiri and Co.

57. *In Ram Sarup Gupta v. Bishun Narain Inter College this Court said this of the need to construe pleadings liberally : (SCC pp. 562-63, para 6)*

Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law. In such a case it is the duty of the court to ascertain the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of pleadings; instead the court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal.

59. *The High Court did not deal specifically with the question whether, in the circumstances of the case, an inference that the parting of the exclusive possession was promoted by monetary consideration could be drawn or not. The High Court did not examine this aspect of the matter, as according to it, one of the essential ingredients, viz., of exclusive possession had not been established. If exclusive possession is established, and the version of the respondent as to the particulars and the incidents of the transaction is found acceptable in the particular facts and circumstances of the case, it may not be impermissible for the court to draw an inference that the transaction was entered into with monetary consideration of mind. It is open to the respondent to rebut this. Such transactions of subletting in the guise of licenses are in their very nature, clandestine arrangements between the tenant and the subtenant and there cannot be direct evidence got. It is not, unoften, a matter for legitimate inference. The burden of making good a case of subletting is, of course, on the appellants. The burden of establishing facts and contentions which support the party's case is on the party who takes the risk of non-persuasion. If at the conclusion of the trial, a party has failed to establish these to the appropriate standard, he will lose. Though the burden of proof as a matter of law remains constant through out a trial, the evidential burden which rests initially upon a party bearing the legal burden, shifts according as the weight of the evidence adduced by the party during the trial. In the circumstance of the case, we think, that, appellants having been forced by the courts below to have established exclusive possession of the ice-cream vendor of a part of the demised premises and the explanation of the transaction offered by the respondent having been found by the courts below to be unsatisfactory and unacceptable, it was not impermissible for the courts to draw an inference, having regard to the ordinary course of human conduct, that the transaction must have been entered into for monetary considerations, There is no explanation forthcoming from the*

respondent appropriate to the situation as found."

AIR 1988 Supreme Court 396 Bhairab Chandra Nandan Vs. Ranadhir Chandra Dutta

*"**2.** The appellant sought the eviction of the respondent on four grounds but the two grounds which found favour with the Trial Court and Appellate Court are that the respondent had sublet the premises to his brother without the consent of the appellant and, secondly, the appellant bona fide required the leased portion of the house for the use and occupation of the members of his family. These concurrent findings, though pertaining to facts have been interfered with and reversed by the High Court and, if we may say so even at the outset by a process of reasoning which is at once in-opposite and unconvincing.*

***5.** Now coming to the question of subletting once again we find that the Courts below had adequate material to conclude that the respondent had sublet the premises, albeit to his own brother and quit the place and the subletting was without the consent of the appellant. Admittedly, the respondent was living elsewhere and it is his brother Manadhir who was in occupation of the rooms taken on lease by the respondent. The High Court has taken the view that because Manadhir is the brother of the respondent, he will only be a licencee and not a subtenant. There is absolutely no warrant for this reasoning. It is not as if the respondent is still occupying the rooms and he has permitted his brother also to reside with him in the rooms. On the contrary, the respondent has permanently shifted his residence to another place and left the rooms completely to his brother for his occupation without obtaining the consent of the appellant. There is therefore no question of the respondent's brother being only a licencee and not a subtenant. Hence it follows that the High Court was not justified in setting aside the concurrent findings of the Courts below on the ground of subletting also."*

AIR 1976 SC 712 Union of India v. M/s Chaturbhai M.Patel & Co.

*"**7.** The High Court has carefully considered the various circumstances relied upon by the appellant and has held that they are not at all conclusive to prove the case of fraud. It is well settled that fraud like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt: per Lord Atkin in A. L. N. Narayanan Chettyar v. Official Assignee, High Court Rangoon, AIR 1941 PC 93. However suspicious may be the circumstances, however strange the coincidences, and however grave the doubts, suspicion alone can never take the place of proof. In our normal life we are sometimes faced with unexplainable phenomenon and strange coincidences, for, as it is said, truth is stranger than fiction. In these circumstances, therefore, going through the judgment of the High Court we are satisfied that the appellant has not been able to make out a case of fraud as found by the High Court. As such the High Court was fully justified in negativing the plea of fraud and in decreeing the suit of the plaintiff."*

AIR 1981 Supreme Court 2235 Pandurang Jivaji Apte v. Ramchandra

Gangadhar Ashtekar (dead) by Lrs and others

11. *In our opinion the question of drawing an adverse inference against Apte and Bavdekar on account of their absence from the court would arise only when there was no other evidence on the record on the point in issue. The first appellate court had relied upon the admission of the decree-holder himself and normally there could be no better proof than the admission of a party. The High Court however, has observed in its judgment that the decree-holder has made no admission in his evidence which would justify refusal to draw adverse inference for the failure of Apte and Bavdekar to step into the witness box.*

13. *In the agreement dated December 29, 1958 between the decree-holder and the judgment-debtor. Ext. 58, there is a clear reference to the amounts due to Apte from the judgment-debtor and the decree-holder had full knowledge of the dues of Apte. Apart from the dues of Apte there were other dues also to be paid by the judgment-debtor. If according to the judgment-debtor himself the amount of Rs.46,000/-, which was due to Apte, had not been cleared off even by the sale of the property to Bavdekar the decree-holder could not proceed against the property in the hands of Bavdekar. The attachment of the property at the instance of the decree holder was only subject to the lien of Apte and unless the entire amount due to Apte was cleared off the decree-holder could not proceed against the property in the hands of the purchaser, Bavdekar. Therefore, the conclusion drawn by the two courts below that the amount of Rs. 46,000/- and odd was due to Apte from the judgment debtor and the same had not been cleared off even by the sale of the property under attachment, was based on the materials on the record viz., the admission of the decree-holder, the admission of the judgment debtor and from various letters and receipts Exts. 47/1 to Ext. 47/13. All these documents have been lost sight of by the High Court which has indeed exceeded its jurisdiction in reversing the finding on the assumption that the courts below had approached the case with a wrong view of law in not drawing an adverse inference against Apte and Bavdekar on their failure to appear in court when the question of loan due to Apte from the judgment-debtor and the sale of the properties for Rs. 46,000/- has been amply proved by the evidence on the record. The question of drawing an adverse inference against a party for his failure to appear in court would arise only when there is no evidence on the record."*

2003 (2) ARC 347 Kashi Nath Vs. Sushila Rastogi (Relevant paras are 98 to 101)

1982 ARC 647 Shambhoo Prasad v. IInd Addl. District and Sessions Judge, Varanasi and others

"8. *Sri Faujdar Rai learned counsel for the petitioner, however, submitted that the photograph relied on by the appellate court in support of its conclusion that the petitioner is not using the shop was not admissible in evidence. It was urged that the photograph had not been proved according to law. I cannot accept the contention. The photograph was filed by the landlord only as a corroborative piece of evidence. There was substantive evidence of the landlord to the effect that*

the petitioner was selling eggs on a thela and that he was primarily engaged in the business of selling eggs and its preparation in the market as a hawker. Moreover, no objection was raised by the petitioner before the appellate court as regards the admissibility of the photograph. The only objection take was that the photograph was contrived and that it did not represent the true state of affairs. This aspect was considered by the appellate court and for good and proper reasons rejected as unsatisfactory."

(2003) 12 Supreme Court Cases 728 Kailash Chander Vs. Om Prakash and another

"4. *The facts found are: Respondent 2 is the son of Respondent 1. In the premises in question there has been a partition by wooden frame/plank. Respondent 2 has been using the rear portion to carry on his activities as UTI agent and Respondent 1 was carrying on cloth business in the front portion of the premises. Respondent 2 has nothing to do with the cloth business in any capacity whatsoever. The respondents did not explain the nature of the possession of Respondent 2 in the premises in their written statement but denied his possession. During the trial, the possession of Respondent 2 was sought to be justified stating that Respondent 1 did not part with the possession of any portion of the premises so as to place Respondent 2 in exclusive possession and that Respondent 2 was in permissive possession of the premises in question having close relation with Respondent 1. The Rent Controller, as already notice above, on appreciation of the evidence held that Respondent 1 had sub-let the portion of the premises to Respondent 2. The Appellate Authority affirmed the same. These findings recorded are based on the evidence. It is no possible to say that these findings recorded by the Rent Controller and affirmed by the Appellate Authority, are either perverse or not based on evidence. The High Court was exercising its revisional jurisdiction under Section 15(6) of the Act. As to the scope of exercise of that power it is explained in the judgment of this Court in Lachhman Dass v. Santokh Singh. In paragraph 7 of the said judgment it is stated thus:(SCC p.205)*

"7. *The first question that arises for our consideration is whether the learned Single Judge of the High Court was justified in reassessing the value of the evidence and substitute his own conclusions in respect of the concurrent findings of fact recorded by the two courts below, in exercise of his revisional powers vested in the High Curt under Section 15(6) of the Act. In the present case as discussed earlier the Rent Controller passed the order of eviction against the respondent on the ground mentioned under Section 13 of the Act against which the respondent preferred an appeal under sub-section (2) of Section 15 of the Act and the Appellate Authority affirmed the order of eviction passed by the Rent Controller. Here it may be noted that the Act does not provide a second appeal against the order passed in appeal by the Appellate Authority under sub-section (2) of Section 15. The Act, however, under sub-section (6) of Section 15 makes a provision for revision to the High Court against any order passed or proceedings taken under the Act. Thus, the legislature has provided for a single appeal against the order passed by the Rent Controlling Authority and no further*

appeal has been provided under the Act. The legislature has, however, made a provision for discretionary remedy of revision which is indicative of the fact that the legislature has created two jurisdictions different from each other in scope and content in the form of an appeal and revision. That being so the two jurisdictions- one under an appeal and the other under revision cannot be said to be one and the same but distinct and different in the ambit and scope. Precisely stated, an appeal is a continuation of a suit or proceedings wherein the entire proceedings are again left open for consideration by the Appellate Authority which has the power to review the entire evidence subject, of course, to the prescribed statutory limitations. But in the case of revision whatever powers the revisional authority may have, it has no power to reassess and re-appreciate the evidence unless the statute expressly confers on it that power. That limitation is implicit in the concept of revision. In this view of the matter we are supported by a decision of this Court in State of Kerala v. K.M. Charia Abdulla and Co.

5. *This Court proceeded to say further that unless the High Court comes to the conclusion that the concurrent findings recorded by the two courts below are wholly perverse and erroneous, which manifestly appear to be unjust, there should be no interference. In the case on hand also the two courts below have appreciated evidence placed on record and on a proper appreciation concluded that the case of sub-letting, as pleaded by the appellant, is proved. In our view, the High Court was not justified in interfering with such concurrent finding. It is not shown on behalf of the respondents herein that the findings recorded by the two courts below were either perverse or not based on evidence. We must also keep in mind that activities as UTI agent in the part of the premises exclusively by him, it was for the respondent to establish that his possession on that premises was not as a sub-tenant. Merely because Respondent 1 is the father of Respondent 2 there cannot be any justification to say that it was not a case of sub-letting."*

2003 (1) AWC 126 (SC) Mohd. Shahnawaz Akhtar and another Vs. Ist A.D.J., Varanasi and others

*"**3.** At this stage, the limits of jurisdiction of the High Court in issuing a writ of certiorari under Article 226 of the Constitution needs to be kept in mind. It has been held by a Constitution Bench of this Court in the case of Syed Yakoob v. K.S. Radhakrishnan and others, (1964) 5 SCR 64, as follows:*

"The question about the limits of the jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of jurisdiction committed by inferior courts or Tribunals ; these are cases where orders are passed by inferior courts or Tribunals without jurisdiction, or in excess of it, or as a result of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural

justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate court. This limitation necessarily means that findings of fact reached by the inferior court or Tribunal as a result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent corrected by a writ, but not an error of fact, however, grave it may appear to b. In regard to the finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly if a finding of fact is based on no evidence that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding off fact recorded by the tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy of insufficiency of evidence led on a point and the interference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ court. It is within these limits that the jurisdiction conferred on High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised.

4. *The trial court, as well as the revisional court, had on appreciation of evidence come to the conclusion that the 4th respondent had sublet the premises. Incoming to the conclusion, they had relied on a report of a Commissioner appointed by the trial court to visit the premises. The Commissioner had found that somebody else was carrying on business of selling ready-made garments inside and around the premises. Admittedly, the 4th respondent was not carrying on this business. The 4the respondent had also not produced any license to carry on any business nor produced any documents like bills, vouchers, sale receipts, etc. to show that he had been carrying on any business in the suit premises. It is on appreciation of this evidence that the suit had been decreed and the revision dismissed. The high Court, however, reversed the findings of the trial court and the revisional court on the reasoning that even if the entire evidence is accepted, this would still not amount to a case of subletting. The High Curt held that at the most, it would be a case of casual license allowing persons to temporarily store their goods inside or to do some business outside the shop by using the patra and also on a chowki. On this reasoning, the High Court allowed the writ petition."*

8. After considering the argument on behalf of parties and after perusal of record and various decisions cited on behalf of parties, it borne out from record that initially this premises in dispute was let out to petitioner on a monthly rent. The question for consideration by this Court is only as whether in the facts and circumstances and finding recorded this shop in dispute has been sub-let to respondent No.2 or not. For the said purpose Section 25 of the Act is relevant. Section 25 is being quoted below:-

"25. Prohibition of Sub-letting-
(1) No tenant shall sub-let the whole of the building under this tenancy.
(2) The tenant may with the permission in writing of the landlord and of the District Magistrate, sub-let a part of the building.
Explanation- For the purposes of this section-
(i) where the tenant ceases, within the meaning of clause (b) of sub- section (1) or sub-section (2) of Section 12, to occupy the building or any part thereof he shall be deemed to have sub-let that building or part;
(ii) lodging a person in a hotel or a lodging house shall not amount to subletting."

9. Sub-Section 1 of Section 12 states that 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 or his family, or (c) in the case of a residential building, he as well as the members of his family have taken up residence, not being temporary residence, elsewhere.

10. Sub Section 2 of Section 12 states that in the case of non-residential building, where a tenant carrying on business admits a person who is not a member of his family or a partner then in that case, tenant shall be deemed to have ceased to occupy the said building. But from the record, no finding has been recorded by the courts below that petitioner has substantially removed his effects from the shop in question and ingredients of Section 12 in true spirit has been complied with. As regards the photograph submitted by respondent, in my opinion, that cannot be taken as a sole evidence for the purposes of establishing that shop in question has been let out to respondent No.2. Further, admittedly, landlord himself has not appeared before the Court and has made statement who was the relevant person for the purposes of establishing the fact that shop in question is in exclusive possession in lieu of valuable consideration. It was incumbent on the part of opposite party to establish and prove to the hilt that the alleged occupant is the sub-tenant enjoying possession exclusively and secondly that sub-tenancy has been created for valuable consideration. Sub-tenancy can neither be presumed nor inferred. It has to be proved to the satisfaction of the Court that two cardinal ingredients as enumerated has been satisfied. In the present case, in my opinion, the opposite party-landlord has to prove to the hilt, the alleged sub -tenancy to respondent No 2. As regards the sub-letting, the ingredients and prove of parting of possession of rented property by the tenant into a third party and receiving monitoring consideration is necessary. Burden of prove of sub letting is on the landlord, but in case, if it is established, burden will be immediately shifted to tenant. Admittedly, respondent No.1 is not a stranger, therefore, no presumption can be raised that he was a sub-tenant. The submission of learned counsel for petitioner that power of attorney in view of Order III Rules 1 and 2 of Civil Procedure Code cannot act as a principal and in respect of matter which only principal can have knowledge. Admittedly, the son of respondent-landlord has appeared before the Court and has stated on oath. At no point of time, the landlord who was the best person to depose before the court has not

come forward to depose before the Court. The Apex Court in **Janki Vashdeo Bhojwani and another Vs. Industrial Bank Ltd. and others** reported in 2005(1)AWC 138 (SC) has considered this issue and has held in para 13 that in view of Order III, Rules 1 and 2 of Civil Procedure Code, confines only in respect of "acts" done by power-of-attorney holder in exercise of power granted by the instrument. The term 'acts' would not include deposing in place and instead of the principal. This argument on behalf of learned counsel for petitioner has got some force to this effect that respondent-landlord has not come forward before the Court and only his son Manmohan Bansal has depose on his behalf on the basis of power of attorney executed. In my opinion he was not the best person to depose to that effect or having any knowledge whether petitioner has sub-let the shop in question or not. In the present case, the court below has assumed that petitioner has sub-let the shop in question to respondent No.2 without recording a finding that whether the tenant has transferred the possession to them or not. The respondent landlord is not able to show from the record that respondent No.2 has been admitted as partner in the business who is not a member of his family as held in case of **Harish Tandon Vs. Additional District Magistrate** reported in 1995 (1) ARC, 220. A presumption has been taken that respondent No.2 has been inducted as a sub tenant in the shop in question. The court below has not recorded a cogent finding to this effect on the basis of relevant record. Unless and until a finding is recorded that respondent No.2 was in exclusive possession, in my opinion, it cannot be held that building in question has been subleted. In AIR 1999 SC, 3087, in **Resham Singh Vs. Ragubir Singh and another**, the Apex Court has taken into consideration this fact that where brother of tenant was carrying on business and it was only found that he was looking after the business particularly when his brother was out or involved in a proceeding then the Apex Court has held that it cannot be said to be sub letting. The Court has to examine the nature of possession of such person who is alleged not to be a member of family of the tenant. If his possession is in the nature of a licence without putting him in exclusive possession it cannot be taken into consideration that it was subletting by the tenant to another person. Though, the judgement cited on behalf of petitioner to this effect that burden was upon the landlord to prove that it was a case of sub letting. As soon as landlord discharges the burden, immediately the burden shifted upon the tenant to prove that premises in occupation of some one else or a person sitting in the shop in question is a member of the family of the tenant and not a partner and if he is not able to prove the same, then he is liable for ejectment. There is no dispute to this effect that if it is established that tenant carrying on business in a building admits a person who is not a member of a family as a partner or a new partner, immediately the vacancy will be there. But from the perusal of the judgement passed by courts below, in my opinion, the burden has not been discharged properly by the landlord, therefore, in my opinion, the order passed by the respondents is not sustainable in law.

11. Therefore, the writ petition is allowed. The orders passed by respondents dated 6.9.2008 (Annexure 15 to writ petition) and order dated 2.3.2009

(Annexure 17 to writ petition) are hereby quashed.

No order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.02.2010

BEFORE
THE HON'BLE PRAKASH KRISHNA, J.
THE HON'BLE RAM AUTAR SINGH, J.

Civil Misc. Writ Petition No. 55351 of 2009

Pt. Nawin Sharma ...Petitioner
Versus
Branch Manager, United Bank of India and others ...Respondents

Counsel for the Petitioner:
In person

Counsel for the Respondents:
Sri K.M. Asthana
Asgi
S.C.

Constitution of India Art.226-Writ of mandamus seeking direction to sanction Housing loan- without disclosing correct address-Public money can not be disbursed nor the petitioner has legal right.

Held: Para 18

The facts of the above cases are quite different from the facts of the present case, because in the present case the petitioner has sought a relief for direction to the respondents to grant loan as prayed for. Under these circumstances the above cases are irrelevant so far as the present case is concerned. The respondents have been entrusted with public money and they are not expected to misappropriate the same or to disburse the said amount under any loan scheme to a person who is not eligible or incapable to repay the same. Moreover the petitioner has got no statutory right to be granted loan in question and it is satisfaction of the bank as to whether the loan can be granted to the petitioner and he is capable to repay the same.

Case law discussed:
(2007) 7 SCC 689, (2008) 10 SCC 1, (2008) 11 SCC 278.

(Delivered by Hon'ble R.A. Singh, J.)

1. By this writ petition the petitioner has prayed to issue a writ of certiorari quashing the rejection letter of respondents no.1 and 2 dated 11.9.2009 (Annexure No.9) in terms of judgment passed by the Hon'ble Apex Court in Management, Assistant Salt Commissioner Vs. Secretary Central Salt Mazdoor Union, (2008) 11 SCC 278 and has further prayed to issue a writ of mandamus commanding respondents no.1 to 4 to grant housing loan to the petitioner within the shortest possible time to be fixed by this Court as the matter of being identical nature has been decided by this Court in C.M.W.P. No.14976 of 2001 which is binding upon the respondents in terms of law laid down by the Hon'ble Apex Court in Official Liquidator Vs. Dayanand and others reported in (2008) 10 SCC 1.

2. The brief facts giving rise to this writ petition are that this second writ petition has been filed by the petitioner for relief and cause of action given in the instant writ petition in consonance to the judgment passed by the Apex Court in Commissioner Karnataka Housing Board Vs. C. Muddaiah, (2007) 7 SCC 689 and no other writ petition has been filed earlier before this Court or in any court of law for the same relief and cause of action. The petitioner has sought for

issuance of a writ of mandamus directing the respondents no.1 to 4 to grant housing loan as the relevant documents have already been filed before the respondents in obedience to the order dated 22.7.2009 passed by this Court in C.M.W.P. No.33114 of 2009 (Annexure no.3) and visa-a-visa the case of identical nature has already been decided by this Court in C.M.W.P. No.14976 of 2001 (Annexure No.1) which is binding upon the respondents in terms of law laid down by the Hon'ble Apex Court in Official Liquidator Vs. Dayanand and others (2008) 10 SCC 1.

3. The petitioner has further alleged in his writ petition that the main grievance of the petitioner is that the petitioner has applied for a housing loan for purchase of plot and construction thereon before respondents no.1 and 2 on 22.6.2009 (Annexure No.2) and due to inordinate delay in the sanction of the housing loan, the petitioner approached this Court and filed first writ petition no.33114 of 2009, in which an order was passed directing the petitioner to appear before the Branch Manager of the Bank alongwith certified copy of this order and submit the relevant documents as required by the bank for processing the application and after submission of the relevant documents the bank shall process the application and take a final decision on the application of the petitioner (Annexure no.3). The petitioner then submitted the copy of order of this Court before the respondents through speed post on 29.7.2009 with a request to intimate about the relevant documents which were required by the bank for sanction of the loan proposal (Annexure no.4). The respondents no. 1 and 2 visited the premises of the petitioner on 3.8.2009 and provided the copy of documents required to be submitted along with application (Annexure No.2) for process of loan. The petitioner submitted the required documents on 4.8.2009 in the office of respondent no.1 (Annexure No.6). The respondents no.1 and 2 again raised some twenty six hypothetical objections in derogation to the order passed by this Court in the above writ petition with a malafide intention to create a stumbling block in the sanction of housing loan proposal (Annexure no.7). The petitioner sent letter dated 25.8.2009 (Annexure No.8) warning the respondents. The respondents no.1 and 2 then sent letter dated 11.9.2009 (Annexure No.9) to the petitioner under which his proposal for loan was declined. Being aggrieved by the action of the respondents, the petitioner filed contempt petition no. 3656 of 2009, which was rejected by this Court on 14.10.2009 (Annexure No.10) and then the petitioner filed this writ petition on the ground that the petitioner wanted to construct his house, one of basic need for survival of human beings, but the respondents rejected his application for loan.

4. On behalf of the respondents a counter affidavit has been filed with this averment that in compliance of order dated 22.7.2009 passed by this Court in **Writ Petition No. 33114 of 2009 (Pt. Nawin Sharma Vs. Branch Manager, United Bank of India and others)** the petitioner did not submit the required documents for processing his loan application and thus the bank had no other option but to take a final decision as per the direction of this Court in the above writ petition and declined to grant housing loan to the petitioner on the ground of non submitting the desired documents and

non-cooperation. Since the petitioner himself failed to comply with the order of this Court passed in above writ petition, hence the second writ petition should be dismissed with exemplary cost. The judgment of the Hon'ble Apex Court as mentioned is not concerned with the subject matter in dispute nor is applicable to the facts and circumstances of the case. The petitioner has also failed to mention his permanent residential address in his loan application and deliberately avoided to disclose the same with ulterior motive. The residential address of 60, Jaipur House Market, Agra, as mentioned by the petitioner in his loan application in fact is one shutter shop and same is not the residence of the petitioner and most of the times it has been found closed. The petitioner has also not disclosed the details of his immovable property worth Rs.40 lacs as mentioned in his loan application nor has submitted the relevant documents in support of his application in order to show his financial capacity to repay the loan and in absence of the relevant documents, the petitioner has been found to be ineligible for sanction and disbursement of loan. A copy of order passed by this Court enclosed as Annexure No.1 is not identical in any manner and the petitioner is not entitled for sanction of loan on the strength of the order passed in another writ petition in a different set of facts and circumstances. The application for housing loan moved by the petitioner with his wife has been found incomplete and the petitioner has also failed to submit the relevant documents as desired by the bank to substantiate the details mentioned in his loan application. The petitioner desires the sanction of huge amount of housing loan without furnishing relevant documents for purpose of processing his application for loan and is constantly pressurising the bank for sanction of housing loan by engaging the bank in unnecessary and uncalled for litigation. The petitioner is himself guilty of disobedience to the order of this Court passed in earlier writ petition. The Senior Manager alogwith the Manager (Operation) of the bank visited the official place of the petitioner at 60, Jaipur House Market, Agra, as mentioned in the application and handed over a letter to him with details of the required relevant documents but he did not submit the said documents. The petitioner has neither disclosed his permanent residential address nor has verified his another immovable properties as mentioned in the loan application. After spot inspection of his address it was found desirable to require relevant necessary documents to be submitted by the petitioner in order to process his loan application, and to assess his capacity to repay huge amount of loan as the official address of the petitioner was one shutter shop which was found closed most of the times and the petitioner failed to disclose his residential address. Thus the bank could not take risk of sanction of a huge amount of housing loan to the tune of Rs.8 lacs without taking security. The petitioner tried to mislead this Court and in this writ petition also he failed to mention his residential address. It has come to the knowledge of the bank that the petitioner has also taken loan from the Syndicate Bank, Dholpura Branch, Agra, which is also running highly irregular on account of default by the petitioner and thus this writ petition being devoid of merits is liable to be dismissed with exemplary cost.

5. We have heard the petitioner in person and Sri K.M. Asthana, learned

counsel for the respondent-bank as well as perused the record.

6. The petitioner in person has contended that in identical writ petition no. 14976 of 2001 **(Shri Tulja Ram and others Vs. Shri Arun Mishra, Vice President, Punjab National Bank and others)** the Division Bench of this Court has directed the Punjab National Bank to grant housing loan to the petitioner in accordance with the scheme and law within a period of two months. The copy of the order dated 19.4.2001 passed in above Writ Petition No.14976 of 2001 (Annexure No.1) is reproduced below:

"We have heard Sri S.P. Sharma, learned Advocate for the petitioner and Sri Tarun Verma, learned advocate for the respondents.

Having heard the learned counsel for the parties, we are of the view that the respondents authorities shall grant housing loan to the petitioner in accordance with the scheme and the law within two months from the date of communication of this order.

The writ petition stands disposed of with the aforesaid observation."

7. The learned counsel for the respondent-bank controverting the above contention has submitted that copy of above writ petition no.14976 of 2001 has not been filed in order to establish that the facts of both writ petitions are identical. Moreover no proposition of law has been laid down by Division Bench of this Court in above writ petition no. 14976 of 2001 and thus this Court is not bound to follow any ratio and pass a similar order in the writ petition in hand.

8. The petitioner has relied on the principle laid down by Hon'ble Apex Court in **Official Liquidator Vs. Dayanand and others,** in (2008) 10 SCC 1, wherein the proposition of law has been laid down which is reproduced below:

"There have been several instances of different Benches of the High Courts not following the judgments/orders of coordinate and even larger Benches. In some cases, the High Courts have gone to the extent of ignoring the law laid down by the Supreme Court without any tangible reason. Likewise, there have been instances in which smaller Benches of the Supreme Court have either ignored or bypassed the ratio of the judgments of the larger Benches including the Constitution Benches. These cases are illustrative of non-adherence to the rule of judicial discipline which is sine qua non for sustaining the system.

It is distressing to note that despite several pronouncements on the subject, there is substantial increase in the number of cases involving violation of the basics of judicial discipline. The learned Single Judges and Benches of the High Courts refuse to follow and accept the verdict and law laid down by coordinate and even larger Benches by citing minor difference in the facts as the ground for doing so. Disrespect to the constitutional ethos and breach of discipline have grave impact on the credibility of judicial institution and encourages chance litigation.

Predictability and certainty is an important hallmark of judicial jurisprudence developed in this country in last six decades and increase in the frequency of conflicting judgments of the superior judiciary will do incalculable harm to the system inasmuch as the courts

at the grass roots will not be able to decide as to which of the judgments lay down the correct law and which one should be followed.

In our constitutional set up every citizen is under a duty to abide by the Constitution and respect its ideals and institutions. Those who have been entrusted with the task of administering the system and operating various constituents of the State and who take oath to act in accordance with the Constitution and uphold the same, have to set an example by exhibiting total commitment to the constitutional ideals. This principle is required to be observed with greater rigour by the members of judicial fraternity who have been bestowed with the power to adjudicate upon important constitutional and legal issues and protect and preserve rights of the individuals and society as a whole. Discipline is sine qua non for effective and efficient functioning of the judicial system. If the courts command others to act in accordance with the provisions of the Constitution and rule of law, it is not possible to countenance violation of the constitutional principle by those who are required to lay down the law."

9. We have examined the copy of order passed by Division of this Court in Civil Misc. Writ Petition No.14976 of 2001 and found that the facts of writ petition has not been mentioned in this order and no principle of law has been laid down therein as Punjab National Bank has been directed to grant housing loan to the petitioner in accordance with scheme and law. The copy of Writ Petition No. 14976 of 2001 has also not been filed in order to enable us to compare the facts of both writ petitions. The copy of Scheme has also not been filed in the present writ petition, under which the respondents have to grant housing loan to the petitioner. Thus the copy of order as Annexure No.1 does not help the petitioner. This Court in Civil Misc. Writ Petition No.33114 of 2009 has already passed the order, in compliance of which the petitioner has failed to file relevant documents as desired by the officers of United Bank of India. The order dated 22.7.2009 passed by this Court in Civil Misc. Writ Petition No.33114 of 2009 is reproduced below:

"In view of the facts of the present case, no useful purpose will be served in keeping the writ petition pending and calling for counter affidavit. Petitioner's application having been received by the Bank, petitioner may appear before the Branch Manager alongwith the certified copy of this order and submit the relevant documents as required by the Bank for processing the application and after submission of the relevant documents Bank shall process the application and take a final decision on the application of the petitioner. Bank shall take appropriate steps on the application of the petitioner within a period of six weeks. We make it clear that we are not expressing any opinion on the entitlement of the petitioner and it is for the Bank to consider all aspects of the matter and shall take appropriate decision.

With the above observation, writ petition stands disposed of."

10. In view of above order the petitioner was directed to appear before the Branch Manager alongwith certified copy of this order dated 22.7.2009 and submit relevant documents as required by the Bank for processing the loan application, and after submission of

relevant documents, bank would have to process application and take a final decision on the application of the petitioner. No entitlement of the petitioner for loan was expressed in the order and it was for the bank to consider all aspects of the matter and take appropriate decision. The officers of the bank visited the place of the petitioner and thought it proper to ask the petitioner to submit twenty six relevant documents in order to know the capacity of the petitioner to repay huge amount of loan, but the petitioner failed to appear before the branch manager and submit required twenty six documents in the bank within the period specified and thus the bank passed the impugned order declining the petitioner for sanction of housing loan.

11. A perusal on record would go to show that the petitioner mentioned his residential address as 60, Jaipur House Market, Agra. It was admittedly not a residential house but a shutter shop which was found closed most of the times as disclosed by the respondents in their counter affidavit. The petitioner also failed to disclose his residential address in this petition and also did not mention the same even in his rejoinder affidavit. The respondents thus rightly rejected the proposal of the petitioner for loan in view of the facts and circumstances of the case.

12. The respondents in para 11 at page 13 of counter affidavit specifically mentioned as below:

"It has further come to the knowledge of the deponent that the petitioner has also take loan from the Syndicate Bank, Dholpura Branch, Agra, which is also running highly irregular on account of default by the petitioner."

13. The petitioner in para 11 at page 13 of the rejoinder stated as below:

"This particular contention of the respondent is in derogation to the law laid down by the Apex Court in Crl. Appeal No.1191-94 of 2005 in Malay Kumar Ganguly -v/s- Dr. Sukumar Mukherjee and others decided on 7th August, 2009, as they have not adduced any evidence in relation to their statements."

14. Thus the petitioner deliberately avoided to reply of above mentioned para 11 at page 13 of counter affidavit filed on behalf of the respondent-Bank, meaning thereby it would be presumed that the petitioner admitted this fact that he took loan from Syndicate Bank, Dholpura Branch, Agra, which became highly irregular on account of default of the petitioner, because the petitioner failed to deny this fact in para 11 of his rejoinder affidavit. Under these circumstances, the respondent-bank rightly declined the proposal of the petitioner for loan in view of the fact that the petitioner concealed this fact that he had taken loan from Syndicate Bank, Dholpura Branch, Agra, which became highly irregular on account of non-payment.

15. It is the discretion of the bank to grant loan to eligible person after taking into consideration the facts as to whether he would be able to repay the same and in case the bank finds that the applicant would not be in a position to pay loan and his application has been moved with malafide intention and ulterior motive to defraud the bank, the bank would be at liberty to reject the application for loan, because the bank is the custodian of public money and it is the duty and

responsibility of bank officers to keep the money of public secured.

16. The principle laid down by Hon'ble Apex Court in the case of **Commissioner, Karnataka Housing Board Vs. C. Muddaiah**, (2007) 7 SCC 689, has no application to the present case and the facts of both cases are quite different. It has been observed in above case that once a direction issued by a competent court, it has to be obeyed and implemented without any reservation. If an order passed by a court of law is not complied with or is ignored, there will be an end of the rule of law. If a party against whom such order is made has grievance, the only remedy available to him is to challenge the order by taking appropriate proceedings known to law. But it cannot be made ineffective by not complying with the directions on a specious plea that no such directions could have been issued by the court. Upholding of such argument would result in chaos and confusion and would seriously affect and impair administration of justice. In the above case the court has further observed that from the reading of the order of the appellant Board, it is obvious that in spite of clear direction issued by a competent court, no payment was made and an express order was passed to the effect that the writ petitioner would not be entitled to pay as he had not worked. The respondent, therefore, had legitimate grievance against such direction. The facts of the present case are quite different from the facts of above case and the principle laid down in this regard does not apply to the present case.

17. The petitioner has also relied on **Management, Assistant Salt Commissioner Vs. Secretary, Central Salt Mazdoor Union**, (2008) 11 SCC 278, in which the Hon'ble Apex Court has discussed the provision of labour law relating to casual labour and held that the Central Government cannot be held to be bound by an act of one of its officers. In terms of the Rules, the job of a licensee could be taken over directly under Rule and not beyond the same. When a statutory action is performed, it must be done in the manner laid down under statute or not at all. All actions of the statutory authorities must be confined within the four corners of the statute. If the appellant was not authorised under the statute to take recourse to Rule 130 of the Rules for the purpose of engaging salt mazdoors jointly on behalf of all licensees, the said action itself must be held to be a nullity. In such a situation and particularly in view of the fact that in making recruitment of respondents, the quality clauses contained in Articles 14 and 16 were not complied with, the respondents cannot derive any benefit therefrom.

18. The facts of the above cases are quite different from the facts of the present case, because in the present case the petitioner has sought a relief for direction to the respondents to grant loan as prayed for. Under these circumstances the above cases are irrelevant so far as the present case is concerned. The respondents have been entrusted with public money and they are not expected to misappropriate the same or to disburse the said amount under any loan scheme to a person who is not eligible or incapable to repay the same. Moreover the petitioner has got no statutory right to be granted loan in question and it is satisfaction of the bank as to whether the loan can be

granted to the petitioner and he is capable to repay the same.

19. The public money entrusted to the bank's cannot be permitted to be misutilised. Respondent bank is bound by the norms set up for the purposes of grant of loan. No writ or direction can be issued as prayed for to grant loan if the bank is not satisfied with the credit worthiness of the petitioner.

20. In view of the above discussions, the respondents have rightly refused to concede the proposal of the petitioner for loan especially in view of the fact that the petitioner has failed to disclose his residential address either in the papers produced for loan or in this writ petition. He has also failed to furnish the documents as required by the respondents in order to grant loan to him. In his rejoinder affidavit the petitioner has also failed to deny the allegations made in para 11 of the counter affidavit wherein it has been mentioned specifically that the petitioner has taken loan from Syndicate Bank, Dholpura Branch, Agra, which is also running highly irregular on account of default of the petitioner.

21. Under these circumstances, this Court is not inclined to allow this writ petition, which is devoid of merits and based on imaginary grounds. Consequently this writ petition is dismissed. But no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.02.2010

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE R.A. SINGH, J.

Civil Misc. Writ Petition No. 39914 of 2009

Bishop Johnson School and College and another ...Petitioners
Versus
The Excise Commissioner, State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri A.D. Saunders

Counsel for the Respondents:
Sri Satish Chaturvedi (Advocate General)
Sri S.P. Kesharwani (Addl. C.S.C.)
Sri Mukesh Prasad

Constitution of India, Article 226-view of U.P. Number and Location of Excise Shop, (forth Amendment) Rules 2008 Rule 5 (4)-challenged-the restrictions of 100 meters-prescribed by judgment of Apex Court in Manoj Kumar Dwivedi Case-reduced to 50 meters without any rational basis-such amendment in rules clearly an eye wash and contrary to very object and purpose of rule making authority-deserves to stuck down being unreasonable and arbitrary.

Held: Para 36

From the foregoing discussions, it is clear that amendments as made by the State in Rule 5(4) by 2008 amendments, is manifestly unreasonable and arbitrary. It clearly defeats the very purpose and object of the policy of the Statute and the purpose for which the State was clothed with the rule making power to effectuate the policy. It is not the case of the respondents that they have withdrawn the policy or there is no more policy of the Statute that excise shop

shall not be located near the place of public resort, school, hospital, place of worship or factory, or to the entrance to a Bazar or a residential colony. The amendment of the rule is clearly an eyewash and is contrary to the very object and purpose for which rule making authority was empowered to frame the rules. Therefore, we are of the clear view that amendments 2008 under rule 5(4) deserves to be struck down as being manifestly unreasonable and arbitrary.

Case law discussed:

(2008) 4 SCC 111, (1976) 4 SCC 750, 1993 Supp (1) SCC 96 (II), 2005(7) SCC 584, (1996) 3 SCC 709, (1985) 1 SCC 641, (2006) 4 SCC 517, (2006) 3 SCC 434, (1997) 2 SCC 453, (2007) 1 SCC 732, (1981) 4 SCC 675, (1974) 1 SCC 19, AIR 1952 SC 123, AIR 1960 S.C. 457, AIR 1954 SC 220, (1890) 34 Law Ed. 620 (A), (1995) 1 SCC 574, (1996) 3 SCC 709.

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

1. Heard Sri A.D. Saunders, learned counsel for the petitioner and Sri Satish Chaturvedi, learned Additional Advocate General assisted by Sri S.P. Kesharwani, learned Additional Chief Standing Counsel for the State and Sri Mukesh Prasad, Advocate appearing for the respondent no. 2.

2. Counter affidavit and rejoinder affidavit have been exchanged between the parties and with the consent of learned counsel for the parties, the writ petition is being finally decided.

3. Brief facts of the case necessary to be noted for deciding the present writ petition are that writ petitioner No. 1 is a minority institution recognized by Board of Council for the Indian Schools Certificate Examination, New Delhi. The petitioner no. 2 is the Principal of the college. More than 3000 students are studying in institution from class I to class XII. The institution is situated at Mahatma Gandhi Marg in the city of Allahabad. Across the road in front of the institution a beer shop is running, whose location is being objected by the petitioners.

4. The State of U.P. in exercise of power under Section 40 of the U.P. Excise Act, 1910 has framed the rules namely; U.P. Number and Location of Excise Shop Rules 1968. Under Rule 5(4) there is prohibition of opening a shop in close proximity to a place of public resort, school, hospital, place of worship or factory, or to the entrance to a Bazar or a residential colony. A public Interest Litigation was filed at Lucknow Bench of this Court objecting indiscriminate opening of beer shops in close proximity to a place of public resort, school, hospital, place of worship or factory, or to the entrance to a Bazar or a residential colony. The Lucknow Bench of this Court entertained the public interest litigation and took the view that no shop within 100 meters of the close proximity of a place of public resort, school, hospital, place of worship or factory or to the entrance to a Bazar or a residential colony be opened. Against the Division Bench judgment of the Lucknow Bench of this Court, State of U.P. filed an appeal in the apex Court which appeal was decided approving the view taken by the High Court that no shop be allowed to run in a radius of 100 meters or 300 fits approximately of a place of public resort, school, hospital, place of worship or factory or to the entrance to a Bazar or a residential colony. The apex Court however, allowed the existing shops to continue till 31.3.2008 and thereafter it was directed that no shop within 100 meters of above places be allowed to run. The judgment of the apex Court is reported

in (2008) 4 SCC 111 **State of U.P. Vs. Manoj Kumar Dwivedi and others**.

5. The present writ petition was filed by the petitioners stating that inspite of the aforesaid judgment of the apex Court, no steps are being taken by the Excise Commissioner in closing the shop, which is within radius of 50 meters of the petitioners' institution. The petitioner after coming to know that 1968 Rules above mentioned has been amended by the State of U.P. vide notification dated 20.3.2008 by U.P. Number and Location of Excise Shops (Fourth Amendment) Rules, 2008 by which Rule 5(4) has been substituted was permitted to amend the writ petition challenging the Rule 5(4) as amended by 2008 Amendment Rules. The petitioners vide amendment application made in the writ petition, has also challenged Rule 5(4) . Following reliefs have been claimed in the writ petition:

"A) To issue a writ order or direction in the nature of mandamus calling upon the respondent No. 1 to take appropriate steps in accordance with law laid down by the Apex Court in the matter of State of U.P. and others Vs. Manoj Kumar Dwivedi and others, reported in AIR 2008 SCW 1912.

B) To issue a writ order or direction in the nature of mandamus directing the respondents to remove the beer shop situate near Bishop Johnson School and College, Mahatma Gandhi Marg, Civil Lines, Allahabad.

(iv) to issue appropriate writ, order or direction declaring Rule 5(4) as amended vide notification dated 20th March, 2009 to be void being ultra-virus of the Constitution of India."

6. The petitioners' case in the writ petition is that the Rule as amended in 2008 does not by any means carry out the purpose and object of the Excise Rules framed thereunder rather it frustrate the very object of the Excise Rules itself. The amended rule is wholly arbitrary, illegal and beyond the scope of rule making power. The object of the amended rule is not to protect or preserve sanctity of place of public resort, school, hospital, place of worship or factory or to the entrance to a Bazar or a residential colony but in other way the action of the State in amending the Rule is contempt of the orders passed by the apex Court in Manoj Kumar Dwivedi's case (supra). A beer shop in so close proximity of the institution has poor and adverse impact on the students particularly to the senior students. At times, young boys are seen drinking beer near and around the beer shop.

7. A counter affidavit has been filed on behalf of the State stating thereunder that beer shop has been licensed to respondent no. 2 for the year 2009-10. The shop is being run since the year 2001. The beer shop is situated at a distance of 120 meters from the main entrance gate, 70 meters from another gate of the petitioner's college, about 178 meters from St. Cathedral Church, 350 meters from the Bishop Hall and 67 meters from the house of the principal. Challenge to the validity of the amended Rule 5(4) is wholly devoid of substance. Rule 5 (4) has been amended by notification dated 20.3.2008, which was within the legislative competence of the Rule making authority. In the unamended Rule words "close proximity" was not defined which was left to the discretion of the authorities and now by the amendment, the minimum distance of 50 meters (in case of the area within the limits of the

City Corporation) has been fixed so as to remove any uncertainty or vagueness. Different distances have been fixed with regard to Corporation, Nagar Palika Parishad and Nagar Panchayat. There are other States in the country namely; State of Tamil Nadu and State of Maharashtra, which have also framed rules to the similar effect. The judgment of the apex Court in Manoj Kumar Dwivedi's case (supra) does not prohibit the competent Legislature from making provisions regarding distances. By notification dated 20.3.2008, the lacuna in the rules have been removed and there is always presumption in favour of the Constitutional validity of the Statutes.

8. A counter affidavit has also been filed on behalf of the respondent no. 2, the licensee of the beer shop, in which it has been stated that after the 4th Amendment Rules 2008, the decision of the apex Court in Manoj Kumar Dwivedi's case (supra) is not applicable and the beer shop in question is to be governed by the provisions of the 4th Amended Rules, 2008. The site of the shop of the respondent no. 2 is in accordance with the provisions of the 4th Amendment Rules and there is no illegality.

9. The petitioners have filed rejoinder affidavit reiterating the pleas raised in the writ petition. It has been stated that the Legislative competence is not being questioned but the exercise is to defeat and nullify the judgment of the apex Court, which is nothing but sheer abuse of the power vested in the authority concerned. Instead of promoting the spirit of the judgment of the apex court in ensuring a clean and pure environment around the institutions and residential areas, the State in an act of vindictiveness has reduced the distance of "close proximity" bringing beer/liquor shops to the very gates of the institutions and doorsteps of residential houses. There is neither any justification nor any cogent reason to reduce the distance of close proximity. The example quoted regarding other States have no applicability in the instant case.

10. Sri A.D. Saunders, learned counsel for the petitioner made following submissions in support of the writ petition:

(i) Amendment Rules, 2008 by which Rule 5(4) has been substituted is in teeth of judgment of the apex Court in Manoj Kumar Dwivedi's case and on this ground alone the amended Rule is liable to be struck down.
(ii) The amended Rule 5(4) does not protect the petitioners' college rather the definition of the school given in Rule 5(4) explanation (ii) includes the colleges owned or managed or recognized by any local authority or Central Government which is discriminatory and arbitrary.
(iii) The Rule 5(4) by which distance for opening the shop has been reduced to 50 meters in Corporation is unreasonable, arbitrary and against the object and policy of the Legislature for not opening the liquor shop near place of worship or school or hospital or residential colony.

11. Learned Additional Advocate General assisted by Sri S.P. Kesharwani, refuting the submissions of learned Counsel for the petitioners contends that judgment of the apex Court in Manoj Kumar Dwivedi's case (supra) does not take away the power of the State Government to legislate and by amendment in Rule 5(4), the very basis of

the judgment of Manoj Kumar Dwivedi's case was taken away. Rule 5(4) having been amended in exercise of the Legislative power of the State, there is no question of violating the judgment of the Supreme Court. There is no lack of legislative competence to enact the impugned rule. There is no allegation in the writ petition that the impugned rules are violative of any fundamental or constitutional rights of the petitioners. Fixation of distances with regard to location of the liquor shops is Legislative function and the State Government validly and lawfully exercised its powers under Section 40(2) (e) of the Excise Act, 1910. There is always a presumption in favour of the Constitutional validity of a legislative enactment including the delegated legislation. The impugned rule is neither arbitrary, nor illegal nor suffers from legislative competence rather the distances provided in different categories of area is based on reasonable classification. In fact by the impugned rules, the Legislature has removed the deficiency in the rule by providing the different classes depending upon density of population which is based on reasonable classification.

12. Sri Mukesh Prasad, learned counsel for the respondent no. 2 submitted that the apex Court in Manoj Kumar Dwivedi's case (Supra) had only filled the vacuum by giving the distance regarding opening of liquor shops near place of public resort, school, hospital, place of worship or factory or to the entrance to a Bazar or a residential colony. While interpreting the word "close proximity" as 1968 Rules did not define the word "close proximity", the State of U.P. has now in exercise of power under Section 40 of the Excise Act has amended Rule 5(4) and has removed the word "Close proximity" and has given the minimum distance, to which the State is fully empowered. Although the Legislature cannot by mere declaration directly overrule or reverse a judicial decision but it can at any time in exercise of its plenary power conferred by the Constitution, render any judicial decision ineffective by enacting a valid law on a topic within its legislative field fundamentally altering or changing its character retrospectively. The Legislature may neutralise the effect of the earlier decision of the Court which becomes ineffective after change of law. The amendment in the Rule is in consistent with the provisions of Part III of the Constitution of India. After the amendment, decision of the apex Court in State of U.P. Vs. Manoj Kumar Dwivedi is no more applicable. No specific grounds have been given assailing either the powers of the State Government to amend the law or the illegality in the validity of the Fourth Amendment Rules.

13. Learned Counsel for the parties have also referred to and relied on various judgments of the apex Court, which shall be referred to, while considering the submissions in details.

14. We have considered the submissions of learned counsel for the parties and have perused the record.

15. Before we proceed to examine the different contentions of learned counsel for the parties, it is necessary to have a look over the relevant rules of the Excise Rules which are under consideration. The challenge in the writ petition is to Rule 5(4) as amended by 2008 Amendment Rules dated 20.3.2008. Section 40 of the U.P. Excise Act, 1910 gives power to the State to make rules for the purpose of

carrying out the provisions of the Act. In exercise of power under Section 40(2)(e), the Governor has framed the rules namely U.P. Number and Location of Excise Shop Rules, 1968. Rule 5 lays down the principles which shall be observed for determining the location and sites of the liquor shops.

16. The rule 5(4) relevant for the present case indicates that the object and policy incorporated in the Rules were to the effect that no liquor shop shall be licensed in **"close proximity"** to a place of public resort, school, hospital, place of worship or factory or to the entrance to a Bazar or a residential colony. The object and purpose for not permitting the opening of the liquor shops near school, hospital and place of worship etc. was to protect the above places from the effect of running of a liquor shop. The present is a case where liquor shop is situated in front of school across the road. Large numbers of shops were being licensed by the State Government to augment its revenue disregard to the policy and object as contained under Rule 5(4). A Public Interest Litigation was filed before the Lucknow Bench of this Court challenging the running of the shops in close proximity to the place of public resort, school, hospital, place of worship or factory or to the entrance to a Bazar or a residential colony. A Division Bench of this Court fixed distance of 100 meters approximately within which no liquor shop was to be opened. The State of U.P. challenged the aforesaid direction of the Division Bench and apex Court in the said case had occasion to consider rule 5(4) of 1968 Rules. The Apex Court laid down following in paragraphs 11 and 12 of the judgment:

"11. We fully agree with the view taken by the High Court and we are also of the view that 10 0 meters or 300 ft.(approx.) should be the right criteria were the Excise Commissioner shall not give any licence to a shop under the Excise Act. We hope and trust that the Excise Commissioner of the State shall take into consideration sub- rule (4) of Rule 5 of the U.P. Excise Rules and see that no shops or sub- shops are opened within radius of 100 meters or 300 ft. (approx.) of a place of public resort, school, hospital, place of worship or factory, or to the entrance to a bazar or a residential colony. The interpretation of the word "close proximity" was vague therefore it was misused by the authorities. But, now the matter has been placed beyond any vagueness. Therefore, with the interpretation of the expression "close proximity" by the High Court, the matter has been put in the right perspective and the doubt has been cleared. Therefore, taking into consideration all the facts and circumstances of the case, we affirm the view taken by the High Court insofar as fixing the distance of 100 meters or 300 ft. (approx.) from a place of public resort, school, hospital, place of worship or factory, or to the entrance to a bazar or a residential colony where no shop or sub-shop shall be opened under the U.P. Excise Act and Rules framed thereunder.

12. However, we do not approve of the approach of the High Court in closing the shops without issuing notice to the affected parties. This should not have been done. Since the operation of the impugned judgment and order was stayed by this Court, these shops have continued to operate. We direct that the interim order dated 28.04.2006 passed by this Court under which these shops are operating, shall continue to operate till 31.3.2008 and after that no shops or sub- shops under the U.P. Excise Act shall be opened or continue

to open within a radius of 100 meters or 300 ft. (approx.) of a place of public resort, school, hospital, place of worship or factory, or to the entrance to a bazar or a residential colony. All the shop owners or sub- shop owners shall close their shops on or before 31. 3.2008 if they are within a radius of 100 meters or 300 ft. (approx.) to a place of public resort, school, hospital, place of worship or factory, or to the entrance to a bazar or a residential colony. As there is sufficient time, the shop owners or sub- shop owners shall make necessary arrangement to shift their shops. If these shops are not closed after 31. 3. 2008 the Excise Commissioner of the State shall see to it that the said shops are closed and no fresh licence or renewal shall be made of a licence if they are operating in prohibited area."

17. As per the direction of the apex Court, the shops which were continuing were allowed to continue till 31.3.20008 and thereafter the shops which were within the radius of 100 meters of a place of public resort, school, hospital, place of worship or factory or to the entrance to a Bazar or a residential colony were directed to be closed. Sufficient time was given for shop owners to make necessary arrangement to shift their shops. The State of U.P. instead of following the directions of the apex Court, choose to amend 1968 Rules. Rule 5(4) was amended by U.P. Number and Location of Excise Shops (Fourth Amendment) Rules, 2008 dated 20.3.2008. Rule 5(4) as existing in 1968 Rules was substituted by following rules:

"4(a) No shop or sub-shop shall be licensed within a distance of 50(fifty) meteres in case of Municipal Corporations; within a distance of 75 (seventy-five) meteres in case of Municipal Councils and Nagar Panchayat; and within a distance of 100 (one hundred) meteres in other areas from any place of public worship or school or hospitals or residential colony:

Provided that if any place of public worship, school, hospital, residential colony comes into existence subsequent to the establishment of shop or sub-shop, the provisions of this rule shall not apply:

Provided further that the distance restriction shall not apply in areas designated as "commercial" or "industrial" by the development authority/industrial development authority or other competent authority.

Explanation.- For the purpose of this rule:-

(i) "Place of Public Worship" means a temple, math, mosque, gurudwara, church, which is, as the case may be, established or managed or owned by a Public Trust registered under the /Charitable and Religious Trust Act, 1920 or under the Charitable Endowments Act, 1890 or by a society registered under Societies Registration Act, 1860 or Wakf Board; or a gurudwara registered with competent authority and such other places of public worship as the State Government may , by notification specify in this behalf from time to time.
(ii) "School" means a pre-primary school, primary school, middle school, high school, inter college owned or managed or recognised by any local authority or the State or Central Government or any college affiliated to or established or managed by any University established by law.
(iii) "Hospital" means any hospital which is managed or owned by a local authority or the State or Central Government and includes any private hospital having a

provision of at least 50 beds and is registered with urban or rural local body.
(iv) "Residential Colony" means a colony developed and constructed on legally held land of which maps have been duly approved by the competent authority recognised by law.
(b) The distance referred in clause (a) shall be measured from the mid-point of the entrance of the shop or sub-shop along the nearest path by which pedestrian ordinarily reaches to the mid-point of the nearest gate of the place of public worship or a school or a hospital or a residential colony, if there is a compound wall and if there is no compound wall to the mid-point of the nearest entrance of the place of public worship or a school or a hospital or a residential colony.
(c) All objections to the licensing of a shop or sub-shop made by persons affected, shall receive full consideration."

18. From the pleadings of the parties, the case of the respondents is that the location of the beer shop of the respondent no. 2 is fully in accord with the amended Rule 5(4). It has been stated in paragraph 5 of the counter affidavit filed on behalf of State that shop of the respondent no. 2 is situated at the distance of 120 meters from the main entrance gate and 70 meters from the another gate of the petitioner's college. Sketch map has been annexed as Annexure-1, which indicates that the beer shop is situated across the road in front of the college and actually shop is opposite to the boundaries of the school and the distance of the shop from the second gate of the college is only 70 meters as stated in the counter affidavit.

19. The first submission of the learned Counsel for the petitioner is that amended rule 5(4) is in breach of the judgment of the apex Court and is liable to be struck down on this ground alone. It has been submitted by the counsel for the petitioner that in making the rule, the State has in fact committed contempt of the judgment of the Apex Court in **Manoj Kumar Dwivedi's** case. The judgment of the Apex Court in the aforesaid case interpreted the rule 5(4) as it existed before amendment. The Division Bench of this Court held that since according to rule, no liquor shop is to be opened in close proximity of place of public resort, school, hospital, place of worship or factory or to the entrance to a Bazar or a residential colony, all shops situated within radius of 100 meters be closed. The Apex Court in (1976) 4 SCC 750 **I.N. Saksena Vs. State of U.P.** has laid down that although the Legislature cannot by bare declaration, directly overrule, reverse or override the judicial decision, it may, at any time, in exercise of plenary power conferred by Articles 245 and 246 of the Constitution of India render a judicial decision ineffective by enacting a valid law. Following was laid down in paragraph 22:

"*22. While, in view of this distinction between legislature and judicial functions. The legislature cannot by a bare declaration, without more, directly overrule, reverse or override a judicial decision, it may, at any time in exercise of the plenary powers conferred on it by Articles 245 and 246 of the Constitution render a judicial decision ineffective by enacting a valid law on a topic within its legislative field fundamentally altering or changing with retrospective, curative or neutralising effect the conditions on which such decision is based. As pointed out by Ray C. J. in Indira Nehru Gandhi v. Raj Narain, (1975) SCC Supp 1 = (AIR 1975 SC 2299) the rendering ineffective of judgments or orders of competent Courts*

and tribunals by changing their basis by legislative enactment is a well known pattern of all validating Acts. Such validating legislation which removes the causes for ineffectiveness or invalidity of actions or proceedings is not an encroachment on judicial power."

20. The Apex Court In the **Matter of: Cauvery Water Disputes Tribunal** 1993 Supp (1) SCC 96 (II) laid down following in paragraph 74:

74. In this connection, we may refer to a decision of this Court in Municipal Corporation of the City of Ahmedabad v. New Shorock Spg. and Wvg. Co., Ltd. (1971) 1 SCR 288 : (AIR 1970 SC 1292). The facts in this case were that the High Court as well as this Court had held that property tax collected for certain years by the Ahmedabad Municipal Corporation was illegal. In order to nullify the effect of the decision, the State Government introduced Section 152A by amendment to the Bombay Provincial Municipal Corporation Act the effect of which was to command the Municipal Corporation, to refuse to refund the amount illegally collected despite the orders of this Court and the High Court. This Court held that the said provision makes a direct inroad into the judicial powers of the State. The legislatures under the Constitution have within the prescribed limits, power to make laws prospectively as well as retrospectively. By exercise of those powers a legislature can remove the basis of a decision rendered by a competent court thereby rendering the decision ineffective. But no legislature in the country has power to ask the instrumentalities of the State to disobey or disregard decisions given by the courts. Consequently, the provisions of sub-section 3)of Section 152A were held repugnant to the Constitution and were struck down. the same effect .s another decision of this Court in Madan Mohan Pathak v. Union of India, (1978) 3 SCR 334: (AIR 1978 SC 803). In this case a settlement arrived at between the Life Insurance Corporation and its employees had become the basis of a decision of the High Court of Calcutta. This settlement was sought to be scuttled by the Corporation on the ground that they had received instructions from the Central Government that no payment of bonus should be made by the Corporation to its employees without getting the same cleared by the Government. The employees, therefore, moved the High Court, and the High Court allowed the -petition. Against that, a Letters Patent A peal was filed and while it was pending, the Parliament passed the Life Insurance Corporation (Modification of Settlement) Act, 1976 the effect of which was to deprive the employees of bonus payable to them in accordance with the terms of the settlement and the decision of the single Judge of the High Court. On this amendment of the Act, the Corporation withdrew its appeal and refused to pay the bonus. The employees having approached this Court challenging the constitutional validity of the said legislation, the Court held that it would be unfair to adopt legislative procedure to undo a settlement which had become the basis of a decision of the High Court. Even if legislation can remove the basis of a decision, it has to do it by alteration of general rights of a class but not by simply excluding the specific settlement which had been held to be valid and enforceable by a High Court. The object of the Act was in effect to take away the force of the judgment of the High Court. The rights under the judgment would be said to arise independently of Article 19 of the Constitution."

21. Similar view has been expressed by the apex Court in 2005(7) SCC 584 **State Bank's, Staff Union (Madras Circle) Vs. Union of India and others**. In view of the above pronouncement of the Hon'ble Supreme Court although Legislature cannot overrule, reverse or override a judicial decision but in exercise of plenary powers conferred on it by the Constitution, may render a judicial decision ineffective by enacting a valid law fundamentally altering or changing the condition on which such decision is based. The rule making power has been exercised by the State under Section 40(2)(e) of the Act by fixing distance with regard to opening of liquor shops. In amending Rule 5(4), it cannot be said that State has breached the judgment of the apex Court or has committed contempt of the apex Court. The question as to whether the amended Rules are valid or not, is another question which shall be separately considered hereunder. However, the amendments cannot be held to be invalid on the ground that it is in breach of the judgment of the apex Court in **Manoj Kumar Dwivedi's** case (supra).

22. The Second and third submissions of the learned Counsel for the petitioners relates to challenge to the amended Rule 5(4) and both the submissions are being considered together. Before considering the submissions in details, it is relevant to refer to the grounds for challenging the statutory Rules. Learned Additional Advocate General has referred to and relied on the judgment of the apex Court in (1996) 3 SCC 709, **State of Andhra Pradesh Vs. McDowell & Co. and others** for the proposition that constitutional validity of a statute can be challenged only on two grounds; (a) lack of legislative competence (b) violation of the fundamental rights guaranteed in part III of the Constitution or of any of the constitutional provisions. In **State of Andhra Pradesh's** case (supra), the provisions of Andhra Pradesh Prohibition (Amendment) Act, 1995 were under challenge on the ground that the provisions were arbitrary. Following was laid down in paragraph 43:

"43. Sri Rohinton Nariman submitted that inasmuch as a large number of persons falling within the exempted categories are allowed to consume intoxicating liquors in the State of Andhra Pradesh, the total prohibition of manufacture and production of these liquors is "arbitrary" and the amending Act is liable to be struck down on this ground alone. Support for this proposition is sought from a judgment of this Court in State of Tamil Nadu v. Ananthi Ammal, (1995 (1) SCC 519 : (1995 AIR SCW 355). Before, however, we refer to the holding in the said decision, it would be appropriate to remind ourselves of certain basic propositions in this behalf. In the United Kingdom, the Parliament is supreme. There are no limitations upon the power of the Parliament. No Court in the United Kingdom can strike down an Act made by the Parliament on any ground. As against this, the United States of America has a Federal Constitution where the power of the Congress and the State Legislatures to make laws is limited in two ways, viz., the division of legislative powers between the States and the federal government and the fundamental rights (Bill of Rights) incorporated in the Constitution. In India, the position is similar to the United States of America. The power of the Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by the Parliament or the Legislature can be struck down by Courts on two ground and two grounds alone, viz., (1) lack of legislative

competence and (2) violation of any of the fundamental rights guaranteed in Part-III of the Constitution or of any other constitutional provision. There is no third ground. We do not wish to enter into a discussion of the concepts of procedural unreasonableness and substantive unreasonableness- concepts inspired by the decisions of United States Supreme Court. Even in U. S. A., these concepts and in particular the concept of substantive due process have proved to be of unending controversy, the latest thinking tending towards a severe curtailment of this ground (substantive due process). The main criticism against the ground of substantive due process being that it seeks to set up the Courts as arbiters of the wisdom of the Legislature in enacting the particular piece of legislation. It is enough for us to say that by whatever name it is characterised, the ground of invalidation must fall within the four corners of the two grounds mentioned above. In other words, say, if an enactment is challenged as violative of Article 14, it can be struck down only if it is found that it is violative of the equality clause/equal protection clause enshrined therein. Similarly, if an enactment is challenged as violative of any of the fundamental rights guaranteed by Clauses (a) to (g) of Article 19(1), it can be struck down only if it is found not saved by any of the clauses (2) to (6) of Article 19 and so on. No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that Court thinks it unjustified. The Parliament and the Legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The Court cannot sit in judgment over their wisdom. "

23. The present is a case, where we have to consider the provisions of delegated legislation. For challenging the validity of a subordinate legislation, apart from the grounds noticed above, there are certain additional grounds to challenge the validity of the delegated legislation. The apex Court in **Indian Express News Papers (Bombay) Private Ltd. and others Vs. Union of India & others** (1985) 1 SCC 641 had laid down that a piece of subordinate legislation does not carry the same dignity which is enjoyed by a Statute passed by a competent legislature. Following was laid down in paragraph 75:

***"75**. A piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. Subordinate legislation may be questioned on any of the grounds on which plenary legislation is questioned. In addition it may also be questioned on the ground that it does not conform to the statute under which it is made. It may further be questioned on the ground that it is contrary to some other statute. That is because subordinate legislation must yield to plenary legislation. It may also be questioned on the ground that it is unreasonable, unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary. In England, the Judges would say "Parliament never intended authority to make such rules. They are unreasonable and ultra vires". The present position of law bearing on the above point is stated by Diplock L. J. in Mixnam. Properties Ltd. v. Chertsey U. D. C., (1964) 1 QB 214 thus:-*

"The various grounds upon which subordinate legislation has sometimes been said to be void .....can, I think, today be properly regarded as being particular applications of the general rule that subordinate legislation, to be valid, must be shown to be within the powers conferred by the statute. Thus the kind of unreasonableness which invalidates a bye-law is not the antonym of "reasonableness" in the sense of which that expression is used in the common law, but such manifest arbitrariness, injustice or partiality that a court would say : 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires .....' If the courts can declare subordinate legislation to be invalid for 'uncertainty,' as distinct from unenforceable .....this must be because Parliament is to be presumed not to have intended to authorise the subordinate legislative authority to make changes in the existing law which are uncertain ....."

24. The apex Court had occasion to consider the grounds for challenging a subordinate legislation in **State of Tamil Nadu and another Vs. P. Krishnamurthy & others** (2006) 4 SCC 517. The validity of rule 38A of Tamilnadu Minor Mineral Concession Rules, 1959 was under challenge in the aforesaid decision. The apex Court again reiterated the accepted grounds to challenge the subordinate legislation. Following was laid down in paragraph 15,16,18 and 19.

***"15**. There is a presumption in favour of constitutionality or validity of a sub-ordinate Legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognized that a sub-ordinate legislation can be challenged under any of the following grounds :-*

a) Lack of legislative competence to make the sub-ordinate legislation.
b) Violation of Fundamental Rights guaranteed under the Constitution of India.
c) Violation of any provision of the Constitution of India.
d) Failure to conform to the Statute under which it is made or exceeding the limits of authority conferred by the enabling Act.
e) Repugnancy to the laws of the land, that is, any enactment .
f) Manifest arbitrariness/unreasonableness (to an extent where court might well say that Legislature never intended to give authority to make such Rules).

***16.** The court considering the validity of a subordinate Legislation, will have to consider the nature, object and scheme of the enabling Act, and also the area over which power has been delegated under the Act and then decide whether the subordinate Legislation conforms to the parent Statute. Where a Rule is directly inconsistent with a mandatory provision of the Statute, then, of course, the task of the court is simple and easy. But where the contention is that the inconsistency or non-conformity of the Rule is not with reference to any specific provision of the enabling Act, but with the object and scheme of the Parent Act, the court should proceed with caution before declaring invalidity."*

*"**18**. In Supreme Court Employees Welfare Association v. Union of India [1989 (4) SCC 187], this Court held that the validity of a subordinate legislation is open to question if it is ultra vires the Constitution or the governing Act or repugnant to the general principles of the laws of the land or is so arbitrary or unreasonable that no fair-minded authority could ever have made it. It was further held that Rules are liable to be*

declared invalid if they are manifestly unjust or oppressive or outrageous or directed to be unauthorized and/or violative of general principles of law of the land or so vague that it cannot be predicted with certainty as to what it prohibited or so unreasonable that they cannot be attributed to the power delegated or otherwise discloses bad faith.

***19**. In Shri Sitaram Sugar Co. Ltd. v. Union of India [1990 (3) SCC 223], a Constitution Bench of this Court reiterated: (Supreme Court Cases pp. 251-52, (Para 47)*

"Power delegated by statute is limited by its terms and subordinate to its objects. The delegate must act in good faith, reasonably, intra vires the power granted, and on relevant consideration of material facts. All his decisions, whether characterized as legislative or administrative or quasi-judicial, must be in harmony with the Constitution and other laws of the land. They must be "reasonably related to the purposes of the enabling legislation". See Leila Mourning v. Family Publications Service [411 US 356] If they are manifestly unjust or oppressive or outrageous or directed to an unauthorized end or do not tend in some degree to the accomplishment of the objects of delegation, court might well say, "Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires": per Lord Russel of Killowen, C.J. in Kruse v. Johnson (1898) 2 QB 91."

25. Learned Additional Advocate General has submitted that constitutionality of a Statute has to be presumed which is well accepted proposition. He has placed reliance on the judgments of the Apex Court in (2006) 3 SCC 434 **Bombay Dyeing and Manufacturing Co. Ltd. (3) Vs. Bombay Environmental Action Group and others**, (1997) 2 SCC 453, **State of Bihar and others Vs. Bihar Distillery Ltd. And others,** (2007) 1 SCC 732 **Arun Kumar & others Vs. Union of India and others,** (1981) 4 SCC 675 **R.K. Garg Vs. Union of India and others** and (1974) 1 SCC 19 **The State of Jammu and Kashmir Vs. Shri Triloki Nath Khosa and others**.

26. There cannot be any dispute to the proposition as laid down by the Apex Court in the above cases. It is suffice to refer to the judgment of the apex Court in **R.K. Garg Vs. Union of India** (supra) and to note the well established principles which have been laid down by the apex Court in the said judgment. Following was laid down in paragraphs 6 and 7.

***"6.** That takes us to the principal question arising in the writ petitions namely, whether the provisions of the Act are violative of Article 14 of the Constitution. The true scope and ambit of Article 14 has been the subject matter of discussion in numerous decisions of this Court and the propositions applicable to cases arising under that Article have been repeated so many times during the last 30 years that they now sound platitudinous. The latest and most complete exposition of the propositions relating to the applicability of Article 14 as emerging from "the avalanche of cases which have flooded this Court" since the commencement of the Constitution is to be found in the judgment of one of us (Chandrachud, J. as he then was) in Re : Special Court Bill, (1979) 2 SCR 476: AIR 1979 SC 478. It not only contains a lucid statement of the propositions arising under Article 14, but being a decision given by a Bench of seven*

Judges of this Court, it is binding upon us. That decision sets out several propositions delineating the true scope and ambit of Article 14 but not all of them are relevant for our purpose and hence we shall refer only to those which have a direct bearing on the issue before us. They clearly recognise that classification can be made for the purpose of legislation but lay down that :

1. The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found is all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that different a must have a rational relation to the object sought to be achieved by the Act.

2. The differentia which is the basis of the classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. In short, while Article 14 forbids class discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense above mentioned.

It is clear that Art. 14 does not forbid reasonable classification of persons, objects and transactions by the legislature for the purpose of attaining specific ends. What is necessary in order to pass the test of permissible classification under Article 14 is that the classification must not be "arbitrary, artificial or evasive" but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislature. The question to which we must therefore address ourselves is whether the classification made by the Act in the present case satisfies the aforesaid test or it is arbitrary and irrational and hence violative of the equal protective clause in Article 14.

7. Now while considering the constitutional validity of a statute said to be violative of Article 14, it is necessary to bear in mind certain well established principles which have been evolved by the Courts as rules of guidance in discharge of its constitutional function of judicial review. The first rule is that there is always a presumption in favour of the constitutionality of a statute and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles. This rule is based on the assumption, judicially recognised and accepted, that the legislature understands and correctly appreciates the needs of its own people, its laws are directed to problems made manifest by experience and its discrimination are based on adequate grounds. The presumption of constitutionality is indeed so strong that in order to sustain it, the Court may take into consideration matters of common knowledge, matters of common report the history of the times and may assume every state of facts which can be conceived existing at the time of legislation."

27. There cannot be any dispute that burden is on the petitioners to establish that rule 5(4) as amended in 2008 is invalid by establishing one or more accepted grounds to challenge the subordinate legislation. Learned Counsel for the petitioners referring to rule 5(4) (a) Explanation (ii), submitted that the definition of "School" given in above rule only includes institution owned or managed or recognized by any local authority or the State or Central Government or any college affiliated to or established or managed by any University established by law. The petitioner's institution is not recognized by any local authority, State or Central Government rather the institution is recognized by the Board of Council for the Indian School Certificate Examination New Delhi. Whether there is any justification for excluding the institution recognized by Board of Council for the Indian School Certificate Examination New Delhi or Central Board of Secondary Education New Delhi? Whether there is any intelligible differentia between the institution recognized by the local authority, State Government or Central Government and the institution recognized by ISC Board or CBSE Board in context of opening of liquor shop and whether there is any rationale nexus with the object sought to be achieved? The object obviously is to keep liquor shops little away from the educational institutions to protect its students, who are of tender age. We are of the opinion that there is no rationale for excluding the institution recognized by the ISC Board or CBSE Board from the definition of the school as given in Explanation (ii) to Rule 5(4). The definition given in Rule 5(4) Explanation (ii) being discriminatory and arbitrary deserves to be struck down as violative of Article 14 of the Constitution of India.

28. The challenge to the amended Rule 5(4) is on the ground of unreasonableness and the amendment being arbitrary. For considering the validity of statute as well as a subordinate legislation, it is necessary to look into the policy and object of the Act. Whether the Statute violates Article 14 of the Constitution of India can be judged only after ascertaining the policy and object of the Act. The Apex Court in AIR 1952 SC 123 **Kathi Raning Rawat Vs. State of Saurashtra,** while considering the grounds to challenge of Ordinance under Article 14 of the Constitution of India laid down following in paragraph 34:

*"**34.** It is a doctrine of the American Courts which seems to me to be well founded on principle that the equal protection clause can be invoked not merely where discrimination appears on the express terms of the statute itself, but also when it is the result of improper or prejudiced execution of the law; vide Weaver on Constitutional Law, p. 404. But a statute will not necessarily be condemned as discriminatory, because it does not make the classification itself but, as an effective way of carrying out its policy, vests the authority to do it in certain officers or administrative bodies. Illustrations of one class of such cases are to be found in various regulations in the U. S. A. which are passed by States in exercise of police powers for the purpose of protecting public health or welfare or to regulate trades, business and occupations which may become unsafe or dangerous when unrestrained. Thus there are regulations where discretion is lodged by law in public officers or boards to grant or withhold licence to keep taverns or sell spirituous liquors, Crowley v. Christensen, (1890) 137 U. S. 86, or other commodities like milk,*

People of the State of New York v. Joh. E. Van De carr, (1905) 199 U. S,. 552, or cigarettes Gundling v. Chicago, (1900) 177 U. S. 183. Similarly there are regulations relating to appointment of river pilots, Kotch v. River Port Pilot Commrs., (1947) 330 U. S. 552 and other trained men necessary for particularly difficult jobs and in such cases, ordinarily, conditions are laid down by the statute, on compliance with which a candidate is considered qualified. But even then the appointment board has got a discretion to exercise and the fact of the candidate for a particular post is submitted to the judgment of the officer or the board as the case may be. It is true that these cases are of a somewhat different nature than the one we are dealing with; but it seems to me that the principle underlying all these cases is the same. The whole problem is one of choosing the method by which the legislative policy is to be effectuated. As has been observed by Frankfurter J. in Tinger v. Texas, (1940) 310 U. S. 141 at p. 147.

"laws are not abstract propositions.... But are expressions of policy arising out of specific difficulties addressed to the attainment of specific ends by the use of specific remedies."

In my opinion, if the legislative policy is clear and definite and as an effective method of carrying out that policy a desecration is vested by the statute upon a body of administrators or officers to make selective application of the law to certain classes or groups of persons, the statute itself cannot be condemned as a piece of discriminatory legislation. After all the law does all that is needed when it does all that it can, indicates a policy ..... and seeks to bring within the lines all similarly situated so far as its means allow."

Vide, Buch v. Bell, (1927) 274 U. S. 200 at p. 208, In such cases, the power given to the executive body would import a duty on it to classify the subject-matter of legislation in accordance with the objective indicated in the statute. The discretion that is conferred on official agencies in such circumstances is not an unguided discretion; it has to be exercised in conformity with the policy, to effectuate which the direction is given and it is in relation to that objective that the propriety of the classification would have to be tested. "

29. The apex Court again in AIR 1960 S.C. 457 **Kangshari Haldar and another Vs. The State of West Bengal**, while considering the vires of West Bengal Tribunals of Criminal Jurisdiction Act, 1952 laid down following principles in paragraph 19 of the judgment for considering the validity of the Statute :

"The result of these decisions appears to be this. In considering the validity of the impugned statute on the ground that it violates Art. 14 it would first be necessary to ascertain the policy underlying the statute and the object intended to be achieved by it. In this process the preamble to the Act and its material provisions can and must be considerer. Having thus ascertained the policy and the object of the Act the court should apply the dual test in examining its validity : Is the classification rational and based on intelligible differentia; and, has the basis of differentiation any rational nexus with its avowed policy and object? If both these tests are satisfied the statute must be held to be valid; and in such a case the consideration as to whether the same result could not have been batter achieved by adopting a different classification would be

foreign to the scope of the judicial enquiry. If either of the two tests is not satisfied the statutes must be struck down as violative of Art. 14 applying this test it seems to us that the impugned provisions contained in S. 2(b) and the proviso to S. 4(1) cannot be said to contravene Art. 14. As we have indicated earlier, if in issuing the notification authorised by S. 2(b) the State Government acts mala fide or exercises its power in a colourable way that can always be effectively challenged; but, in the absence of any such plea and without adequate material in that behalf this aspect of the matter does not fall to be considered in the present appeal."

30. The present is a case, where the Court is to examine the validity of the rules framed by the State in exercise of power under U.P. Excise Act, 1910. Under Article 19(1) (g), every citizen has right to carry on any business. Article 19(6) empowers the State to impose reasonable restrictions. In context of carrying on business of liquor, the nature of business, the nature of restrictions to be imposed on such business, have been subject of consideration by the Courts including the apex Court. In considering the nature and extent of restrictions which are to be imposed on carrying on a business, the nature of business is one of the essential factors. The Apex Court in AIR 1954 SC 220 **Kooverjee B. Bharucha Vs. Excise Commissioner and the Chief Commissioner, Ajmer** had occasion to consider the nature of business relating to intoxicating liquors. The apex Court quoted with approval opinion of Field, J. in **Crowley Vs. Christensen,** (1890) 34 Law Ed. 620 (A). Following was laid down in paragraph 7 by the apex Court.

"Laws prohibiting trades in noxious or dangerous goods or trafficking in women cannot beheld to be illegal as enacting a prohibition and not a mere regulation. The nature of the business is, therefore, an important element in deciding the reasonableness of the restrictions. The right of every citizen to pursue any lawful trade or business is obviously subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, order and morals of the community. Some occupations by the noise made in their pursuit, some by the odours they engender, and some by the dangers accompanying them, require regulations as to the locality in which they may be conducted. Some, by the dangerous character of the articles used, manufactured or sold, Require also special qualifications in the parties permitted to use, manufacture or sell them.

These propositions were not disputed, but it was urged that there was something wrong in principle and objectionable in similar restrictions being applied to the business of selling by retail, in small quantities, spirituous and intoxicating liquors. It was urged that their sale should be without restriction, that every person has a right which inheres in him, i.e. a natural right to carry or trade in intoxicating liquors and that the State had no right to create a monopoly in them. This contention stands answered by what Field, J. said in - 'Crowley v Christensen', (1890) 34 Law Ed. 620 (A) :

"There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, it is true , first falls upon him in his health, which the habit undermines; in his morals,

which it weakens; and in the self-abasement which it creates. But as it leads to neglect of business and waste of property and general demoralisation, it affects those who are immediately connected with the dependent upon him. By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying.

The statistics of every State show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been, at all times; by the courts of every State, considered as the proper subject of legislative regulation. Now only may a licence be exacted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day, and the days of the week, on which the saloons may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of federal law.

The police power of the State is fully competent to regulate the business - to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited or he permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licences for that purpose. It is a matter of legislative will only".

These observations have our entire concurrence and they completely negative the contention raised on behalf of the petitioner. The provisions of the regulation purport to regulate trade in liquor in all its different spheres and are valid."

31. In **Khoday Distilleries Ltd. & others Vs State of Karnataka and others** (1995) 1 SCC 574 again the Hon'ble Supreme Court has considered the various aspects of the nature of liquor business. The apex Court noted with approval in the decision in **Kooverjee B. Bharucha Vs. Excise Commissioner and the Chief Commissioner, Ajmer**, the opinion of Field, J. as noticed above. The apex Court held that some business requires regulations as to the locality in which they may be conducted looking to the dangers accompanying them. Paragraph 22 of the judgment is quoted as below:

*"**22**. In Cooverjee B. Bharucha v. Excise Commissioner and the Chief Commissioner , where the vires of Excise Regulation I of 1915 was under challenge on the ground of violation of Article 19(1)(g), the Constitution Bench of five learned Judges, among other things, held that:*

(a)In order to determine the reasonableness of restrictions, envisaged by Article 19(6), regard must be had to the nature of the business and the conditions prevailing in that trade. These factors would differ from trade to trade and no hard and fast rule

concerning all trades can be laid down. It cannot also be denied that the State has the power to prohibit trades which are illegal or immoral or injurious to the health and welfare of the public. Laws prohibiting trades in noxious or dangerous goods or trafficking in women cannot be held to be illegal as enacting a prohibition and not a mere regulation. The nature of the business is, therefore, an important element in deciding the reasonableness of the restrictions. The right of every citizen to pursue any lawful trade or business is obviously subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, order and morals of the community. Some occupations by the noise made in their pursuit, some by the odours they engender, and some by the dangers accompanying them require regulation as to the locality in which they may be conducted. Some, by the dangerous character of the articles used, manufactured or sold, require also special qualification in the parties permitted to use them, manufacture or sell them. The Court in this connection referred to the observations of Field, J. in P. Crowley v. Henry Christensen a part of which is as follows: ....."

32. The Excise Act, 1910 itself contemplates that the rules regarding restrictions of localities wherein permission to carry out the liquor trade be granted may be framed. Section 40(1) and sub section (2) (e) is quoted as below:

"40. Power of State Government to make rule.-*(1) The State may make rules for the purpose of Government carrying out the provisions of this Act or other law for the time being in force relating to excise revenue.*

Provided.....

(2) In Particular and without prejudice to the generality of the foregoing provision, the State government may make rules-

(a).....

(b).....

(c).....

(d).....

(e) regulating the periods and localities for which and the persons to whom, licences for the vend by wholesale or by retail of any intoxicant may be granted;"

33. To effectuate the purpose and object of the Act, rules were framed by the State namely; U.P. Number and Location of Excise Shops Rules, 1968. Rule 5(4), (5) and (6) of the 1968 Rules are quoted as below:

"5*. The following principles shall be observed in determining the location and the sites for shops/sub-shops:*

(1).....

(2).....

(3).....

(4) No new shop or sub-shop shall be licensed in close proximity to a place of public resort, school, hospital, place of worship or factory, or to the entrance to a bazar or a residential colony. All objections to the licensing of a shop or sub-shop made by the persons affected, shall receive fully consideration.

(5) No shop or sub-shop shall be located outside the inhabited site of a village, town or city.

(6) In the case of the existing shops, periodical enquiry shall be made as to whether their position is in conformity with policy under these rules. If their location is found to be objectionable, such steps as are possible, shall be taken, to select a more suitable site and to arrange for its removal."

34. The very title of the rules indicates that rules have been framed for regulating the locations of excise shops. The policy which is revealed from Rule 5(4) is that no excise shop shall be licensed in close proximity to a place of public resort, school, hospital, place of worship or factory, or to the entrance to a Bazar or a residential colony. The Legislature being well aware of the ill effects of locating the liquor shops near the above places, have contemplated framing of rules to restrict the opening of excise shops near schools. As noticed above, the Apex Court in **Manoj Kumar Dwivedi's** case (supra) had approved the Division Bench decision of this Court taking the view that any shop situated within 100 meters of a place of public resort, school, hospital, place of worship or factory, or to the entrance to a Bazar or a residential colony is to be treated within close proximity. Now by the amendments made in the year 2008, rule 5(4) has been amended. The amended provisions now has deleted the words "close proximity" from the Rule 5(4) and has substituted it by distances in the municipal Corporation. The distance has now been provided as 50 meters. The policy of the Act and the Rules still remains of not locating the excise shops near close proximity to a place of public resort, school, hospital, place of worship or factory, or to the entrance to a Bazar or a residential colony.

35. The question for consideration is that when the policy of the Statute has not been changed whether the amendments made are arbitrary and unreasonable and violates Article 14 of the constitution of India. The apex Court in **State of Tamil Nadu and another Vs. P. Krishnamurthy & others** (supra) has laid down that subordinate legislation can be struck down, if it is manifestly unreasonable and arbitrary. The rule making authority has been empowered to make rules with regard to location of excise shops. The policy of the Statute and Rules still being that excise shop be not located in close proximity to a place of public resort, school, hospital, place of worship or factory, or to the entrance to a Bazar or a residential colony, can it be said that to effectuate the said policy, the State can prescribe any distance under its rule making power. Can State, while making the rule provide that excise shop be located from place of public resort, school, hospital, place of worship or factory, or to the entrance to a Bazar or a residential colony 1 meter away? The answer obviously has to be negative. The rule making authority has to exercise its discretion in making the rule in a manner, which carry on the policy of the Statute and promote the object. There is a clear pronouncement of this Court on this very subject and on this very rule itself that any distance within 100 meters is close proximity. There has to be strong reason for justifying that close proximity is only 50 meters. As noticed above, it is true that the State, while exercising its rule making power has power to amend the rule, even after its interpretation by the apex Court in Manoj Kumar Dwivedi's case but the question still remains as to whether the amendments made by the State under rule 5(4) are reasonable and not arbitrary. The institution in the present case is institution recognised by ISC Board in which classes from Ist to XII are running and there are approximately 3000 students. Locating the excise shop in front of the school across the road which admittedly is about 70 meters from the second gate of the school, is in not conformity with the policy of the Statute. Intoxicating liquors are harmful to the individuals consuming them and to the society as a whole, is a view which has been reiterated time and again by the apex Court.

In (1996) 3 SCC 709 **State of Andhra Pradesh Vs. McDowell and Company and others**, the apex Court again quoted with the approval the opinion of the Field, J. as noted above. Following was laid down in paragraph 40:

"For the sake of completeness, and without prejudice to the above holding, we may examine the alternate line of thought. In Cooverjee Bharucha, (AIR 1954 SC 220) a Constitution Bench of this Court expressed its whole-hearted concurrence with the opinion of Field, J. in Crowley v. Christensen, (1889-90) 34 L. Ed. 620, to the effect that: "There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority." While laying down the said proposition. Mahajan, C.J., speaking for the Court, referred generally to the position obtaining under Article 19(1) (g) and Clause (6) of the Article. The learned Chief Justice said that the reasonableness of the restriction has to be determined having regard to the nature of the business and the conditions prevailing in that trade."

36. From the foregoing discussions, it is clear that amendments as made by the State in Rule 5(4) by 2008 amendments, is manifestly unreasonable and arbitrary. It clearly defeats the very purpose and object of the policy of the Statute and the purpose for which the State was clothed with the rule making power to effectuate the policy. It is not the case of the respondents that they have withdrawn the policy or there is no more policy of the Statute that excise shop shall not be located near the place of public resort, school, hospital, place of worship or factory, or to the entrance to a Bazar or a residential colony. The amendment of the rule is clearly an eyewash and is contrary to the very object and purpose for which rule making authority was empowered to frame the rules. Therefore, we are of the clear view that amendments 2008 under rule 5(4) deserves to be struck down as being manifestly unreasonable and arbitrary.

37. In the result the writ petition is allowed. The Rule 5(4) as amended by notification dated 20.3.2008 is held to be violative of Article 14 of the Constitution of India and is consequently struck down. A mandamus is also issued to the respondent no. 1 to remove/shift the beer shop in question situated near Bishop Johnson School.

38. However, the parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.02.2010

BEFORE
THE HON'BLE B.K. NARAYANA, J.

Civil Misc. Writ Petition No. 61209 of 2007

Abu Bakar ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Anil Kumar Singh

Counsel for the Respondents:
C.S.C.

Constitution of India-Art. 226-cancellation of fair price shop licence-on

basis of complaint of one BPL card holder-statement recorded behind the back of petitioner-neither the complaint of such statement given-nor opportunity to cross-examination given-cancellation order entail civil consequences-not sustainable.

Held: Para 10

In view of the settled legal position, I have no hesitation in holding that the cancellation of petitioner's fair price shop agreement by respondent No. 3 in contravention of principles of natural justice cannot be sustained. Since the appellate authority failed to rectify the error committed by the Licensing authority, respondent No.3 the order of the appellate authority is also liable to be set aside along with the order of the licensing authority.

Case law discussed:
(1998)7 SCC 66, (1993) 3 SCC 259.

(Delivered by Hon'ble B.K. Narayana, J.)

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

2. The petitioner's fare price shop licence was suspended by respondent No. 3 by order dated 23.12.2005 on the allegations that the petitioner had contravened the provisions of U.P. Scheduled Commodities Distribution Order, 2004 by charging excess amount for the essential commodities from the BPL card holders and Antodaya card holders. By the same order, the petitioner was also required to show cause as to why his agreement he not cancelled. The petitioner filed his reply to the show cause notice denying the allegations made against him and along with his reply, the petitioner also filed documents before respondent No. 3 for showing that the grounds on which the petitioner's fair price shop agreement was sought to be cancelled were unfounded. After receiving petitioner's reply, respondent No.3 recorded the statements of some of the BPL and Antodaya card holders behind the back of the petitioner and without affording him any opportunity to cross examine the said witness and without furnishing him with the copies of their statements by his order dated 7.2.2006, cancelled the petitioner's fair price shop holding that the allegations made against the petitioner were proved. Against the order of respondent No.3 petitioner filed an appeal before the respondent No.2 which was registered as Appeal No. 153-A of 2004 and dismissed by him by his order dated 23.12.2005. Learned counsel for the petitioner submitted that the cancellation of the petitioner's fair price shop agreement by the respondent No.3 on the basis of the statement of the witness recorded behind the back of the petitioner and without the copies of the statements of the witnesses being furnished to him and also without giving him any opportunity to cross examine the witness who had deposed against him was not sustainable, action of the respondents No.3 being in contravention of principles of natural justice. He further submitted that the order of respondent No. 3 was challenged by the petitioner before the respondent No.2 specifically on the aforesaid ground. However, the respondent No.2 dismissed the petitioner's appeal without considering and recording any finding on the aforesaid issue raised before him.

3. In support of his submissions learned counsel for the petitioner placed reliance upon decision of this Court in **Raj Pal Singh Vs State of U.P. and**

others reported in 2008, 26, LCD page 931, National Building Construction Corporation Vs S. Raghunathan (1998)7 SCC 66, and D.K. Yadav Vs JMA Industries (1993) 3 SCC 259.

4. Learned counsel for the petitioner next submitted that the failure of the appellate authority to redeem the illegality committed by the respondent No.3, licensing authority has rendered the order of the respondent No.2 is also liable to be set aside.

5. Learned Standing Counsel submitted that the impugned orders do not suffer from any illegality or infirmity warranting any interference by this Court.

6. I have considered the submissions made by learned counsel for the parties and perused the record of the writ petition as well as the impugned orders. A close reading of the order dated 23.12.2005 passed by respondent No.3 shows that the petitioner's fair price shop agreement was cancelled on the ground that he was charging excess amount from BPL and Antodaya card holders for the essential commodities meant for sale through public distribution system at a fixed price. The order further shows that respondent No. 3 had recorded the statements of several BPL and Antodaya card holders and while holding that the allegations made against the petitioner were proved he had relied upon the statements of the said witnesses. There is no material on record indicating either the petitioner was given any opportunity to cross examine the witness who had deposed against him or the copies of the statements of witnesses so recorded were furnished to him. Thus what follows from the above discussion is that the petitioner has been penalised on the basis of the statements of Antodaya and BPL. card holders recorded behind his back although neither the copies of the statements of the aforesaid witnesses were furnished to the petitioner nor he was given any opportunity to cross examine the witness so examined.

7. The Hon'ble Supreme Court in iota of cases has reiterated that a person who is put to any harm, he shall first be afforded adequate opportunity of showing cause. In **D.K. Yadav (Supra)** the Supreme Court while having emphasis on affording opportunity by the authority which has the power to take punitive or damaging action held that orders affecting the civil rights or resulting consequences would have to answer the requirement of Article 14. The Hon'ble Apex Court concluded as under:

"The procedure prescribed for depriving a person of livelihood would be liable to be tested on the anvil of Article 14. The procedure prescribed by a statute or statutory rule or rules of orders affecting the civil rights or result in civil consequences would have to answer the requirement of Article 14. Article 14 has a pervasive procedural potency and versatile quality equalitarian in its soul and principles of natural justice are part of Article 14 and the procedure prescribed by law must be just, fair and reasonable and not arbitrary, fanciful or oppressive."

8. In **National Building Construction Corporation (Supra)**, it was observed by the Apex Court that a person is entitled to judicial review, if he is able to show that the decision of the public authority deprived him of some benefit or advantage which in the past he had been permitted to enjoy and which he

legitimately expected to be permitted to continue to enjoy either until he is informed the reasons for withdrawal and the opportunity to comment on such reasons.

9. This Court in the case of **Rajpal Singh (Supra)** again held that where fair price shop licence of a dealer is cancelled by placing reliance on the report of the Supply Inspector and the copy of the report is not furnished to the dealer, such an order is in contravention of principles of natural justice and is liable to be set aside.

10. In view of the settled legal position, I have no hesitation in holding that the cancellation of petitioner's fair price shop agreement by respondent No. 3 in contravention of principles of natural justice cannot be sustained. Since the appellate authority failed to rectify the error committed by the Licensing authority, respondent No.3 the order of the appellate authority is also liable to be set aside along with the order of the licensing authority.

11. For the aforesaid reasons, the writ petition is allowed. The order dated 23.12.2005 passed by respondent No.3 (Annexure 8 to the writ petition) as well as the appellate order dated 18.1.2007 passed by respondent No.2, (Annexure 16 to the writ petition) are hereby quashed. Respondent No.3 may be at liberty to pass a fresh order in the matter after complying with the principles of natural justice.
