APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.01.2010

BEFORE
THE HON'BLE C.K. PRASAD, C.J.
THE HON'BLE PANKAJ MITHAL, J.

Special Appeal No.17 of 2010

Shom Raj Shukla ...Appellants/Petitioner
Versus
Public Service Commission U.P. and others ...Respondents/Opposite Party

Counsel for the Petitioner:
Sri Kamlesh Narayan Pandey

Counsel for the Respondents:
C.S.C.

U.P. Public Service Commission Reservation for Scheduled Castes, Scheduled Tribes & others backward classes Act- 1994 Section- 3(6)- Appointment of work shop Instructor- out of 17 General Category 12 post occupied by scheduled Caste candidates- all those reserve category persons got more marks than the last selected candidate of General Category-argument that if they allowed to occupy vacancy of General Category-reservation exceed more than 50% held-misconceived-it can not be ground for reconsideration of reservation policy by Govt.-but those candidate can not be counted in reservation Quota-Single judge rightly declined to interfere.

Held Para- 14

However, we hasten to add that appointment of a large number of candidates belonging to the reserved category in the general category on merit, may be a ground to reconsider the policy of reservation, but it cannot be said that those members of the reserved category who have been appointed on merit, in the face of the language of Section 3 (6) of the Act, 1994, have to be counted amongst the members of the reserved category.

Case law discussed:
1963 (Suppl.) SCR 439,1992 Supp. (3) SCC 217, [(2004) 2 UPLBEC 1445.

(Delivered by Hon'ble C.K. Prasad, CJ)

1. Writ petitioner-appellant, aggrieved by order dated 26.11.2009 passed by a learned Single Judge in Civil Misc. Writ Petition No.35839 of 2004, has preferred this special appeal under Rule 5 Chapter VIII of the Allahabad High Court Rules.

2. Shorn of unnecessary details facts giving rise to the present appeal are that in response to the advertisement made by the U.P. Public Service Commission for appointment to the post of Workshop Instructor, the writ petitioner-appellant (hereinafter called as 'the writ petitioner') as also a large number of candidates offered their candidatures. After usual process of selection, the Public Service Commission published the list of selected candidates on 24.12.2003. The name of writ petitioner does not find place in that. He challenged the select list alleging that out of 17 general posts, 12 posts have been filled-up from the candidates belonging to the reserved category, which is impermissible in law and accordingly, prayer was made to quash the list. It is not the case of the writ petitioner that advertisement itself provided for reservation to the extent indicated above. The writ petitioner's prayer was resisted on the ground that the candidates of reserved category, who had secured equal marks or more marks than the marks secured by the last selected candidate of the general category, have been appointed and those will not account for in the

reserved category. The submission made by the writ petitioner did not find favour with the learned Single Judge and he dismissed the writ application, inter alia, observing as follows:-

"As per the provisions quoted above, in case a candidate of reserve category has received marks equivalent or higher marks than the general category candidate, then his/her candidature has to be considered as general candidate. In the present case exactly this has been done and the 12 candidates of reserve category have secured more marks than the general category candidates, as such they have been treated as general category candidates on account of this mandatory provision of Section 3 (6) U.P. Act No.4 of 1994. Ceiling of 50% to reserve category candidates in no way is applicable, inasmuch as the selection of reserve category candidates, in the present case, against quota meant for general category candidates, cannot be treated to be exceeding the quota of 50% provided for under the reservation. This ground raised by the petitioner is unsustainable and cannot be subscribed."

3. Mr. Pandey, appearing on behalf of the writ petitioner, submits that the reservation of more than 50% posts in favour of reserved category is a fraud on the Constitution and on this ground alone, the select list is fit to be quashed. In support of the submission, reliance has been placed on the Judgement of the Supreme Court in the case of **M.R. Balaji and others Vs. State of Mysore [**1963 (Suppl.) SCR 439] and our attention has been drawn to the following passage from the said judgement:-

"It is in this connection that courts often consider the substance of the matter and not its form and in ascertaining the substance of the matter, the appearance or the cloak, or the veil of the executive action is carefully scrutinized and if it appears that notwithstanding the appearance, the cloak or the veil of the executive action, in substance and in truth the constitutional power has been transgressed, the impugned action is struck down as a fraud on the Constitution. We have already noticed that the impugned order in the present case has categorised the Backward Classes on the sole basis of caste which, in our opinion, is not permitted by Art. 15 (4); and we have also held that the reservation of 68% made by the impugned order is plainly inconsistent with the concept of the special provision authorised by Art. 15 (4). Therefore, it follows that the impugned order is a fraud on the Constitutional power conferred on the State by Art. 15 (4)."

4. Reliance has also been placed on a Constitution Bench judgement of the Supreme Court in the case of **Indra Sawhney v. Union of India** [1992 Supp. (3) SCC 217, and our attention has been drawn to paragraph 178 of the judgement, which reads as follows:-

"**178.** It was for the first time that this Court in Balaji has indicated broadly that the reservation should be less than 50% and the question how much less than 50% would depend on the relevant prevailing circumstances in each case. Though in Balaji the issue in dispute related only to the reservation prescribed for admissions in the medical college from the educationally and socially backward classes, Scheduled Castes and Scheduled

Tribes as being violative of Article 15 (4), this Court after expressing its view that it should be less than 50% observed further that

"[T] he provisions of Article 15 (4) are similar to those of Article 16 (4) .... Therefore, what is true in regard to Article 15 (4) is equally true in regard to Article 16 (4)... reservation made under Article 16 (4) beyond the permissible and legitimate limits would be liable to be challenged as a fraud on the Constitution." (SCR pp. 473-74)

This decision has gone further holding that the reservation of 68% seats made in that case was offending Article 15 (4) of the Constitution. To say in other words, Balaji has fixed that the maximum limit of reservation all put together should not exceed 50% and if it exceeds, it is nothing but a fraud on the Constitution. Even at the threshold, I may emphatically state that I am unable to agree with the proposition fixing the reservation for SEBCs at 50% as the maximum limit."

5. Yet, another decision on which reliance has been placed, is a Division Bench decision of this Court in **Prana Vir Singh (Dr.) v. Chancellor, Chandra Shekhar Azad University of Agriculture and Technology, Lucknow and others**, [(2004) 2 UPLBEC 1445] and our attention has been drawn to paragraph 12 of the judgement, which reads as follows:-

"**12**. From the facts of the case it appears that initially there were nine posts of Subject Matter Specialist (Yield Production), which had been advertised by Annexure-2 to the writ petition. Out of these nine posts two were reserved for Scheduled Caste and three for other Backward Class and four posts were in general category. In our opinion, this reservation of five out of nine posts was clearly illegal as it exceeded 50% maximum permissible limit of reservation. In the Constitution Bench decision of the Supreme Court in *P.G. Institute of Medical Education and Research v. Faculty Association*, JT 1998 (3) SC 223, it has been observed (vide Para 31)".

6. Reference has also been made to an unreported decision of this Court dated 13.8.2008 passed in Civil Misc. Writ Petition No.190 of 2006 (Dr. Shailendra Singh Vs. State of U.P. and another). In the said case, it has been held as follows:-

"We therefore find that the post reserved for scheduled caste on which Dr. Permanand T Dudhey was selected was in excess of the percentage of reservation for scheduled caste candidate."

7. We do not find any substance in the submission of Mr. Pandey, and the decisions relied on are clearly distinguishable.

8. It is not the case of the writ petitioner that out of 17 posts, 12 have been filled-up from amongst the members of the reserved category on the basis of any concession given to them. It seems that all these persons have qualified with the members of the general category and have been selected on merit. In our constitutional scheme, there is no reservation for the members of the general category and the reservation is for the members of the reserved category, i.e., Scheduled Caste, Scheduled Tribe, and Other Backward Classes. The Constitution does not provide that the vacancies, which are not reserved have to

be filled-up by the members of the general category. The members of the reserved category can claim appointment on merit for the posts, which are not reserved, but the converse is not true. The members of the general category cannot be considered for appointment on reserved posts. Under the scheme of the Constitution, no such reservation in favour of the general category has been provided.

9. It is relevant here to state that the State Legislature has enacted the U.P. Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994, to provide for the reservation in public services and posts in favour of the persons belonging to the Scheduled Castes, Scheduled Tribes and Other Backward Classes of citizens. Section 3 (6) of the aforesaid Act, which is relevant for the purpose, reads as follows:-

3. Reservation in favour of Scheduled Castes, Scheduled Tribes and Other Backward Classes.-

xx xx xx

(6). If a person belonging to any of the categories mentioned in sub-section (1) gets selected on the basis of merit in an open competition with general candidates, he shall not be adjusted against the vacancies reserved for such category under sub-section (1).

Xx xx xx"

10. From a plain reading of the aforesaid provision, it is evident that if a person belonging to any of the reserved categories, gets selected on the basis of merit in an open competition with general candidates, he shall not be adjusted against the vacancy reserved for such category. Therefore, such of the candidate of the reserved category selected on the basis of merit in an open competition with general category, shall not be accounted for calculating the percentage of reservation.

11. In that view of the matter, the very plea of the writ petitioner that more than 50% of the posts have been reserved for the members of the reserved category, is absolutely fallacious. Merely the fact that more than 50% of the persons belonging to reserved category have been appointed, will not mean that reservation had exceeded 50% of the vacancies and had exceeded the same. De jure reservation of more than 50%, ordinarily may not be permissible, but de facto it may be possible that more than 50% of the posts are filled by members of the reserved category on merit, as had happened in the present case.

12. It is not the case of the writ petitioner that any candidate belonging to his category and having secured less marks than him, has been appointed and the writ petitioner left out. His very comparison with the members of the other categories, who have been appointed on the seat reserved for them, is absolutely misconceived.

13. Now referring to the decision of the Supreme Court in ***M.R. Balaji*** (supra), the same is clearly distinguishable. In the said case, the reservation of more than 50% was held to be fraud on the Constitution. Here, reservation has not been provided exceeding 50% of the posts. As stated earlier, more than 50% of the posts have been filled-up by the members of the reserved category, not by giving any concession to them, but on

account of the fact that they had competed and qualified along with the members of the general category. For the same reason, all the decisions relied on by the writ petitioner are clearly distinguishable and they do not support the writ petitioner's contention.

14. However, we hasten to add that appointment of a large number of candidates belonging to the reserved category in the general category on merit, may be a ground to reconsider the policy of reservation, but it cannot be said that those members of the reserved category who have been appointed on merit, in the face of the language of Section 3 (6) of the Act, 1994, have to be counted amongst the members of the reserved category.

15. We are of the opinion that the consideration of the matter by the learned Single Judge does not suffer from any error calling for interference in this appeal.

16. We do not find any merit in the appeal and it is dismissed, accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.01.2010

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 274 of 2010

Shiv Lochan ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri R.C. Yadav

Counsel for the Respondents:
C.S.C.

Constitution of India-Art. 226-Writ jurisdiction-person invoking extraordinary jurisdiction must be with clean hand-clean hearted-concealment of dismissal of earlier petition as well as Special Appeal-dis entitled the petitioner for any sympathy-petitioner also guilty-of filing false affidavit-only dismissal will not be substantial justice-but dismissal of writ petition with exemplary cost of Rs.25000/-proper.

Held: Para 10

A litigant who has approached this Court in extra ordinary equitable jurisdiction with unclean hands, his conduct makes him liable to pay an exemplary cost for abusing the process of the Court besides wasting precious time of the Court which could have been utilized for other more delinquent employee serving cases. Moreover, he is also guilty of swearing a false affidavit. Thus the petitioner must be saddled with the liability of heavy cost so that in future such thing may not recur.

Case Law discussed:
(2006)2 SCC 541, 2003(Suppl.) 3 SCR 352, AIR 2005 SC 3110, AIR 2005 SC 3330, JT 2004(1) SC 88, AIR 1964 SC 345, (2003)9 SCC 401.

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

1. This is not only a frivolous and mischievous petition but also apparently the petitioner has approached this Court with unclean hands by concealing the material facts.

2. Though the writ petition has been drafted in an innocuous manner, a simple reading of paragraphs 4 and 5 shows that he was initially appointed as Assistant Teacher in Maharana Pratap Purva Madhyamik Vidyalaya Punapar Bhatauli,

District Azamgarh (Presently District Mau) on 25th August, 1977 and respondent No.5 issued approval letter on 25th March, 1982 in respect to the appointment of the petitioner. Para 6 further shows that respondent No.5 also issued another letter on 12th January, 1983 in respect to the appointment of teachers who were appointed before permanent recognition and granted approval in respect of the appointment of four teachers including the respondent No.8, ignoring the petitioner and experience certificate claimed to be obtained by the petitioner in 1995 and thereafter he has mentioned that Maharana Pratap Purva Madhyamik Vidyalaya Punapar Bhatauli, Mau was upgraded as Uchcha Prathmik Vidyalaya i.e. Junior High School in December, 1996. Again he has said that the respondent No.5 granted approval to the petitioner on 30.12.1996. The relief sought in the writ petition is that the petitioner should be given appointment to the post of Head Master in the concerned institution which has been mentioned by the petitioner's counsel as Maharana Pratap Purva Madhyamik Vidyalaya Punapar Bhatauli, Mau.

3. However, on a closer scrutiny it is evident that the petitioner was initially appointed as Assistant Teacher in a privately managed recognized junior primary school i.e. Maharana Pratap Purva Madhyamik Vidyalaya Punapar Bhatauli, Azamgarh on 25th August, 1977 (Annexure - 2 to the writ petition) but on 25th March, 1982 he was appointed on purely adhoc/temporary basis as Assistant Teacher in Junior Basic School of Basic Shiksha Parishad by the District Basic Education Officer, Azamgarh. In order to join pursuant to the appointment letter dated 25th March, 1982, the petitioner left his service from Maharana Pratap Purva Madhyamik Vidyalaya Punapar Bhatauli, Mau and joined at Junior Basic School, Azamgarh therein. Later on at some point of time when Maharana Pratap Purva Madhyamik Vidyalaya Punapar Bhatauli, Mau was upgraded, the petitioner somehow obtained some documents in order to lay his claim, after more than a decade, in Maharana Pratap Purva Madhyamik Vidyalaya Punapar Bhatauli, Mau claiming seniority with effect from his initial appointment i.e. 25th August, 1977.

4. It appears that based on documents obtained by the petitioner later on, he approached the Director of Education claiming that he is working at the institution "Maharana Pratap Purva Madhyamik Vidyalaya Punapar Bhatauli, Mau" and is not getting salary and then filed writ petition No.14472 of 2001 which was disposed of by this Court on 18th April, 2001 directing the concerned authority to decide the matter after giving opportunity. An order was passed on 7th July, 2001 by the Finance and Accounts Officer, Basic Shiksha, Mau pursuant to judgment dated 18.4.2001 against which another writ petition No.38242 of 2004 was filed by some other persons along with petitioner which was disposed of on 14th December, 2005. It is pursuant thereto the order dated 11/15th May, 2007 was passed by the Director Basic Education observing that Shiv Lochan, the present petitioner had left the institution i.e. Maharana Pratap Purva Madhyamik Vidyalaya, Punapur, Bhatauli, Mau long back and could not have been permitted to join the said institution again in 1997. The validity of the said order dated 11/15.5.2007 was challenged in writ petition no.27602 of

2007 which was dismissed by the Hon'ble Single Judge vide judgement dated 17th April, 2009 observing as under:

".....Admitted position is that after petitioner had left the institution he had no concern with the institution and another incumbent had been appointed and had been function. After 14 year under what contingency he was permitted to come back in the institution. There is no provision of adjustment in the institution as has been sought to be done in the present case. Entire proceedings taken in favour of petitioner is void on this score. Admitted position is that in the vacancy of the petitioner another incumbent had been appointed and petitioner by no stretch of imagination could have ipso facto returned and resume his duty. Return of petitioner cannot be subscribed in law. View taken by the Director of Education is totally correct view, as petitioner was not at all retaining his lien on earlier post and said post had already substantively been filled up and in this background by no stretch of imagination he could have been absorbed and adjusted in the institution against any other vacancy as per U.P. Act No.6 of 1979. There is no provision of absorption/ adjustment there and in case there is fresh vacancy then fresh selection proceeding will have to be undertaken."

5. Aggrieved by the aforesaid judgement of the Hon'ble Single Judge, the petitioner preferred Special Appeal No. (847) of 2009 which has been dismissed by the Division Bench vide order dated 30th July, 2009.

6. Without disclosing the above facts and taking pleadings in a misleading manner, as pointed out above, this writ petition has been filed by the petitioner stating that this is the first writ petition being filed by him seeking relief for appointment on the post of Head Master in the institution concerned i.e. Maharana Pratap Purva Madhyamik Vidyalaya Punapar Bhatauli, Mau.

7. In my view by not disclosing the factum of earlier writ petition no.27602 of 2007 in the present one, the petitioner is guilty of approaching this Court with unclean hands and of concealment of material facts.

8. In ***Ram Saran Vs. IG of Police, CRPF and others, (2006) 2 SCC 541***, the Apex Court observed "A person who seeks equity must come with clean hands. He, who comes to the court with false claims, cannot plead equity nor would the court be justified to exercise equity jurisdiction in his favour. A person who seeks equity must act in a fair and equitable manner. ....."

9. In ***Ram Preeti Yadav Vs. U.P. Board of High School and Intermediate Education and others, 2003 (Suppl.) 3 SCR 352***, it was reiterated after referring to various earlier decisions of the Apex Court that fraud misrepresentation and concealment of material fact vitiates all solemn acts. In ***State of Andhra Pradesh & another Vs. T. Suryachandra Rao, AIR 2005 SC 3110***, the Apex Court after referring to various earlier decisions held that suppression of a material document would also amount to a fraud on the Court. The same view has been reiterated in ***Bhaurao Dagdu Paralkar Vs. State of Maharashtra & others, AIR 2005 SC 3330***. In ***R. Vishwanatha Pillai Vs. State of Kerala & others, JT 2004(1) SC 88*** the Apex Court observed that a person, who

seeks equity, must act in a fair and equitable manner. In ***Rajabhai Abdul Rehman Munshi Vs. Vasudev Dhanjibhai Mody, AIR 1964 SC 345***, it was held that if there appears on the part of a person, who has approached the Court, any attempt to overreach or mislead the Court by false or untrue statements or by withholding true information which would have a bearing on the question of exercise of the discretion, the Court would be justified in refusing to exercise the discretion or if the discretion has been exercised in revoking the leave to appeal granted even at the time of hearing of the appeal. The same view was reiterated and followed in ***Vijay Syal & another Vs. State of Punjab & others (2003) 9 SCC 40***1.

10. A litigant who has approached this Court in extra ordinary equitable jurisdiction with unclean hands, his conduct makes him liable to pay an exemplary cost for abusing the process of the Court besides wasting precious time of the Court which could have been utilized for other more delinquent employee serving cases. Moreover, he is also guilty of swearing a false affidavit. Thus the petitioner must be saddled with the liability of heavy cost so that in future such thing may not recur.

11. The writ petition is accordingly dismissed with cost quantified at Rs.25,000/-. The cost shall be deposited by the petitioner within two months with the Registrar General of this Court. In case of failure by the petitioner to pay the amount of cost, it shall be recovered as arrears of land revenue for which the Registrar General of this Court shall take appropriate steps.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.01.2010

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

Civil Misc. Writ Petition No. 428 of 2010

Dr. Kalp Nath Chaubey ...Petitioner
Versus
Information Commissioner Central Information Commission, New Delhi and others ...Respondents

Counsel for the Petitioner:
Sri R.B. Singhal
Sri Akhileshwar Singh

Counsel for the Respondents:
A.S.G.I.
Sri R.R. Khan
Sri S.K. Singh

Right to Information Act-2005-Section 20-Penalty for non-supply of required information within time-appellate authority without considering the explanation without disclosing any reason for its satisfaction about deliberate delay- imposition of penalty-not sustainable.

Held: Para 16

An authority, when exercises power to impose penalty, is bound to give reasons for conclusion. Merely repeating the words given in the sections does not satisfy the requirement of law. The Public Information Officer may have committed lapse bonafidely or malafidely, there may or may not be a reasonable cause but the authority has to advert to the cause shown by the officer before imposing penalty, without adverting to the relevant cause shown by the Public Information Officer, the penalty cannot be imposed. It is true that Right to Information Act, 2005 is a

beneficial piece of legislation and the same has been enacted to provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authority. The provisions of the said Act has to be implemented in a manner as to achieve its object.

Case law discussed

A.I.R. 1974 S.C. 87; A.I.R. 1990 S.C. 1984.

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

1. Heard counsel for the petitioner, Sri R.B. Singhal, Senior Advocate, Assistant Solicitor General of India assisted by Sri R.R. Khan for respondent No.1 and Sri S.K. Singh appearing for respondent No.4.

2. The contesting parties are represented by their counsels. No notice has been issued to respondents No.2 and 3, who are only proforma parties. Looking to the nature of issues raised in this writ petition, with the consent of parties, we proceed to dispose of the writ petition finally.

3. By this writ petition, the petitioner has prayed for quashing the order dated 16th December, 2009 by which penalty of Rs.25,000/- has been imposed upon the petitioner as deemed Public Information Officer/Principal under Section 20(1) of the Right to Information Act, 2005.

4. The petitioner's case in the writ petition is that petitioner was working as Principal, Satish Chandra Degree College Ballia from March, 2009 to 8th May, 2009 and was also given charge of Co-ordinator of Indira Gandhi National Open University, Study Centre, Satish Chandra Degree College, Ballia. The respondent No.4 who was working on the post of Lab Assistant in the same College and was also President of Shikshanettar Karmchari Parishad, Satish Chandra College, Ballia sought certain informations under the Right to Information Act, 2005 vide his application dated 8th April, 2009 (Annexure-1 to the writ petition). The said application was forwarded by letter dated 14th April, 2009 of respondent No.3 to the petitioner for providing information. The petitioner after receiving the said letter vide his letter dated 7th May, 2009 informed respondent No.4 that information has been sought as President of Shikshanettar Karmchari Parishad, hence it is not covered by Section 3 of the Right to Information Act, 2005 and he is not entitled for information. Petitioner's case further is that Sri R.S. Pandey was made Co-ordinator from 8th May, 2009. A first appeal was filed by respondent No.4 in which direction was issued on 21st May, 2009 directing the Public Information Officer to provide the information. It is not disputed that subsequent to the said order the information's were provided by the subsequent Coordinator, Sri R.S. Pandey on 24th October, 2009. A second appeal was filed before the information was given, which came for consideration before the Central Information Commissioner. The Central Information Commissioner while proceeding issued notice under Section 20 of the Right to Information Act, 2005 to both, petitioner and Sri R.S. Pandey. The petitioner submitted his reply and the Central Information Commissioner by the impugned order has imposed penalty of Rs.25,000/- on the petitioner against which the petitioner has come up in this writ petition.

5. Learned counsel for the petitioner, challenging the impugned order, contended that the petitioner, within the prescribed time, has already sent reply that information cannot be given since the application was made by the President of Shikshanettar Karmchari Parishad. He submits that there was no delay or mistake on the part of the petitioner. He submits that on 12th May, 2009 the respondent No.4 clarified that he is seeking information as an individual and thereafter the proceedings were taken and direction was issued on 21st May, 2009 to provide the information. Learned counsel for the petitioner submits that petitioner ceased to be Coordinator on 8th May, 2009 when charge was given to Sri R.S. Pandey. Thus for any subsequent delay the petitioner cannot be penalised. He further submits that Central Information Commissioner without giving any reason has passed the order under Section 20 of the Right to Information Act, 2005.

6. Sri R.B. Singhal appearing for respondent No.1 has justified the order of the Central Information Commissioner. He submits that Central Information Commissioner has clearly found that no reasonable cause has been shown for not giving the information, hence the Central Information Commissioner was fully empowered to impose penalty.

7. Sri S.K. Singh learned counsel appearing for respondent No.4 submits that the petitioner was the Public Information Officer at the relevant time and he ought to have supplied the information and there being delay penalty has rightly been imposed.

8. We have considered the submissions of learned counsel for the parties and have perused the record.

9. The question, which has arisen in the present case, is as to whether the Central Information Commissioner has rightly invoked the power under Section 20 of the Right to Information Act, 2005 for imposing penalty. Section 20 of the Right to Information Act, 2005 is quoted below:-

"20. Penalties.- *(1) Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Office, as the case may be, without any reasonable cause, refused to receive an application for information or has not furnished the information within the time specified under sub-section (1) of Section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall impose a penalty of two hundred and fifty rupees each day till application is received or information is furnished, so however, the total amount of such penalty shall not exceed twenty-five thousand rupees:*

Provided that the Central Public Information Office or the State Public Information Officer, as the case may be, shall be given a reasonable opportunity of being heard before any penalty is imposed on him:

Provided further that the burden of proving that he acted reasonably and diligently shall be on the Central Public Information Officer or the State Public Information Office, as the case may be.

(2) Where the Central Information Commission or the State Information Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer or the State Public Information Officer, as the case may be, has, without any reasonable cause and persistently, failed to receive an application for information or has not furnished information within the time specified under sub-section (1) of Section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information it shall recommend for disciplinary action against the Central Public Information Officer or the State Public Information Officer, as the case may be, under the service rules applicable to him."

10. The present is a case where the petitioner who was working as Coordinator after receiving the letter dated 14th April, 2009 within one month has sent a letter on 7th May, 2009 stating that no information can be given since the application was submitted by respondent No.4 as President of Shikshanettar Karmchari Parishad and not as a citizen. The petitioner has submitted before the Central Information Commissioner that on 8th May, 2009 charge of Coordinator was given to Sri R.S. Pandey and subsequent delay if any committed was by Sri R.S. Pandey and the petitioner cannot be found guilty. He submits that finding recorded by the Central Information Commissioner that after the order dated 21st May, 2009 information should have been supplied by 6th June, 2009 which having not been done, the delay has been caused was against Sri R.S. Pandey and the said finding cannot be made basis for imposing penalty upon the petitioner. It is submitted that the Central Information Commissioner only given conclusions that no reasonable cause has been shown. It is submitted that even the reply of the petitioner dated 7th May, 2009 has not been adverted to.

11. The order in proceeding under Section 20 of the Right to Information Act, 2005 is an order of penalty and the said power can be exercised only when the Central Information Commissioner at the time of deciding any complaint or appeal is satisfied that without any reasonable cause the Central Public Information Officer has refused to receive the application or has not furnished the information within the time specified under sub-section (1) of Section 7 or malafidely denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information. A perusal of the different grounds, which have been made for invoking the power of penalty indicate that there has to be finding that there was no reasonable cause or knowingly or malafidely incorrect or incomplete information was given. The penalty proceedings are quasi judicial proceedings where the Commission is entrusted with the power to impose penalty. A perusal of the order impugned indicates that only conclusions have been recorded by the Commission that no reasonable cause has been shown for not providing the

information. The letter of the petitioner dated 7th May, 2009 by which he informed that why information cannot be provided has not been even specifically dealt with nor there is any finding as required under Section 20 of the Right to Information Act, 2005 for imposing penalty. There is different between reasons and conclusions. The conclusions are opinion formed by an authority on the basis of reasons recorded therein. The reasons are link between the conclusions and materials on record. The Apex Court in A.I.R. 1974 S.C. 87; **Union of India vs. M.L. Capoor and others** has defined as to what are the reasons. Following was laid down by the Apex Court in paragraph 28:-

*"**28**. In the context of the effect upon the rights of aggrieved persons, as members of a public service who are entitled to just and reasonable treatment, by reason of protections conferred upon them by Articles 14 and 16 of the Constitution, which are available to them throughout their service, it was incumbent on the Selection Committee to have stated reasons in a manner which would disclose how the record of each officer superseded stood in relation to records of others who were to be preferred, particularly as this is practically the only remaining visible safeguard against possible injustice and arbitrariness, in making selections. If that had been done, facts on service records of officers considered by the Selection Committee would have been correlated to the conclusions reached. Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi-judicial. They should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable. We think that it is not enough to say that preference should be given because a certain kind of process was gone through by the Selection Committee. This is all that the supposed statement of reasons amounts to. We, therefore, think that the mandatory provisions of Regulation 5 (5) were not complied with. We think that reliance was rightly placed by respondents on two decisions of this Court relating to the effect of non-compliance with such mandatory provisions. These were: Associated Electrical Industries (India) Pvt. Ltd., Calcutta v. Its Workmen, AIR 1967 SC 284 and Collector of Morighyr v. Keshav Prasad Goenka, (1963) 1 SCR 98 = (AIR 1962 SC 1694)."*

12. A perusal of the order impugned imposing penalty indicates that in first, second and third paragraphs the authority has noted the contentions of Sri K.N. Chaubey (petitioner) and Sri R.S. Pandey (deemed Public Information Officer) who claims to have joined as Coordinator on 8th May, 2009. In the fourth paragraph the decision has been given in following words:-

"No reasonable cause has been shown for not providing the information. In view of this the Commission finds this as a fit case for levy of penalty since the delay has been over 100 days the Commission levies a maximum penalty of Rs.25000/- as per Section 20(1) of the RTI Act on Mr. K.N. Chaubey, Deemed PIO/Principal."

13. The above observations in the order is the entire discussion, reason and conclusion of the authority. The order impugned indicates that the explanation given by the petitioner was not adverted to nor any reason has been given for not finding reasonable cause. The words "no reasonable cause has been shown for not providing the information" at best are only conclusion of the authority. From the dictum of the Apex Court as laid down by the Apex Court in the ***Union of India vs. M.L. Capoor's*** case (supra), the above observations of the authority cannot be said to be any reason.

14. The recording of the reasons in an order passed by administrative authority exercising quasi judicial function has been emphasised from time to time. The Apex Court in the case of ***S.N. Mukherjee vs. Union of India*** reported in A.I.R. 1990 S.C. 1984 while considering the question of recording of reasons laid down following in paragraph 38:-

"38*. The object underlying the rules of natural justice "is to prevent miscarriage of justice" and secure "fair play in action." As pointed out earlier the requirement about recording of reasons for its decision by an administrative authority exercising quasi judicial functions achieves this object by excluding chances of arbitrariness and ensuring a degree of fairness in the process of decision-making. Keeping in view the expanding horizon of the principles of natural justice, we are of the opinion, that the requirement to record reason can be regarded as one of the principles of natural justice which govern exercise of power by administrative authorities. The rules of natural justice are not embodied rules. The extent of their application depends upon the particular statutory framework whereunder jurisdiction has been conferred on the administrative authority...."*

15. Section 20 of the Right to Information Act, 2005 which empowers the Central Information Commissioner to impose penalty has to be more stringently observed. For imposing penalty an opinion has to be formed that the Public Information Officer without any reasonable cause has not furnished the information within the time specified. The formation of the opinion has to be on the basis of objective consideration. The opinion has to be formed on the basis of relevant materials. The formation of the opinion should disclose materials on the basis of which the opinion/conclusions are formulated. We are of the view that the opinion as contemplated under Section 20(1) of the Right to Information Act, 2005 for imposing penalty has not been formulated by the Central Information Commissioner.

16. An authority, when exercises power to impose penalty, is bound to give reasons for conclusion. Merely repeating the words given in the sections does not satisfy the requirement of law. The Public Information Officer may have committed lapse bonafidely or malafidely, there may or may not be a reasonable cause but the authority has to advert to the cause shown by the officer before imposing penalty, without adverting to the relevant cause shown by the Public Information Officer, the penalty cannot be imposed. It is true that Right to Information Act, 2005 is a beneficial piece of legislation and the same has been enacted to provide for

setting out the practical regime of right to information for citizens to secure access to information under the control of public authority. The provisions of the said Act has to be implemented in a manner as to achieve its object.

17. In view of the foregoing discussions, we are satisfied that Central Information Commissioner having not adverted to the relevant reply submitted by the petitioner and there being no reason given in the order impugned, the order dated 16th December, 2009 deserves to be and is hereby set-aside remitting the matter to the Central Information Commissioner to pass fresh order in accordance with law expeditiously preferably within a period of three months from the date of production of a certified copy of this order.

The writ petition is disposed of accordingly.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.01.2010

BEFORE
THE HON'BLE RAJES KUMAR, J.

Civil Revision No. 482 of 2009

Shree Ram Gupta ...Revisionst/Defendant
Versus
Shafiquer Rahman & others ...Respondents

Counsel for the Revisionist:
Sri Subhash Chandra Tiwari

Counsel for the Opposite Parties:
Sri Saurabh Srivastava

Code of Civil Procedure order VI Rule 17- Amendment of written statement After 17 month from the date of closing of evidence-No reason given for not approaching earlier amendment sought regarding applicability of the provisions of Act No. 13 of 1972- held not bona fide application rightly rejected.

Held: Para -10

In the present case the evidence of both the parties have been closed and the suit was fixed for final hearing and, therefore, the trial had commenced. No reason has been given that in spite of the due diligence the applicant could not have raised the plea taken in the amendment application in the earlier written statement. In the circumstances, the petitioner is not entitled for the benefit of the proviso to Order 6 Rule 17.

Case law discussed
2007 (3) ARC 410, 2009 (3) ARC 502, (2008) 7 S.C.C. 85.

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

1. This revision is directed against the order of the Judge, Small Causes Court dated 3.10.2009 by which he has rejected the amendment application filed by the petitioner, who was defendant in the suit.

2. The respondent filed S.C.C. Suit No. 58 of 2004 for ejectment and arrears of rent in which the petitioner was defendant no. 1. The petitioner filed the written statement and contested the case. It appears that evidence of both the parties have been closed on 10.7.2007 and 26.7.2007 was fixed for hearing. Further an application under Order 15 Rule 5 C.P.C. was moved, which has not been replied by the defendants. On 25.1.2008 the petitioner-defendant moved an application seeking permission to deposit rent of Rs.20,000/-, which has been allowed on 28.1.2008 and thereafter a date was fixed for disposal of the

application under Order 15 Rule 5 C.P.C. On 2.4.2008, defendant no. 2 Shree Kant Gupta, filed amendment application which has been rejected on 7.8.2008. Shree Kant Gupta filed Revision No. 385 of 2008 before this Court against the said order dated 7.8.2008 which has been rejected by this Court on 20.10.2008. Thereafter, on 2.2.2009, the petitioner-defendant no. 1, Shree Ram Gupta filed amendment application. The said amendment application has been rejected by the impugned order. The court below has held that the amendment application has been filed after one year seven months from the date of the close of evidence just to delay the proceeding. It has been further observed that the amendment application has been filed by the petitioner after rejection of the earlier amendment application filed by defendant no. 2. The amendment application has been rejected also on the ground that the petitioner-defendant no. 1 by way of amendment intended to resile with the earlier admission and the pleadings taken in the written statement. On these grounds it has been held that the amendment application was moved to delay the proceeding with mala fide intention.

3. Heard Sri S.C. Tiwari, learned counsel for the applicant, and Sri Saurabh Srivastava appearing on behalf of the respondents.

4. Learned counsel for the petitioner submitted that by the amendment the applicant has raised the plea that the construction of the premises in dispute was made prior to 1972 and, therefore, Act No. 13 of 1972 was applicable and, therefore, the S.C.C. Suit filed was not maintainable. This plea is necessary to adjudicate the issue and, therefore, ought to have been allowed. He submitted that the apex Court in the case of **Andhra Bank v. ABN Amro Bank N.V. and Ors. reported in** *2007 (3) ARC 410* has held that the delay is no ground for refusing the prayer of amendment. He further submitted that defendant no. 2 had earlier moved the application raising the plea that during pendency of the proceeding, on the intervention of the neighbors, the dispute has been settled between the parties and, according to which, the plaintiff-landlord has received the rent in cash upto December, 2007 and agreed to withdraw the suit and when he refused to withdraw the suit a sum of Rs.20,000/- was deposited on 12.2.2008 in the court. It was pleaded that since the above facts have come into existence after filing of the written statement, such amendment was liable to be allowed. However, the amendment has been rejected on the ground that it has been moved after nine months from the date of the close of the evidence.

5. Learned counsel for the respondents submitted that the amendment application was moved to delay the proceeding with mala fide intention. He submitted that the evidence was closed on 10.7.2007 of both the parties and 26.7.2007 was fixed for hearing. Thereafter, for one reason or the other, the defendant had tried to delay the proceeding and when the amendment application filed by defendant no. 2 has been rejected with the new plea the amendment has been moved by the petitioner-defendant no. 1. He submitted that since the application is not bona fide the same should not be entertained and in support of it he relied upon the recent decision of the apex Court in the case of ***Revajeetu Builders & Developers v.***

Narayanaswamy & Sons & others reported in *2009 (3) ARC 502*. He further submitted that by the amendment such pleading has been taken which amounts to resiling from the admission made in the original written statement, which is not permissible. In support of the contention he relied upon the decision of the apex Court in the case of ***Gautam Sarup v. Leela Jetly and others*** reported in *(2008) 7 S.C.C. 85***.** He submitted that on the aforesaid facts and circumstances the trial court has rightly rejected the amendment application.

6. Having heard learned counsel for the parties I have perused the impugned order and given my anxious consideration to the rival submissions.

7. Admittedly, the evidence of both the parties have been closed on 10.7.2007 and 26.7.2007 was fixed for hearing. The present amendment application has been moved by petitioner-defendant no. 1 on 2.2.2009 after one year seven months from the date of closure of the evidence. No proper reason has been given for such delay. It is also necessary to mention that defendant no. 2 has moved the amendment application on 2.4.2008 which has been rejected by the trial court on 7.8.2008 against which Revision No. 385 of 2008 has been dismissed on 20.10.2008. While dismissing the revision this Court observed as follows:

"The court below finding that the evidence was already over on 10.7.2007 and the case was fixed for hearing on 26.7.2007 and the defendant-tenant was seeking adjournment after adjournment and the application for amendment having been moved after nine months of the evidence being over was not liable to be allowed and accordingly, rejected the same.

In the facts and circumstances of the case, where the amendment was sought in the written statement after nine months of close of evidence of the parties and the case being fixed for hearing and disposal, no illegality appears to have been committed by the Court below in rejecting the amendment application.

The revision accordingly, fails and stands dismissed."

8. In the circumstances and for the reasons given by this Court in rejecting the amendment application moved earlier, the present amendment application cannot be entertained. It appears that the amendment application has not been moved bona fidely and has been moved with a mala fide intention to delay the proceeding. the apex Court in the case of ***Revajeetu Builders & Developers*** (supra) held as follows :

"67*. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment.*

(1) Whether the amendment sought is imperative for proper and effective adjudication of this case ?

(2) Whether the application for amendment is bona fide or mala fide?

(3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) Whether the proposed amendment constitutionally or

fundamentally changes the nature and character of the case ? and

(6) As a general rule, the Court should decline amendment s if a fresh suit on the amended claims would be barred by limitation on the date of application.

68. These are some of the important factors which may be kept in mind while dealing with application filed under Order VI Rule 17. These are only illustrative and not exhaustive.

69. The decision on an application made under Order VI Rule 17 is a very serious judicial exercise and the said exercise should never be undertaken in a casual manner.

70. We can conclude our discussion by observing that while deciding applications for amendments the courts must not refuse bonafide, legitimate, honest and necessary amendments and should never permit mala fide, worthless and/or dishonest amendments."

9. The trial court has recorded categorical finding that by the amendment the defendants intended to resile with the admission made in the written statement, which is not permissible in law. The apex Court in the case of Gautam Sarup (supra) has held that under Order 6 Rule 17 the party cannot be permitted to resile from the admissions made in the earlier written statement by moving amendment application.

It is also necessary to examine Order 6 Rule 17 which reads as follows :

"The court may at any stage of the proceedings allow either party to alter or amend his pleading in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties :

Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

10. In the present case the evidence of both the parties have been closed and the suit was fixed for final hearing and, therefore, the trial had commenced. No reason has been given that inspite of the due diligence the applicant could not have raised the plea taken in the amendment application in the earlier written statement. In the circumstances, the petitioner is not entitled for the benefit of the proviso to Order 6 Rule 17.

11. On the facts and circumstances stated above, I am of the view that the trial court has rightly exercised its discretion in not entertaining the amendment application. In the result the revision fails and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.01.2010

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 645 of 2010

Brij Raj Dwivedi ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Kumar Dwivedi

Counsel for the Respondents:
C.S.C.

Constitution Of India Art.226- Salary-Petitioner working as Principal-Sanskrit Madhyamic Vidyalaya After retirement of regular Principal on 15.03.2002-signature also attested by D.I.O.S.-No appointment letter following procedure as contained in section 25 of U.P. Board of Secondary Sanskrit Education Act, 2000-Produced-attesting signature for administrative purpose-can not be the basis for payment of salary.

Para:-6 & 7

In Selva Raj (supra), the case relied by the petitioner, the Court found that when the petitioner (Selva Raj) was allowed to discharge duties of Secretary (Scouts), his salary was also drawn against the post of Secretary (Scouts) under GPR 77, yet he was not paid the salary. In these factual circumstances, the Apex Court found when he was allowed to work on a higher post, though in temporary and officiating capacity and his salary was drawn during that time against the post of Secretary (Scouts), on the principle of quantum merit, the respondents-authorities should have paid him the emoluments of the post of Secretary (Scouts). In para 4 the Apex Court further clarified that the payment made under the order of the Apex Court shall not be treated as if any promotion was given to the appellant Selva Raj on the post of Secretary (Scouts). Besides, the order by which he was posted is also quoted in the judgment of the Apex Court and it shows that by the order passed by the competent authority, Selva Raj was specifically attached to look after the duties of Secretary (Scouts) with a further condition that his salary shall be drawn against the post of Secretary (Scouts) under GPR 77. In the case in hand there is no order of appointment of the petitioner in any manner but it appears that on the death of the Principal, the petitioner was allowed to officiate and his signatures were attested for administrative purposes. He was never appointed at any point of time on the post of Principal.

In the case of Bhagwat Prasad Pandey (supra), this Court as such has not decided any issue but has referred to the earlier judgment of this Court in Narmedeshar Misra Vs. District Inspector of Schools, Deoria & others 1982 UPLBEC 171 which has been considered by the Division Bench (in which I was also a member) in Daljeet Singh (supra) and in view of the discussion made therein, I do not find that the same, in any manner, help the petitioner.

Case Law Discussed
AIR 1999 SC 838, Writ Petition No. 64399 of 2009 decided on 27.11.2009, 2007(2) ESC 987, 1991 Supple (2) SCC 733, 2007(7) ADJ 117, 1982 UPLBEC 171.

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

1. Heard Sri Ashok Kumar Dwivedi for the petitioner.

2. The grievance of the petitioner is that he was allowed to discharge duties of Principal after attesting his signature by the District Inspector of schools on officiating basis on 3.7.2003 but has not been paid salary payable on the post of Principal and instead he has continuously been paid salary of the post he holds on substantive basis which is illegal, arbitrary and violative of principle of 'equal pay for equal work'. He placed reliance on the Apex Court decision in **Selva Raj Vs. Lt. Governor of Island, Port Blair** AIR 1999 SC 838 and a single Judge decision of this Court in **Writ Petition No. 64399 of 2009 (Bhagwat Prasad Pandey Vs. state of U.P. & others)** decided on 27.11.2009.

3. However, I find no force in submission. From the record, it is evident that the post of Principal in Sanskrit Madhyamik Vidyalaya, Sonaha, District Basti (hereinafter referred to as "College") fell vacant on 15.3.2002 as a result whereof the petitioner was allowed to look after the duties of the Principal as officiating Principal and his signature was attested by the Deputy Inspector (Sanskrit Pathshala), Gorakhpur Mandal, Gorakhpur by letter dated 3.7.2002. No letter of appointment of the petitioner appointing him even as officiating Principal has been placed on record. Learned counsel for the petitioner, even otherwise, could not show any provision under which the Management could have appointed the petitioner on officiating basis as Principal of the College. Whether a person, who is allowed to look after the duties of the higher post can be treated to be a person appointed on the post in order to claim salary is a question considered by a Division Bench of this Court in **Smt. Vijay Rani Vs. Regional Inspectress of Girls Schools Region-I, Meerut & others 2007 (2) ESC 987** and this Court observed as under:

"The aforesaid documents cemented the conclusion that the Petitioner-Appellant was only required to look after and discharge the duties of the officiating Principal but was never promoted/appointed on the said post. In other words, it can be said that the Petitioner-Appellant was given only current duty charge in addition to her substantive post and this arrangement did not result in promotion to the post of which, the current duty charge was handed over. In ***State of Haryana Vs. S.M. Sharma AIR 1993 SC 2273,*** *the Chief Administrator of the Board entrusted Sri S.M. Sharma, with the current duty charge of the post of Executive Engineer, which was subsequently withdrawn as a result of his transfer to other post. He challenged the said order stating that it amounts to reversion. The Apex Court held that Sri Sharma was only having current duty charge of the Executive Engineer and was never promoted or appointed to the aforesaid post and therefore, on transfer to some other post, it did not result in reversion from the post of Executive Engineer.*

A somewhat similar situation occurred in ***Ramakant Shripad Sinai Advalpalkar Vs. Union of India and others, 1991 Supple (2) SCC 733*** *and the Apex Court observed as under:-*

"The distinction between a situation where a government servant is promoted to a higher post and one where he is merely asked to discharge the duties of the higher post is too clear to require any reiteration. Asking an officer who substantively holds a lower post merely to discharge the duties of a higher post cannot be treated as a promotion."

It was further held that such situations are contemplated where exigencies of public service necessitate such arrangements and even consideration of seniority do not enter into it sometimes. However the person continues to hold substantive lower post and only discharges duties of the higher post essentially as a spot-gap arrangement. A further contention was raised that if such an arrangement continued for a very long period it would give some kind of right to continue on the post but negativing such contention, it was held that an in-charge arrangement

is neither recognition nor is necessarily based on seniority and therefore, no rights, equities and expectations can be built upon it.

In this view of the matter, the Petitioner-Appellant has miserably failed to show that the management ever appointed her as officiating Principal of the College and, therefore, we hold that she was only allowed to discharge duties of the office of officiating Principal, but was never appointed/promoted by the management as officiating Principal of the College. The question no. 1 is answered and decided accordingly."

4. Besides above, there is another aspect of the matter. The petitioner was working in a Sanskrit College. After the enforcement of U.P. Board of Secondary Sanskrit Education Act, 2000 (hereinafter referred to as "2000 Act"), the institutions imparting Sanskrit education upto Uttar Madhyama are governed by the provisions of the said Act. Section 25 of 2000 Act provides procedure for appointment of Head of the institution, teachers and other employees and reads as under:

"25. Procedure for appointment of Head of institution, teachers and other employees.- *Subject to the provisions of this Act, the Head of institution and teachers and other employees of an institution shall be appointed in accordance with the regulations."*

5. Neither any regulation nor any material has been shown to this Court to fortify that the petitioner was ever appointed in accordance with the procedure prescribed for appointment for the post of Principal. The question where no appointment whatsoever has been made, whether an incumbent can be directed to be paid salary of the higher post though he is substantively holding another post was also considered at length by this Court in **Daljeet Singh Vs. State of U.P. & others 2007 (7) ADJ 117** and negatived therein.

6. In **Selva Raj (supra)**, the case relied by the petitioner, the Court found that when the petitioner (Selva Raj) was allowed to discharge duties of Secretary (Scouts), his salary was also drawn against the post of Secretary (Scouts) under GPR 77, yet he was not paid the salary. In these factual circumstances, the Apex Court found when he was allowed to work on a higher post, though in temporary and officiating capacity and his salary was drawn during that time against the post of Secretary (Scouts), on the principle of quantum merit, the respondents-authorities should have paid him the emoluments of the post of Secretary (Scouts). In para 4 the Apex Court further clarified that the payment made under the order of the Apex Court shall not be treated as if any promotion was given to the appellant Selva Raj on the post of Secretary (Scouts). Besides, the order by which he was posted is also quoted in the judgment of the Apex Court and it shows that by the order passed by the competent authority, Selva Raj was specifically attached to look after the duties of Secretary (Scouts) with a further condition that his salary shall be drawn against the post of Secretary (Scouts) under GPR 77.

In the case in hand there is no order of appointment of the petitioner in any manner but it appears that on the death of the Principal, the petitioner was allowed to officiate and his signatures were

attested for administrative purposes. He was never appointed at any point of time on the post of Principal.

7. In the case of **Bhagwat Prasad Pandey (supra),** this Court as such has not decided any issue but has referred to the earlier judgment of this Court in **Narmedeshar Misra Vs. District Inspector of Schools, Deoria & others 1982 UPLBEC 171** which has been considered by the Division Bench (in which I was also a member) in **Daljeet Singh (supra)** and in view of the discussion made therein, I do not find that the same, in any manner, help the petitioner.

8. In view of the above discussions, I find no merit in the writ petition. Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2010

BEFORE
THE HON'BLE PRADEEP KANT, J.

Civil Misc. Writ Petition No. 1015 of 2008

Jai Prakash Singh Yadav ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Someshwari Prasad
Sri A.S. Dubey
Sri Vijay Kumar Gautam

Counsel for the Respondents:
Sri Tirath Raj Shukla
C.S.C.

U.P. Police Officer Subordinate Rank (Punishment & appeal Rule 1991- Section Rule 8(2)(b)- Dismissal by dispense with. enquiry- petitioner a police constable- after facing selection process appointed -at the time of appointment date of birth recorded as 1.7.86- Subsequently it is alleged that as per information given by Board -the date of birth is 1.7.87 and not 1.7.86- even in counter affidavit not disclosed that as to how this entry made? who permitted to correct- the authorities not only acted negligently and carelessly but devised novel method by getting report about date of birth to dismiss its petitioner - furnishing High School Certificate with incorrect date of birth-why could not be inquired ? Dismissal order quashed with cost of Rs.50,000/- recoverable from erring officer.

Para: 21, 22, & 24.

Notice is also taken in the present case of the fact that the charge against the petitioner in the instant case was that he furnished a forged certificate of High School examination where the date of birth was recorded as 1.7.1986 but it was found on verification from the Board that it was actually 1.7.1987. Why for such a charge the inquiry was not possible or why it was not reasonable and practicable to hold such inquiry against the employee has not been disclosed at all. It was a simple case where a person who was selected and later on appointed, was charged of furnishing the high school certificate which incorrectly recorded his date of birth. Such a charge could have been very well enquired into by holding departmental inquiry.

This Court is, therefore, of the considered opinion that Rule 8(2) (b) could not have been attracted in the instant case and, therefore, the order of dismissal is per se bad in law.

In the given facts and circumstances of the case, the writ petition deserves to be allowed with compensatory cost as the petitioner has been ousted from service

for no fault of his and without giving any opportunity of hearing.

Case Law Discussed:

2006(1) ESC 374(All) (DB), Special Appeal no. 165 of 2007 decided on 21.2.2008,-2008(3) ADJ 689 (DB), 2005(II) SCC Page 525, 1991(1) SCC page 362, AIR 1985, SC page 1416.

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

1. Heard Sri Vijay Kumar Gautam, learned counsel for the petitioner and Sri Tirath Raj Shukla, learned counsel for the respondents.

2. By means of this writ petition the petitioner Jai Prakash Singh Yadav challenges the order dated 13th September, 2007 passed by Superintendent of Police, Ballia dismissing him from service by exercising power under Rule 8 sub-rule 2(b) of the U.P. Police Officer Subordinate Rank (Punishment and Appeal Rules), 1991.

3. The petitioner was selected as Constable in Civil Police in the recruitment held at Azamgarh Center on 26.6.2005. In pursuance of the advertisements No. 51-04, dated 6th January, 2005 directions for recruitment was made at Azamgarh Center. All the persons who were desirous of being so appointed and were possessing all the requisite qualifications applied for the post and they had undergone physical test, written examination and interview. The applicants who could qualify all the aforesaid tests were selected and were given appointments.

4. The Director General of Police, U.P. vide, his confidential letter dated 29.06.2007 issued directions for reviewing the entire selection on some alleged irregularities being detected in holding the said selection. The Superintendent of Police in pursuance of the directions aforesaid reviewed the entire selection with respect to the recruits who were appointed in the year 2005 and 2006 and the deliberations in interview, physical verification, educational qualification, date of birth, health certificate, caste certificate etc. were got re-examined and re-verified.

5. In regard to the petitioner it was found that in the High School certificate which was produced/filed by him along with the application form mentioned his date of birth 1.7.1986, which on getting re-verified from the Regional Officer, U.P. Board of Secondary Education, Varanasi, revealed that his date of birth was actually 1.7.1987. This alleged act of the petitioner was taken as furnishing a forged certificate at the time of recruitment. The Superintendent of Police found that in this situation, it was not in public interest to allow the petitioner to continue in service. After making the said observation in the order, he further observed that the petitioner had filled the form in his own hand-writing and has also undertaken that in case any information given in the application form is found to be incorrect then his selection may be cancelled and then whatever legal action can be taken would be taken for which he would have no objection. An affidavit was filed by him that if any information was found incorrect after his selection, his selection could be cancelled.

6. The Superintendent of Police in his wisdom, thought that it was a case where it was not reasonably practicable to hold the enquiry and, therefore, applying the provisions of Rule 8 2(b), dismissed

the petitioner from service without giving him any opportunity of hearing and without holding any inquiry.

7. On facts, it is the admitted case that in the High School certificate issued by the U.P. Board, the date of birth was recorded as 1.7.1986. It is not know as to what prompted the Superintendent of Police to get it re-verified from the Board and it is also not clear from the counter affidavit filed by the State that how and on what basis and material, the Board has given that his date of birth was actually 1.7.1987 and not 1.7.1986.

8. The counter affidavit, filed by the State and the supplementary affidavit filed by the petitioner makes a very curious and interesting reading regarding the date of birth mentioned in the High School certificate and as has been verified by U.P. Board. The State says in paragraph 4 of the counter affidavit that petitioner's date of birth as recorded in the High School certificate was 1.7.1986 but the same was found to be 1.7.1987, when verified by the U.P. Board but it does not disclose the fact that from where the Board got this correct date of birth particularly when no inquiry was made from the petitioner. The material on which this conclusion was drawn by the board has neither been brought on record nor it finds mention in the verification report submitted by the Board, to the Superintendent of Police.

9. In paragraph 6 of the counter affidavit, the following contents has been stated by the State:

".....it is stated that according to verification done by U.P. Board of High School and Intermediate Education, Regional Office, Varanasi, correct date of birth of the petitioner is 1.7.1986."

10. The averments are self contradictory and are without support. The plea of the petitioner is that his date of birth was 1.7.1986.

11. In this background it is a matter of consideration that from where and on what basis the U.P. Board on re-verification, furnished its report along with letter dated 31.08.2007 to the Superintendent of Police, saying that his date of birth was 1.7.1987 and not 1.7.1986. The chart submitted by the Board also shows the date of birth was recorded as 1.7.1986 in the column of the date of birth where no date like 1.7.1987 has been recorded at all. Rather the date 1.7.1986 has been mentioned twice in the same very column and in the last column, though originally the same date of 1.7.1986 was mentioned, but later on it was cut and a note was made that the date of birth is 1.7.1987 and not 1.71986. How this entry has been made and who permitted to make such an entry has neither been explained by the State, nor could be explained.

12. There is one more aspect of the matter which totally belies the case of the respondent and that is a letter written by the Secretary of U.P. Board of High School and Intermediate Examination on 18.8.2007 to the Superintendent of Police, Ballia which says that the date of birth of the petitioner was 1.7.1986 which is duly verified.

13. Apart from the legal plea that the provisions of Rule 8 2(b) of the rules of 1999 could not have been applied in the instant case, this appears to be a case

where the government authorities have acted not only negligently and carelessly but as a matter of fact they have also devised a novel method, by getting a report about the date of birth only to dismiss the petitioner from service.

14. The action of the respondents not only deserves condemnation but is also to be seriously deprecated and requires appropriate disciplinary action against the officers of the Police Department and the Madhyamik Shiksha Parishad, U.P. Board of High School and Intermediate Education.

15. A person, namely, the petitioner, who applied for being recruited as a constable in U.P. civil police was duly considered and on being satisfied about his eligibility and qualifications including the date of birth etc. with the certificates produced by him, he was selected and appointed. Unless there was some reason for any doubt regarding the recorded date of birth of the petitioner from any quarter whatsoever, there was no occasion for the Director General of Police or the Superintendent of Police to re-inquire and re-verify the date of birth of the petitioner. Nothing has been brought on record by the State to show as to why the petitioner's case was submitted for scrutiny before the Board for re-verifying his date of birth when apparently there was no complaint against him.

16. The selections made can not be interfered with at the sweet-will of the persons who are responsible for holding the selection unless of course some serious irregularities are found to have been committed in the selection. The appointments cannot be set aside or quashed in a light and in a casual manner as has been done in the instant case. Sanctity has to be accorded to the selections made, and unless proved otherwise they have to be upheld. Tinkering with the selections and/or appointments made, in such an irresponsible and apparently designed manner, hits very hard the selectees, who face termination of their services, despite being legally selected.

17. The law is well settled that for dispensing with the inquiry it is essential that a valid reason has to be recorded by the authority in writing because of which it was reasonably impracticable to hold such enquiry. This makes it clear that there has to be some reason which persuades the authority in power to dismiss any employee without holding disciplinary inquiry and without giving him any opportunity of hearing, and such a reason has to be recorded in writing in the order.

18. The aforesaid provisions do not empower the authority concerned to order dismissal from service or award major punishment in service arbitrarily.

19. In this case learned counsel for the petitioner, in support of his plea that Rule 8(2) (b) could not have been attracted in the instant case, has cited a number of judgments namely **2006(1) ESC 374 (All) (DB) State of U.P. & other V/s Chandrika Prasad** decided on 19th October, 2005 **Special Appeal No. 165 of 2007 Vashisth Narayan Singh V/s State of U.P. & others, decided on 8.22007., 2008(3) ADJ 689 (DB) Pushpendra Singh (CP 2187) and another** decided on 21.2.2008, **2005(II) SCC page 525 Sudesh Kumar V/s State of U.P and others** decided on 19.4.2005.,

1991(1) SCC page 362 Jaswant Singh V/s Punjab and others decided on 27th November, 1990, AIR 1985, SC page 1416, Union of India Vs Tulsi Ram Patel, decided on 11.7.1985.

20. Learned counsel for the petitioner has cited the aforesaid cases in support of his plea that in the instant case, the aforesaid provision could not have been applied or attracted as there was no ground for not holding inquiry nor any such ground has been recorded by the disciplinary authority giving any reason which prohibited or compelled him not to hold the inquiry or in other words, holding of an inquiry was not reasonably practicable.

21. Notice is also taken in the present case of the fact that the charge against the petitioner in the instant case was that he furnished a forged certificate of High School examination where the date of birth was recorded as 1.7.1986 but it was found on verification from the Board that it was actually 1.7.1987. Why for such a charge the inquiry was not possible or why it was not reasonable and practicable to hold such inquiry against the employee has not been disclosed at all. It was a simple case where a person who was selected and later on appointed, was charged of furnishing the high school certificate which incorrectly recorded his date of birth. Such a charge could have been very well enquired into by holding departmental inquiry.

22. This Court is, therefore, of the considered opinion that Rule 8(2) (b) could not have been attracted in the instant case and, therefore, the order of dismissal is per se bad in law.

23. It is further observed that even on merits there was nothing before the Superintendent of Police to reach the conclusion that the date of birth of the petitioner was 1.7.1987. As already observed, the conduct of the respondents including the Superintendent of Police as well as the Board can not be appreciated and it is for the State Government to initiate necessary proceedings and make an inquiry into the matter as to why the Superintendent of Police required re-verification of the date of birth of the petitioner despite clear date of birth being recorded in High School certificate and on what basis the U. P. Board gave information that it was actually 1.7.1987 and not 1.7.1986 particularly when the letter written by Secretary Madhyamik Shiksha Parishad to the Superintendent of Police on 18th August, 2007 verifies that the date of birth of the petitioner was 1.7.1986 and not only that, but in the counter affidavit also the state has actually admitted that the date of birth was 1.7.1986 but they unsuccessfully tried to make out a case that the date of birth, was wrongly recorded in the High School certificate and it was actually 1.7.1987.

24. In the given facts and circumstances of the case, the writ petition deserves to be allowed with compensatory cost as the petitioner has been ousted from service for no fault of his and without giving any opportunity of hearing.

25. I, therefore, while setting aside the order dated 13.09.2007 dismissing the petitioner from service, also impose a cost of Rs.50,000/- upon the State-respondents which shall be paid to the petitioner within a period of one month from the

date of receipt of certified copy of this order. In case the cost is not paid within the aforesaid time, the same shall be recovered as arrears of land revenue by issuing recovery certificate by Registrar General of this Court. The cost given to the petitioner by the State Government shall be recoverable from the salary of the erring officers.

26. The writ petition is, therefore, allowed and the impugned order dated 13.9.2007 is set aside. The petitioner shall be reinstated into service forthwith. All the consequential benefits shall also be given to the petitioner forthwith.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.01.2010.

BEFORE
THE HON'BLE VINOD PRASAD, J.

Criminal Appeal No. 2105 of 1979

Piarey Lal & others ...Appellants (In Jail)
Versus
State of Uttar Pradesh ...Respondent

Counsel for the Appellant:
Sri S. P. Kumar
Sri A.N.Mishra
Sri Amit Saxena,

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

Code of Criminal Procedure-Section-384/385/386---Disposal of criminal appeal against conviction-Trial Court record already weeded out-session judge-reported impossibility of reconstruction of record-direction for re-trial-infacts and circumstance of the case-futile-as occurrence took place before 34 years everything has been changed-connection under section 325/34 I.P.C. in view of law laid down by apex court- except set-a-side conviction and to allow the appeal on option before the court.

Held: Para 18

So far So far as direction of retrial is concerned, in view of the fact that total documentary as well as other evidences have been lost directing for re trial will be very unfair to the accused persons as they will never be able to convince the court that allegations levelled by the prosecution and the deposition by it's witnesses are not true. The spot scene must have been altered by now. Resultantly in consonance with above exposition of law by the Supreme Court there is no option left but to allow this appeal and set aside the impugned conviction and sentence imposed on the appellant.

Case law discussed:
2004 SCC (Cr) 901, AIR 1996 SC 2439, AIR 1999 SC 3850, State of U.P. Versus Shankar 1154, AIR 1999 SC 3535, AIR 2005 SC 1250; AIR 2005 SC 1248.

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

1 In this appeal four sibling brothers Piyare, Hiralal, Puran Lal and Sitaram, have challenged their conviction under section 325/34 IPC and imposed sentence of five years R.I. Recorded by IIIrd Addl Session Judge, Pilibhit in S.T. No. 109 of 1977, State Vs. Piarey Lal and others, vide his impugned judgement and order dated 6.7.1979.

2. In bird's eye view, prosecution allegations against four appellants are that on 30.4.1976 at 5.00 p.m. They committed murder of Gendan Lal by a blunt object near a water channel. Information about the occurrence was lodged by Lalta Prasad at the police station Jahahanbad on the same day at

11.00 p.m. Covering a distance of four Kms. Autopsy on the dead body was conducted by Dr. R.S. Sharma, PW-5, who had proved his post mortem examination report Ext-ka Doctor has noted three anti mortem injuries on the corpse of the deceased. The FIR of the informant was registered as Ext. ka-1 and corresponding GD entry is Ext. Ka-2 S.I. Babu Singh commenced the investigation of the crime who got the inquest on the dead body conducted and got prepared the inquest report and other papers Ext.Ka-3 to Ka-5 and thereafter sealing it, the same was dispatched to the mortuary through constable Sri Krishnal Mishra and Naubat Singh for the purpose of autopsy. Blood stained earth and articles were recovered vide Ext. Ka-6. I. O. also recovered the weapon of assault and the rope material EXT. 2 and 3 and prepared their recovery memo Ext. Ka-7. During investigation I. O. had also made spot inspection and had prepared site plan Ext. Ka-8. Completing investigation he has charge sheeted accused appellants vide Ext. Ka-9.

3. Submission of charge sheet resulted in summoning of all the accused persons by the court of the Magistrate, who finding their case triable by court of Session's committed it to Sessions Court for trial.

4. During trial, in order to stablish appellants guilty prosecution examined in all five witnesses of facts. S.I. Bhagwat Singh, PW-3, S.I. Babu Singh PW-4 and Dr. R.S. Sharma, PW-5 were formal witnessed.

5. On the evidence led before it, after summation of facts and circumstances of the case trial court vide his impugned order dated 6.7.1979 convicted all the appellants under section 325/34 IPC and imposed sentence of five years R.I. Hence instant appeal challenging that judgement and order by the appellants.

6. This appeal was admitted on 12.7.79 and trial court record was requisitioned for disposal of this appeal. However order sheet of the appeal indicate that Sessions Judge, Pilibhit had informed on 6.8.03 that trial court record has already been weeded out on 17.3.99. In such a situation this court ordered for reconstruction of the record on 3.9.2003 with a period of three months.

7. In pursuance of the direction by this court, District Judge, Pilibhit endeavoured for the reconstruction of the record and had appointed addl. Sessions Judge/FTC No.3, Pilibhit, Sri S.S. Lal an enquiring officer to inquire into the matter. The inquiring Officer vide his report dated 18.9.2004 found that reconstruction of the record of the concerned sessions trial no. 109 of 1977, State Vs. Piarey Lal and other is impossible and therefore, in turn, Sessions Judge, Pilibhit also reported to this court on 21.8.09 that reconstruction of the record is not possible. After persuing both the reports I am of the opinion that any further direction or endeavour for reconstruction of the record will onlybe a futile exercise without any fruitful result.

8. On the merits of the matter as can be perceived through the impugned judgement and order it transpires that according to the prosecution allegation because of grazing of buffaloes an altercation ensued between the deceased Gendan Lal and Piyarey Lal appellant. At the instigation of Piyarey Lal all other

appellants reached the spot and belaboured Gendan Lal near a water channel, who after sustaining serious injuries squatted on the ground and the accused persons then retreated from the spot. Informant and many co-villagers had witnessed this incident. Lalta Prasad, informant, thereafter, brought his family members to the scene of the assault and leaving the injured under their supervision went to search village Chaukidar whom he found in village Kharua. Accompanied with the village Chaukidar Lalta Prasad went to the police station Jahanabad, where he lodged his written first information report, which was recorded at 11.00 p.m.

9. Dr. R.S. Sharma, PW-5 who had conducted autopsy on the dead body of the deceased on 1.5.1976 on the internal examination had found parietal and temporal bone fractured, membrane were reptured and brain matter was coming out of the wound. Semi digested food material was present in the large intestine. Following ante-mortem injuries were detected on the dead body by the doctor:-

"In doctor's opinion cause of deceased death was shock and haemorrhage as a result of sustaining injury."

10. All the accused had denied prosecution allegations and incriminating circumstance appearing against them in the prosecution evidence in their statements under section 313 CrP.C.

11. The trial judge after going through the evidences came to the conclusion that the charge under section 302/34 is not established, but the appellants are guilty for offences under section 325/34 and therefore convicted them for the said charge and sentenced them as noted in the opening paragraph of this order. Hence this appeal.

12. When the appeal was called out, nobody appeared for the appellants to support the appeal and therefore, Sri Amit Saxena, advocate was appointed amicus curie to argue the appeal.

13. Sri Saxena submitted that in the absence of the lower court record when reconstruction is also not possible the appeal of the appellants cannot be decided on merits, He submitted that the procedure prescribed under section 385/386 Cr.P.C. has to be observed in deciding an appeal on merits and the said procedure lays down that if an appeal is not dismissed in-limine at the stage of admission then a date has to be fixed for hearing of the same after noticing both the parties. On the date so fixed for hearing of the same after noticing both the parties. On the date so fixed record of the case has to be perused and then only the appeal can be decided on merits after hearing appeallant or his pleader in support of the appeal, In support of his contention Sri Saxena relied upon Sections 384, 385 and 386 of the Code(Cr.P.C.) which are extracte below for a ready reference:-

384. Summary dismissal of appeal

(1) If upon examining the petition of the appeal and copy of the judgment received under section 382 or section 383, the Appellate Court considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily:

Provided that-

(a) no appeal presented under Section 382 shall be dismissed unless the appellant or his pleader has had a

reasonable opportunity of being heard in support of the same;

(b) no appeal presented under Section 383 shall be dismissed except after giving the appeallant a reasonable opportunity of being heard in support of the same, unless the Appellate court considers that the appeal is frivolous or that the production of the accused in custody before the Court would involve such inconvenience as would be disproportionate in the circumstances of the case;

(c) no appeal presented under Section 383 shall be dismissed summarily until the period allowed for preferring such appeal has expired.

(2).....

(3) Where the appellate court dismissing an appeal under this section is a Court of Sessions or of the Chief Judicial Magistrate, it shall record its reasons for doing so.

(4) Where an appeal presented under section 383 has been dismissed summarily under this section and the Appellate Court finds that another petition of appeal duly presented under section 382 on behalf of the same appellant has not been considered by it, that Court may, notwithstanding anything contained in Section 393, it satisfied that if is necessary in the interest of justice so to do, hear and dispose of such appeal in accordance with law.

385. Procedure for hearing appeals not dismissed summarily

(1) if the Appellate Court does not dismiss the appeal, it shall cause notice of the time and place at which such appeal will be heard to be given-

to the appellant or his pleader;

to such officer as the State Government may appoint in this behalf;

if the appeal is from a judgement of conviction in a case instituted upon complaint, to the complainant;

if the appeal is under Section 377 or Section 378, to the accused and shall also furnish such officer, complainant and accused with a gopy of the grounds of appeal.

(2).....

(3).....

386. Powers of the Appellate Court- *After persuing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under Section 377 or Section 378, the accused, if he appears, the Appellate Court may, if considers that there is no sufficient ground for interfering, dismiss the appeal, or may-*

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tired by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;

(c) in an appeal for enhancement o sentence-

(i) reverse the finding and sentence and acquit or discharge the accused or order

him to be re-tried by a Court competent to try the offence, or
(ii) alter the finding maintaining the sentence, or
(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;
(d) in an appeal from any other order, alter or reverse such order;
(e) make any amendment or any consequential or incidental order that may be just or proper."

14. Thus what has been enacted in the statute is that no appeal can be decided without perusal of the record. Ecen if the appeal has to be dismissed summarily, the perusa of the consideration thereof is indispensable as is laid down under section 384 Cr.P.C. Under section 385 Cr.P.C. procedure which has to be followed if the appeal is not dismissed summarily is provided according to which a notice is required to be given mentioning time and place of hearing of the appeal to the appellant, the Government Advocate and to the complainant, Subsequent section #86 Cr.P.C. provides that after perusal of the record and hearing the appellant or his pleader and the public prosecutor appellate court may pass judgement in the appeal. Under such a procedure when scan the present appeal I find that perusal of record is not possible as the same has already been weeded out. Reconstruction of the record after a lapse of more that three decades of the incident is also an impossibility and the court below has shown it's inability for such reconstruction. In such a situation it has been observed by the apex court in the case of **State of U.P. Versus Abhai Raj Singh; 2004 SCC(Cr) 901** as follows:-

"If it is possible to have the records reconstructed to enable the High Court itself to hear and dispose of the appeals in the manner envisaged under Section 386 of the Code, rehear the appeals and dispose of the same, on its own merits and in accordance with law. If it finds that re-construction is not practicable but by order retrial interest of justice could be better served- adopt that course and direct retrial- and from that stage law shall take its normal course. If only reconstruction is not possible to facilitate High Court to hear and dispose of the appeals and the further course of retrial and fresh adjudication by Session Court is also rendered impossible due to loss lf vitality important basic records- in that case and situation only, the direction given in the impugned judgment shall operate and that matter shall stand closed."

15. Earlier also it has been held that in absence of record appeal has to be decided by acquitting the accused. For a ready reference see **Bani Singh versus State of U.P.: AIR1996 SC 2439; Rishi Nandan Pandit versus State of Bihar: AIR 1999 SC 3850; State of U.P. versus Shankar 1154; State of Tamil Nadu versus Rajendran: AIR 1999 SC 3535; State of U.P. Versus Kishan AIR 2005 SC 1250; State of U.P. Versus Pappu @ Yunus: AIR 2005 SC 1248.**

16. Mr. Saxena submits that directing for re-trial of the whole case while the incident has occurred 34 Years ago, will not be a justified exercise as all the evidences of the occurrence must have lost its efficacy. He further submits that statement under section 161 Cr.P.C. as well as other record including original post mortem examination report, inquest

report and other documents also must have been weeded out and therefore, directing for re-trial for the case will only amount to the harassment of the parties without any fruitful results.

17. Learned AGA, after having gone through the report of the Session Judge also submits that on the peculiar facts of the case, directing for retrial will not be very material but he contended that the alteration of the offence by the trial judge was not very justified.

18. Having given anxious consideration to all the attending circumstances I am of the view that the appeal preferred by the accused persons against their conviction in this court is their first appeal. The Apex Court has held that the first appeal is a continuation of trial. Section 384 to and 386 Cr.P.C. leaves no room for doubt that for deciding an appeal on merits perusal of the trial court record is sine Qua non to critically appreciate evidences to separate the grains from the chaff. It is incumbent upon the appellate court to look into the record independently than what has been stated by the trial court and come to it's own conclusions which not possible in this appeal. So far So far as direction of retrial is concerned, in view of the fact that total documentary as well as other evidences have been lost directing for re trial will be very unfair to the accused persons as they will never be able to convince the court that allegations levelled by the prosecution and the deposition by it's witnesses are not true. The spot scene must have been altered by now. Resultantly in consonance with above exposition of law by the Supreme Court there is no option left but to allow this appeal and set aside the impugned conviction and sentence imposed on the appellant.

19. In view of the above, this appeal is allowed. The conviction and sentence of the accused appellants are hereby set aside and they are acquitted charged under section 325/34 IPC. All the appellants are on bail. They need not surrender. Their bail bonds are cancelled and sureties discharged.

20. A copy of judgement is directed to transmit to the trial court for its intimation.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.01.2010

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

Civil Misc. Writ Petition No. 2682 of 2010

Dr. Raj Kumari Singh and another
...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri R.P. Dubey

Counsel for Respondent:
C.S.C.

Constitution of India Art.-226-Petitioner working as lecturer- opted Contributory Pension Fund benefit-in view of G.O. Dated 25.8.99 opted G.P.F. with pension-can not be refused-option can be given even prior one month to retirement.

Held: Para- 17

In our opinion, the petitioners in the present Writ Petition, who exercised

their option in the year 2004 in terms of the Government Order dated 25.8.1999, are entitled to the benefit of GPF Scheme with Pension.

Case law discussed:

Civil Misc. Writ Petition NO. 25140 of 2001 (Dr. Shri Gopal Gupta and others Vs. State of U.P and others), Civil Misc. Writ Petition No. 13169 of 2008 (Kirti Chand Gupta and others Vs. State of U.P. and others).

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

1. Heard Sri R.P. Dubey, learned counsel for the petitioners and the 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. From the averments made in the Writ Petition, it appears that the petitioner no. 1 Dr. Raj Kumari Singh was appointed as Lecturer in B.Ed. on 1.10.1977 at Daya Nand Arya Kanya Degree College, Moradabad. The date of birth of the petitioner no. 1 Dr. Raj Kumari Singh is 5.12.1952, and she is to attain the age of superannuation on 4.12.2014, and is due to retire on 30.06.2015 after getting Session benefit.

4. It further appears that the petitioner no. 2 Dr. Poonam Gupta was appointed as lecturer in Zoology in the aforesaid College on 14.02.1981. The date of birth of the petitioner no. 2 Dr. Poonam Gupta is 29.9.1956, and she is to attain the age of superannuation on 29.8.2018, and is due to retire on 30.06.2019 after getting Session benefit.

5. It is, interalia, stated in the Writ Petition that the aforesaid College is affiliated to Mahatma Jyotiba Phule Rohil Khand University, Bareilly.

6. It further transpires that initially the petitioners opted for Contributory Provident Fund Scheme (CPF). However, in the year 2004, the petitioners exercised their options in terms of the Government Order dated 25.8.1999 for switching over from Contributory Provident Fund Scheme (CPF) to General Provident Fund Scheme (GPF) with Pension. The intimation in regard to the exercise of options in the year 2004 by the petitioners and other teachers working in Daya Nand Arya Kanya Degree College, Moradabad was sent by the Principal of the College to the Director of Higher Education, U.P., Allahabad by the Communication dated 2.5.2004 (Annexure-8 to the Writ Petition).

7. 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 petitioners in accordance with the Government Order dated 25.8.1999, and various decisions of this Court.

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

9. 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.

10. The last such Government Order was issued on 25.8.1999 (Annexure 5 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 (Annexure 6 to the Writ Petition), 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.

11. 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....."

12. Copy of the said Judgment and Order dated 26th October, 2006 has been filed as Annexure 7 to the Writ Petition.

13. 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.

14. By the Order dated 3.11.2008 (Annexure 9 to the Writ Petition), their Lordships of the Supreme Court dismissed the said Special Leave Petition.

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

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

17. In our opinion, the petitioners in the present Writ Petition, who exercised their option in the year 2004 in terms of the Government Order dated 25.8.1999, are entitled to the benefit of GPF Scheme with Pension.

18. As noted earlier, the petitioner no. 1 is due to retire on 30.6.2015 while the petitioner no. 2 is due to retire on 30.06.2019, and therefore, the options exercised by the petitioners in the year 2004 have been exercised as per the requirement of the said Government Order dated 25.8.1999.

19. 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 10 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.

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

21. The Writ Petition is accordingly allowed.

22. The respondents are directed to give benefit of the Government Order dated 25.08.1999 to the petitioners in terms of the options exercised by the petitioners within three months of the filing of the certified copy of this Order before the Director of Higher Education, Uttar Pradesh, Allahabad.

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

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.01.2010

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 2958 of 2010

Sudhir Kumar ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Bhanu Prakash Singh

Counsel for the Respondent:
C.S.C.

Constitution Of India Act-226-Selection of petition in Special B.T.C. Course- in year-2008- obtained 323 out of 600- on last date of Submission of Form 20.2.09 and subsequently the result of basic paper dated on 2.9.09 and theory marks enhance from 323 to 339-whether the enhance marks can be taken into account for consideration of merit? Held 'No' reasons -explained.

Held: Para-19

In view of the above, I am categorically of the opinion that the marks obtained by the petitioner in back paper as a result of his appearing therein after the last date of submission of the application form cannot be allowed to be considered by respondent No.2 for considering his candidature for admission in Special B.T.C. Course, 2008 since the same would not relate back entitling him to seek a direction to the respondent No.2 to take into account the new marks which he has obtained subsequently as a result of his appearing in back paper. The writ petition therefore lacks merit. Dismissed.

Case law discussed:
W.P. No.1920 of 2010, (Ankit Kumar Tiwari & Anr. Vs. State of U.P. & Ors.), Ankit Kumar

Tiwari (supra) 18th January, 2010, W.P. No. 4638 of 2006 (Sushil Kumar Singh & Anr. Vs. State of U.P. & Ors.), W.P. No. 70082 of 2009 (Akhilesh Kumar Maurya Vs. State of U.P. & Ors.), Sushil Kumar Singh's case (supra), W.P. No. 39289 of 2000, (Kamlesh Kumar Yadav Vs. Director, Rajya Shaikshik, Anusandhan Evam Prashikshan Parishad, U.P., Lucknow and Ors.), Special Appeal No.86 of 2004, (1994) 2 SCC 723, 1993 Supp (2) SCC 611.

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

1. Heard Sri B.P. Singh, learned counsel for the petitioner and perused the record.

2. The petitioner applied for Special B.T.C. Training Course- 2008 showing his marks in B.Ed. examination as 323 out of 600 in theory and 378 out of 400 in practical. He was student of B.Ed. in Desh Deepak Adarsh Mahavidhyalaya Tendua Mafi Beekapur, Faizabad. The institution is affiliated to Dr. Ram Manohar Lohia Audh Vishwavidhyalaya, Faizabad (U.P.). The last date of submission of the application for Special B.T.C. Training Course-2008 was 20th February, 2009. The petitioner applied for the said training course along with all the documents and testimonials he possessed till then. Later on, it appears that the petitioner appeared in some back paper and examination result was declared on 2nd September, 2009 and his marks in theory were increased from 323 to 339 out of 600.

3. In the light of the result of back paper, the representation of the petitioner dated 15.10.2009, requesting the Director, S.E.R.T.I. Nishatganj, Lucknow to consider his candidature based on the marks he had obtained in back-paper of B.Ed., the result whereof declared on 2nd September, 2009, is pending and the counsel for the petitioner seeks a writ of mandamus commanding the respondents to decide his representation taking into account the increased marks of the petitioner in back paper.

4. Counsel for the petitioner relying on a judgment of this Court ***in Writ Petition No.1920 of 2010, (Ankit Kumar Tiwari & Anr. Vs. State of U.P. & Ors.)*** contended that he is also entitled for the same direction.

5. Having considered the submission carefully, I do not find myself to agree with him. It is admitted that the petitioner was supposed to furnish full details of his educational qualification, marks obtained therein etc. along with his application form, the last date whereof was 20th February, 2009. Admittedly, till then the petitioner had the documents showing his theory marks in B.Ed. as 323 and that is what he submitted along with application form.

6. The short question, which is to decide is, whether the subsequent event whereby the petitioner has got higher marks, can be treated to relate back with the initial examination so as to make the effect of back paper and the revised marks entitle the incumbent to claim benefit thereof in a case where the last date of submission of the application form or submission of any document had already expired.

7. There can be two circumstances in which the marks obtained by a candidate in his examination stands revised. Sometimes where provisions exist, the candidate apply for scrutiny or revaluation of his answer sheets if he suspects anything wrong in the marks

disclosed in his result and if his complaint is found true and on revaluation or scrutiny the marks obtained by the candidate are declared increased to some extent, there would be no difficulty at all to relate back the effect of such scrutiny or revaluation, inasmuch as, here is a case of mistake of fact or declaration by the Examining Body itself and for fault of the Examining Body, the candidate cannot be made to suffer because this is admitted by the Examining Body that it has committed mistake in declaration of lower marks though the candidate was entitled of higher marks and they rectify the same.

8. In my view, in such a case the mark sheet issued to the candidate would stand corrected from the date it was originally issued and even if last date for submission of an application form or a document has expired and such an eventuality takes place on a later date, the candidate can be given the benefit of such increased marks and the authority would be entitled to consider the revised mark sheet. In fact it is a case of reappraisal of marks itself and the original mark sheet issued to the candidate becomes non est from its inception and stands substituted by the revised mark sheet. Whether the candidate apply for scrutiny or revaluation before the last date of submission of the application form or subsequent thereto would be wholly irrelevant so long as he had validly applied for the same and such request has been accepted by the Examining Body.

9. However, second is a contingency where if the statutes permit a candidate whose result is already declared, may be allowed to improve his position by freshly appearing in some papers, which are normally called "back paper" and there he secure better marks than what he has got earlier. The question would be, whether the subsequent transaction would entitle the candidate to claim the benefit of the fresh mark sheet to be treated as a substitute of original mark sheet with retrospective effect, even in those cases, where the last date for submission of the application form or document has already been expired, I find that in none of the judgments cited and relied by the counsel for the petitioner, this issue has been raised, argued and decided. Therefore, it cannot be said that the judgments relied on by the petitioner lay down any law on this issue. In fact they are all silent on the legal aspect of the matter and only a direction has been issued to the respondents to consider the marks of the candidate received in back paper without deciding the issue whether such mark sheet, in law, could have been considered or not.

10. In ***Ankit Kumar Tiwari (supra)*** the Hon'ble Single Judge passed following order on 18th January, 2010:

"The petitioners, by means of this writ petition has prayed that the respondents be directed to entertain their new marksheets for the purposes of preparing the merit list for appointment in Special B.T.C. training course 2008.

The petitioners after applying for the above course appeared in the back paper and their marks were increased. They want that on the basis of the increased marks their names in the merit list be included.

In writ petition No. 4638 of 2006 Sushil Kumar Singh and another Vs. State of U.P. and others, decided on 11.2.2009,

this Court in similar circumstances has allowed the writ petition and permitted the filing and consideration of the marksheets of the back papers to the petitioners as the same were presented before the authority concerned before the declaration of the result. Following the above decision, another bench of this Court vide order dated 22.12.2009 passed in writ petition No. 70082 of 2009 Akhilesh Kumar Maurya Vs. State of U.P. and others directed the respondents to consider the candidature of the petitioners on the basis of the improved marks secured in the back paper.

In view of the aforesaid facts and circumstances, this writ petition is also disposed of at this stage, with the consent of the parties, in the light of the aforesaid decisions and it is directed that the respondents shall consider the candidature of the petitioners as per their improved marks in accordance with law within a period of two months from the date of production of the certified copy of this order."

11. His Lordship has relied on the earlier judgment of this Court in Writ Petition No.4638 of 2006 (Sushil Kumar Singh & Anr. Vs. State of U.P. & Ors.) decided on 11th February, 2009 and Writ Petition No.70082 of 2009 (Akhilesh Kumar Maurya Vs. State of U.P. & Ors.) decided on 22nd December, 2009.

12. A perusal of the judgment of the Hon'ble Single Judge in **Sushil Kumar Singh's case (supra)** shows that the same has been decided in terms of the judgment dated 22.5.2003 passed in **Writ Petition No.39289 of 2000, (Kamlesh Kumar Yadav Vs. Director, Rajya Shaikshik Anusandhan Evam Prashikshan Parishad, U.P., Lucknow and Ors.)** as affirmed in **Special Appeal No.86 of 2004** decided on 11.9.2007. This leads to the judgment in Kamlesh Kumar Yadav (supra). A perusal of the judgment shows that Kamlesh Kumar Yadav passed B.Ed. examination securing 3rd Division in theory. He appeared in back papers under the provision of Statute of the University concerned and improved his position by securing 2nd Division in Theory papers. The degree was awarded by the University to him on 1st February, 1998 mentioning that he has passed B.Ed examination and has secured 2nd Division in Theory paper and 1st Division in practical paper. The application was filed by Sri Kamlesh Kumar Yadav on 17th March, 1998 along with which he could not file mark sheet showing the marks obtained by him in back papers but before declaration of the result, he filed the same. Though his documents subsequently submitted were rejected by the Director, Rajya Shaikshik Anusandhan Evam Prashikshan Parishad on the ground that after the last date of receipt of application form no fresh document can be entertained but this Court observed that the facts are not disputed that Kamlesh Kumar Yadav had passed B.Ed. Course viz. 2nd Division in theory paper and 1st Division in practical papers as per degree awarded to him on 1st February, 1998 by the University and therefore the Director ought to have taken into consideration the marks obtained by him in consequence of the back paper as per degree awarded to him.

13. The judgment in Kamlesh Kumar Yadav (supra) clearly show that since the B.Ed. degree was issued to him on 1st February, 1998 showing that he had passed in Theory in 2nd Division

which was admittedly before date of submission of the application form, and this fact having not been disputed, this Court granted relief to him directing the respondent to take into consideration the marks of Kamlesh Kumar Yadav according to the degree awarded to him which was in accordance with the marks he has obtained in back paper. It is true that this Court, while considering Sushil Kumar Singh's case (supra) found as a matter of fact that the mark sheet was awarded to Kamlesh Kumar Yadav on 25th August, 1998 and not prior to March, 1998 which is the last date of submission of application form and even then he was allowed relief by the Court extending the benefit of the said judgment to the petitioners in Sushil Kumar Singh's case.

14. So far as this case is concerned, it is not the case of the petitioner before this Court that the degree has been awarded to him before last date of the application form showing his marks according to the result in back paper. In fact the case of the petitioner is that he, having passed B.Ed. examination in 2009 itself, the degree has not been issued so far and only a mark sheet was issued to him on 17th February, 2009 showing 323 marks in theory paper which he submitted along with his application form on 20th February, 2009 and in fact he appeared in back paper subsequent to the last date of submission of the application form and has secured higher marks only in the result declared in September, 2009 vide mark sheet dated 2nd September, 2009. The entire transaction in the case in hand with respect to the revised mark sheet as a result of petitioner's appearing in back paper is subsequent to the last date of submission of the application form and therefore apparently the judgment of this Court in Kamlesh Kumar Yadav (supra) has no application.

15. The other judgements having simply followed Kamlesh Kumar Yadav (supra) and its follow up judgments, therefore also inapplicable since no issue at all has been considered therein. At this stage the question as to whether the transaction which has taken place subsequent to the last date of submission of application form can be taken into account or not can be considered in the light of the law laid down by the Apex Court in ***U.P. Public Service Commission U.P., Allahabad & Anr. Vs. Alpana (1994) 2 SCC 723*** wherein the last date of submission of the application form was 20th August 1988. The qualification necessary to be possessed by the candidate was a degree of Bachelor in Laws. The candidate was also required to submit law degree examination certificate and mark sheet along with application form. Alpana, who filed application had appeared in the Law examination in 1988 before 20th August, 1988 but till the last date of submission of application form her result of the law examination had not been declared. The result of law examination was declared in October, 1988. However, she submitted the application form in anticipation of her clearance of the Law examination in which she was found successful in the result declared in October, 1988. However, the U.P. Public Service Commission cancelled her candidature on the ground that she was not eligible since she had not passed law examination up to 20th August, 1988. The writ petition filed before this Court was allowed. The writ petition No.18918 of 1991 was allowed by this Court vide judgement dated 17th March, 1993 observing that the result

would relate back to the date of examination and therefore cancellation of candidature of Alpana was illegal. This Court followed the Apex Court decision in ***Ashok Kumar Sharma Vs. Chandra Shekher, 1993 Supp (2) SCC 611***. Reversing the decision of this Court in appeal filed by the Commission, the Apex Court distinguished the judgment in Ashok Kumar Sharma (supra) & observed as under:

".....Whether this decision was correct or not was not gone into as Sahai, J. was of the view that it would be unfair to quash selection after such a long lapse of time. It was thus on equitable considerations that the learned Judge ultimately agreed with the order proposed by the majority. Two things stand out from this judgment, namely, the majority applied by analogy the principle of Rule 37 whereas Sahai, J. endorsed the decision on equitable consideration. It must, however, be noticed that in that case a conscious decision was taken by the Secretary of the Department that such candidates who submitted the applications after the last date for receipt of applications but before the interviews were held should be considered eligible for appointment. This decision was not challenged and its validity was not required to be gone into. Pursuant to this decision such candidates were examined and selected on merits and were ultimately appointed. It was only when they were granted seniority over others that the latter challenged their appointments after a long lapse of time. The Court was, therefore, reluctant to disturb the status quo."

16. Thereafter the legal question as to whether the subsequent declaration of result could make the petitioner eligible and would relate back to the date of examination or not was considered in para 6 of the judgment, and, the Apex Court has held as under:

"In the facts of the present case we fail to appreciate how the ratio of the said decision of this Court can be attracted. The facts of this case reveal that the respondent was not qualified to apply since the last date fixed for receipt of applications was August 20, 1988. No rule or practice is shown to have existed which permitted entertainment of her application. The Public Service Commission was, therefore, right in refusing to call her for interview. The High Court in Writ Petition No.1898 of 1991 mandated the Public Service Commission to interview her but directed to withhold the result until further orders. In obedience to the directive of the High Court the Public Service Commission interviewed her but her result was kept in abeyance. Thereafter, the High Court while disposing of the matter finally directed the Public Service Commission to declare her result and, if successful, to forward her name for appointment. The High Court even went to the length of ordering the creation of a supernumerary post to accommodate her. This approach of the High Court cannot be supported on any rule or prevalent practice nor can it be supported on equitable considerations. In fact there was no occasion for the High Court to interfere with the refusal of the Public Service Commission to interview her in the absence of any specific rule in that behalf. We find it difficult to give recognition to such an approach of the High Court as that would open up a flood of litigation. Many candidates superior to the respondent in merit may not have

applied as the result of the examination was not declared before the last date for receipt of applications. If once such an approach is recognised there would be several applications received from such candidates not eligible to apply and that would not only increase avoidable work of the selecting authorities but would also increase the pressure on such authorities to withhold interviews till the results are declared, thereby causing avoidable administrative difficulties. This would also leave vacancies unfilled for long spells of time. We, therefore, find it difficult to uphold the view of the High Court impugned in this appeal."

17. This is what has been held by this Court also in Writ Petition No.19404 of 2005 (Arvind Kumar Dubey Vs. State of U.P.) decided on 19th April, 2006 wherein this Court held as under :

"The learned counsel for the petitioner further submitted that the certificate issued by the University declaring him successful in B.P.Ed Examination relates back to the Year 2001 as the certificate issued by the University is the year 2001 and therefore, he should be treated to be an eligible applicant for applying for the Special BTC 2004.

The submission raised by the learned counsel for the petitioner seems to be lucrative in the first instance. However, in the opinion of the Court, the petitioner is not entitled for any relief as the matter is squarely covered by three decisions of the Supreme Court in Rekha Chaturvedi (Smt.) Vs. University of Rajasthan and Commission, U.P. Allahabad and another Vs. Alpana, 1994(2)SCC 723 and in the case of Ashok Kumar Sharma and Other Vs. Chander Sekhar and another, 1997 (4) SCC 18 in which the Supreme Court held that if a candidate does not possess the requisite prescribed qualification on or before the last date prescribed for receiving the application by the respondents, in that event, the candidate was eligible to apply or apply for the said examination.

In the present case, the petitioner did not had a degree in B.P.Ed examination on or before the last date of receiving the application for the Special BTC 2004 and the degree was granted after the results were declared on 19.8.2004. Even through the said degree relates back to the year 2001, nevertheless, the petitioner was not eligible on the date when the advertisement was made nor was eligible on the date of the receiving of the applications in as much the result was not declared on or before that date. Consequently, the judgement, as cited aforesaid, are fully applicable to the present facts circumstances of the case. The petitioner is not entitled for any relief and the writ petition is dismissed."

18. This Court has further taken a view that only such document as were available to a candidate on or before the last date of submission of the application form can be considered by the authorities concerned but if a document has been possessed later on cannot be allowed to be considered. This is how while deciding the Special Appeal No.579 of 2000 (Director, State Council of Educational Research & Training & Ors. Vs. Raj Kishor) on 03.4.2006 a Division Bench of this Court also observed as under:

"This Court therefore, directed the appellant no.1 to consider the document

of the candidate which if he possessed much before the last date of submission of the application form and provided the said documents are genuine and in case they are selected, to give all consequential benefits. We are in the entire agreement with the reasoning given in the aforesaid judgment."

19. In view of the above, I am categorically of the opinion that the marks obtained by the petitioner in back paper as a result of his appearing therein after the last date of submission of the application form cannot be allowed to be considered by respondent No.2 for considering his candidature for admission in Special B.T.C. Course, 2008 since the same would not relate back entitling him to seek a direction to the respondent No.2 to take into account the new marks which he has obtained subsequently as a result of his appearing in back paper. The writ petition therefore lacks merit. Dismissed.

20. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.01.2010

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 3503 of 2010

Bhola Nath Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri R.K. Ojha

Counsel for the Respondents:
C.S.C.

U.P. Secondary Education Service Selection Board-Rules 1998- Rule-11(2)(b) and 12(b)- Selection of Principal-Regular Principal retired-vacancy advertised in 2008-When requisition sent-admittedly Mr. A was senior most lecturer retired but working at the end of session i.e. 30.6.2010-petitioner claim his name among two senior most lecturer may also be forwarded as after retirement of Mr. 'A' he stood at serial no. 2-held-misconceived-only those two senior most lecturer is to require to participate in selection-whose name send in requisition.

Held: Para-11

In view of the aforesaid discussion, I have no hesitation in holding that if by the time the selection is made one or both the senior most teachers retire, then the consideration of the next one or two senior most teachers would be contrary to the scheme of the Rules. Only such teachers are to be considered whose names are sent along with requisition under Rule 1(a)

Case law discussed:
[(1990) 1 UPLBEC 539].

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

1. With the consent of the learned counsel for the parties - Sri R.K. Ojha for the petitioner, learned Standing Counsel for respondent no.1 and Sri A.K. Yadav on behalf of respondent no.2, this matter is being finally disposed of at this stage itself under the Rules of the Court, since a pure question of law has been raised.

2. The post of principal of Gopal Vidyalaya Inter College, Koraon, Allahabad, was requisitioned to the Commission under Rule 11 of the U.P. Secondary Education Service Selection Board Rules, 1998 (for short, '1998 Rules). Pursuant thereto an advertisement was published in 2008. At the time when

the requisition was made and also when advertisement was published, Sri Shatru Badhan Singh was at sl. no. 1 being the seniormost teacher, Sri Gunraj Singh was at sl. no.2 and the petitioner was at sl. no. 3.

3. The selection process for the said post of principal took place in January, 2010 and call letters for interview were issued on 16.12.2009. In the meantime, Sri Shatru Badhan Singh retired, his date of birth being 1.10.1947, after attaining the age of superannuation, i.e. 62 years, but he continued to serve the institution till the end of the session, i.e. 30th June, 2010, in view of Regulation 21 of Chapter III of the Regulations framed under UP Intermediate Education Act, 1921.

Learned counsel for the petitioner submits that since the interview are going to be held in January, 2010, and Sri Shatru Badhan Singh has already retired, he (the petitioner) has become the second seniormost teacher in the institution and, therefore, he should be called for interview. His submission is that two seniormost teachers in the institution for the purpose of selection on the post of principal should be seen on the date when the interview is going to be held and not at an earlier point of time. He places reliance on Rule 12(6) of 1998 of the Rules.

4. He submits that the proviso to sub-rule (6) to rule 12 mandates that two senior most teachers in the institution are to be called for interview and, therefore, the crucial date for determining who are the two senior most teachers is the date on which the interview letters are issued or when the interview is to be held.

5. However, I find no force in the submission.

6. The procedure for making recruitment for the post of principal or headmaster is contained in rules 11 and 12. However, for our purpose Rule 11(1), (2) (a), (b) and 12(6) are relevant and reproduced below:

"11. Determination and notification of vacancies.--(1) For the purposes of direct recruitment to the post of teacher, the management shall determine the number of vacancies in accordance with sub-section (1) of Section 10 and notify the vacancies through the Inspector, to the Board in the manner hereinafter provided.

(2)(a) The statement of vacancies for each category of posts to be filled in by direct recruitment including the vacancies that are likely to arise due to retirement on the last day of the year of recruitment, shall be sent in quadruplicate, in the pro forma given in Appendix "A" by the Management to the Inspector by July 15 of the year of recruitment and the Inspector shall, after verification from the record of his office, prepare consolidated statement of vacancies of the district subject-wise in respect of the vacancies of lecturer grade, and group-wise in respect of vacancies of trained graduates grade. The consolidated statement so prepared shall, along with the copies of statement received from the Management, be sent by the Inspector to the Board by July 31 with a copy thereof to the Joint Director:

Provided that if the State Government is satisfied that it is expedient so to do, it may, by order in writing, fix other dates for notification of vacancies to the Board in respect of any particular year of recruitment:

Provided further that in respect of the vacancies existing on the date of the commencement of these rules as well as the vacancies that are likely to arise on June 30, 1998, the Management shall, unless some other dates are fixed under the preceding proviso, send the statement of vacancies by July 20, 1998 to the Inspector and Inspector shall send the consolidated statement in accordance with this sub-rule to the Board by July 25, 1998.

Explanation.--For the purpose of this sub- rule the word 'group-wise' in respect of the trained graduates grade means in accordance with the following groups, namely:

(a) Language This group consists of the subjects of Hindi, Sanskrit, Urdu, Persian and Arabic.
(b) Science This group consists of the subjects of Science and Mathematics;
(c) Art and Craft
(d) Music
(e) Agriculture
(f) Home Science
(g) Physical Education
(h) General This group consists of the subjects not covered in any of the foregoing groups.

(b) With regard to the post of Principal or Headmaster, the Management shall also forward he names of two senior most teachers, along with copies of their service records (including character rolls) and such other records or particulars as the Board may require, from time to time.
Explanation:- For the purpose of this sub-rule "senior-most teacher" means the senior-most teachers in the post of the highest grade in the institution, irrespective of total service put in the institution."

"12. Procedure for direct recruitment--

(1).....

(6) The Board, having regard to the need for securing due representation of the candidates belonging to the Scheduled Castes/Scheduled Tribes and other Backward Classes of citizens in respect of the post of teacher in lecturers and trained graduates grade, call for interview such candidates who have secured the maximum marks under sub-clause (4) above/and for the post of Principal/Headmaster, call for interview such candidates who have secured maximum marks under sub-clause (5) above in such manner that the number of candidates shall not be less than three and not more than five times of the number of vacancies.

Provided that in respect of the post of the principal of Headmaster of an institution the Board shall also in addition call for interview two senior-most teachers of the institution whose names are forwarded by the Management through Inspector under clause (b) of sub-rule (2) of Rule 11."

7. From a perusal of Rule 11 (2)(a) it is evident that as and when a vacancy occurs or is likely to occur a requisition for making recruitment to the said vacancy shall be sent by the management in pro forma Appendix A by July 15 of the year of recruitment. After verification of the record by his office, the Inspector shall prepare a consolidated list of vacancies of the district subject-wise and shall sent it to the Commission. Sub-rule (b) of Rule 11(2) further makes it obligatory for the management to send names of two senior most teachers along with copy of their service record to the Commission. The management shall also place such other record as the Board may require from time to time. Sub-rule (4) of

Rule 11 further directs that in any year of recruitment the Inspector shall on the basis of his office record declare the vacancy and notify the same to the Board if the Management fails to notify vacancy by the date specified in sub-rule (2) of Rule 11. The scheme of the rule makes it very clear that the recruitment has to be made with reference to the year of recruitment in which the vacancy has occurred and the requisition needs to be sent to the Board. The obligation upon the management to send names of the two senior most teachers conferred by rule 11(2)(b) shows that the said names have to be sent along with the requisition to be sent under rule 11(2)(a), meaning thereby that the names of senior most teachers would not vary from time to time since the names are to be sent along with the requisition with reference to the direct recruitment for the post of headmaster or principal and only these names are to be considered by the Board. Rule 12 (6) makes it clear that only those teachers whose names have already been received by the Board, i.e. of the two senior most teachers, shall be issued interview letters. Proviso to rule 12(6) refers to the date when names of such teachers have been forwarded under rule 11(2)(b).

8. Learned counsel for the petitioner submits that in case there is a delay in selection and in the meantime the senior most teacher retires, the very purpose of sending names would become meaningless as none would be available for consideration for the post of principal or headmaster. If the contention of the learned counsel is accepted, then with the passage of time and delay, if any, names of the senior most teachers would go on varying and there shall be no certainty about the names of the two senior most teachers to be considered. However, a perusal of rule 11 (2)(b) and 12(6) collectively makes the contention of the learned counsel untenable. The post of principal or headmaster is to be filled in by direct recruitment so a right has been conferred upon two senior most teachers with reference to date of vacancy to have an opportunity to be considered for the highest post in their institution, i.e. Principal or the headmaster. It is not a case of promotion so as to very from time to time.

9. A pari materia provision contained in rule 4 (1)(ii) of the UP Secondary Services Commission Rules, 1983, came up for consideration before a Division Bench of this Court in **Nand Kishore Prasad Vs. UP Secondary Education Services Commission, Allahabad and others [(1990) 1 UPLBEC 539]** and this Court in paragraph 4 and 5 of the judgement held as under:

"4. Rule 4(ii) of the UP Secondary Education Services Commission Rules, 1983 provides that in regard to the post of head of an institution, the Management shall also forward the names of two senior most teachers copies of their service records and such other record or particulars as the Commission may require from time to time for consideration by the Commission when the question of appointment of the Principal of the Institution is to be considered by the Commission.

5. Sub-rule (ii) of Rule 4, quoted above, in our opinion, clearly intends that on the date when the vacancy arose, on that date, the management is called upon to find out who are the two senior most teachers whose names are to be forwarded

to the Commission hence the date when the vacancy arose would be the relevant date for the purposes of Rule 4(ii). Merely because of a subsequent event, if another teacher becomes the senior most teacher in the college, he does not have a right to ask the manager to send his name also. If the interpretation is not taken then the result will be the process of selection by the Commission will never be completed as the name of the senior most teachers would on changing and the process of forwarding names will also continue. This does not take away the right of the said teacher to be considered for the post of Principal of the Institution if he has applied for the same. In the circumstances so far as this petition is concerned, we do not find any merit in the same. The petition is accordingly dismissed."

10. Since rule 11(2)(b) of 1988 Rules is worded similarly, what has been interpreted by the Division Bench in **Nand Kishore Prasad's case (supra)**, in my view, it would apply to the interpretation of rule 11(2)(b) of 1988 Rules and is consistent to the view I have taken and I stand fortified from the aforesaid Division Bench Judgement. Learned counsel for the petitioner could not place anything before to persuade me to take a different view.

11. In view of the aforesaid discussion, I have no hesitation in holding that if by the time the selection is made one or both the senior most teachers retire, then the consideration of the next one or two senior most teachers would be contrary to the scheme of the Rules. Only such teachers are to be considered whose names are sent along with requisition under Rule 1(a)

12. I, therefore, find no merit in the writ petition. Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.01.2010

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

Civil Misc. Writ Petition No. 4475 of 2010

Purnamasi ...Petitioner
Versus
State Of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Awdhesh Kumar Yadav

Counsel for the Respondents:
C.S.C.

Constitution of India-Art. 226-Correction of date of birth-on basis of Horoscope-admittedly petitioner passed High School- date of birth recorded on basis of High School certificate cannot be altered.

Held: Para-3

In a similar situation, the Supreme Court in the case of State of M.P. Vs. Mohan Lal Sharma reported in 2002(7) SCC Page 719 has rejected such a contention founded on a horoscope as against a matriculation certificate.

Case law discussed-
2002(7) SCC Page 719.

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

1. The petitioner is claiming correction of his date of birth on the basis of a horoscope.

2. There is no provision under law so as to raise a conclusive foregone presumption in favour of the petitioner in respect of the date of birth as indicated in

the horoscope. For this the petitioner will have to lead evidence in a suit to be filed before the court of competent civil jurisdiction. The petitioner is educationally qualified and was working as a Collection Amin. He has passed his matriculation in 1969 where his date of birth recorded is 31.1.50. The date of birth as reflected in the horoscope is 31.12.52.

3. In a similar situation, the Supreme Court in the case of State of M.P. Vs. Mohan Lal Sharma reported in 2002(7) SCC Page 719 has rejected such a contention founded on a horoscope as against a matriculation certificate.

4. This writ petition therefore cannot be entertained.

5. It is accordingly dismissed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.01.2010

BEFORE
THE HON'BLE MRS. POONAM SRIVASTAV, J.

Criminal Revision No. 5458 of 2009

Deepak Alias Pappu Yadav ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri S.K. Dubey

Counsel for the Respondent:
Govt. Advocate

Code of Criminal Procedure-Application to summon the record of cross case U/S 307, 120-B, 167, 218, 220, 342, 147, 148, 149, 323,504 IPC- Rejection by Trial Court- held proper order passed by magistrate u/s 156(3) to register and investigate the case- Stayed by High Court- neither Charge sheet, nor FIR nor Summoning order in existence No existence of Cross Case Rejection- held proper.

Held: Para 10

Principles laid down in all these decisions are that whenever cross case is pending, both cases should be tried together. No doubt, it is settled principle of law. I am in full agreement that cross case should be tried together. But in the instant case taking into consideration that only an order was passed by Magistrate to register and investigate the matter, which has been stayed by this Court as far back as in year 2006, there is no cross case in existence at present. Therefore, application has rightly been rejected by Additional Sessions Judge. No good ground for interference is made out. The instant revision lacks merits and is, accordingly, dismissed.

Case Law Discussed-
1994(23) AIR page 296, 2006 INDLAW SC 1253, 2000(40) ACC (SC) 783, 2001(42) ACC (SC)479, 2000(40) ACC (SC) 149, 2003 (46) ACC(SC) 881, 2008 (63) ACC 71.

(Delivered by Hon'ble Mrs. Poonam Srivastav, J.)

1. Heard learned counsel for revisionist and learned A.G.A. for the State.

2. The instant revision is preferred against order dated 28.10.2009 passed by Additional Sessions Judge F.T.C. 3rd, Jaunpur, in Session Trial No.290 of 2005 arising out of case crime no.302 of 2005 under Section 307 I.P.C. Police Station Kotwali Jaunpur, District Jaunpur.

3. Grievance of revisionist is that an application was moved before Additional Sessions Judge with a prayer to summon

record of cross case under Sections 307, 120-B, 167, 218, 220, 342, 147, 148, 149, 323, 504 I.P.C., which is pending and both cases may be tried together.

4. Facts are somewhat different. Revisionist filed an application under Section 156(3) Cr.P.C. Learned Magistrate passed an order on 4.2.2006 directing to register and investigate the matter against some police officials. The said order was challenged before this Court in criminal revision no.1708 of 2006, which is still pending. An interim order staying operation of the order dated 4.2.2006 under Section 156(3) Cr.P.C. was passed.

5. It is admitted that consequent to the said order, no first information report has been registered so far. Application for summoning record of cross case was rejected by Additional Sessions Judge, which is impugned in the instant revision.

6. I have perused the impugned order dated 28.10.2009 whereby application 54-Kha preferred on behalf of revisionist was rejected with a finding that cross case is not in existence either at any police station or in any other court of law.

7. The counsel for revisionist has tried to stress that since there is stay order granted by this Court in criminal revision no.1708 of 2009 then it will be presumed that order by virtue of which a direction was given to register and investigate criminal case is not in existence. Therefore, learned Magistrate has committed illegality in holding otherwise. He has placed reliance on two decisions one is Dr. G.C. Tripathi Vs. State of U.P. and another 1994 (23) A.I.R. page 296. On the basis of this decision, it is argued that effect of stay order means that order stayed cannot be given effect to, it does not mean that authority cannot cancel or rescind, recall or withdraw that order. Another decision is in the case of Ravikant S Patil Vs. Sarvabhouma S. Bagali 2006 INDLAW SC 1253, which relates to stay of conviction. It was held that order granting stay of conviction is not rule but is an exception to be resorted to in rare cases depending upon facts of the case but where conviction itself is stayed, effect is that conviction will not be operative from the date of stay.

8. I do not think that these decisions are of any help to revisionist. Both these decisions only elucidate on the effect of a stay order. Assuming that there is an order passed by this Court in criminal revision no.1708 of 2006 staying order of the Magistrate to register criminal case, it means that no criminal case is registered since stay order is operative. Consequent result is that no criminal case is in existence either because there is an interim order operative staying order of the Magistrate to lodge FIR or alternatively matter was probed by the Magistrate and only an order was passed for registering criminal case. In either circumstance, FIR is not in existence. Therefore, there is no question of any cross case pending before any court. In absence of FIR there is no investigation, no charge sheet, no summoning order and consequently no trial is pending in any court. Therefore, contention of the counsel for revisionist that cross case should be tried together is a hypothetical situation. In the event, stay is vacated, criminal revision no.1708 of 2006 is dismissed then FIR can be lodged and entire process of law will take its course. There being nothing of this kind,

argument of the counsel for revisionist is without any substance.

9. Counsel for revisionist has also placed reliance on a number of decisions of the Apex Court as well as this Court; Kulwant Singh Vs. Amarjit Singh and others 2000 (40) ACC (SC) 783, Sudhir and others Vs. State of M.P. 2001 (42) ACC (SC) 479, Balbir Vs. State of Haryana and another 2000 (40) ACC (SC) 149, State of M.P. Vs. Mishrilal (dead) and others 2003 (46) ACC (SC) 881 and Jugdish and others Vs. Additional Sessions Judge/FTC, Siddarth Nagar and another 2008 (63) ACC 71.

10. Principles laid down in all these decisions are that whenever cross case is pending, both cases should be tried together. No doubt, it is settled principle of law. I am in full agreement that cross case should be tried together. But in the instant case taking into consideration that only an order was passed by Magistrate to register and investigate the matter, which has been stayed by this Court as far back as in year 2006, there is no cross case in existence at present. Therefore, application has rightly been rejected by Additional Sessions Judge. No good ground for interference is made out. The instant revision lacks merits and is, accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD THE: 27.01.2010

BEFORE
THE HON'BLE R.K. AGRAWAL, J.
THE HON'BLE S.C. AGARWAL, J.

Civil Misc. Writ Petition No. 6449 of 2009

Shyam Sunder Gupta ...Petitioners
Versus
State of U.P. & others ...Opposite Parties

Counsel for the Petitioner:
Sri Sanjay Srivastava

Counsel for the Respondents:
Sri R.K.Mishra,
A.G.A.

Constitution of India, Act-226-Quashing of FIR-offence under Section 498-A,323, 506 and 3/4 Dowry Prohibition Act- on ground in matrimonial dispute they have settled a their differences- duly verified by mediation centre- no useful purpose shall be in continuing the criminal proceeding accordingly FIR quashed.

Held: Para-11

Considering the facts that the subject matter of this FIR, which is a matrimonial dispute and is of a pure personal nature, is now stands voluntary, mutually and amicably settled between the parties vide compromise deed filed through Mediation Centre of this Court, we see no purpose in continuing the criminal proceedings arising out of FIR in question. The dispute between the parties is of a purely personal nature. After compromise between the parties, keeping the matter alive with no possibility of a result in favour of the prosecution is a luxury for the courts.

Case law discussed:
(2008) 2 Supreme Court Cases(Cri.) 464.

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

1. The petitioners through the present writ petition have invoked the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India praying for a writ, order or direction in the nature of certiorari quashing the impugned FIR dated 5.6.2007 relating to case crime no.41 of 2007 under Section 498-A, 323, 504, 506 IPC and 3/4 D.P. Act, P.S. Armapur, District- Kanpur Nagar.

2. Heard Sri Sanjay Srivastava, learned counsel for the petitioners and learned AGA for respondent nos. 1 and 2. Learned counsel for respondent no. 3- the complainant did not appear when the case was taken up in the revised list.

3. This is a matrimonial dispute. The first informant Anita Gupta, respondent no. 3 is the wife of petitioner no. 1 Shyam Sunder Gupta. Petitioner no. 2 and 3 are the real brothers and petitioners no. 4 and 5 are the parents of petitioner no.1.

4. F.I.R. was lodged on the orders passed by the Metropolitan Magistrate-IV, Kanpur Nagar on the application under Section 156(3) Cr.P.C. moved by respondent no. 3. It was alleged that respondent no. 3 was married with petitioner no.1 on 14.05.2003. The petitioners were not happy with the dowry given and started harassing respondent no.3 on account of demand of Hero Honda motor-cycle and 25000- in cash as dowry. Demand for dowry was made on 20.04.2007 at 12 Noon. When the demand was not fulfilled, the petitioners beat the respondent no.3 but she somehow managed to escape and got herself medically examined on 20.4.2007 at Ursala Hospital, Kanpur Nagar.

5. On 10.4.2009, at the time of admission of this writ petition, a Division Bench consisting of Hon'ble Imtiyaz Murtaza, J. and Hon'ble S.C. Nigam, J. held that it was one of those case in which reconciliation should be tried between the disputing parties. The matter was referred to Mediation Centre of this Court.

6. Report of Mediation Centre is on record. Mediation sessions took place on 10.06.2009 and 03.07.2009, parties came to terms and settlement agreement was executed, which is also on record.

7. As per the terms and the settlement agreement, the petitioner no. 1 and respondent no. 3 decided to obtain a decree or mutual divorce on the condition that a sum of Rs.75000/- is paid by the petitioners to respondent no.3 by bank draft within a period of three months before the Court where the proceedings of aforesaid case crime no. 41 of 2007 are pending. It was further agreed that all civil and criminal cases pending between the parties shall be treated to be withdrawn.

8. Learned counsel for the petitioners submitted that in pursuance of the compromise/ settlement agreement 3.7.2009 the petitioners have deposited a sum of Rs.75000/- in the Court of ACMM-II Kanpur Nagar in Crime no 41 of 2007 and case no. 1831 of 2009, P.S. Armapur, District- Kanpur Nagar through bank draft. A certificate copy of application dated 30.09.2009 filed by petitioner no.1 in the court of ACMM-II, Kanpur Nagar has been filed to show that bank draft for Rs.75000/- was deposited

in court by petitioner no. 1 within stipulated period.

9. Learned counsel for the petitioners submitted that parties have come to terms and matrimonial dispute has been mutually settled and thus the FIR and all proceedings connected therewith be quashed.

10. Apex Court in case of **Madan Mohan Abbot Vs. State of Punjab (2008) 2** Supreme Court Cases(Cri.) 464 observed as under:-

"We need to emphasise that it is perhaps advisable that in disputes where the question involved is of a pure personal nature, the court should ordinarily accept the terms of the terms of the compromise even in criminal proceedings as keeping the matter alive with no possibility of a result in favour of the prosecution is a luxury which the courts, grossly overburdened as they are, cannot afford and that the time so saved can be utilised in deciding more effective and meaningful litigation. This is a common sense approach to the matter based on ground of realities and bereft of the technicalities of the law.

11. Considering the facts that the subject matter of this FIR, which is a matrimonial dispute and is of a pure personal nature, is now stands voluntary, mutually and amicably settled between the parties vide compromise deed filed through Mediation Centre of this Court, we see no purpose in continuing the criminal proceedings arising out of FIR in question. The dispute between the parties is of a purely personal nature. After compromise between the parties, keeping the matter alive with no possibility of a result in favour of the prosecution is a luxury for the courts.

12. We accordingly allow the writ petition and the FIR dated 5.6.2007 relating to case crime no. 41 of 2007 under Section 498-A, 323, 504, 506 IPC and 3/4 D.P. Act, P.S. Armapur, District-Kanpur Nagar and all proceedings connected therewith are quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.01.2010

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

Criminal Misc. Habeas Corpus Writ Petition No. 28862 of 2009

Shashi Kumar Yadav ...Applicant
Versus
Union of India and others ...Respondents

Counsel for the Applicant:
Sri Ramanuj Yadav

Counsel for the Respondents:
Sri Sudhir Mehrotra
Sri V.K. Nagaich
A.S.G.I.

Constitution of India Art. 226-Habeas Corpus Petition-detention order passed on 21.3.2009- 275 explosive detonators recovered from possession of petitioner- to supply the nexlite- certainly a serious charge- but delay in disposal of Representation about four weeks- process of law must have been followed- explanation for delay- minister concern was on tour held not proper- detention order quashed.

Held: Para-11

We find that this inordinate delay of 4 weeks in disposal of the representation of the petitioner by the Central Government has not been adequately and reasonably explained by the Central Government. We are conscious of the fact that the allegations against the petitioner are of a very serious nature but when it is decided to preventively detain a person by depriving him of his right of personal freedom, the due process of law has to be observed. The manner in which the representation of the petitioner remained pending before the Central Government for a long period of about 4 weeks, is shocking to the conscience of the Court. In these circumstances, we have no option but to quash the continued detention of the petitioner.

Case law discussed:
AIR 1999 SC 684, 2009 (67) ACC 83

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

1. This Habeas Corpus Petition has been filed for setting-aside the order of detention passed against the petitioner Shashi Kumar Yadav under Section 3 (2) of the National Security Act dated 21.3.2009 by District Magistrate, Chandauli.

2. The detention order was passed on the grounds that the petitioner was involved in supplying explosives to the nexalite organisations. On 31.1.2009 at 1 p.m., a police party under leadership of Sri R.K. Ram, inspector, P.S Chandauli, checked bus no. U.P.65-R-9305. On search, 275 explosives detonators were recovered from the possession of the petitioner, whereas 275 detonators were recovered from the possession of the co-accused Manjoor Rajdhar and 250 detonators were recovered from the possession of Sikandar Ram. The petitioner had no license to possess the above detonators. These detonators were to be sold to nexalite organisations who were involved in violent activities against public and the security forces, creating a feeling of fear and panic in the public mind and affecting the public order. District Magistrate apprehended that the petitioner was trying to obtain bail from the Court and if the petitioner was granted bail, there was apprehension that he would again involve himself in the aforesaid anti-national activities affecting the public order and peace, hence, it was thought necessary to preventively detain the petitioner.

3. We have heard Sri Ramanuj Yadav, learned counsel for the petitioner, Sri Sudhir Mehrotra, learned counsel for the respondent nos. 2 to 7 and Sri V.K. Nagaich, learned counsel for respondent no.1 Union of India.

4. The learned counsel for the petitioner has confined himself to one submission that the representation of the petitioner dated 1.4.2009 which was submitted to various authorities including the Central Government through jailor, was considered with inordinate delay by the Central Government.

5. It was pointed out that the District Magistrate forwarded the petitioner's representation with his comments on 14.4.2009, to the State Government after obtaining the comments from the S.P. Chandauli. It was submitted that the State Government received the representation on 15.4.2009 and even rejected the same on 21.4.2009. This shows that the State Government disposed of the representation of the petitioner with utter promptness.

6. In the two counter affidavits filed on behalf of Union of India by the under Secretary, Ministry of Home and Affairs, Government of India, it was submitted that though there has been some delay in consideration of the representation by the Central Government, but there has not been any casualness in the matter. The administrative delay is due to huge voluminous bulk of such cases received from the State of U.P. The ministry had taken some time in clearing the back-log and the work has now been streamlined to avoid such lapses and delay. The two affidavits filed on behalf of respondent no.1 are dated 16.7.2009 and 15.12.2009. Both the affidavits are highly unsatisfactory. No particulars have been given in the affidavits to show as to when the representation of the petitioner was received by the Central Government from the State Government and when it was processed and on which date, the same was rejected. We are shocked to see such casual approach on behalf of the Central Government in dealing with the grave matters like preventive detention.

7. The affidavit filed on behalf of the State of U.P reveals that the representation of the petitioner was sent to the Central Government on 17.4.2009 by speed post. It must have reached the Central Government within 3 days i.e. latest by 20.4.2009.

8. The representation was rejected by the Central Government on 18.5.2009 after a lapse of 4 weeks. No satisfactory explanation for this delay has been furnished by the respondent no.1. The ground that during the relevant period, a large number of representations were received from the State of U.P cannot be said to be a sufficient ground for not taking action for a period of about 4 weeks.

9. In **Rajammal V. State of Tamil Nadu, AIR 1999 SC 684** where consideration of the representation had been delayed merely because the Minister was on tour, it was held to be an unjustified ground for permitting violation of the fundamental rights of liberty of a citizen guaranteed under Article 21 of the Constitution, as the said file could easily have been forwarded to the Minister. The said decision mentions that "absence of Minister at the Headquarters is not sufficient to justify the delay, since the file could be reached to the Minister with utmost promptitude in a case involving the vital fundamental right of the citizen."

10. The absence of dealing clerk of NSA Desk in February, 2009 due to long leave and delay in consideration of NSA matters was very seriously viewed by another Bench of this Court in **Pranshu Dutt Dwivedi Vs. Superintendent District Jail, Fatehgarh, Farrukhabad and others, 2009 (67) ACC 83**.

11. We find that this inordinate delay of 4 weeks in disposal of the representation of the petitioner by the Central Government has not been adequately and reasonably explained by the Central Government. We are conscious of the fact that the allegations against the petitioner are of a very serious nature but when it is decided to preventively detain a person by depriving him of his right of personal freedom, the due process of law has to be observed. The manner in which the representation of the petitioner remained pending before the Central Government for a long period of about 4 weeks, is shocking to the

conscience of the Court. In these circumstances, we have no option but to quash the continued detention of the petitioner.

12. The writ petition is allowed. The petitioner shall be released forthwith unless wanted in connection with any other case.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.01.2010

BEFORE
THE HON'BLE RAJESH CHANDRA, J.

Criminal Misc. Application No. 33050 of 2009

Chand and others ...Petitioner
Versus
State of U.P. and another ...Respondent

Counsel for the Petitioner:
Sri K.P. Tiwari

Counsel for the Respondent:
Govt. Advocate

Code of Criminal Procedure-Section 2(d)-Complaint-on direction of magistrate-Charge sheet submitted by police for offense under section 323, 504, 506 IPC-argument that the charge sheet be treated like complaint and the I.O. became complainant-hence without recording the statement of the complainant and their witnesses-magistrate can not take cognizance-held-wholly misconceived-report submitted by public servant no need of recording statement application rejected.

Held: Para 10 & 11-

I considered over this argument and I feel that the same is misplaced. Proviso to Section 200 of the criminal procedure lays down that whenever a complaint is made in writing by a public servant, the Magistrate need not examine the complainant or the witnesses.

In the present case also the complaint has been filed by a public servant hence the Magistrate was not obliged to record the statement under Section 200 or 202 Cr.P.C..

Case law discussed-
2000 (2) JIC 649 (All) 200 (45) ACC 609.

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

1. The application under Section 482 Cr.P.C. has been filed for the quashment of the charge sheet being charge sheet no. NCR 24/2008 dated 15.10.2008 under Section 323, 504, 506 I.P.C. P.S. Lisari, District Meerut.

2. As interim relief it has been prayed that till the disposal of the application the proceedings of the above said case may be stayed.

3. In brief the facts of the case are that one Kadir submitted a report against the accused Chand and others at the police station which was registered as a non cognizable case. The complainant then moved an application under Section 155 (2) of the code of criminal procedure before the Magistrate making a prayer that the police of the P.S. Lisari Gate may be directed to make an investigation in the case. This application was allowed by the Magistrate vide order dated 21.4.2008 and thereafter the investigation ensued. After investigation the investigating officer found that only the offence under Section 323, 504, 506 I.P.C. are made out and as such submitted the charge sheet for the aforesaid offences. The Magistrate took cognizance and summoned the accused

Chand, Asmin and Fajil for the aforesaid offences.

4. Heard the learned counsel for the applicants as well as the learned A.G.A..

5. Learned counsel for the applicants submitted that the offences under Section 323, 504, 506 I.P.C. are non cognizable, hence in view of the explanation to Section 2 (d) of the Code of Criminal Proceeding, it could not proceed as state case and it has to proceed as a complaint case. He further submitted that the learned Magistrate has erroneously passed an order taking cognizance on the charge sheet.

6. I have carefully considered the above submissions. It is not disputed that the offences under Sections 323, 504, I.P.C. are non cognizable. The offence under Section 506 I.P.C. was made cognizable and non bailable vide the Uttar Pradesh Government Notification No. 777/VIII- 94 (2)-87 dated July 31, 1989 published in U.P. Gazette, Extra Part-4 Section (Kha) dated 2nd August, 1989. This notification issued by the Government was held to be illegal by Division Bench of this Court in the case of Virendra Singh & Others vs. State of U.P. & Others, 2000 (2) JIC 649 (All) 200 (45) ACC 609, and so the position is that now the offence under Section 506 I.P.C. is also a non-cognizable offence.

6. It is clear from above that all the three offences punishable under Section 323, 504, 506 I.P.C. are non cognizable.

Explanation to Section 2(d) of the Cr.P.C. runs as under:

"Explanation-A report made by a police officer in a case which discloses, after investigation the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant."

7. In view of the said explanation report of the police officer after investigation disclosing commission of non-cognizable offence has to be deemed to be a complaint and the police officer who submitted the report has to be deemed to be a complainant. In other words the charge sheet submitted by the police in a non-cognizable offence shall be treated to be a complaint and the procedure prescribed for hearing of complaint case shall be applicable to that case.

8. In the present case the charge sheet submitted by the investigating officer shall be treated as a complaint and the cognizance taken by the Magistrate shall be deemed to have been taken on a complaint.

9. Learned counsel for the applicant tried to argue that since the charge sheet has to be treated as a complaint, the Magistrate could not have taken cognizance of the offences until unless the Magistrate recorded the statement of the investigating officer under Section 200 Cr.P.C..

10. I considered over this argument and I feel that the same is misplaced. Proviso to Section 200 of the criminal procedure lays down that whenever a complaint is made in writing by a public servant, the Magistrate need not examine the complainant or the witnesses.

11. In the present case also the complaint has been filed by a public servant hence the Magistrate was not obliged to record the statement under Section 200 or 202 Cr.P.C..

12. In view of the above the present application under Section 482 Cr.P.C. is liable to be dismissed.

13. The application is dismissed.

14. However it is made clear that the case shall be treated to be a complaint case and the procedure prescribed for hearing of complaint case shall be applicable to the present case.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.01.2010

BEFORE
THE HON'BLE RAJESH CHANDRA, J.

Criminal Misc. Application No. 33247 of 2009

Arvind Kumar ...Applicant
Versus
State of U.P. & another ..Opposite Parties

Counsel for the Applicant:
Sri Ravindra Sharma

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

Code of Criminal Procedure- Section 482- Quashing of charge sheet-offense under section 274,275,419.420,464,468 IPC read with section 3/7 essential commodities Act and Drugs and cosmetics Act. Section 18/27-Sufficient material collected by investigation officer-prima facie offense made out-no illegality or irregularity disclosed in charge sheet-cannot be interfered-direction issued to consider bail application keeping in view of Lal Kamalendra Pratap Singh.

Held: Para 6

I have considered over the argument and also perused the papers. In the case at hand the material collected by the investigating officer is sufficient to make out prima facie offence against the applicant and since there is sufficient evidence against the accused applicant I do not find any illegality or irregularity in the filing of the Charge sheet or in the order of the lower court by which the applicant has been summoned.

Case law discussed:
(2009) 2 SCC(Criminal) 730, (2006) 3 SCC (Cri) 188 are: (SCC p. 748, para 12), Criminal Appeal No. 538 of 2009 Supreme Court dated 23.3.2009.

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

1. The applicant has filed this application under Section 482 of the Code of Criminal Procedure to quash the Chargesheet dated 12/9/09 in case crime no. 03/09, under Sections 274,275,419.420,464,468 IPC and Section 3/7 Essential Commodities Act & Section 18/27 of Drugs and Cosmetics Act and Section 21/22 NDPS Act pending as case no.4890 of 2009 (State Vs. Ramesh Chandra & Others) in the court of Addl. CJM I, Jaunpur.

2. The learned counsel for the applicant argued that the Charge sheet has been submitted against the accused applicant without collecting proper evidence and as such is liable to be quashed.

3. It has further been argued that the accused applicant was not arrested on the spot and the licence of the drug is also not

in his name. He has falsely been implicated in the case.

4. The learned A.G.A. on the other hand argued that during investigation sufficient evidence has been collected against the accused applicant. He is the son of the main accused Ramesh Chandra Gupta. Ramesh Chandra Gupta had stated at the time of recovery of the drugs that the entire business is being run by Arvind Kumar, the applicant in this case.

5. Hon'ble the Apex Court dealing with the scope of exercising jurisdiction under Section 482 Cr.PC. has held as under in **K. Ashoka Vs. N.L. Chandrashekhar (2009) 2 SCC (Criminal) 730**:

It is now a well-settled principle of law that the High Court in exercise of its inherent jurisdiction under Section 482 of the Code may quash a criminal proceeding inter alia in the event the allegations made in the complaint petition even if they are taken at their face value and accepted in their entirety does not disclose commission of a cognizable offence. Some of the principles which would be attracted for invoking the said jurisdiction have been laid down in ***Indian Oil Corpn. v. NEPC India Ltd. (2006) 3 SCC (Cri) 188 are: (SCC p. 748, para 12)***

"(i) A complaint can be quashed where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out the case alleged against the accused.

For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.

(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with mala fides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.

(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.

(v) A given set of facts may make out: (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceeding are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by

itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not?

6. I have considered over the argument and also perused the papers. In the case at hand the material collected by the investigating officer is sufficient to make out prima facie offence against the applicant and since there is sufficient evidence against the accused applicant I do not find any illegality or irregularity in the filing of the Charge sheet or in the order of the lower court by which the applicant has been summoned.

7. The application is therefore, dismissed.

8. However, the learned lower court is directed that after the applicant surrenders in the court within three weeks from today his bail application shall be disposed of in the light of the judgment passed by 7 judges Bench of this court in **Amarawati and another Vs. State of U.P., 2005 Cr. L.J. 755** as approved by the Apex Court in **Lal Kamlendra Pratap Singh Vs. State of U.P. in criminal Appeal No. 538 of 2009 Supreme Court dated 23.3.2009**.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.01.2010

BEFORE
THE HON'BLE ABHINAVA UPADHYA, J.

Civil Misc. Writ Petition No. 42482 of 2009

Smt. Arvind Kumari Yadav ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri S.K. Anwar

Counsel for the Respondents:
C.S.C.

Indian Stamp Act- Section 43- A(3)- Charging of Stamp duty-plot in question recorded as agricultural land-according to circle rate stamp duty paid-subsequent change of user and potentiality of land can be material under acquisition proceeding for compensation purpose-but can not be ground for levy of extra stamp duty or imposing penalty.

Held: Para-8

It is true that the market value of a land is the only relevant factor for determination of payment of stamp duty under the Act and for that it is the bounded duty of the Collector to determine it not merely on the basis of the circle rate or its entry in the revenue records, but on the same basis as is required for the purpose of payment of compensation under the land acquisition proceedings.

Case law discussed:-
2005(98) RD, 511.

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

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

2. Present writ petition has been filed by the petitioner challenging the orders passed under section 47-A (3) and 56 (1-A) of the Indian Stamp Act as applicable to the State of U.P.

3. The petitioner had purchased a piece of land being Arazi Khasra No.220 Khata No.126 measuring 0.40 Acre. Sale deed was executed and registered in

favour of the petitioner on 19.12.2005 before Sub-Registrar, Etawah, which is filed as Annexure-1 to the writ petition. According to the petitioner, the land in question was agricultural land and the same was purchased for Rs.4 lacs, but for the payment of stamp duty the market value of the land as disclosed by the petitioner himself was Rs.4,40,000/- on which stamp duty to the tune of Rs.44,000/- was paid and the said instrument was duly registered. Thereafter, that upon the report of the Sub-Registrar proceedings under section 47-A (3) of the Indian Stamp Act were drawn and the petitioner was served with a notice to which he replied. The Collector not being satisfied with the reply proceeded to hear the matter and passed order determining the deficiency in stamp duty in the execution of the sale deed vide its order dated 20.11.2008. Against the said order, the petitioner preferred an appeal before the Commissioner under section 56 (1-A) of the Indian Stamp Act and the Commissioner affirmed the order of the Collector and dismissed the appeal, hence this writ petition.

4. The main contention of the learned counsel for the petitioner is that the Collector has proceeded to determine deficiency in stamp duty on the ground that after the execution of the sale deed on 19.12.2005 the petitioner himself applied for declaration of land as non agricultural under section 143 of the U.P. Zamindari Abolition & Land Reforms Act, 1950 and the Sub Divisional Officer declared the said land as non agricultural vide its order dated 13.3.2006. It is alleged that declaration under Section 143 was the sole reason for the Collector to give the finding that the potentiality of the land was always residential even at the time of execution of the sale deed and therefore, the petitioner has evaded the payment of stamp duty by showing it as agricultural land.

5. Learned counsel appearing for the petitioner submits that potentiality or the market value of the land has to be seen on the date of execution of the sale deed and not future prospect of the land as has been done in the present case. According to him, on the date of execution of the sale deed the said property was agricultural land and the circle rate prevalent was taken into consideration and the stamp duty was accordingly paid.

6. On the other hand, learned Standing Counsel submitted that the nature of the land as recorded in the revenue record will not be the only determinative factor for considering the market value of the property. The market value of the property has to be seen in relation to the area where it is situated and how much a willing purchaser would pay and a willing seller would willingly accept at a given point of time.

7. I have considered the submission raised by the learned counsel for the petitioner as well as learned Standing Counsel and have perused the orders impugned in the writ petition.

8. It is true that the market value of a land is the only relevant factor for determination of payment of stamp duty under the Act and for that it is the bounded duty of the Collector to determine it not merely on the basis of the circle rate or its entry in the revenue records, but on the same basis as is required for the purpose of payment of

compensation under the land acquisition proceedings. This Court in the case of **Ram Khelawan alias Bachha Versus State of U.P. reported in 2005 (98) RD, 511**, has held in no uncertain terms that for determination of the market value the only procedure required to be adopted by the Collector is that of determination of compensation under the land acquisition proceeding. In order to highlight the aforesaid proposition of law laid down in the aforesaid judgment, relevant portion of paragraph 16 of the same is quoted herein below:-

"16..... It is interesting to note that Rule 7 no where prescribed the basis, formula or principle for determining market value. It only prescribes procedure like notice, admission of oral or documentary evidence, calling for information or record from any public office and inspection of property. The result is that, whether Rule 7 of Rules of 1997 applies or not market value has to be determined on the same principle on which market value in land acquisition cases is determined. Minimum market value fixed in accordance with Rules of 1997 is relevant only and only for the purposes of referring the document by Registering Officer to the Collector before registration. Even after such reference market value is to be determined not in accordance with the minimum value fixed under Rule 4 of the Rules of 1997 but in accordance with general principles of determination of market value as applicable in land acquisition cases. Simultaneously when proceedings are initiated after registration of the document under section 47-A(3) of the Act market value has to be determined in accordance with general principles applicable for the said purpose like principles of determination of market value in land acquisition cases without taking recourse to minimum market value of the property fixed in accordance with Rule 4 of the Rules 1997."

9. I entirely agree with the aforesaid interpretation and I find that no such consideration as enumerated above is reflected from the order passed by the Collector under Section 47-A(3) of the Indian Stamp Act.

10. Under these circumstances, the impugned orders are against the law laid down by this Court in the case of **Ram Khelawan (supra)** and, therefore, cannot be sustained and is hereby quashed. Accordingly, the order of Commissioner passed under section 56 (1-A) of the Indian Stamp Act is also set aside.

11. It is further directed that the Collector will proceed to determine the market value of the property in accordance with procedure given in the judgment in the case of **Ram Khelawan (supra)** and pass appropriate orders thereafter.

12. It goes without saying that the market value has to be determined as on the date of execution of the sale deed. It is also made clear that any inspection that may be made, the petitioner shall be associated in the same.

13. Any amount already deposited by the petitioner pursuant to the order passed under section 47-A (3) of the Indian Stamp Act shall be subject to any further order that may be passed by the Collector in the fresh proceedings to be initiated by him as directed above.

14. Subject to aforesaid direction, the writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.01.2010

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

Civil Misc. Writ Petition No. 45129 of 2009

Gopal Singh and another ...Petitioner
Versus
State of U.P. and others ...Respondent

Counsel for the Petitioner:
Sri R.K. Vaish

Counsel for the Respondent:
C. S. C.

U.P. Urban land (Ceiling & Regulation) Act 1976-Section 10(5) 10(6)-Land declared Surplus-Physical possession remained with actual owner no proceeding for taking possession ever initiated-even compensation not paid entitled to remain in possession subject to return of compensation if any paid to petitioner-direction to delete the name of state and record the name of owner given.

Held: Para-5 & 6-

The Repeal Act of 1999 envisages that all action, subject to the provision made in that Act itself, shall abate. It is provided under Section 3 that even if a notification under Section 10(3) has been issued vesting the vacant land in the State Government and also compensation has been paid, but if the possession has not been taken, the land would be restored to the land holder, however, subject to return of the compensation if received. In the present case, it is not the case of the respondents that compensation has been paid and they have miserably failed that the possession was ever taken in accordance to the provision of the repealed Act.

For the reasons above, this petition stands allowed and the Authorities are directed to delete the name of the State from the revenue record and record the name of the owner of the disputed land in accordance to law, if possible, within a period of two months from the date of submission of a certified copy of this order.

(Delivered by Hon'ble D.P. Singh, J.)

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

2. The petitioners have sought a mandate to the Revenue Authorities to delete the name of the State in the revenue record with regard to the disputed land and record the name of the petitioners as the rightful owners in view of the fact that the Urban Land (Ceiling and Regulation) Act, 1976 has since been repealed w.e.f. 18.3.1999 in view of Act No. 15 of 1999.

3. The petitioners claim to be the owner in possession of Gata No. 107-A and 107-B i.e. measuring about 2 bigha and 17 biswa situated in village Dahtura, Tehsil Sadar, Agra which fell within the Nagar Nigam. Proceedings under U.P. Urban Land (Ceiling and Regulation) Act, 1976 were initiated and 359.637 square meter land was declared surplus and though notification under Section 10(3) was issued in 1993, no proceedings under Section 10(5) or 10(6) were completed and the actual physical possession remained with the petitioners. It is also stated that in view of repealed Act, as the physical possession had not been taken

under Section 10 (5) or 10(6), the ceiling proceedings had abated and the land stood restored to the petitioner but yet the Revenue Authorities are not entering his name.

4. In the counter affidavit though it is stated that a notification under Section 10(5) was issued, however, neither the date of possession has been disclosed nor any possession memo appears to have been executed. There is nothing on record to show that the possession even under Section 10(6) was ever taken. The petitioners have annexed a copy of the reply under the Right to Information Act dated 26.11.2009 issued by the Tehsildar, Sadar, Agra showing that the actual physical possession remains with the petitioners and in fact no legal possession memo was ever executed with regard to the disputed land. Thus, it is apparent that the petitioners are still in possession of the disputed land.

5. The Repeal Act of 1999 envisages that all action, subject to the provision made in that Act itself, shall abate. It is provided under Section 3 that even if a notification under Section 10(3) has been issued vesting the vacant land in the State Government and also compensation has been paid, but if the possession has not been taken, the land would be restored to the land holder, however, subject to return of the compensation if received. In the present case, it is not the case of the respondents that compensation has been paid and they have miserably failed that the possession was ever taken in accordance to the provision of the repealed Act.

6. For the reasons above, this petition stands allowed and the Authorities are directed to delete the name of the State from the revenue record and record the name of the owner of the disputed land in accordance to law, if possible, within a period of two months from the date of submission of a certified copy of this order.

No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.01.2010

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

Civil Misc. Writ Petition No. 60795 of 2009

Madhyamik Shiksha Parikshad ...Petitioner
Versus
District Judge, Baghpat and others
...Respondent

Counsel for the Petitioner:
Sri J.S. Tomar

Counsel for the Respondents:
Sri Sunil Kumar Dubey

U.P. Intermediate Education Act. 1921-Section-22-Bar of jurisdiction of civil Courts-Civil Suit for summoning answer sheet and to award appropriate marks-interim-application-civil court issued direction-held-without jurisdiction-order not sustainable.

Held: Para-8

Having perused the records and having considered the aforesaid submissions, it is evident that the entire exercise undertaken by the plaintiff-respondent was misdirected and the application for summoning the answer-books was also misplaced. The trial court and the revisional court, therefore, erred in proceeding to summon the answer-

books, as such, the orders are unsustainable.

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

1. Heard Sri J.S. Tomar, learned Standing Counsel for the State and learned counsel for the Caveator-respondent No.3.

2. The challenge is to the orders passed by the trial court dated 19.9.2008 and the order of the learned District Judge dated 15.5.2009 in Revision whereby the direction of the trial court to produce the answer-books has been maintained.

3. The plaintiff-respondent No.3 filed a Suit. Her allegation was that she has faired well in the High School Examination of 2007 and was expecting more than 70% marks but she was awarded far lesser marks than her expectation, as such, the Suit should be decreed and appropriate relief should be granted. The relief claimed was to grant proportionate marks to the petitioner and, accordingly, correct her result.

4. During the pendency of the Suit, an application was moved for summoning the answer-books and the said application No.42-C was allowed by the trial Court directing Board of High School and Intermediate Examination, who is the petitioner before this Court, to produce the answer-books. The said order has been maintained in revision. Hence this petition by the Board.

5. Learned Standing Counsel contends that the trial court and the revisional court have both completely over looked Section 22 of the U.P. Intermediate Education Act, 1921, which is as follows:-

"22. **Bar of Jurisdiction of Courts.**- No order or decision made by the Board or any of its Committees in exercise of the powers conferred by or under this Act shall be called in question in any Court."

6. It is contended that the results of the respondent - plaintiff has been declared in accordance with the powers conferred on the Board under the Act and the Regulations framed there under and, as such, such orders declaring the result of the plaintiff-respondent could not be subjected to scrutiny before the civil court.

7. Apart from this, there is a specific procedure provided for scrutiny under the Act itself and it was open to the plaintiff-respondent to have applied for the same and sought the redressal of her grievances which has admittedly not been done.

8. Having perused the records and having considered the aforesaid submissions, it is evident that the entire exercise undertaken by the plaintiff-respondent was misdirected and the application for summoning the answer-books was also misplaced. The trial court and the revisional court, therefore, erred in proceeding to summon the answer-books, as such, the orders are unsustainable.

9. Accordingly, the writ petition is allowed and the orders dated 19.9.2008 and 15.5.2009 are quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2010

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

Civil Misc. Writ Petition No. 64470 of 2009

Smt. Shanti Devi ....Petitioner
Versus
State of U.P. and others ...Respondent

Counsel for the Petitioner:
Sri Raj Karan Yadav

Counsel for the Respondents:
C.S.C.

Urban Land (Ceiling & Regulation) Act-1976-Section 10 (3)-Proceeding against dead person- taking possession-declaration of surplus land about 1471 square meters notice neither served upon erstwhile owner-nor possession taken under U.P. Urban Land Ceiling (taking of possession payment of amount and allied matters) direction 1983 by producing form no. 4 LC-11 in column 9-notice issued against dead person-entire proceeding stood abated-direction not to interfere with possession of petitioner given.

Held: Para-7 & 8

However, learned Standing counsel contends that the possession of the vacant land after it vested in the State under Section 10 (3) was taken over by the State. Apart from a bald allegation in the counter affidavit there is no documentary proof to prove the factum of possession. In fact even the date on which the possession was allegedly taken by this State is not disclosed in the counter affidavit. The State Government itself in exercise of powers under Section 35 of the Act has issued directions known as U.P. Urban Land Ceiling (Taking of Possession, Payment of Amount and Allied Matters) Direction 1983 for the purposes of taking over possession. These directions provide that where possession of the excess vacant land is taken either Sub Section 5 or Sub Section 6 of Section 10, entry would have to be made in the register in Form No. ULC-III and also in column no. 9 of the Form No. ULC-I. It further mandates the Competent Authority to put his signatures in the column no. 2 of Form No. ULC-I and column no. 10 in Form No. ULC-III in token of verification of the entries of possession. Neither there is any allegation in the counter affidavit nor copies of any of the forms have been annexed to show that in fact possession was taken.

The issue can be examined from another angle. Learned Standing counsel does not dispute that there is no other provision for taking of possession under the Act except the power provided under Section 10(5) and 10(6). Admittedly, the very first step of taking over possession was taken through a notice under Section 10 (5) dated 26.6.1999 which was issued in the name of the land holder. The fact that the land holder died on 4.3.1996 has not been denied. Thus, even the notice under Section 10 (5) was void and would not give any right or power to the respondents to seek or take over possession of the disputed land.

Case law discussed:
[2005 (60) ALR 535].

(Delivered by Hon'ble D.P. Singh, J.)

1. Heard learned counsel for the parties.

2. The relief claimed in this petition is for a mandate to the respondents not to take actual physical possession of the disputed land treating as having been declared surplus and further restrain them from interfering with their possession and

for a declaration that proceedings under the Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter referred to as the Act) viz a viz the disputed land stood abated.

3. The relevant facts are that upon the promulgation of the Act Amru, the predecessor in interest on the petitioner submitted his return under Section 6 (1) and without any notice or opportunity under Section 8(3) thereof an order under Section 8(4) was issued on 2.6.1984 declaring about 1471 square meters land as excess from plot nos. 156/6 and 156/7. However since the order was not served on the land holder, he executed a registered will dated 10.5.1991 in favour of the petitioner who was his daughter-in-law and subsequently the land holder died on 4.3.1996. After the death of the land holder, the petitioner applied for mutation of her name which was duly entered in the revenue records. However, a notice under section 10 (5) was issued on 26.6.1999 against the deceased land holder calling upon him to surrender the possession of the alleged excess land but the said notice was returned by the process server with the endorsement of his death. Nevertheless, in pursuance of the aforesaid notice the name of the State was mutated in the revenue record and now they are seeking to dispossess the petitioner thus, the present petition with the allegation that the Act was repealed by the Repeal Act of 1999 abating all proceedings under the Act wherein actual physical possession was not taken over.

4. The State respondents have filed their counter affidavit inter alia stating that a notice under Section 8 (3) of the Act was issued to the land holder who had filed his objection on 12.12.1983 but he did not produce any evidence in support of his objection and therefore, the objections were rejected on 2.6.1984 declaring about 1471 sq. meters of land as surplus under the Act. It is further alleged that a notice under Section 10 (3) was duly published in the official gazette and after publication of the notice the name of the State Government was duly mutated on 10.6.1999 and possession was also taken over and therefore, the petitioner is not entitled to any relief.

5. Before the court proceeds further it would be relevant to go through the scheme of the Act. Upon promulgation of the Act a statement has to be prepared by the Competent Authority with regard to holding of excess land and the draft statement is required to be served under Section 8 (3) on the land holder inviting his objection. After receipt of objection the Competent Authority, after reasonable opportunity to the land holder can pass a final order under Rule 8 (4) declaring excess vacant land under Section 8 (4) and a draft statement has to be prepared under Section 9. Thereafter the Competent Authority has to issue a notification under Section 10 (1) inviting persons who are interested in such vacant land to lodge their claims whereafter it has to publish a notification under Section 10 (3) by which the land would deem to have vested in the State free from encumbrances with regard to taking over possession of the vacant land. The Competent Authority has to issue a notice under Section 10 (5) of the Act ordering the land holder to surrender or deliver possession to the Government or any person authorised in that behalf within 30 days of the receipt of notice failing which the Competent Authority is authorized to

take possession by force under Section 10 (6).

6. It is evident from the record that notice under Section 10 (5) asking the land holder to surrender possession was issued on 26.6.1999 and a copy of the same is annexed with the counter affidavit. The notice shows it was returned with endorsement of the process server that the land holder is dead and therefore, notice could not be served. Thus, it is established beyond any shadow of doubt that the notice under Section 10 (5) was issued for the first time in June, 1999. Before the notice could be issued, the legislature intervened and promulgated the Repeal Act of 1999 which was adopted by the State of U.P. w.e.f. 18.3.1999. Under the Repeal Act all proceedings have been abated except those where actual physical possession has been taken over and it makes a distinction between "possession" under Section 10 (5) or sub clause 6 and "vesting" as under Section 10(3). A Division Bench of our Court in the **State of U.P. Vs. Hari Ram** *[2005 (60) ALR 535]*, after considering in detail the scheme of the Act and the Repeal Act has held that where actual physical possession before 18.3.1999 is not taken, all proceedings under the Act would abate and no action on the basis of the Act can be taken.

7. However, learned Standing counsel contends that the possession of the vacant land after it vested in the State under Section 10 (3) was taken over by the State. Apart from a bald allegation in the counter affidavit there is no documentary proof to prove the factum of possession. In fact even the date on which the possession was allegedly taken by this State is not disclosed in the counter affidavit. The State Government itself in exercise of powers under Section 35 of the Act has issued directions known as U.P. Urban Land Ceiling (Taking of Possession, Payment of Amount and Allied Matters) Direction 1983 for the purposes of taking over possession. These directions provide that where possession of the excess vacant land is taken either Sub Section 5 or Sub Section 6 of Section 10, entry would have to be made in the register in Form No. ULC-III and also in column no. 9 of the Form No. ULC-I. It further mandates the Competent Authority to put his signatures in the column no. 2 of Form No. ULC-I and column no. 10 in Form No. ULC-III in token of verification of the entries of possession. Neither there is any allegation in the counter affidavit nor copies of any of the forms have been annexed to show that in fact possession was taken.

8. The issue can be examined from another angle. Learned Standing counsel does not dispute that there is no other provision for taking of possession under the Act except the power provided under Section 10 (5) and 10 (6). Admittedly, the very first step of taking over possession was taken through a notice under Section 10 (5) dated 26.6.1999 which was issued in the name of the land holder. The fact that the land holder died on 4.3.1996 has not been denied. Thus, even the notice under Section 10 (5) was void and would not give any right or power to the respondents to seek or take over possession of the disputed land.

9. Thus, it is apparent that all proceedings taken against the deceased land holder stood abated under the Repeal Act, 1999 and accordingly, it is declared

as such and the writ petition succeeds and is allowed. The respondents are further directed not to interfere in the possession of the petitioner over the disputed land and to further enter their names in the relevant revenue register.

10. In the circumstances of the case, no order as to costs.
