REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.07.2010

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Revision No. 245 of 1997

Gauri Shankar Saraogi and another
...Defendant/Appellant
Versus
Sharda Prasad Dwivedi and another
...Plaintiff/Opposite Parties

Counsel for the Revisionist:
Sri R.S. Mishra
Sri K. Shailendra
Sri Ravi Kiran Jain

Counsel for the Opposite Parties:
Sri A.K. Tiwari
Sri B.D. Mandhyan
Sri R.K. Porwal
Sri Satish Mandhyan

Code of Civil Procedure-Section 92-Suit for Renewal of Trustee-property of Public Trust Situated in Dist. Agra-already sold with permission of Calcutta High Court-permission granted by Civil Court Agra-held-without jurisdiction-as much prior to institution of suit-property of trust already sold.

Held: Para 10 & 18

The subject matter of the trust in the instant case could have been the two properties one at Calcutta and the other at Agra. The property at Agra having been sold much before the application for leave to institute the suit was moved only the property at Calcutta was left with the Trust. Thus, on the date on which the application for leave was moved there was no property of the trust or any part of the subject matter of the trust at Agra. Therefore, to my mind, the court at Agra lacked inherent jurisdiction for entertaining the suit under Section 92 C.P.C. or to grant leave to to two or more persons to institute such a suit.

In view of above facts and circumstances, I am of the opinion that the court below in passing the impugned judgement and order granting leave to the plaintiff (applicant)/opposite parties to institute the suit under Section 92 C.P.C. acted completely without jurisdiction as admittedly no part of the subject matter of the trust was situate at Agra at the relevant time.

Case law discussed:
AIR (31) 1944 PC 39, 1924 PC 95, AIR 1954 SC 340, AIR 1995 SC 2001.

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

1. Ram Kishan Dass, Har Kishan Das Saraogi is a public trust of religious and charitable nature created for the Hindu public. The said trust owned properties mentioned in Schedules 'A' and 'B' of the proposed plaint i.e. house no.165, 167 situate at M.G.Road, Clacutta in Schedule 'A' and house no.1/67 Peepal Mandi, Agra in Schedule 'B'.

2. The two applicants/opposite parties both residents of Agra applied for leave of the court at Agra to institute a suit under Section 92 C.P.C. for removal of the existing trusties two in number, both residents of Calcutta and for appointment of new trusties as well as for directing rendering of accounts of the trust. The application for grant of leave to file proposed plaint was opposed by the defendant/revisionists herein. One of the objection was that the property at Agra is no more in existence as it has been sold under the orders of the Calcutta High Court dated

28.4.1988, therefore, the application for leave is not maintainable.

3. The Additional District Judge, Agra vide judgment and order dated 12.8.1997 allowed the application and granted permission to file the suit under Section 92 C.P.C. Aggrieved by the aforesaid order, the defendants have preferred this civil revision under Section 115 C.P.C.

4. I have heard Sri Ravi Kiran Jain, Senior Advocate assisted by Sri Kshitij Shailendra for the defendant/revisionists and Sri B.D.Mandhyan, Senior Advocate assisted by Sri Tarun Gaur for the plaintiff (applicant)/opposite parties.

5. The basic argument of Sri Jain is that the impugned judgment and order is without jurisdiction. The Court at Agra had no jurisdiction to grant leave for institution of suit under Section 92 C.P.C. as no part of the property of the trust was situated in Agra at the relevant time.

6. Sri Mandhyan has countered the above argument by submitting that in fact one of the properties of the trust was at Agra and the illegal sale of the same would not affect the jurisdiction of the Court. He has further submitted that though no relief in respect of the property sold has been claimed in the proposed suit, nonetheless the action of the trustees in its sale was determintal to the trust as well as public at large therefore, a suit under Section 92 C.P.C. with the leave of the Court is maintainable.

7. Section 92 C.P.C. provides that where in a trust created for public charitable or religious nature there is any breach of such trust, the Advocate General or two or more persons having an interest in the trust with the leave of the court may institute a suit for a decree for the purposes specified therein including that of removal and appointment of trustees and rendering of the accounts. Thus, from the plain language of the aforesaid provision it is apparent that two persons having interest in the trust have a right to maintain a suit under Section 92 C.P.C. with the leave of the Court. However, the moot question which arises for consideration is as to which court is empowered to grant leave for institution of such suit or as to before which court such a suit would be maintainable.

8. In order to answer the above question, it would again be beneficial to refer to the provision of Section 92 C.P.C. itself which also provides the forum where such a suit is to be instituted. It lays down that a suit may be instituted in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate. Thus, such a suit can be instituted either:

(1) in the competent court of original jurisdiction; or

(2) in any other court empowered in that behalf by the State Government;

provided that such a court ought to be one within whose local limits of jurisdiction the whole or any part of subject matter of the trust is situate.

9. This above second part of Section 92 C.P.C. is most important and relevant for the purposes of determining the

jurisdiction of the civil court where a suit is to be instituted. It has to be a court where whole or any part of the subject matter of the trust is situate. This part refers and qualifies both the courts mentioned in the first part.

10. The subject matter of the trust in the instant case could have been the two properties one at Calcutta and the other at Agra. The property at Agra having been sold much before the application for leave to institute the suit was moved only the property at Calcutta was left with the Trust. Thus, on the date on which the application for leave was moved there was no property of the trust or any part of the subject matter of the trust at Agra. Therefore, to my mind, the court at Agra lacked inherent jurisdiction for entertaining the suit under Section 92 C.P.C. or to grant leave to to two or more persons to institute such a suit.

11. It is also relevant to note that the trustees against whom the suit is being proposed to be instituted are also not residing within the jurisdiction of the Court at Agra.

12. The view taken by me finds support from a decision of the Privy Council **Bilasrai Joharmal and another Vs. Shivnarayan Sarupchand and others AIR (31) 1944 PC 39** wherein the Lordships observed that the Court will not take upon itself the task to interfere with the administration of a charity when the charity has to be conducted in a different land outside the courts jurisdiction where the court is not in a position to supervise its administration effectively.

13. Sri Mandhyan had made a feeble attempt to defend the impugned judgment and order by saying that no such specific plea with regard to the jurisdiction was raised by the defendant/ revisionists in the court below and, therefore they cannot be permitted to raise it for the first time in the revision.

14. I am not at all impressed by the aforesaid submission. First, for the reason that there is a specific reference of such a plea in the impugned judgement itself. The impugned judgment refers to it in paragraph 3 as well as in paragraph 10 wherein it is mentioned that the property at Agra has been sold with the permission of the High Court at Calcutta and, therefore, the plaintiff/applicants have no right to file application under Section 92 C.P.C. Secondly where the question of jurisdiction goes to the very root of the matter, the plea of jurisdiction even if it has not been specifically raised in the court below, it can always be permitted to be raised in appeal/revision or even at any subsequent stage including that execution of the decree.

15. Their Lordships of the Privy Council in **Ram Lal Hargopal Vs. Kishanchandra and others 1924 PC 95** ruled that an objection to the jurisdiction, however late in the day may be raised, if on the facts admitted or proved it is manifest that there is a defect of jurisdiction.

16. Again in the case **Kiran Singh and others Vs. Chaman Paswan and others AIR 1954 SC 340** three Hon'ble Judges of the Supreme Court went on to observe as under:

"It is a fundamental principle that a decree passed by a Court without jurisdiction is a nullity and, that its

invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties."

17. A similar view has been expressed by the Supreme Court in ***Most. Re. P.M.A. and others Vs. Moran Mar Marthoma and another AIR 1995 SC 2001*** wherein the Court observed that plea of absence of jurisdiction of civil court can be raised and entertained at any stage.

18. In view of above facts and circumstances, I am of the opinion that the court below in passing the impugned judgement and order granting leave to the plaintiff (applicant)/opposite parties to institute the suit under Section 92 C.P.C. acted completely without jurisdiction as admittedly no part of the subject matter of the trust was situate at Agra at the relevant time.

19. Accordingly, the impugned judgement and order dated 12.8.1997 passed by the Ist Additional District Judge, Agra in Misc. Case No.417 of 1994 between Sharda Prasad Dwivedi and another and Gauri Shankar Saraogi and another suffers with jurisdictional error and is set aside. Consequently, the application for leave to institute the suit stands rejected.

20. This revision as such is allowed.

No order as to costs.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.07.2010

BEFORE
THE HON'BLE YOGENDRA KUMAR SANGAL, J.

Review Petition No. 264 OF 2006

Sant Bux Singh ...Petitioner
Versus
Deputy Director of Consolidation and another ...Respondent

Counsel for the Petitioner:
S.K. Mehrotra

Constitution of India Art.226- Review Petition-Writ Petition-Challenging the validity of order passed by consolidation authorities-D.D.C. Without discussion of facts and evidence-without application of mind-without recording any reason passed crypic order-petition also dismissed-order passed by writ court recalled-Review allowed.

Held: Para 10

Learned counsel further argued that court of Deputy Director of Consolidation is final court in the matter of Consolidation proceedings. When a revision is presented before the Deputy Director of Consolidation, it is expected from the court that it would take notice of the case of the parties and also evidence adduced by them and after taking into consideration the findings of the Courts below by giving his own finding and reason in brief on the points in dispute, the final order will be passed. Learned counsel for the petitioner argued that if we go through the judgment delivered by Deputy Director of Consolidation, we will find only in last 10 lines conclusion has been drawn without discussing evidence in brief that lower courts have taken into consideration the facts and circumstances of the case and evidence available on the record and scrutinized

the evidence properly and he is in agreement of the findings of the courts below. He has not given his own finding even in brief why the Will in favour of Sant Bux executed by Garibe is not reliable and should not given effect. He just acted on computerized system of administration of justice by just affixing a rubber stamp of approval on the concurrent decisions merely on the ground that they are based on the findings of fact. This cannot be said judgement in the eyes of Law. Learned counsel further argued that this aspect of the case also not seen in the matter while deciding the writ petition.

Case Law Discussed:

2005 (1) SCC 40, AIR 1962 Supreme Court 567, 2001 (19) LCD 527

(Delivered by Hon'ble Yogendra Kumar Sangal, J.)

1. This Review Petition was filed by the petitioner of Writ Petition No. 1082 (Cons.) of 2005 Sant Bux Singh vs. Deputy Director of Consolidation with the prayer to recall the judgement and order passed in the Writ Petition dated 3rd July, 2006 by this Court.

The aforesaid writ petition was filed by the petitioner with the prayer to set aside the orders dated 12.03.1999 passed by the C.O. (Consolidation Officer) rejecting his Objection under Section 9 of the Consolidation of Holdings Act (hereinafter referred to as the 'Act'), 30.08.2003 passed by the S.O.C. (Settlement Officer Consolidation) dismissing the Appeal and also another order passed by the D.D.C. (Deputy Director of Consolidation) dated 23.07.2005 dismissing the Revision also.

Undisputed facts of the case are that one Garibe S/O Jodha was recorded tenure-holder of Plot Nos. 56, 60 and 45 in the basic year in revenue record when the Consolidation operation was started in the area where this land situated. In the record on land of Plot Nos. 56 and 45 name of Garibe was recorded as sole tenure-holder while on the land of Plot No. 60 his name was recorded as co-sharer along with other tenure-holders. Garibe S/O Jodha had died on 05.05.1985. Sant Bux Singh, the petitioner his Nephew i.e. Son of real Brother of Garibe while respondent no. 2, Smt. Bindeshwari is daughter's married daughter of Garibe. Petitioner claimed himself by filing objection under Section 9 of the C.H. Act entitled to be recorded tenure holder on the land of Garibe on the basis that no other male member in the family of Garibe except him surviving. Later on he also claimed by amendment in objection that he is entitled to get recorded his name in the revenue record on the basis of last Will executed by Garibe on 28.04.1985. This prayer of amendment in Objection was earlier rejected by the C.O. and also by the S.O.C. in Appeal but later on in Revision, D.D.C. had allowed it and permitted to amend his Objections as prayed.

2. On the other hand, respondent no. 2 Smt. Bindeshwari also claimed herself heir of Garibe on the basis of another Will registered on 17/18.05.1982 and executed by Garibe and filed Objection to record her name on the land in dispute. Both the parties filed documents and led oral evidence in support of their respective cases before the C.O. After going through evidence on record C.O. rejected the claim of Sant Bux Singh and ordered to enter the name of Smt. Bindeshwari Devi in place of Garibe in record on the basis of Will in her favour. Appeal filed before the S.O.C. and Revision filed before the

D.D.C. by petitioner both were also dismissed. Writ Petition No. 1082(Cons.) of 2005 was filed challenging the aforesaid three orders but the same was also dismissed. Aggrieved by this order, the instant Review Petition has been filed by Sant Bux Singh.

Undisputedly, this Review Petition was filed well within time. For disposal of the Review Petition Notice was served on the counsel for the respondent No. 2, Shri Pankaj Gupta through counsel for petitioner applicant who appeared on the date fixed for hearing. He has not pressed for time to file objections in the review case. File of the writ petition already available. On the request of parties' counsel their arguments as well as of learned Standing Counsel were heard on merit and record was perused.

3. It was argued on behalf of the review petitioner that this Court while dismissing the writ petition not considered the points raised on behalf of the petitioner and decided the matter on the points which were not raised from the petitioner's side. It was further argued that Supplementary Affidavit filed on behalf of the petitioner vide Application No. 725(W) of 2006 and documents annexed with it, although the same was replied on behalf of the respondent no. 2 through counter affidavit, were not taken into consideration by this Court. In the Supplementary Affidavit it was pointed that Consolidation Officer referring the order dated 21.12.1992 passed by the Additional Munsif 3rd in civil case pending between the parties in civil court wrongly observed that the Munsif court had believed the Will in favour of Smt. Bindeshwari by Garibe and held it reliable. The above finding recorded by the Consolidation Officer was totally incorrect as the above court did not record any such finding about the above Will in his order dated 21.12.1992 and he had annexed the certified copy of order as Annexure S-2. This incorrect finding affected the final judgment of C.O. This aspect of case was not taken into consideration by the Court while deciding the writ petition.

4. Copy of the Will executed by Garibe in favour of the petitioner was also available filed along with the Supplementary Affidavit and from its perusal, it is clear that detail of immovable properties which were bequeathed by Garibe in favour of the petitioner are given in Paragraph 1. Arrangement for the maintenance and livelihood of daughter of Garibe namely Dashrath Devi was also made in the Will in Paragraph 3 where it is said that she will live in the house (also bequeathed to petitioner) during her life time and Sant Bux will maintain her during this period. Only after her death possession of the house will be taken by Sant Bux or his heirs. Learned counsel for the applicant argued that when such conditions were there in the Will, if Sant Bax failed to maintain her during her life time, Law will take its own course and Dashrath Dei will be in a position to get enforced conditions through legal proceedings. There is also specific averments in the Will why he is bequeathing his property in favour of Sant Bux. It was also specially mentioned in the last two lines that earlier Will executed by him shall stand revoked /cancelled and this is his last Will. Learned counsel for the review-petitioner argued that all these facts detailed in the Will clearly shows that some how these were escaped from

the notice of the Court when the impugned judgement was pronounced which is apparent error on the face of record because it was observed in it that these details are not there in Will and this error effected the decision. On the other hand, learned counsel for the respondent no. 2 argued that after going through the record impugned order was passed. I have gone through the copy of the Will available on record and found that details are there and this grave and apparent error arose in the judgement. It appears that availability of the supplementary affidavit was escaped from the notice of this Court while passing the impugned order.

5. It was further argued that undue emphasis was given on this point by the Consolidation Authorities and also taken into consideration by this Court also while dismissing the writ petition that Will in favour of the respondent no. 2 is a registered one while Will executed in favour of the review-petitioner is an un-registered document. Law is clear on this point as held by the Apex Court in 2005 (1) SCC 40 Daulatram Vs. Shodha and others and also in AIR 1962 Supreme Court 567 Rani Purnima vs. Kunwar Khagendra, that mere fact a Will is registered Will not by itself is sufficient to dispel all suspicion regarding it. Learned counsel for the petitioner argued that it was not seen either by the Consolidation Authorities and also by this Court in dismissing the writ petition that at the time of registration of the Will in favour of respondent no. 2, whether it was checked by the Registration Authority that Testator knew that it is Will being executed which he is admitting and signing the same. It is also to be seen that the Officer registering the Will read it over to the testator or not and the testator admitted the execution before the Officer registering the Will, but not clear from the record whether these facts were seen and considered. In Daulatram Case, the Apex Court upheld the genuineness of un-registered Will revoking/cancelling the earlier registered Will .

6. Civil Suit was pending between the parties which is clear from the record. Two Wills executed in favour of the parties by Garibe were also in dispute in that Civil Suit, it is also clear from the record and also not disputed by the parties counsel at the time of arguments. Consolidation Authorities and also this Court while deciding the Writ Petition has not taken pre-caution to avoid the contradictory finding which may be possible by two courts i.e. Consolidation court and also by the Civil Court in the pending suit regarding the same Will. It is also in the finding of the Consolidation Officer that there was one own Son of Garibe, where he has gone and why his rights about the property and his maintenance not considered by the Consolidation Officer when interest of daughter of Garibe was considered, it is also not clear from the record.

Another fact taken into consideration by the Consolidation Authorities and by this Court was that after filing his first Objection before the Consolidation Officer, petitioner got amended his Objection and he had pleaded case of Will in his favour by Garibe after two years. It is correct that there is delay on the part of Sant Bux in this regard but his amendment application which was firstly rejected by the Consolidation Officer then the

Appeal filed was also dismissed by the S.O.C. was allowed the by the D.D.C. in Revision filed and he was permitted to plead case of Will in his favour by Garibe about the property in dispute. It is established Law that amendment in the pleading relates back to the date of presentation of the plaint or Written Statement. Moreover, this Court in 1984 92) L.C.D 319 Zazbalnisa Vs. Bachchu and others held that a Will relied upon by the Objector cannot be rejected merely on the ground that there was no reference of it in the Objections filed on his behalf. Moreover, after this amendment, respondent no. 2 was allowed sufficient time to file reply of the same and she did so. Later on fresh issues were framed and evidence of the parties was recorded on this point. There will be any material effect of this delay on his part in raising this plea in these circumstances it was also not considered.

7. From the record it is clear that Garibe has also revoked his first Will deed bequeathing his property in favour of one Deen Dayal and by 2nd Will deed he bequeathed his property in favour of respondent no. 2. Now, if he again revoked his this Second Will and bequeathes his property in favour of the petitioner how it matters. Sant Bux is also not an unknown person to the family of Garibe. He is son of his real Brother and he claimed that he is the only surviving male member in the pedigree of Garibe. Reasons are there in Will-deed why he is bequeathing property in his favour. Learned counsel for the applicant argued that these circumstances were also not considered by the Consolidation Authorities and also by this Court at the time of disposal of the Writ Petition. It appears that simply seeing concurrent findings of Consolidation authorities, writ petition was dismissed. My attention was drawn by the learned counsel for the review-petitioner on the case Law reported in LCD 1999 (17) 134 Smt. Ram Devi Vs. 8th Additional District Judge, Kanpur which was also referred in the impugned judgement where this Court has laid down as follows :

"Constitution of India, Article 226 ..... concurrent decisions, interference in....Held, it is the duty of the court to examine the material and do justice between the parties..... It will be denial of justice, if court acts on computerized system of administration of justice by just affixing a rubber stamp of approval on concurrent decisions merely on the ground that they are based on findings of the fact."

8. With reference to the above Law, learned counsel for the petitioner argued that it is denial of justice, in the present case also, because for the reasons attention of the court escaped from the the facts detailed in the Will executed by Garibe in favour of Sant Bux where all these details were given which are said not given in the Will by Garibe in the impugned judgement.

9. Learned counsel for the respondent No. 2 argued that Review Petition is not maintainable against the impugned order. Learned counsel for the petitioner argued that there is nothing in Article 226 of the Constitution of India to preclude the High Court from exercising the power of Review which inheres in every court of the plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. It may be

exercised where some mistake or error apparent on the face of record is found and it may also be exercised on any analogous ground.

In case, 2001 (19) LCD 527 M.M. Thomas Vs. State of Kerla, Apex Court held that if any apparent error is noticed by the High Court in respect of any order passed by it, the High Court has not only power but a duty to correct it. The High Courts power in that regard is plenary. High Court is court of record has inherent powers to correct the record. The burden to prove that Will in favour of Sant Bux executed by Garibe was forged or was obtained by undue influence or by playing fraud was on respondent no. 2. It was also to be seen whether respondent no. 2 has discharged its burden or not. It was argued that this important aspect of the matter was also not considered in deciding writ petition.

10. Learned counsel further argued that court of Deputy Director of Consolidation is final court in the matter of Consolidation proceedings. When a revision is presented before the Deputy Director of Consolidation, it is expected from the court that it would take notice of the case of the parties and also evidence adduced by them and after taking into consideration the findings of the Courts below by giving his own finding and reason in brief on the points in dispute, the final order will be passed. Learned counsel for the petitioner argued that if we go through the judgment delivered by Deputy Director of Consolidation, we will find only in last 10 lines conclusion has been drawn without discussing evidence in brief that lower courts have taken into consideration the facts and circumstances of the case and evidence available on the record and scrutinized the evidence properly and he is in agreement of the findings of the courts below. He has not given his own finding even in brief why the Will in favour of Sant Bux executed by Garibe is not reliable and should not given effect. He just acted on computerized system of administration of justice by just affixing a rubber stamp of approval on the concurrent decisions merely on the ground that they are based on the findings of fact. This cannot be said judgement in the eyes of Law. Learned counsel further argued that this aspect of the case also not seen in the matter while deciding the writ petition.

11. From the above discussions and circumstances and also taking into consideration the arguments of the parties' counsel I am of the view that argument raised by the learned counsel for appellant are not without force and has some subsistence. There are sufficient reason to exercise the power of reopen the matter in the interest of justice. There is mistake and also self-evident error on the face of the record in the impugned order. The same is hereby recalled. The application to review the impugned judgement is allowed. Writ Petition be registered on its original number and be listed again for hearing before appropriate Bench. Needless to mention that the matter in writ shall be decided afresh and any observation made in this judgment regarding merit of the case will not come in the way of the appropriate bench.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.07.2010

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

Special Appeal No. 276 of 2003

Vivek Yadav ...Petitioner/Appellant
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Vinay K. Gupta

Counsel for the Respondents:
C.S.C.

U.P. Recruitement of Dependent of Govt. Servants Dying-in-Harness Rules 1974-Rule-5- Application for compassionate appointment by minor-Rejected on ground of time barred beyond statutory period of 5 years-although application moved by the petitioner-appellant within 5 years on achieving the age of majority-held-being beneficial piece of legislation-confers power to relax the delay-application must by competent person a minor is no competent unless attain age of 18 year- the authority as well as Single Judge-can not ignore this aspect.

Held: Para 8

The power to relax itself contemplates that in a particular case, the matter has to be dealt with in a just and equitable manner. In other words, the test to be applied is does the family of the deceased continue to suffer financial distress and hardship occasioned by the death of the breadwinner so as to relax the period within which the application could be made. These are matters of fact, which the competent authority would have to consider. In the instant case, what we find is that the application was rejected merely because it was beyond the time prescribed.

Case law discussed:
(1994) 4 SCC 138, [(2009) 13 SCC 122], [(1998) 9 SCC 485], [(1996) 8 SCC 23, [2000 (2) UPLBEC 1694].

(Delivered By Hon'ble Ferdino Inacio Rebello, C.J.)

1. This special appeal is preferred by the appellant, who sought appointment on compassionate basis on attaining majority after the death of his father on 26th of May, 1986. Late father of the appellant was working on the post of Assistant Agriculture Inspector in Rajkiya Krishi Beej Bhandar, District Rae Bareli. On account of the death of his father, who was the sole bread earner, the entire family is facing financial crunch and it became impossible for the family to make both ends meet. The family of the deceased had no immovable property and they are living in the rented house and there was nobody to support the family. The mother of the appellant was illiterate and was not aware of the benefits and thus, did not claim compassionate appointment under the State Rules, which are known as U.P. Recruitment of Dependants of Government Servants Dying-in-Harness Rules, 1974 (hereinafter referred to as 'the Rules'). The appellant was born on 2nd of February, 1984 and on completion of 18 years of age, he preferred a representation dated 4th of August, 2001 before the District Agriculture Officer requesting for his appointment on compassionate basis as the financial and social problems occasioned by the death of his father continue. The family of the appellant consists of his mother, three sisters and another brother. The mother of the appellant also gave no objection on 29th

of August, 2001. Though the authorities below forwarded and recommended the case of the appellant for relaxing the condition to make the application in time, the same was not acted upon. Thereafter the appellant finally made a representation to the Minister of Agriculture, to which he received an order issued on 28th of February, 2002, rejecting the representation on the ground that the representation made by the appellant for appointment on compassionate basis was time barred and there was no justification for granting compassionate appointment to him. The said letter was served upon the appellant only on 22nd of October, 2002.

The appellant, thereafter preferred a writ petition before this Court. A learned Judge of this Court, vide his order, which is subject matter of the present appeal, was pleased to hold that the writ petition lacks merit and is dismissed. The stand of the State-respondents is that the writ petitioner's application was barred by time and, therefore, they refused to extend the benefit of relaxation on the ground that there is no justification for relaxation.

2. The contention on behalf of the appellant is that no reason had been assigned for rejecting his application. The learned Judge was pleased to hold that before such an argument could be advanced, the appellant-writ petitioner should have demonstrated that any right of the appellant-writ petitioner is affected. The learned Judge further observed that since the appellant-writ petitioner applied beyond the limitation prescribed by the Rules, which was five years, he could not establish his right and once the right is not established, he cannot invoke the discretion of the State for relaxation, in the event of his claim being time barred. It is this matter, which the subject matter of the present appeal.

3. The relevant rule for consideration of appointment on compassionate basis is rule 5 of the Rules, 1974, which reads as follows:-

"5. Recruitment of a member of the family of the deceased.- (1) In case a Government servant dies in harness after the commencement of these rules and the spouse of the deceased Government servant is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purposes, be given a suitable employment in Government service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules if such person-

(i) fulfils the educational qualifications prescribed for the post,

(ii) is otherwise qualified for Government service, and,

(iii) makes the application for employment within five years from the date of the death of the Government servant:

Provided that where the State Government is satisfied that the time-limit fixed for making the application for employment causes undue hardship in any

particular case, it may dispense with or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner.

(2) As far as possible, such an employment should be given in the same department in which the deceased Government servant was employed prior to his death.

(3) Each appointment under sub-rule (1) should be under the condition that the person appointed under sub-rule (1) shall upkeep those other family members of the deceased Government servant who are incapable for their own maintenance and were dependant of the abovesaid deceased Government servant immediately before his death."

4. A perusal of Rule 5 would show that an application for employment on compassionate basis is to be made within five years from the date of death of the deceased Government servant. There is a proviso conferring power upon the Government for relaxing the time-limit fixed for making such application, where the Government is of the opinion that it causes undue hardship and for dealing with the case in a just and equitable manner. Reading of this rule would demonstrate that the application must be by a competent person, who is competent to make it. A minor, therefore, could not have made application. The time-limit for an application contemplated by the rule, therefore, could only be read to mean 'by a competent person', in other words, who has attained the age of majority. In a case, where the applicant is minor, it would not be possible for the minor to make an application for various reasons including that he is minor and as such he cannot be appointed to a post in the Government. Rule 5, therefore, will have to be read in such manner that it gives effect to the policy of the Government, which is to provide employment to a member of the family of a government employee, who dies in harness, so as to mitigate the hardship. The issue whether the family of the deceased over long passage of time continues to face the hardship, would be examined on the merits of the claim. Rule 8 of the Rules, 1974 itself contemplates that a candidate seeking appointment under the Rules must not be less than 18 years of age at the time of appointment. In the instant case, as averred by the appellant, his mother was uneducated or illiterate, he was a minor though the elder son and there were elder sisters. Therefore, in such cases, considering the object of the Rules, the proviso to Rule 5 must normally be exercised, as for the purpose of dealing with the cases in a just and equitable manner. In exercising such discretion, no doubt, the authority exercising the discretion will examine the record before him.

5. The law on the subject of compassionate appointment is no longer *res-integra.* The claim for appointment on compassionate basis is on the premise that such person or his family were dependants on the earning of the deceased employee. This claim is considered reasonable, though otherwise it could be violative of Articles 14 and 16 of the Constitution of India. The reason being that the family suffers a sudden crisis on the death of employee, who had served the State and died in service. In **Umesh Kumar Nagpal v. State of Haryana and Ors.**, (1994) 4 SCC 138, the Supreme Court was pleased to observe as under:-

"The appointment on compassionate ground cannot be a source of recruitment. It is merely an exception to the requirement of law keeping in view the fact of the death of employee while in service leaving his family without any means of livelihood. In such cases, the object is to enable the family to get over sudden financial crisis. Such appointments on compassionate ground, therefore, have to be made in accordance with Rules, Regulations or administrative instructions taking into consideration the financial condition of the family of the deceased. This favourable treatment to the dependant of the deceased employee must have clear nexus with the object sought to be achieved thereby, i.e. relief against destitution. At the same time, however, it should not be forgotten that as against the destitute family of the deceased, there are millions and millions of other families which are equally, if not more, destitute. The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectation, and the change in the status and affairs of the family engendered by the erstwhile employment, which are suddenly upturned."

6. The law on the subject has been reiterated in a recent decision of the Supreme Court in **M/s Eastern Coalfields Ltd. V. Anil Badyakar & Ors.** [(2009) 13 SCC 122]. The law, therefore, as declared is that the object of compassionate appointment is to enable a family of the deceased employee who are in penury to tide over the sudden financial crisis and not to provide employment. Mere death of an employee therefrom by itself does not entitle his family to compassionate appointment. At the same time, the Supreme Court has observed in **S.Mohan V.Government of T.N.** [(1998) 9 SCC 485] that the compassionate employment cannot be claimed and offered whatever the lapse of time and after the crisis is over. The Supreme Court in **Haryana State Electricity Board V. Naresh Tanwar** [(1996) 8 SCC 23, observed as follows:-

"It has been indicated in the decision of Umesh Kumar Nagpal that compassionate appointment cannot be granted after a *long lapse of reasonable period* and the very purpose of compassionate appointment, as an exception to the general rule of open recruitment, is intended to meet the immediate financial problem being suffered by the members of the family of the deceased employee. In the other decision of this Court in Jagdish Prasad case, it has been also indicated that the very object of appointment of dependent of deceased employee who died in harness is *to relieve immediate hardship and distress caused to the family by sudden demise of the earning member of the family and such consideration cannot be kept binding for years.*

7. This Court in several decisions has taken note of the fact of an application being made by a member of the family on attaining majority. In **Manoj Kumar Saxena Vs. District Magistrate, Bareilly and Others** [2000 (2) UPLBEC 1694], the learned Judge of this Court considered the various other judgments holding that when an application is being moved for appointment on compassionate basis of a member of the family on attaining majority, because he was minor at the time of the death of his father, it cannot be said that there was delay in moving the

said application by the petitioner for consideration.

In our opinion, that really may not be a correct reading of the rule as that would contemplate that the rule would stand suspended till such time a minor attains majority and thereafter the minor within 5 years on attaining majority could make application. No provision whether it be primary or sub-ordinate legislation must be read even if it be a beneficial piece of legislation which has the effect of adding words against the expression of language of the provision. The proviso, in our opinion, which confers power to relax the delay in making an application within five years, also must be read to include consideration of an application even after expiry of 5 years if the applicant was a minor at the time of death of the deceased employee and makes an application within reasonable time of attaining majority.

8. The power to relax itself contemplates that in a particular case, the matter has to be dealt with in a just and equitable manner. In other words, the test to be applied is does the family of the deceased continue to suffer financial distress and hardship occasioned by the death of the breadwinner so as to relax the period within which the application could be made. These are matters of fact, which the competent authority would have to consider. In the instant case, what we find is that the application was rejected merely because it was beyond the time prescribed.

9. The learned Judge, while dismissing the writ petition was pleased to hold that the appellant-writ petitioner was unable to establish his right, therefore, he was not entitled to invoke the extra-ordinary jurisdiction of this Court. The right of compassionate appointment does not confer a right, but it does give rise to the legitimate expectation in a person covered by the Rule that his application should be considered, if otherwise he meets with the requirement. Once that be the case, an applicant whose claim is rejected can invoke the extra-ordinary jurisdiction of this Court.

10. In our opinion, therefore, the application moved by the appellant was maintainable. No purpose at this stage will be served by remitting the matter back to the authority for re-consideration. The record would show that the appellant had made out a case for invocation of the power in the authority to waive the time for moving the application. That, however, does not mean that the appellant, as a matter of course, should be entitled for being considered for employment under the Rules. The competent authority will have to be satisfied on the basis of the materials before it that the appellant's case is a fit one for compassionate appointment, which would include consideration of the financial status of the family of the appellant since the time of death of his father till date and whether they continue to exist in penury or financial distress.

11. We may also observe in parting that in such matters, ordinarily the appeals should be disposed of at the threshold itself as they brook no delay. The impugned judgement of the learned Judge is of the year 2003. The appeal is now heard by this Bench in the year 2010, after seven years. It is no doubt true because of the docket explosion, Courts are hard pressed for time. Considering the

issue which is penury or financial hardship, ordinarily the matter must be dealt with at the earliest. The authorities also who have to consider the application, must complete this exercise of consideration within six months of the application being received.

12. The appeal is accordingly, **allowed**. The impugned judgement of the learned Judge dated 5th of February, 2003 and the order dated 28th February, 2002 are set aside. The competent authority, on a copy of this judgement being served on it, to take a decision in accordance with law at any rate not later than eight weeks from today and communicate the same to the appellant. It will be open to the competent authority to call for additional details considering the long passage of time. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.07.2010

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE YOGENDRA KUMAR SANGAL, J.

Habeas Corpus No. 383 of 2010

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

Counsel for the Petitioner:
Sri Akhter Abbas

Counsel for the Respondent:
Advocate General
G.A.

Constitution of India Art. 226- Habeas Corpus writ-Petitioner alongwith his wife detained in Police Station inspite of stay of arrest-detention of 5 days-Police tried to justified its stand in garb of medical check up-held-unjustified in absence of statutory provisions court issued guide lines-strictly prohibited the detention at Police station for more than 24 hours for medical check-up-govt. Directed to take follow up action by forthwith.

Held: Para 48 & 50

Thus, for the police, if it is permitted to keep a witness in the premises of police station awaiting medical opinion, then so far as the reputation and dignity of the person concerned in the eyes of common citizen is concerned, undoubtedly, a long stay in the premises of the police station shall tarnish the image and reputation of such person. Of course, in case there would have been some statutory provisions to deal with such situation validating the police action, there may be valid ground for detention or stay of a witness in the eyes of common citizen but in absence of any statutory provision, such action shall adversely affect the dignity of such person in peoples' eye.

In view of above, we allow the writ petition and issue a writ in the nature of mandamus commanding the state of U.P. as under:

1. No person who is a witness in a case, female or male shall be permitted to reside or be detained in the police station awaiting medical check-up or medical report or for any other reason for more than 24 hours. For medical examination, such person may be permitted to stay for limited period to the maximum of three days in the hospital/Primary Health Centre or other statutory home or shelters. If necessary, appropriate police protection may be provided during such stay at a place other than police station.

2. The Government shall ensure that the medical examination of the prosecutrix or a witness or the person involved in a criminal case be done on the same day or within the maximum period of 24 hours and the hospital/Primary Health Centre

shall ensure to submit the report by the next 24 hours to the police station concerned. Let appropriate circular be issued accordingly forthwith.

3. The Chief Secretary, Government of U.P. Is directed to appoint a Committee of experts which shall frame appropriate guidelines for medical examination/submission of the report to the police/investigating agency keeping in view the time involved in such medical or pharmacological examination, expeditiously and preferably within a period of two months from the date of receipt of a certified copy of this order.

Since the petitioner No.2 was kept in the premises of the police station for about two weeks without justifiable reason causing mental pain and agony and her stay has been held to be violative of Art. 21 of the Constitution of India, she shall be entitled for the compensation/cost, to the tune of Rs.25, 000/-from the state Government which shall be deposited in this Court within two months from today with liberty to the petitioner to withdraw the amount so deposited.

It shall be open for the petitioners to avail appropriate remedy for further compensation and action permissible under law.

Case law discussed:

AIR 1936 PC 253, AIR 1961 SC 1527, AIR 1963 SC 1077, AIR 1964 SC 358, AIR 1967 SC 295, (Para 34), 1999 (8) SCC 266, 2000 (7) SCC 296, AIR 2001 SC 1512, 2002 (1) SCC 633, AIR 2004 SC 486, AIR 2004 SC 1657, (1876) 1 Ch.D. 426, AIR 1972 SC 2077, AIR 1975 SC 915, AIR 1979 SC 1573, 1995 (1) SCC 156, AIR 1986 SC 2160, AIR 1980 SC 326, 2004 (12) SCC 713, 2001(6) SCC 496, AIR 1991 SC 1902, AIR 2007 SC 1046, 2006(13) SCC 382.

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

1. Present writ petition in the nature of habeas corpus has been preferred asserting that the petitioners were unlawfully detained by the police in pursuance to a First Information Report lodged on the allegation that the petitioner No.1 Sartaj had abducted the petitioner No.2 Afreen Bano who is alleged to be a minor.

Brief facts giving rise to the present controversy are discussed hereinafter :

2. A First Information Report dated 12.4.2010 in Crime No.391 of 2010 under Sections 363/366 I.P.C. was registered at Kotwali Nagar, Sitapur with the allegation that the petitioner No.1 abducted the petitioner No.2 Afreen Bano, a minor with oblique motive. Apprehending arrest in pursuance to the allegation contained in the First Information Report, the petitioner No.1 had preferred a writ petition No.4158(M/B) of 2010 in which by an interim order dated 6.5.2010, a Division Bench of this Court had stayed the arrest of the petitioner No.1 till filing of the charge-sheet. A copy of the interim order dated 6.5.2010 passed in writ petition No.4158M/B) of 2010 has been annexed as Annexure No.3 to the writ petition. It has been stated by the petitioner No.1 that in spite of the interim order passed by this Court, he was arrested by the police on 1.6.2010 and continued under detention up to 5.6.2010. It has also been asserted that Smt. Afreen Bano was also detained in the police station for about fourteen days.

3. The petitioners have pleaded that they entered into wedlock on 6.4.2010 through Nikah at Roop Nagar, Punjab. The petitioner No.2 passed High School with Roll No.0922313 and in the High School certificate (annexure No.2), her date of birth has been recorded as 20.4.1992. Accordingly, the submission is

that the petitioner No.2 attained the age of majority on 19.4.2010. Since she attained the age of majority, she could not have been arrested by the police in the month of June, 2010.

4. On the other hand, it has been stated by the learned Advocate General that the petitioner No.2 was recovered by the police on 2.6.2010 and on the same day, medical examination was done. X-Ray was done on 3.6.2010 in district hospital Sitapur and she was permitted to stay in the house of lady Station House Officer of Mahila Thana Smt. Indu Chaubey Srivastava. Learned Advocate General emphatically argued that the petitioner No.2 was never detained or apprehended by the police. However, since the entire medical check-up was not done, she was permitted to stay in the house of Station House Officer of Mahila Thana from 2.6.2010 to 14.6.2010. On 14.6.2010 in pursuance to the order passed by this Court, she was sent to Nari Niketan, Lucknow and later on released on 17.6.2010 by Court's order. It has been further stated that the medical report was received on 16.6.2010. According to the medical report, she has attained the age of majority. The State has justified the stay of Afreen Bano at the residence of Station House Officer till receipt of the medical report on the ground that there was no place to keep her.

5. Rebutting the submission of the learned Advocate General, Shri Akhtar Abbas, learned counsel appearing for the petitioners submitted that the petitioner No.2 Afreen Bano was detained by the police forcibly at Mahila Thana for about fourteen days against all canons of justice which amount to custodial violence. It has been submitted that since the medical examination was done on 2.6.2010 and X-Ray admittedly was done on 3.6.2010, the respondents were not justified to detain the petitioner No.2 at police station. The submission is that only because the X-Ray report was not received, the police was not justified to detain the petitioner No.2 at police station. The petitioners' counsel has relied upon the judgments reported in 1997 Vol. 1 SCC 416 D.K. Basu versus State of West Bengal, (1997) 6 SCC 241 Vishaka and others versus State of Rajasthan and others, 1973 Cri.L.J. 1880 Ramdhani Pandey versus State of M.P., 2003 Cri.L.J. 1464 Mahendra Jain(Patni) and etc. versus Union of India and etc., 1995 Cri.L.J. 2754 A. Nallasivan versus State of Tamilnadu and others.

6. Attention of the court has been invited by the learned Advocate General to Regulation 162 of the U.P. Police Regulations which provides that as a rule, minor girls, specifically those termed as 'strayed' should not be kept in the custody of the police but in all such cases where the hospital or the dispensary with family accommodation exists, such girls should be made over to the hospital authorities as dieted patients.

7. The substantial question of law of public importance involved is:

"Whether a lady or a minor girl not being accused in a criminal case may be detained or permitted to stay at police station on any ground whatsoever ?

8. In the present case, admittedly, according to the High School certificate, Afreen Bano, petitioner No.2 has attained the age of majority, i.e. exceeded the age of eighteen years, though on the date of alleged occurrence, she seemed to be

minor. A statement was made before the Court that Afreen Bano wants to stay with Sartaj Ahmad, petitioner No.2. Accordingly, under police protection, she was permitted to go Hardoi along with the petitioner No.1 on 17.6.2010 subject to investigation of the pending criminal case. A defence has been taken by the State that the petitioner No.1 was never arrested and on 4.6.2010, he was called at police station so that his statement under Section 161 CrPC could have been recorded.

9. So far as the detention of the petitioner No.2 at the police station is concerned, it does not seem to be justified. The petitioner No.2 had attained the age of majority when she was recovered by the police on 2.6.2010. Though a defence has been taken that she stayed voluntarily at the house of Station House Officer of Mahila Thana, Sitapur along with her mother but defence taken by the police does not inspire confidence. Though the petitioner No.2 before the Court tried to submit that she stayed on her own but the surrounding facts and circumstances and the material on record do not speak so.

10. The only reason assigned by the respondents with regard to stay or detention of the petitioner No.2 at the police station is non-availability of medical report. According to the learned Advocate General, the medical report was received only on 16.6.2010. Whether non-availability of medical report justifies the police to keep a lady in the premises of police station. Why a lady along with her mother will stay at the police station when their house is situated in the same district at the distance of some kilometer? Whether non-availability of medical report justified the detention of the prosecutrix in the police station voluntarily or involuntarily? No material has been placed on record that the stay of the petitioner No.2 in the police station at the residence of Station House Officer, Mahila Thana was in accordance with some rules or regulations or entry was made in the general diary assigning reasons. On the one hand, the police asserts that the stay was voluntarily and on the other hand, it has been stated that since the medical report was not made available by the hospital, the petitioner No.2 and her mother kept at the residence of the Station House Officer, Mahila Thana. The defence taken by the police seems to be self-contradictory.

11. In the case of Ramdhani Pande(supra), the Madhya Pradesh High Court held that restricting movement of a person by the police against his or her will amounts to arrest or unlawful detention.

12. In the case of Mahendra Jain(Patni), the Calcutta High Court ruled that in case a person is detained under the garb of interrogation for prolonged period, such person could be treated at par with accused and it will amount to custodial violence and violative of Article 21 of the Constitution of India.

13. In the case of A. Nallasivan(supra), Madras High Court declared an overnight detention of 90 women and 28 children in the Forest Ranger's Office as illegal and directed for C.B.I. enquiry.

14. Coming to the facts of the present case, the reason assigned by the police with regard to detention or stay of the petitioner No.2 at the house of Station House Officer, Mahila Thana for about

two weeks seems to be a cooked up defence. After X-Ray on 3.6.2010, the petitioner No.2 should have been set at liberty to go her mother's house or wherever she wanted. Neither any restriction could have been imposed by the police nor she should have been permitted to stay in the police station alleged to be at the residence of Station House Officer along with her mother awaiting the medical report. Such action on the part of the police amounts to restrict the liberty of a person, hence violative of Art. 21 of the Constitution of India. In any case, the petitioner could not have been detained at the police station awaiting medical report – whether it is voluntary or involuntary. In absence of powers conferred by the rules, the prosecutrix or the female or male witness of a case cannot be compelled to reside in the premises of the police station awaiting medical report. Such restriction under the garb of voluntary act amounts to abuse of process of law and an act of highhandedness on the part of the police.

15. In Immoral Traffic (Prevention) Act, 1956, an accused may be kept under safe custody in pursuance to the order, passed by the appropriate Magistrate under Section 17 of the Act to the maximum period of ten days.

16. Section 27 of the Act commands the State to establish protective homes. However, the case of the petitioner No.2 does not fall within the ambit of Immoral Traffic (Prevention) Act, 1956.

17. The Parliament has legislated the Juvenile Justice (Care and Protection of Children) Act, 2000 (In short, Act) for proper care, protection and treatment of children catering to their development needs and adopting a child friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation.

18. Under Section 34 of the Act, it is the duty of the state to establish and maintain children's home in every district or group of districts.

19. Section 37 empowers the State government to recognize the reputed and capable voluntary riminalizati and provide them assistance to set up and administer shelter homes for juveniles as may be required.

20. The Juvenile Justice (Care and Protection of Children) Rules, 2007 (in short, Rules) contains detailed provision for protection and rehabilitation of children. The fundamental principles which should be followed in the matter of children is given in Rule 3 of the Rules which consists principle of presumption of innocence, principle of dignity and worth, principle of right to be heard, principle of best interest, principle of family responsibility, principle of safety, i.e. no harm, no abuse, no neglect, no exploitation and no maltreatment, positive measures which involves the full mobilization of all possible resources, including the family, volunteers and other community groups, the principle of non-stigmatizing semantics, decisions and actions, principle of non-waiver of rights, principle of equality and non-discrimination, principle of right to privacy and confidentiality, principle of last resort, i.e. institutionalization of a child or juvenile in conflict with law and principle of repatriation and restoration, i.e. right to be re-united with family and

restored back to the same sociao-economic and cultural status that such juvenile or child enjoyed before coming within the purview of the Act and lastly the principle of fresh start, i.e. promote new beginning for a child.

21. Under Rule 29 of the Rules, children's homes are to be constructed and under Rule 30, shelter homes for short stay should be riminaliz or earmarked.

22. Chapter V of the Rules deals with rehabilitation and social reintegration. Rule 38 of the Rules provides that the State shall set up an after care programme for the care of juveniles or children. The after care programme shall be made available for children aged 18-21 years. Rule 38 contains various necessary conditions to formulate after care programme for juvenile or children. Chapter VI of the Rules contains the standards of care for institutions. In nutshell, the Act and the Rules framed thereunder containing various provisions to take care of the children involved in criminal cases does not seem to cover the present controversy where the prosecutrix/petitioner No.2 stood as a witness in the criminal case and not an accused.

23. Much emphasis has been given to Regulation 162 of the U.P.Police Regulation which is reproduced as under:

"162. As a rule, minor girls, especially those termed as 'strayed' should not be kept in the custody of the police. In all cases where a hospital or dispensary with female accommodation exists, such girls should be made over to the hospital authorities as dieted patients.

The period for which it will be necessary for the dispensary to keep such girls will not exceed fifteen days save with the consent of the district board concerned."

24. The provisions contained in Regulation 162 of the U.P. Police Regulations does not seem to make out a case to defend the police action. The permissible limit of fifteen days may be enjoyed by placing the girl in the hospital and not within the premises of police station. Moreover, Regulation 162 of the Police Regulations seems to become redundant in view of the Juvenile Justice (Care and Protection of Children) Act, 2000. The provisions contained in U.P. Police Act regulating the minors' custody cannot be read in derogation of the statutory provisions (supra).

25. In the case of D.K. Basu(supra), their Lordships of Hon'ble Supreme Court has issued certain guidelines with regard to arrest and handling the interrogation of the arrestee. For convenience, relevant portion is reproduced as under:

"We therefore, consider it appropriate to issue the following requirements to be followed in all cases of arrest or detention till legal provisions are made in that behalf as preventive measures :

(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register.

(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of he next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.

(7) The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The "Inspection Memo" must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.

(8) The arrestee should be subjected to medical examination by trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned Stare or Union Territory. Director, Health Services should prepare such a penal for all Tehsils and Districts as well.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the illaqa Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

(11) A police control room should be provided at all district and state headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board."

26. However, the case of D.K. Basu (supra) does not seem to cover the present

controversy. The arrest of the petitioner No.1 was stayed by the Division Bench of this Court (supra), hence there was no occasion with regard to his arrest and detention by the police. The petitioner No.2 stood as a witness with regard to her own abduction and once, she submits that she had gone voluntarily along with the petitioner No.1 and entered into wedlock and attained the age of majority, then the police was not justified in curtailing her freedom of movement even temporarily in view of judgment of Hon'ble Supreme Court in the case reported in 2006 CrLJ 3309 Lata Singh versus State of U.P. and another.

27. It has been stated that in pursuance to provisions contained in Sections 8 and 34 of the Juvenile Justice Act, juvenile homes and shelter have been created all over the State but that too does not seem to empower the State to keep a witness in such home.

28. During the course of argument, it has been vehemently argued by the learned Advocate General, assisted by the learned Government Advocate that under law, there is no provision with regard to the place where the prosecutrix or a witness may be detained during medical examination. Hence, often they are kept in police premises or Primary Health Centre and such action on the part of the police does not suffer from any impropriety or illegality. The submission of the learned Advocate General at the face of record seems to be violative of statutory provisions (supra) and even Regulation 162 of the U.P. Police Regulations which prohibits detention of a person (minor) in the police station.

29. It is settled law that in case the authorities want to do certain things, then that should be done in the manner provided in the Act or statutory provisions and not otherwise vide **Nazir Ahmed Vs. King Emperor, AIR 1936 PC 253; Deep Chand Versus State of Rajasthan, AIR 1961 SC 1527, Patna Improvement Trust Vs. Smt. Lakshmi Devi and others, AIR 1963 SC 1077; State of U.P. Vs. Singhara Singh and other, AIR 1964 SC 358; Barium Chemicals Ltd. Vs. Company Law Board AIR 1967 SC 295, (Para 34) Chandra Kishore Jha Vs. Mahavir Prasad and others, 1999 (8) SCC 266; Delhi Administration Vs. Gurdip Singh Uban and others, 2000 (7) SCC 296; Dhanajay Reddy Vs. State of Karnataka, AIR 2001 SC 1512, Commissioner Of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and others, 2002 (1) SCC 633; Prabha Shankar Dubey Vs. State of M.P., AIR 2004 SC 486 and Ramphal Kundu Vs. Kamal Sharma, AIR 2004 SC 1657, Taylor Vs. Taylor, (1876) 1 Ch.D. 426; Nika Ram Vs. State of Himachal Pradesh, AIR 1972 SC 2077; Ramchandra Keshav Adke Vs. Govind Joti Chavare and others, AIR 1975 SC 915; Chettiam Veettil Ammad and another Vs. Taluk Land Board and others, AIR 1979 SC 1573; State of Bihar and others Vs. J.A.C. Saldanna and others, AIR 1980 SC 326, A.K.Roy and another Vs. State of Punjab and others; AIR 1986 SC 2160; State of Mizoram VS. Biakchhawna, 1995 (1) SCC 156.**

It is also settled law that what cannot be done directly, it cannot be done indirectly vide 2004 (12) SCC 713 Ram Chandra Singh versus Savitri Devi and others. The authorities cannot be

permitted to use the premises of the police station for any purpose except for what it has been meant for. In case, they are permitted to do so, then it shall create a gallery to abuse the process of law keeping in view the moral devaluation in our system.

30. A Division Bench of this Court, of which one of us (Hon'ble Devi Prasad Singh, J) was a member, in a **writ petition No.443(H/C) of 2007 Siyaram alias Shukul versus State of U.P. and other connected petitions**, held that the provisions contained in Section 160 of the Code of Criminal Procedure is mandatory and it shall be obligatory on the part of the State authorities/police to issue notice for the summoning of witness to record the statement of the witnesses. Direction was issued to issue appropriate circular. Operative portion (para 58) of the judgment of Siyaram alias Shukul (supra) is reproduced as under :

"58. Under the facts and circumstances of the case and keeping in view the present trend of functioning of the police in the State of U.P. as reflected from the discussions made hereinabove, it is necessary not only to provide some compensation to the petitioner but also appropriate direction should be issued to check the recurrence of unlawful detention, custody or harassment of common citizen by the police keeping in view the Apex Court's judgment in D.K. Basu's case. In view of above, we propose to pass the following order for compliance by the respondents :

i) The petitioners shall be entitled for compensation to the tune of Rs.1, 25,000/- from the Government of U.P., out of which Ram Ashish alias Pintu shall be entitled for Rs.50,000/- and others shall be entitled for Rs.25,000/- each on account of their unlawful detention/restraint in the police station Ram Sanehighat, district Barabanki. The respondent/State is directed to pay the compensation within two months accordingly. This shall be apart from the compensation or damages which the petitioners may be entitled in accordance with law from regular Court.

ii) The Control Room constituted in every district of the State of U.P. in pursuance to the Apex Court's judgment in D.K. Basu's case(supra) shall also contain the records pertaining to the names of persons along with particulars of criminal case in which a person is being summoned or called in the police stations of respective district for questioning or for any other purpose. No witness or a person shall be called in the police station in the night without prior approval of the Superintendent of Police of the district concerned subject to restrictions imposed by Hon'ble Supreme Court in the case of D.K. Basu's case(supra). This may be done by establishing a computer network and use of information technology.

iii) It shall be mandatory for the law enforcing agencies to serve a notice in writing under Section 160 CrPC before calling a person in the police station. No person shall be lifted, frisked from their home unless a notice in writing is served assigning reason therein. In the general diary, appropriate entries shall be made indicating the arrival and departure of such person to/from such police station, disclosing reason of summoning of such person. The respondents are further directed to comply with the Apex Court's judgment in D.K. Basu's case(supra) in its letter and spirit.

iv) Every person, who is called to the police station during the course of investigation and enquiry, should be permitted to attend the police station along with his next friend or family member and he or she should be informed of his right to call his lawyer during the course of questioning.

v) Let entire staff of police station Ram Sanehighat, district Barabanki be transferred to other region/far off districts forthwith."

31. Neither the Code of Criminal Procedure nor any other statutory provisions empowers the police to retain the witness, in the present case, the prosecutrix within the premises of police station awaiting the medical report.

32. Ordinarily, in such a situation where a female is produced before the doctor for medical examination which includes X-Ray to verify age, then necessary check-up should be done by the doctors immediately and report should be provided as early as possible. Doctors do not seem to be justified in keeping the matter pending for two weeks and providing report to the police only on 16.6.2010 though the X-Ray was done on 3.6.2010. There appears to be inaction on the part of the doctors in not providing the report of the medical examination and outcome of X-Ray at the earliest to the police and under the garb of such lapse on the part of the hospital, the police kept the petitioner No.2 in police station for about two weeks. The State Government must issue appropriate Government Orders or circulars to ensure that as and when an accused, witness or prosecutrix is produced before a doctor, then the medical examination including X-Ray must be done immediately or maximum within 24 hours and report should be given on the next day to the police so that the investigation may not be held up for want of medical report.

33. During the period of medical investigation in case it continues for more than 24 hours, then the prosecutrix or the witness should be kept in the hospital/Primary Health Centre itself or in shelter home established under the statutory provisions but not within the premises of police station. A country where more than 35% population are illiterate and almost 40% peoples are living below the poverty, it is not expected that people are conscious of their constitutional and statutory rights. With the fear of police atrocity, a statement may be given supporting police version. Still the legacy of British rule subsists and the police is not treated as friend. It is not easy for a common citizen to enter into premises of police station and lodge a First Information Report. In such situation, in case the police is permitted to detain a person/witness in its campus for any reason whatsoever, there may be more likelihood of abuse and violation of human rights than to secure the peoples' interest.

34. By catena of judgments, Hon'ble Supreme Court settled the law that the dignity and quality of life and privacy of citizen are fundamental rights protected by Art. 21 of the Constitution of India vide **2001(6) SCC 496 Hinch Lal Tewari versus Kamala Devi and AIR 1991 SC 1902 Banglore Medical Trust versus B.S. Mudappa, AIR 2007 SC 1046 Milkmen Colony Vikas Samiti versus State of Rajasthan and others and 2006(13) SCC 382 Nagar Nigam, Meerut versus Al Faheem Meat Exports Private Limited and others.**

35. In a civilized society, more so when the matter cropped up with regard to ladies, police must be cautious while using the premises of the police station which includes the residence of officers posted there to keep the witnesses for any reason whatsoever. Keeping in view the analogy that an accused is to be produced before the Magistrate within 24 hours, no person including a witness should be kept in police station for interrogation for a long period in violation of the direction, issued by the Hon'ble Supreme Court in the case of D.K. Basu(supra) and this Court (supra).

36. The Universal Declaration of Human Rights (10.12.1948) begin its preamble with the strong assertion riminaliza the inherent human dignity and of the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world.

Needless to say that dignity is a complex idea possessing philosophical, political and legal resonances. As a social and legal status, dignity has to be nourished and maintained by society and all the three wings of the government by enforcing constitutional mandate in its letter and spirit.

37. The social upholding of individual dignity furnishes the basis of a general assurance of decent treatment and respect as people live their lives and go about their business in public.

38. A well ordered society means a society fully and effectively governed by a conception of justice or rule of law. John Rawls in his most celebrated treatise, "A Theory of Justice" had rightly observed that the society governed by justice means based on strict compliance theory rather than partial compliance theory.

39. Edmund Burke in his treatise, "Reflections on the Revolution in France", had observed, to quote

"to make us love our country, our country ought to be lovely."

A country shall be lovely only in case every one get his or her due right, with dignity. (A Professor in New York University).

40. Professor Jeremy Waldron in his "Oliver Wendeli Holmes Lecturers (2009)" published in Harvard Law Review(May 2010) observed :

"We are talking about a display that matters practically to individuals. It matters to them in their reliance on the principles of justice in the ordinary course of their lives, and in the security with which they enjoy that reliance. In a well-ordered society, where people are visibly impressed by signs of one another's commitment to justice, everyone can enjoy a certain assurance as they go about their business. People know that when they leave home in the morning they can reasonably count on not being discriminated against, humiliated, or terrorized. They feel secure in the basic rights that justice defines; they can face social interactions without the elemental risks that interaction would involve if one could not count on others to act justly."

Learned author further proceed to observe:

"The point of the visible self-presentation of a well-ordered society, then, is not just aesthetic; it is the conveying of an

assurance to all citizens that they can count on being treated justly."

Learned author further observed, to quote:-

"A person's dignity is not just a decorative fact about him or her. It is a matter of status, and as such, it is in large part normative : it is something about a person that commands respect from others and from the state. Moreover, one holds a certain status not just when one happens to have a given set of rights or entitlements, but also when the recognition of those rights or riminalizat is basic to how one is treated. So it is with the fundamentals of social reputation. We accord people dignity on account of the sorts of beings human individuals."

41. Ronald Dworkin in his celebrated treatise, "Law's Empire" observed, to quote:

"All this is a matter for the government to handle. The government is the entity that is required to display equal concern and respect for all its citizens…..but the citizen themselves do not share an identical obligation."

42. Criminal Justice System must be legitimate based on just and fair procedure to avail the peoples' confidence which has got direct nexus with the object sought to be achieved. By adopting an unjust, improper and illegitimate method while making investigation in criminal cases, State will lose the peoples' confidence and in due course of time, the peoples will settle their score at their own end by approaching mafias or anti-social elements.

43. In an article titled, "Prosecutorial Power and the Legitimacy of the Military Justice System" published in Harvard Law Review, Vol. 123, February 2010 part, observation of Robert H. Jackson in a book, "The Federal Prosecutor" has been referred. To quote:

"The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous…….While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst."

44. In our administration of justice, the power vests in police to investigate and stand as witness to prosecute the accused. The prosecutorial power in America is vested in an independent agency which comes into action at initial stage. In our country, the role of the prosecuting agency ordinarily starts from submission of the charge-sheet by the police. Heavy burden lies on the police to act fairly upholding the dignity of the citizen within the four corners of law.

45. Learned author(supra) with regard to legitimacy in criminal justice system observed as under :

"Legitimacy is an essential feature of an effective system of criminal justice. In order to maintain authority over those it regulates, a criminal justice system must remain legitimate in the eyes of those people. When people perceive the criminal process as fair and legitimate, they are more likely to accept its results as accurate and are more likely to obey the substantive laws that the system enforces. Moreover, such people are more likely to cooperate with police and prosecutors, who necessarily rely

on the trust of the community to carry out their roles in the criminal justice system."

….....the legitimacy of criminal procedure is enhanced when observers and defendants believe that prosecutors are pursuing justice. Incidents of prosecutorial misconduct undermine this element of institutional legitimacy and threaten to create the impression that prosecutors are seeking personal gains rather than just outcomes. Prosecutorial misconduct and arbitrariness can also undermine a third dimension of systemic legitimacy; uniformity of outcome. Disparate treatment of similarly situated defendants – whether it appears to be the result of invidious discrimination or prosecutorial whim – can harm popular faith in the criminal justice system."

46. The opinion expressed by the author(supra) seems to be correct to maintain the human dignity and casts a duty on the police to behave properly in a dignified manner without interfering directly or indirectly with the dignity of human being which is protected by Art. 21 of the Constitution of India. A thing which cannot be done directly, it cannot be done indirectly. Criminal Justice System in our country requires a second look to regulate and keep the police action within the four corner of law.

47. While dealing with riminalization of politics and mafia in a case reported in **2006 LCD 1243, Chandrika Prasad Nisad Vs. State of U.P.** decided by one of us(Hon'ble Devi Prasad Singh, J), it has been opined that time has come to bifurcate the investigating agency of the police force from the law and order. The police force dealing with law and order should be confined only upto registration of the First Information Report. Thereafter, the matter should be referred to the investigating agency which should discharge its obligation in proper manner without encroaching upon the dignity and quality of life of the citizens. For betterment of the system, the government should consider to separate investigating agency from law and order.

48. Thus, for the police, if it is permitted to keep a witness in the premises of police station awaiting medical opinion, then so far as the reputation and dignity of the person concerned in the eyes of common citizen is concerned, undoubtedly, a long stay in the premises of the police station shall tarnish the image and reputation of such person. Of course, in case there would have been some statutory provisions to deal with such situation validating the police action, there may be valid ground for detention or stay of a witness in the eyes of common citizen but in absence of any statutory provision, such action shall adversely affect the dignity of such person in peoples' eye.

49. In view of above, while holding that the petitioner No.2 was wrongfully detained at the police station we also propose to issue directions to meet out the requirement till the State Government legislate law itself to meet such contingencies. The petitioners have already been released, hence no further order is required to that extent.

50. In view of above, we allow the writ petition and issue a writ in the nature of mandamus commanding the state of U.P. as under :

1. No person who is a witness in a case, female or male shall be permitted to reside or be detained in the police station

awaiting medical check-up or medical report or for any other reason for more than 24 hours. For medical examination, such person may be permitted to stay for limited period to the maximum of three days in the hospital/Primary Health Centre or other statutory home or shelters. If necessary, appropriate police protection may be provided during such stay at a place other than police station.

2. The Government shall ensure that the medical examination of the prosecutrix or a witness or the person involved in a criminal case be done on the same day or within the maximum period of 24 hours and the hospital/Primary Health Centre shall ensure to submit the report by the next 24 hours to the police station concerned. Let appropriate circular be issued accordingly forthwith.

3. The Chief Secretary, Government of U.P. Is directed to appoint a Committee of experts which shall frame appropriate guidelines for medical examination/submission of the report to the police/investigating agency keeping in view the time involved in such medical or pharmacological examination, expeditiously and preferably within a period of two months from the date of receipt of a certified copy of this order.

Since the petitioner No.2 was kept in the premises of the police station for about two weeks without justifiable reason causing mental pain and agony and her stay has been held to be violative of Art. 21 of the Constitution of India, she shall be entitled for the compensation/cost, to the tune of Rs.25,000/- from the state Government which shall be deposited in this Court within two months from today with liberty to the petitioner to withdraw the amount so deposited.

It shall be open for the petitioners to avail appropriate remedy for further compensation and action permissible under law.

51. Let a copy of the order be sent to the Chief Secretary, Government of U.P. for compliance and to issue appropriate order or circular in terms of the aforesaid direction and submit a compliance report within three months. Registry to take follow-up action.

The writ petition is allowed accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.07.2010

BEFORE
THE HON'BLE YOGENDRA KUMAR SANGAL, J.

Consolidation No. 608 of 1995

Mukhdev ...Petitioner
Versus
Collector/D.D.C. & others ...Respondent

Counsel for the Petitioner:
Sri Akhilesh Kalra
Sri Ram Kumar Singh

Counsel for the Respondent:
C.S.C.

Constitution of India Art 226- Cancellation of Patta granted by A.R.O. On 31.12.70-Land in Question reserved for forest on 30.07.70-Gazete published on 21.1.71 consequently land in Question vested with forest under

section 20-all rights obligations of individual came to an end-consolidation authorities rightly canceled such document-obtained with collusion of authorities-granted against the law-No extraordinary power can be exercised.

Held: Para 12

This Patta and entry in the revenue record were not issued and made in accordance with the provisions of Law. This have no legal value. If ignoring the same at the time of PADTAL and initial stage of the proceedings to keep the record of right up to date and correct Consolidation Officer has made entry of Reserved Forest on the land in dispute along with other land shown in the Notification under Section 4 and 20 of the Act, in these circumstances, the Act of Consolidation Officer cannot be held illegal and without jurisdiction. By cancelling the impugned order of three Consolidation authorities, if again an entry in the revenue record of the name of the petitioner is made it will be a wrong and void entry in the record. No useful purpose will be served by passing such order because again Forest Department will take steps for expunging this entry. It is established law that even if ground exists, court can refuse to interfere in writ jurisdiction with the impugned order, if there is no miscarriage of justice by the same.

Case Law Discussed:
1996 RD 448.

(Delivered by Hon'ble Yogendra Kumar Sangal, J.)

1. This writ petition has been filed by the petitioner Mukhdev with the prayer to issue writ, order or direction in the nature of certiorari to quash the impugned judgement and order dated 28.02.1978 passed by the C.O. (Consolidation Officer), opposite party no. 3 (Annexure -4); order dated 02.01.1989 passed by the S.O.C. (Settlement Officer Consolidation), Opposite Party No. 2 (Annexure -5) and the judgement and order dated 22.09.1995 passed by the D.D.C.(Deputy Director of Consolidation), Opposite Party no. 1 (Annexure No. 9) to the writ petition.

2. It has further been prayed for direction against respondents not to interfere in the peaceful possession and use by the petitioner of land of Plot No. 2755 area 3 Acres, situated in Village Suzauli, Pargana Dharampur, Tehsil Nanpara, district Baharaich.

3. Heard learned counsel for the petitioner, learned Standing Counsel for the Opposite Party Nos. 1, 2 & 3, counsel for the respondent no. 4 and perused the record.

4. As per petition's case, Assistant Record Officer was authorised to grant Patta i.e. Lease of land on behalf of L.M.C. (Land Management Committee) of the village and he did so on 31.12.1970 and Leased out the land of plot no. 2755, area 3 Acres in favour of the petitioner. Copy of the Lease-deed is Annexure -1 on record. Name of the petitioner was mutated in the revenue record on 20.06.1972 and he became Sirdar of the land clear from the Annexure -2 of the writ petition, but when the the Consolidation operation started in the area, Consolidation Officer has wrongly struck off his name entered on the land in dispute from the revenue record.

5. On the other hand, case of the respondents was that on 04.08.1967 a Notification was issued by the State Government under Section 4 of the Indian Forest Act and it was proposed to declare

the land detailed in the Schedule of the Notification as Reserved Forest including the land of Plot No. 2824 also and invited Objection from the general public. Any Objection against the Notification by any person was filed, nothing as such is on the record. Consequences of the Notification are given in Section 5 of the Indian Forest Act (hereinafter referred to as 'the Act') where it is provided that after issuance of the Notification under Section 4, no right shall be acquired in or over the land comprised in such Notification except by Succession or under the grant or Contract in writing made or entered into by or on behalf of the Government by some person in whom such right was vested when the Notification was issued..

6. Learned counsel for the respondent no. 4 argued that after the Notification under Section 4 of the Act transfer of the right in favour of the petitioner in the land which was intended to be declared Reserved Forest, does not arise. It is clear from the record that Notification under Section 20 of the Act was also issued on 30.07.1970 published in the Gazette on 21.12.1970 where total 1178.77 Acre land including the land of Plot No. 2824 was delcared as Reserved Forest from the dated 21.01.1971. This is not disputed on behalf of the petitioner and also clear from the copy of the Notification available on the record.

7. In the present case, it is said that the land was allotted and Lease-deed was executed on 31.12.1970 in favour of the petitioner and also name of the petitioner was mutated in revenue record under this Lease on 20.06.1972. Consolidation Operation was started in the area where land of Plot No. 2824 situated. Under Section 9 of the C.H. Act on behalf of the Forest Department, an Application was moved before the Consolidation Officer to correct the record and to enter the Reserved Forest on the land declared as Reserved Forest including the land of Plot No. 2824. On behalf of the petitioner objections were also raised before the Consolidation Officer that he is recorded tenure holder on the land of Plot No. 2755 on the basis of the valid Patta granted by the Land Management Committee. Reply of the same was submitted on behalf of the Forest Department that Patta was illegally executed in favour of the petitioner by the Assistant Record Officer (A.R.O.) on behalf of the Land Management Committee regarding the land of Plot No. 2824 and also name of the petitioner was wrongly mutated in the revenue record, in view of the provisions of Section 5 of the Act. It was further argued that A.R.O. was never authorised by the Land Management Committee to grant such Patta. Powers given to the Land Management Committee cannot be further delegated and also the alleged allotment was never confirmed/approved by the competent authority. C.O. after giving opportunity of hearing to both the parties and perusing the record did not agree with the case of the petitioner and rejected his Objection and recorded the Reserved Forest in the record against the land declared as such in the Notification under Sections 4 & 20 of the Act.

8. Aggrieved by this order, petitioner filed an Appeal before the S.O.C. which was dismissed and Revision was filed before the D.D.C. which too was dismissed. Learned D.D.C. held that Notification under Section 4 & 20 of the Act already issued. Land has been declared Reserved Forest so the Consolidation Courts has no jurisdiction

to interfere in the matter. Aggrieved by these orders earlier a Writ Petition No. 409 (Conso.) of 1991 filed. Copy of the order passed in the Writ Petition is available on the record. This Court did not entered into the merit of the case in deciding the writ petition and it was simply held that as S.O.C. and the D.D.C. held that Consolidation courts have no jurisdiction to interfere in the matter so it was incumbent upon the D.D.C. to relegate to the parties to the position, they held at the time of initial proceedings before the Consolidation Authorities and matter was remitted to the Court of Deputy Director of Consolidation to decide afresh, giving opportunity of hearing to the parties. Under this order of the Court matter was again heard by Zila Adhikari/Deputy Director of Consolidation concerned and by the impugned order dated 22.09.1995, Revision was again dismissed. Other Revisions consolidated having the same issue were also dismissed. Aggrieved by this order again, this writ petition has been filed.

9. With reference to the rejoinder affidavit filed on behalf of the petitioner, learned counsel for the petitioner raised the arguments that land of Plot No. 2755 area three Acres allotted to him under the Lease-deed was never included in the Notification issued under Section 4 & 20 of the Act. This argument has no leg to stand because record shows and also admitted to petitioner himself in Paragraph 1 of the writ petition that Plot No. 2824 is the old number of Plot No. 2755 and land of Plot No. 2824 was included in both the Notifications issued under Sections 4 & 20 of the Act. Claim of the petitioner is that land of Plot No. 2824/2755 was allotted to him by the A.R.O. on behalf of the Land Management Committee on 31.12.1970 so he became tenure holder, Sirdar of the land in dispute and later on his name was also mutated in the revenue record showing him Sirdar of the land. Copy of the Patta and entry in the Revenue Record showing him Sirdar of the land of Plot No. 2755 were also filed along with the writ petition as Annexure Nos. 1 & 2. It was further argued that vide Notification under Section 20 of the Act, land included in the Notification was to be deemed Reserved Forest from 21.01.1971 but before this date already the land of Plot No. 2755 was allotted to him by the competent authority and he became tenure-holder of the same so this land cannot be deemed declared and notified as Reserved Forest. As his name was mutated and entered in the revenue record so Consolidation Officer was bound to give effect to this entry and he was not authorised to order to struck off his name from the revenue record and to make entry of Reserved Forest on the land of Plot No. 2824/2755.

10. Undisputedly, land of Plot No. 2824/2755 was included in the Notification under Section 4 and 20 of the Act. For the sake of arguments, if it is taken correct that there was a valid Patta of the land of Plot No. 2755 in favour of the petitioner, even then in the light of Law laid down by the apex Court in ***State of U.P. Vs. Deputy Director of Consolidation***, reported in 1996 RD 448. It is obvious that petitioner was holding land as a Sirdar and was not vested with proprietory rights under the Abolition Act. He was tenure-holder and proprietory right vested with the State. The state being the Proprietor of the land under the Abolition Act, it was justified to issue

notification under Section 4 and 20 of the Act to declare this land as Reserved Forest. After notification under Section 20 of the Act he will also have no right in the land of plot no. 2824/2755, even though he might have acquired any right under the Patta executed by A.R.O. in his favour on 31.12.1970 i.e. after the date of Notification under Section 4 and 20 of the Act.

11. Learned counsel for the petitioner raised question that the land in dispute not covered under Section 3 of the Act as it was an agricultural land but it could have been determined on the date of the Notification under Section 4 of the Act which was issued on 4th August, 1967 or before when the Notification under Section 20 of the Act, whether the land in dispute is agricultural land or not. No such Objection was raised before the date of Notification under Section 20 of the Act. No doubt, it was correctly held by the Consolidation authorities that they were not authorized to see the nature of the land after the Notification under Section 20 of the Act, even if the petitioner was having Lease-deed in his favour of the land of Plot No. 2824/2755 after the Notification under Section 20 his no right remains in the land in dispute. Apex Court in this regard held as such which is as follows:

"Once the notification under Section 20 of the Act declaring the land as Reserved Forest is published then all rights in the said and claimed by any person comes to an end and no longer available. The Notification is binding on the Consolidation authorities in the same way as a decree of the Civil Court. Objection regarding nature of the land cannot be raised at this stage. The Consolidation Authorities were bound by the Notification which had attained the finality."

12. As regards the validity of the Patta, learned Standing Counsel and counsel for the respondent no. 4 argued that A.R.O. was never authorized to grant such Patta on the land for which the State Government has already issued Notification under Section 4 on 04.08.1967 showing that the land is going to be declared as Reserved Forest. No such provision of Law or resolution of the Land Management Committee authorising to grant Patta to A.R.O. shown and filed. Approval after granting alleged Patta was obtained, as per Rules it is also not clear from the record. Nowhere it is shown that such approval was not required in the matter. Learned Standing Counsel argued that Revenue Authorities including A.R.O or supposed to have the knowledge that the land of Plot No. 2824/2755 has been intended to be declared as Reserved Forest vide notification issued under Section 4 of the Act, issued in the year, 1967. Further, Notification under Section 20 of the Act was also published in Gazette on 21.12.1970 and it was dated 23rd July, 1970 which is clear from the record. It shall be presumed again that A.R.O. was knowing about this notification under Section 20 of the Act published earlier to the date 31.12.1970 when the alleged Patta was executed in favour of the petitioner. Learned Standing Counsel argued that only with an intention to get benefitted to the petitioner and in his collusion A.R.O. and Lekhpal of the area have done all these misdeeds and petitioner is not entitled for any relief of the same. Arguments of learned Standing Counsel in the facts and circumstances of the case cannot be said

without force. Entry in the revenue record are open to attack that it was made fraudulently or surreptitiously. Fraud rob a document of all its legal effect and cannot found a claim to possessory title. This Patta and entry in the revenue record were not issued and made in accordance with the provisions of Law. This have no legal value. If ignoring the same at the time of PADTAL and initial stage of the proceedings to keep the record of right up to date and correct Consolidation Officer has made entry of Reserved Forest on the land in dispute along with other land shown in the Notification under Section 4 and 20 of the Act, in these circumstances, the Act of Consolidation Officer cannot be held illegal and without jurisdiction. By cancelling the impugned order of three Consolidation authorities, if again an entry in the revenue record of the name of the petitioner is made it will be a wrong and void entry in the record. No useful purpose will be served by passing such order because again Forest Department will take steps for expunging this entry. It is established law that even if ground exists, court can refuse to interfere in writ jurisdiction with the impugned order, if there is no miscarriage of justice by the same.

13. From the facts and circumstances of the case and taking into consideration arguments of the parties' counsel, I am of the view that petitioner has not approached this court with clean hands. No interference is required by this Court in the matter in writ jurisdiction. Writ Petition has no force, accordingly the same is hereby dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.07.2010

BEFORE
THE HON'BLE FERDINO INACIO REBELLO, C.J.
THE HON'BLE AMRESHWAR PRATAP SAHI, J.

Special Appeal No. 866 of 2010

Rajiv Saxena and others ...Appellants
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Radha Kant Ojha,
Sri Ankit Saran

Counsel for the Respondents:
Dr. H.N. Tripathi
C.S.C.

Allahabad High Court Rules 1952, Chapter VIII Rule-5- Special appeal-arises out from the order passed by Tribunal under Section 25 of Society Registration Act-Single Judge allowed the petition on ground Tribunal lacks with power of granting interim order-held-Special appeal not maintainable-However the direction issued to dispose of election petition as itself within 2 month.

Held: Para 9

In our opinion, this view correctly reflects the true scope and intent of Rule 5. A proper reading of the rule and its intendment is that once an order passed by a competent tribunal is the subject matter of an exercise of this Court in its extraordinary jurisdiction under Article 226 and/or 227, then no intra court appeal would lie. All that is required is that the judgment, order or award is by a tribunal, court or statutory arbitrator or made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act with respect to

any matter enumerated in the State List or Concurrent list. The only exclusion, therefore, is orders or decision in the course of an administrative enquiry and as noted in Sardar Mohd. Ansar (supra), if the appeal itself was not maintainable.

Case law discussed:

1994(2) ESC 641 Alld, 2003 (1) UPLBEC 4961

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

1. This special appeal is against an order passed by the learned Single Judge dated 11.5.2010. A writ petition was filed before the learned Single Judge against an order of the Prescribed Authority hearing an election dispute under Section 25 of the Societies Registration Act, 1860. The Tribunal in the purported exercise of its powers had granted interim relief in an election dispute. The stand of the petitioners was that the learned Tribunal has no jurisdiction to grant the interim relief in the absence of any specific power so conferred on the Tribunal. The contention of the respondent-appellants herein was that the power to grant final relief would include the power of granting interim relief.

2. The learned Single Judge after considering the rival contentions held that there is no power in the Tribunal to grant interim relief. It is against that order the present special appeal has been filed.

3. A preliminary objection has been taken on behalf of the respondents that in terms of Rule 5 of Chapter VIII of the Allahabad High Court Rules, 1952 a special appeal would not be maintainable as the petition arose in respect of an order passed by the Tribunal. The relevant rule is being quoted below:

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

4. On the other hand the learned counsel for the appellant placed before us several judgments of Division Benches of our court to point out that in the instant case the appeal is maintainable and the Tribunal has jurisdiction to grant interim relief.

5. In the case of **Sardar Mohd. Ansar Vs. State of U.P. reported in 1994(2) ESC 641 Alld** the issue before the learned Division Bench was whether the special appeal would lie. An appeal was preferred under the provisions of the U.P.Intermediate Education Act 1921 by

a person belonging to the clerical cadre. A perusal of the provisions shows that such an appeal was not maintainable as only a teacher could maintain an appeal. The Division Bench proceeded to observe that since the appeal could not be instituted by a class III employee it was non-est. Though that order was the subject matter of proceedings so far as the court under Articles 226 and 227 as the appeal itself was not maintainable taking recourse to the extra ordinary jurisdiction was of no consequences. The special appeal in this circumstance under Rule 5 would be maintainable as it would not be an order passed by a Tribunal competent to entertain an appeal in the subject matter.

6. The aforesaid judgment in our opinion is clearly distinguishable.

7. In the instant case the Prescribed Authority as a Tribunal had did not lack patent jurisdiction to entertain the election dispute. The only dispute is whether in exercise of such jurisdiction it could grant interim relief. In such circumstances the reliance sought to be placed in the judgment in the case of Sardar Mohd. Ansar (supra) is clearly distinguishable on the facts of the present case.

8. Attention was also invited to the observations of the Division Bench in the case of **Vajara Yojna Seed Farm, Kalyanpur (M/s) Vs. Presiding Officer reported in 2003 (1) UPLBEC 4961** and paragraphs 49 and 50 were referred. A perusal of the said observations will make it clear that in so far as the learned Division Bench is concerned it held that once the Tribunal has jurisdiction then irrespective of the fact whether the award was legal or illegal, a special appeal against order of learned Single Judge in exercise of jurisdiction under Articles 226 and 227 would not be maintainable.

9. In our opinion, this view correctly reflects the true scope and intent of Rule 5. A proper reading of the rule and its intendment is that once an order passed by a competent tribunal is the subject matter of an exercise of this Court in its extraordinary jurisdiction under Article 226 and/or 227, then no intra court appeal would lie. All that is required is that the judgement, order or award is by a tribunal, court or statutory arbitrator or made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act with respect to any matter enumerated in the State List or Concurrent list. The only exclusion, therefore, is orders or decision in the course of an administrative enquiry and as noted in Sardar Mohd. Ansar (supra), if the appeal itself was not maintainable.

10. In the instant case the only issue is as to whether the Tribunal has specific jurisdiction to grant interim relief or not. In other words the Tribunal could exercise jurisdiction may be rightly or wrongly. That order was subject matter of the writ petition before the learned Single Judge.

11. In our opinion the special appeal is not maintainable. In the light of that the special appeal is dismissed. The Tribunal is directed to dispose of the election petition within two months from the date of production of a certified copy of this order before it.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.07.2010

BEFORE
THE HON'BLE FERDINO INACIO REBELLO, C.J.
THE HON'BLE AMRESHWAR PRATAP SAHI, J.

Special Appeal No. 892 of 1999

M/s S.R. Paper Cones, Ghaziabad
...Appellant/Petitioner
Versus
Addl. Labour Commissioner, Ghaziabad and others ...Respondents

Counsel for the Petitioner:
Sri V.R. Agarwal

Counsel for the Respondents:
C.S.C.

U.P. Industrial Dispute Act-1947-Section 6(4) Second Reference-Can be remitted for reconsideration-but once State Govt refused to publish the award-same reference can not be subject matter of conciliation preceding-view taken by Single Judge regarding second reference be treated as reconsideration.

Held Para 9

In the light of the above, in our opinion, the second reference, as made, is without jurisdiction. Once a reference is made, it is not open to this Court to amend the reference. The power to amend the reference is with the appropriate Government which, in the present case, is the State. Apart from that, the learned Single Judge himself arrived at a finding that the entire exercise was without jurisdiction. After having so held, it was not open for the learned Single Judge to direct that fresh reference shall be treated as an order for reconsideration by the Labour Court.

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

1. In spite of service of the appeal on the learned counsel for respondent no.3, no appearance has been filed.

2. The appellants, original petitioners, are aggrieved by order dated 06.08.1999 passed by the learned Single Judge, whereby the learned Judge, in order to do complete justice between the parties, directed that fresh reference shall be treated by the Labour Court as an order for reconsideration under sub-section (4) of Section 6 of the Uttar Pradesh Industrial Disputes Act, 1947 and will be decided on the evidence already on record, after hearing both the parties.

3. It is the submission on behalf of the appellants that considering the provisions of sub-section (4) of Section 6 of the Uttar Pradesh Industrial Disputes Act, 1947 (hereinafter referred to as the 'State Act'), the learned Judge could not have issued aforesaid directions.

4. A few facts may be set out. A reference was made on 13.04.1992. The reference pertains to the termination of services of respondent no.3. An award came to be passed by the Labour Court on 02.03.1995, whereby the reference was answered against the respondent no.3. The appropriate Government, which is the State Government in the present case, refused to publish the award, against which the appellants herein filed a writ petition challenging the act of the State Government refusing to publish the award. The said petition was dismissed. It is to be noted that the respondent workman did not challenge the said award.

5. From the averments made in the writ petition, it appears that subsequent to that, the Labour Court once again raised the same industrial dispute and took the matter into conciliation. The appellants herein raised objections about the maintainability of the said proceedings. In spite of that, the second reference order came to be passed. That was the subject matter of challenge before this Court in respect of which the present appeal arises. The learned Judge disposed of the petition in terms of what has been stated above.

6. In appeal, the order of the learned Single Judge was stayed. The question for our consideration is whether it was open to the State Government to make the second reference?

7. The issue is covered by Section 6(4) of the State Act, which reads as under:-

"6. Awards and action to be taken thereon.-

(1).... ....

(4) Before publication of an award of a Labour Court or Tribunal under sub-section (3), if the State Government is of the opinion that,-

(a) the adjudicating authority has unreasonably refused permission to any party to adduce evidence; or

(b) any party was prevented by any other sufficient cause from adducing evidence; or

(c) new and important material fact or evidence has come to notice, which after the exercise of due diligence, was not within the knowledge of, or could not be produced by, the party at the time when the award was made; or

(d) the award is likely to disturb the industrial peace; or

(e) the award is likely to affect prejudicially the national or State economy; or

(f) the award is likely to interfere with the principles of social justice; or

(g) the award has left undetermined any of the matters referred for adjudication, or where it determines any matter not referred for adjudication and such matter cannot be separated without affecting the determination of the matters referred; or

(h) the award is so indefinite as to be incapable of being enforced; or

(i) illegality of the award is apparent upon the face of it, it may, after giving the parties reasonable opportunity of being heard, for reasons to be recorded, remit the award for reconsideration of the adjudicating authority, and that authority shall, after reconsideration, submit its award to the State Government, and the State Government shall publish the award in the manner provided in sub-section (3)."

8. Thus, it would be clear that in the circumstances set out therein, it is open to the State Government not to publish the award. However, what is relevant is that the same reference can be remitted for reconsideration. The question, therefore,

of a second reference does not arise in view of the express language of Section 6 (4) of the State Act. In the instant case, factually, the State Government has made a second reference. That reference is based on initiation of conciliation proceedings afresh. It is not possible for us to go into the issue as to why the State Government did not publish the reference in view of the earlier order passed by this Court. This Court, however, can judicially review insofar as the second reference is concerned considering that there was no power to the State Government to make the reference.

9. In the light of the above, in our opinion, the second reference, as made, is without jurisdiction. Once a reference is made, it is not open to this Court to amend the reference. The power to amend the reference is with the appropriate Government which, in the present case, is the State. Apart from that, the learned Single Judge himself arrived at a finding that the entire exercise was without jurisdiction. After having so held, it was not open for the learned Single Judge to direct that fresh reference shall be treated as an order for reconsideration by the Labour Court.

10. In view of the above, the impugned order of the learned Single Judge, to the extent it directs that the fresh reference be treated as an order for reconsideration under sub-section (4) of Section 6 of the State Act, is set aside.

11. The appeal stands disposed of accordingly.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.07.2010

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

Special Appeal No. 949 of 2007

Dileep Kumar Srivastava ... Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri W.H. Khan
Sri Krishnaji Khare
Sri Ravi Kant

Counsel for the Respondents:
Sri Amit Sthalekar
Sri D.S. Srivastava
Sri Shiv Kumar Sharma
Sri Mustaqeem
Ms. Pooja Srivastava
C.S.C.

The Subordinate Civil Courts Ministrial Establishment Rules 1947 Rule-19 readwith U.P. Government Servants Seniority Rules 1991- Seniority-criteria for consideration- Rule 1991 has no retrospective applicability-hence Rule 19 of Rules 1947-is the only provision applicable-Appellant was initially appointed on 15.12.75 while Respondent appointed on 17.1.74 at Mirzapur-subsequently transferred from Mirzapur to Allahabad on 11.04.74 and after waiting long period confirmed on 1.2.85 while appellant confirmed at Mirzapur on 13.4.83 itself-it is not a case that R-4 was not eligible for promotion and for the first time in 1985 Dist. Allahabad and found fit-Hence the criteria of length of Service adopted by appointing authority held justified-Single Judge rightly declined to interfere.

Held: Para 18

In the present case, the appellant was confirmed at Mirzapur judgeship where he was appointed and the respondent no. 4, who was appointed earlier to appellant at Mirzapur itself and transferred to Allahabad in the year 1974, waited for his confirmation more than a decade, which ultimately was done on 1.2.1985. The reliance on the length of service by the appointing authority cannot be said to be arbitrary or beyond the scope of Rule 19. Thus, Rule 19 itself permits in exceptional cases to rely on criteria other than confirmation and in the facts of the present case, we are satisfied that substantial justice has been done in determination of seniority of petitioner and the respondent no. 4, on the basis of length of service.

Case Law discussed:

(1997)3 Supreme Court Cases 399, 1991 Supp. (2) SCC 51, AIR 1986, S.C. 1043, 1998(2) E.S.C. 1331, Special Appeal No. 147 of 2007, AIR 1988 S.C. 887, J.T. 2001 (3) S.C. 1, AIR 2007 S.C 1211, AIR 1961 S.C. 1346, (1995)1 LBESR 298.

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

1. Heard learned Counsel for the parties.

2. This special appeal has been filed against the judgment and order dated 15.6.2007, passed by Hon'ble Single Judge, dismissing the writ petition No. 18182 of 2006, filed by the petitioner appellant. Brief facts necessary for deciding the issues raised in the writ petition are that the appellant was appointed as class III employee in the judgeship of Mirzapur on 15.12.1975 in the payscale of Rs. 354-550. The appellant was confirmed on 30.4.1982. The appellant made a request for his transfer from Mirzapur to Allahabad Judgeship. The District Judge vide his letter dated 16.9.1984 gave consent for transfer with rider that seniority of the appellant will be determined later on. By order dated 30.9.1984, the appellant was transferred from Mirzapur to Allahabad Judgeship, who joined on 1.10.1984. The respondent no. 4, Mithilesh Kumar Srivastava was appointed as class III employee in the judgeship of Mirzapur on 17.1.1974 in the pay scale of Rs. 354-550. The respondent no. 4 was transferred from Mirzapur to Allahabad on 11.4.1974. The respondent no. 4 joined at Allahabad in the year 1974 and continuously worked thereafter. By order dated 1.2.1984, the respondent no. 4 was confirmed.

3. The appellant moved an application on 11.9.1985 for fixation of his seniority. A list of candidates in different scales as sanctioned by the Government orders dated 28.2.1985, 2.4.1984 and 31.5.1985 for the purposes of staffing pattern was prepared by a Committee in which the petitioner's name was also included at serial no. 49. An objection was submitted by the respondent no. 6, Shafiq Ahmad to the gradation but no decision was taken by the District judge. On 26.9.1991, appellant made an application to the District Judge that his name in the gradation/ seniority list be placed at its proper place. A report was submitted by the Senior Administrative Officer on 2.11.1991 that appellant can be placed below Rama Shankar Srivastava and above Smt. Lalita Kumari. The District Judge passed the order dated 10.12.1991 placing the name of the appellant below Rama Shankar Srivastava and above Smt. Lalita Kumari. The appellant submitted a representation to the Administrative

Judge. An order dated 13.2.1996 was communicated to the appellant informing that his seniority had been fixed below Raghubir Prasad Yadav and above Shafique Ahmad. After the above order dated 13.2.1996, a representation was made by respondents no. 4 and 6. Representation of Respondent No. 4, Mithilesh Kumar Srivastava was allowed by order of the Administrative Judge dated 23.1.2006, which was communicated to the District Judge vide letter dated 7.2.2006. Aggrieved by the aforesaid order dated 23.1.2006, the appellant filed a writ petition No. 18182 of 2006, praying for quashing the order dated 23.1.2006 and other consequential reliefs.

4. Hon'ble Single Judge by the impugned judgment dismissed the writ petition filed by the appellant and affirmed the order of Administrative Judge dated 23.1.2006, declaring the respondent no. 4 senior to the appellant. Hon'ble Single Judge relying on his judgment in writ petition No. 47915 of 2005, Satya Prakash Sharma Vs. State of U.P. and others, took the view that after enforcement of the U.P. Government Servants Seniority Rules, 1991, the Subordinate Civil Courts Ministerial Establishment Rules, 1947 stand impliedly repealed. Hon'ble Single Judge further relying on judgment of the apex Court in **S.B. Patwardhan v. State of Maharashtra and others**, (1997)3 Supreme Court Cases 399 took the view that seniority has to be counted from the date of appointment and not according to the date of confirmation. Hon'ble Single Judge took the view that the respondent no. 4 having been appointed earlier, mere fact that appellant was confirmed earlier, is not relevant. It has further been held by Hon'ble Single Judge that rule 19 contains the word "ordinarily" which expression does not mean solely rather it is flexible which gives option to the authority to determine seniority for the purpose of promotion. Hon'ble Single Judge further held that the list prepared in the year 1985 was not the seniority list and seniority was not ever determined and the order dated 10.1.1996, which was passed by Hon'ble Administrative Judge on the representation of the appellant was ex-parte.

5. Learned Counsel for the appellant contends that Hon'ble Single Judge erred in dismissing the writ petition. He submits that order of Administrative Judge dated 23.1.2006 declaring the respondent no. 4 senior to the appellant was an erroneous order. He submits that U.P. Government Servants Seniority Rules, 1991 is not applicable and the determination of the seniority is to be governed by 1947 Rules. He contends that in any view of the matter, 1991 Rules are prospective in nature and has no effect on inter-se determination of the seniority between the petitioner and the respondent no. 4. He submits that a person is entitled to reckon his seniority on the date when he was born in the cadre and any subsequent alteration of Rules determining the seniority has no consequence. It is contended that 1991 Rules cannot effect retrospectively the determination of seniority. He submits that gradation list prepared in 1985 was for all practical purpose a seniority list, which held the field for a quite long period and it was not open for the Administrative Judge to alter the seniority after such a long time. It is further submitted that Rule 19 of 1947 Rules having not been under challenge, the same could not have been ignored by

Hon'ble Single Judge relying on judgment of the apex Court in the cases of **S.B. Patwardhan and O.P. Garg and others v. State of U.P. and others, 1991 Supp. (2) SCC 51** (supra). Learned Counsel for the appellant has placed reliance on various judgments of this Court and the apex Court which shall be referred to while considering the submissions in details.

6. Learned Counsel for the respondents refuting the submissions of learned Counsel for the appellant contended that Hon'ble Administrative Judge has rightly determined the seniority of the petitioner and the respondent no. 4. It is submitted that the respondent no. 4 was appointed in the year 1974, whereas the appellant was appointee of subsequent batch of 1975. The fact that appellant was confirmed at Mirzapur earlier and the confirmation exercise was taken place at Allahabad in 1985, could have no effect on the seniority of the respondent no. 4, who was senior to the appellant in his appointment at Mirzapur. It is submitted that 1991 Rules are fully applicable and after enforcement of 1991 Rules, 1947 Rules are impliedly overruled and the determination of seniority shall be governed by 1991 Rules. It is submitted that no seniority list was prepared in the year 1985 as contended by learned counsel for the appellant and list prepared in the year 1985 was only staffing pattern, which cannot be treated as seniority list. Appellant himself represented in 1991 for correct fixation of his seniority on which order was passed by Hon'ble Administrative Judge on 13.2.1986. Again the matter was represented by the respondent no. 4 on which the order was passed by Hon'ble Administrative Judge on 23.1.2006. The submission of learned counsel for the appellant that there was a long standing seniority of the appellant is incorrect. The seniority was never determined earlier.

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

8. The first submission of learned counsel for the appellant is that 1991 Rules are general rules which shall have no effect on 1947 Rules. It is contended that 1947 Rules have been continued in force by virtue of Article 372 of the Constitution of India unless altered or repealed or amended by a competent Legislature or other competent authority. Reliance on the judgment of the apex Court in the case of **Om Prakash Shukla Vs. Akhilesh Kumar Shukla and others,** AIR 1986, S.C. 1043 has also been placed. Another judgment relied by learned counsel for the appellant is 1998(2) E.S.C. 1331 **Raj Vikram Khare Vs. District Judge Banda & another,** wherein it has been held that U.P. Recruitment to Services (Age Limit) Rules, 1972 shall be applicable as amended from time to time with regard to recruitment of ministerial staffs of the subordinate civil courts. The issue as to whether 1991 Rules are applicable for determination of seniority of ministerial staffs of the subordinate courts have been considered in detail in our judgment of the date in special appeal No. 147 of 2007 **Omvir Sharma Vs. State of U.P.,** wherein it has been held that 1991 Rules are applicable for determination of seniority of ministerial staffs of the subordinate civil courts and after enforcement of 1991 Rules, 1947 Rules shall stand repealed. The similar submissions raised by learned counsel for

the appellant in this regard, have been considered and negatived by us in our above judgment. For the reasons given by us in the above judgment of the date, we hold that 1991 Rules are applicable for determination of seniority of ministerial staffs of the subordinate civil courts and Rule 19 of 1947 Rules is no longer in force after enforcement of 1991 Rules.

9. The next submission pressed by learned counsel for the appellant is that even after 1991 Rules are applicable, the 1991 Rules are not retrospective in operation and the seniority of the petitioner appellant and the respondent no. 4 is to be determined in accordance with 1947 Rules since the determination of seniority has to be on the date when a person was born in the cadre. Any subsequent Rules shall have no consequence. Learned counsel for the appellant has placed reliance on the judgment of the apex Court in the case of **K.V. Subba Rao and others. Vs. Government of Andhra Pradesh and others** AIR 1988 S.C. 887. In the said case, the apex Court took the view that Rule 4(e) of Andhra Pradesh State and Subordinate Service Rules 1962, which provided for criteria for determination of seniority, shall not have any retrospective effect and operate prospectively. Following was laid down in paragraphs 7 and 8:

" 7. We have already pointed out that the law is that it is open to the State to provide a rule for determining inter se seniority. Rule 4(e) of the Special Rules before amendment in 1980 had provided that the seniority of Deputy Tehsildars would be determined with reference to the date of allotment maintained and ranking assigned by the Andhra Pradesh Public Service Commission in the merit list of the particular selection. That obviously was confined to inter se seniority of direct recruits and did not cover inter se seniority between recruits of the two sources. Therefore, the General Rules had been relied upon. In 1980, by the impugned amendment to Rule 4(e) of the Special Rules, the State Government prescribed the manner of providing inter se seniority among the recruits of the two categories. The amended rule provided the date of confirmation in the substantive vacancy as the basis. Rule 3(b) fixed the reservation of direct recruits with reference to substantive vacancies at 50% and Rule 4(e), therefore, made provision with reference to the seniority in the substantive vacancies with reference to the date of confirmation. The amendment in terms is within the competency of the State Government and is not open to challenge. This is a rule made under the proviso to Article 309 of the Constitution and as settled by this Court in exercise of that power the rule can be given retrospective operation. The impugned amendment has been given retrospective operation from 12th October, 1961. From the judgment of the Tribunal we find that the authority of the State Government to make a rule for future application was not seriously disputed but what was assailed was the retrospectivity given to the amendment.

8. Indisputably many of the promotees on the basis of seniority already assigned to them have been holding posts of Tehsildars, Deputy Collectors and Special Grade Deputy Collectors. Many have retired from service having enjoyed those promotional benefits. Promotions between 1961 and 1971 on the basis of the seniority

assigned under Rule 33(a) of the General Rules is under challenge. That period is a distant one from now varying between 17 to 27 years. To allow the amendment to have retrospective operation is bound to create problems. The State Government while amending the rule should have taken into consideration the practical problems which would arise as a consequence of retrospectivity. It should have taken into account the far-reaching adverse effect which the rule, if given such retrospective effect, would bring about in regard to services of scores of employees and the disquiet it would result in by disturbing settled situations. We are, therefore, not of the view that the rules should be given retrospective effect from 1961. It would, however, be wholly justified and appropriate to give the rules prospective operation by fixing 9th October, 1980 as the date from which it should take effect. We accordingly direct that Rule 4(e) as amended on 9th October, 1980, shall not have any retrospective effect and would operate prospectively."

10. The next judgment relied by counsel for the appellant is **P. Mohan Reddy Vs. E.A.A. Charles & Ors. J.T. 2001 (3) S.C. 1.** The apex Court in the said judgment held that no employee can claim to have a vested right to have a particular position in any grade but the right vests in accordance with the rules remaining in force at the time when he was born in cadre. After considering several earlier cases of the apex Court, following was laid down in paragraph 17:

" 17. A conspectus of the aforesaid decisions of this Court would indicate that even though an employee cannot claim to have a vested right to have a particular position in any grade, but all the same he has the right of his seniority being determined in accordance with the Rules which remained in force at the time when he was borne in the Cadre. The question of re-determination of the seniority in the cadre on the basis of any amended criteria or Rules would arise only when the amendment in question is given a retrospective effect. If the retrospectivity of the Rule is assailed by any person then the Court would be entitled to examine the same and decide the matter in accordance with the law. If the retrospectivity of the Rule is ultimately struck down, necessarily the question of re-drawing of the seniority list under the amended provisions would not arise, but if however, the retrospectivity is upheld by a Court then the seniority could be re-drawn up in accordance with the amended provisions of the employees who are still in the cadre and not those who have already got promotion to some other cadre by that date. Further a particular Rule of seniority having been considered by Court and some directions in relation thereto having been given, that direction has to be followed in the matter of drawing up of the seniority list until and unless a valid Rule by the Rule Making Authority comes into existence and requires otherwise, as was done in Bola's case (1997 AIR SCW 3172 : AIR 1997 SC 3127) (supra). It may be further stated that if any Rule or Administrative Instruction mandate drawing up of seniority list or determination of inter se seniority within any specified period then the same must be adhered to unless any valid reason is indicated for non-compliance of the same."

11. A perusal of 1991 Rules does not indicate that Rules had been given any retrospective operation. Rule 1(2) states

that they shall come into force at once. Rule 3 gives its overriding effect. 1991 Rules having not been given any retrospective operation, it shall have only prospective operation. The appellant, who was transferred from judgeship of Mirzapur to Allahabad on 1.10.1984, is claiming determination of his seniority according to Rules then existing. Learned Counsel for the appellant is right in his submission that for determination of seniority between the appellant and the respondent no. 4, after transfer of the appellant to judgeship at Allahabad, 1947 Rules are relevant and shall have application. Thus, for determination of seniority between the petitioner and the respondent no. 4, we have to look into 1947 Rules, which were applicable at the relevant time and the consideration of claim of the parties has to be in accordance with 1947 Rules. Hon'ble Single Judge in the impugned judgment has recorded finding that seniority was not determined in 1985 as claimed by the appellant and the list which has been referred as seniority list is not actual seniority list. The appellant has brought on record, the report of three members Committee dated 4.12.1985, which is said to be a gradation list, copy of which has been filed as Annexure-4 to the affidavit along with stay application. The opening part of the report is as follows.

"List of candidates proposed to be put in the scale given in G.O. No. 1436/VII-A Nyaya-740/84 dated 28.2.85, G.O. No. 1480/VII-A-Nyaya-749/84 dated 2.4.84 and 2758/VIIA- Nyaya-24 Dated 31.5.85 for the purposes of staffing pattern."

12. From the above, it is clear that the said report was prepared for the purpose of staffing pattern and was not a seniority list nor the procedure required to be followed for preparation and mphasizes n of seniority list was followed in preparing the said list. The said list cannot be said to be list determining the seniority. According to own case of the appellant, he made a representation on 26.8.1991 to the District Judge that his name be placed at correct position in the gradation list. The said representation was decided by District Judge on 10.12.1991, against which the petitioner represented to the Administrative Judge, which representation was decided on 13.2.1996. The said decision dated 13.2.1996 was ex-parte. The respondent no. 4 and other parties thereafter represented the matter to the District Judge as well as to the High Court on administrative side, on which the impugned decision dated 23.1.2006 was taken by the Administrative Judge. Thus, the submission of the appellant cannot be accepted that seniority was mphasize in 1985 and long standing seniority could not be altered by the Administrative Judge. The District Judge, while giving consent on 16.9.1984 for transfer of the appellant from Mirzapur to Allahabad Judgeship had specifically provided that seniority of the appellant shall be determined later on. No determination of seniority by the District Judge in the year 1985, as alleged has been brought on record.

13. The next submission of learned counsel for the appellant is that Hon'ble Single Judge erred in relying on the judgments in the cases of **S.B. Patwardhan and O.P. Garg** (supra) for taking the view that confirmation cannot be the sole criteria for determining the seniority. He submits that aforesaid two

cases were distinguishable since the dispute was between the promotee and direct recruits. Relying on the judgment of the apex Court in the case of **Union of India and others Vs. S.K. Saigal and others AIR 2007 S.C 1211,** it has been submitted that without there being challenge to Rule 19, the said Rule 19 could not have been ignored. The submission of learned Counsel for the appellant to the extent that Rule 19 was not challenged has substance. 1947 Rules being applicable for determination of seniority till they are superseded by 1991 Rules have to be looked into for determination of seniority. In view of the above, now we proceed to consider the respective claim of the parties in accordance with Rule 19 of 1947 Rules. Rule 19 of 1947 Rules is as follows:

"19. Seniority:- Seniority in service, for the purposes of promotion shall ordinarily be determined from the date of the order of confirmation in the grade and if such date is the same in the case of more than one person then according their respective position in the next lower grade or the register of recruited candidates in the case of persons confirmed in the lowest grade."

14. Now we again revert to the relevant dates with regard to the appellant and the respondent no. 4. The respondent no. 4 was appointed on 17.1.1974 in the judgeship of Mirzapur in the scale of 354-550. The appellant was appointee of subsequent batch i.e. of 1975 batch, who joined in the same payscale on 15.12.1975. The respondent no. 4 was transferred from Mirzapur to Allahabad on 11.4.1974. The appellant was confirmed on 13.4.1983, while working at Mirzapur, whereas the respondent no. 4 was confirmed on 1.2.1985, while working at Allahabad. The appellant joined on transfer at Allahabad on 1.10.1984.

15. The rule 19 provides that seniority in service for the purpose of promotion shall be **ordinarily** determined from the date of confirmation. Word "ordinarily" came for consideration before the apex Court and this Court on several occasions. The appellant himself has placed reliance on the judgment of the apex Court in **AIR 1961 S.C. 1346 Kailash Chand Vs. Union of India.** The Apex Court was considering the provisions of Railway Establishment Code Rules 2046(2) (a) where the words "should ordinarily be retained" were used. While considering the meaning of word "ordinarily", the apex Court laid down following in paragraph 8:

"(8) This intention is made even more clear and beyond, doubt by the use of the word "ordinarily". "Ordinarily" means "in the large majority of cases but not invariably". This itself mphasizes the fact that the appropriate authority is not bound to retain the servant after he attains the age of 55 even if he continues: to be efficient. The intention of the second clause 1 therefore clearly is that while under the first clause the appropriate authority has the right to route the' servant who falls within clause (a) as soon as he attains the age of 55, it will, at that stage, consider whether or not to retain him further. This option to retain for the further Period of five years can only be exercised if the servant continues to be efficient; but in deciding whether or not to exercise this option the authority has to consider circumstances other than the question of efficiency also; in the absence of special circumstances he "should" retain the servant; but, what are special circumstances is loft entirely to the authority's decision. Thus, after the age of

55 is reached by the servant the authority has to exercise' its discretion whether or not to retain the servant; and there is no right in the servant to be retained, even if, he continues to be efficient."

16. Word "ordinarily" came for consideration before this Court in **Lalit Mohan Vs. Secretary/General Manager, Distt. Co-op. Bank, Varanasi (1995)1 LBESR 298.** The Court was considering Regulation 85 (x) of U.P. Cooperative Society Employees Service Regulation 1975, which provides that no employee shall ordinarily remain under suspension for more than six months. Following was laid down in paragraph 9:

"9. The learned counsel for the respondents referred to various cases including the case of Kailash Chandra v. The Union of India 1961 (3) FLR 379 (SC), Nirmal Chand Jain v. The District Magistrate, Jabalpur and Anr. AIR 1976 MP 95, Krishan Dayal and Ors. V. General Manager, Northern Railway AIR 1954 Punjab 245 and the Full Bench in the case of AM. Patroni and Anr. V. E.C. Kesavan AIR 1965 Ker.75. In the said cases, the use of the word 'ordinarily' in various statutes and its implications have been considered. Considering the law laid down in the said cases and the meaning of the word 'ordinarily' as given in various Dictionaries it seems that the word 'ordinarily' means in the majority of cases but not invariably. Agreeing with the said view I feel that in the present rule also the word 'ordinarily' means majority of cases unless there are special circumstances."

17. From the above decision, it is clear that the word "ordinarily" means majority of cases unless there are special circumstances. In the present case, Administrative Judge, while considering the inter-se seniority between the parties has taken the view that rule 19 uses the word "ordinarily" which is applicable only to those cases where the persons appointed in a cadre or confirmed or to completion of probation without any discrimination or a person coming from outside the cadre and joining service with different attributes of confirmation. Following was the observations made by the Administrative Judge in his order dated 23.1.2006:

" The confirmation is an inglorious uncertainty. The counting of seniority from the date of confirmation leaves him at the whim of the appointment authority, who may confirm or delay the confirmation of a particular employee to give undue benefit to a favour employees. Once an employee is confirmed on a substantive post his seniority must be reckoned from the date he was substantially appointed on the post. Rule 19 as such rightly refers to word "ordinarily" and is applicable only to those cases where the persons appointed in a cadre or confirmed or to completion of probation without any discrimination or a person coming from outside the cadre and joining service with different attributes of confirmation."

18. The question to be considered is as to whether there was any exceptional circumstance in the present case due to which the confirmation in service could not be taken as basis rather length of service be taken as basis for determination of seniority. There is no dispute that the respondent no. 4 was appointed earlier to the appellant and he was transferred to Allahabad on 11.4.1974. The confirmation of the appellant was made at Mirzapur on 30.4.1983 and after his confirmation he was transferred to Allahabad on 1.10.1984. The

respondent no. 4, who was transferred to Allahabad in 1974 itself continued awaiting his confirmation which was done only on 1.2.1985. There is nothing on record to indicate that at any point of time, earlier to 1.2.1985, the respondent no. 4 was considered for confirmation and was not found fit. The appellant was appointed at judgeship of Mirzapur and was confirmed in the Mirzapur Judgeship, whereas the respondent no. 4 and the employee even appointed earlier to him i.e. respondent no. 7, who was appointed as early as in 1967, were not confirmed till 1.2.1985. The present is not a case where confirmation of all the employees was taken at Allahabad. At Allahabad, the confirmation was made with great delay in the year 1985 of the respondent no. 4, who was transferred and working at Allahabad from 11.4.1974 i.e. after more than a decade, which was special feature on the basis of which Administrative Judge did not refer to or relied the determination of seniority on the basis of confirmation. The Administrative Judge has rightly held that a person with different attribute of confirmation cannot contend that error was committed in not relying on criteria of confirmation as provided under Rule 19. Rule 19 does not mandatorily provides that confirmation in service, in all cases has to be the basis for determination of seniority. It uses the word "ordinarily" which gives a flexibility and in a case where there are certain special circumstances, the criteria other than the confirmation can be adopted by the appointing authority, for determination of seniority. In the present case, the appellant was confirmed at Mirzapur judgeship where he was appointed and the respondent no. 4, who was appointed earlier to appellant at Mirzapur itself and transferred to Allahabad in the year 1974, waited for his confirmation more than a decade, which ultimately was done on 1.2.1985. The reliance on the length of service by the appointing authority cannot be said to be arbitrary or beyond the scope of Rule 19. Thus, Rule 19 itself permits in exceptional cases to rely on criteria other than confirmation and in the facts of the present case, we are satisfied that substantial justice has been done in determination of seniority of petitioner and the respondent no. 4, on the basis of length of service.

19. For the reasons as given above, we are of the view that the order of the Administrative Judge dated 23.1.2006 deserves to be affirmed and has rightly been confirmed by the Hon'ble Single Judge in dismissing the writ petition. The appellant is not entitled for any relief.

The appeal is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.07.2010

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

Special Appeal No. 1036 of 2010

Chinta Mani ...Appellant/Petitioner
Versus
State of U.P. and others
...Respondents/Defendants

Counsel for the Petitioner:
Sri Awadhesh Singh

Counsel for the Respondents:
Sri P.K. Tripathi
C.S.C.

U.P. Agricultural Credit Rules-1975-Rule 29-readwith U.P. Z.A. & L. R. Act; 1950-section 279-Recovery Collection charges-10%-realization upon total amount sought to be recovered-

contention that realisation of 10% collection charges simply on issue of citation-not proper-it should not be more than half-held-in absence of specific pleading court under writ jurisdiction in particular case can issue direction-but not amount to dilute the impact of such provision-view taken by single judge-held justified.

Held: Para 25

It is something different that the High Court in the exercise of its extra ordinary jurisdiction under Article 226 of the Constitution of India proceeds to make certain observations or grant concessions on the peculiar facts of individual cases. The same, in our opinion, would not amount to laying down an absolute proposition that the recovery charges cannot be realized even where only a Citation has been issued. The Court in it's discretion may pass orders but that would not amount to dilute the impact of the provisions of sub-section 2 of Section 279 of the 1950 Act. The contention, therefore, raised by the learned counsel for the appellant that the decision relied upon by him mandate complete waiver of collection charges cannot be accepted.

Case Law discussed

1999 (2) AWC 1201, 1999 (2) AWC 1218, 1999 (2) AWC 1220

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

1. The appellant is a borrower. He took a loan from the respondent - State Bank of India, Branch Dibai, to the tune of Rs. 2 Lacs for the purchase of a Tractor. The appellant admittedly defaulted in making repayment of the said agricultural loan that was disbursed in the year 2001. Consequently, recovery proceedings were initiated and a Citation of recovery was issued for recovery of the amount of loan as arrears of land revenue under the provisions of the U.P Zamindari Abolition & Land Reforms Act, 1950 read with the 1952 Rules.

2. The challenge in the writ petition giving rise to this appeal was to the Citation of recovery dated 3.4.2010 whereby a sum of Rs. 2,17,000/- was sought to be recovered together with 10% recovery charges. The learned single Judge upon the concession made by the appellant - petitioner that he is ready to pay the entire amount of loan with interest in easy installments, proceeded to pass an order on 25.5.2010 fixing the time period for the repayment and if the said schedule was adhered to, it was also provided in condition No. II that in case the installments are deposited in the Bank, then half of the collection charges only shall be recovered from the petitioner.

3. Learned counsel for the appellant contends that the grievance now only remains with regard to half of the recovery charges that are to be recovered from the appellant under the impugned judgment.

4. To substantiate his submissions, learned counsel has cited 5 decisions before us. The first decision is in the case of Ram Niwas Vs. State of U.P. and others, Special Appeal No.260 of 2010 decided on 22.3.2010; the second decision is in Bed Veer Singh Vs. State of U.P. and others, Writ Petition No.14518 of 2008 decided on 18.3.2008; the third decision is in the case of Satish Vs. State of U.P. and others, Writ Petition No.9483 of 2002 decided on 6.3.2002; the fourth decision is in the case of Raj Kumar Vs. State of U.P. and others, Civil Misc. Writ Petition No.33704 of 2006 decided on 3.7.2006; and fifth decision relied on is in the case

of Mirza Javed Murtaza Vs. U.P. Financial Corporation, AIR 1983 Allahabad 234 (Paragraph No.16).

5. On the strength of the said decisions, learned counsel contends that since no steps for actual recovery of the amount had been undertaken, the respondents are not entitled to realise any collection charges from the petitioner. He further submits that mere issuance of Citation by itself is of no consequence as it does not amount to an undertaking of actual steps for recovery.

6. Learned Standing Counsel Sri Pipersenia, on the other hand, contends that the recovery is made in view of the provisions of Section 279 of the U.P. Z.A. & L.R. Act read with the Rules framed thereunder. He submits that the contention advanced on behalf of the petitioner and the decisions relied on do not consider the impact of the provisions of sub-section (2) of Section 279 of 1950 Act. He contends that the legal position cannot be diluted and the decisions that have been relied upon by the learned counsel for the petitioner are founded on concessions extended by this Court in the exercise of extraordinary jurisdiction under Article 226 of the Constitution which cannot be said to be laying down a law for waiving recovery charges after the issuance of a Citation by the Collector. He, therefore, submits that the said decisions are clearly distinguishable and hence the appeal deserves to be dismissed.

7. Before proceeding to consider the impact of the judgments relied upon by the learned counsel for the appellant, it deserves to be mentioned that the recovery in the present matter arises out of a Citation issued by the Collector of the district for recovering the defaulted amount of loan from the appellant as arrears of land revenue. The said recovery is being made under Section 279 of the U.P.Z.A. & L.R. Act 1950 which is quoted below:-

"279. Procedure for recovery of an arrear of land revenue.- [1] An arrear of land revenue may be recovered by anyone or more of the following process:

(a) by serving a writ of demand or a citation to appear on any defaulter;

(b) by arrest and detention of his person;

(c) by attachment and sale of his moveable property including produce;

(d) by attachment of the holding in respect of which the arrear is due;

(e) [by lease or sale] of the holding in respect of which the arrear is due;

(f) by attachment and sale of other immovable property of the defaulter, [and]

[(g) by appointing a receiver of any property, moveable or immovable of the defaulter.]

[(2) The costs of any of the processes mentioned in sub-section (1) shall be added to and be recoverable in the same manner as the arrear of land revenue.]"

8. The Citation, which has been appended along with the writ petition is in Form 69 as provided for in Rule 236 of the U.P. Zamindari Abolition & Land Reforms Rules, 1952, which is quoted below:-

"236. Writs, citations, warrants of arrest and warrants of attachment of movable property shall be in the Z.A.

Form 68, 69, 70 and 71. They shall be signed by the issuing officer and sealed with his official seal."

9. The writ or the Citation has to be issued under orders of the Collector under the provision of Section 280 of the Act read with Rule 241 of the Rules. Rule 242 of the 1952 Rules sounds a caution that before proceeding to take any other coercive process like arrest, detention or attachment, the Citation to appear should be issued as a primary step ordinarily. The question, which has been raised by the learned counsel for the appellant, is with regard to the extent of charges to be realized by way of collection at the stage of issuance of a citation. For this, a reference may be had to Rule 243 of the 1952 Rules, which is quoted below:-

"[243. The fee charged for the issue of a writ of citation to appear shall be rupees two. This fee shall be added to the arrears to which the writ or citation is issued, and shall be included in the amount specified therein.]"

10. If the defaulter does not respond to the said citation, then further coercive steps as provided for can be taken. A perusal of Rule 243 would indicate that there is a specific fee of Rs. 2/- that is authorized to be included along with the amount as a fee for the memo of citation. The question to be examined is as to whether the costs of recovery as collection charges can be further imposed saddling the borrower with a liability of 10% collection charges upon issuance of a citation.

11. There is a notable aspect of the manner of serving the citation. It has to be done as per Rule 246 quoted below:-

"246. (1) Service of the writ or citation shall, if possible be made on the defaulter personally, but if service cannot be made on the defaulter it may be made on his agent. If the defaulter or his agent cannot be found or if there is more than one defaulter against whom a writ or citation has issued a copy of the writ or citation may be fixed at a prominent place on or adjacent to the defaulter's residence.

(2) Personal service shall be made by delivery to the defaulter or his agent of the foil of the writ of citation. The other portion shall be brought back to the tahsil by the process-server and attached to the counterfoil. When returning this portion, the process-server shall report to the officer whom the tahsildar may appoint for served and if it was not served on the defaulter personally, the reason why it was not served. The official receiving the report shall note the particulars on the process, if this has not been done already.

(3) With the sanction of the Collector, writs of demand may also be served by registered post. In such cases the post office receipt shall be attached to the counterfoil."

12. The Rule, therefore, requires the service through a process server. It can be done through the Collection Amin or Collection peon of the department. They are employed and paid from the State Exchequer. It, therefore, cannot be said that no actual expenses have been incurred for serving a citation which is also one of the modes of recovery. It is for this reason that costs have been separately

provided for apart from the fee of the memo of citation under Rule 243 of 1952 Rules. The mode of service through registered post is provided for with the permission of the Collector additionally. The amount of actual expenses are a different issue which can be calculated under the Act and Rules subject to the maximum of 10% of the principal amount but the power to levy is traceable to the provisions indicated above.

13. The legislative background that authorises the Collector to proceed to realise such collection charges has been dealt with in a controversy that came to be considered by a Division Bench of our Court in the case of Mahalakshmi Sugar Mills Co. Ltd. Vs. State of U.P. and others, reported in 1999 (2) AWC 1201. The said decision took notice of another Division Bench judgment of this Court, which has been relied upon by the learned counsel for the petitioner in the case of Mirza Javed Murtaza (supra).

14. The matter was proceeded with and the learned Judges of the Division Bench differed in their opinions in relation to the issues involved particularly relating to the question of recovery of 10% collection charges under the garb of the Government Order dated 30.8.1974. This difference of opinion was referred to a third Hon'ble Judge and the majority opinion ruled that such recovery on the mere issuance of a citation was not leviable. The opinion of the Hon'ble third Judge is reported in 1999 (2) AWC 1218 delivered on 13.11.1998. Accordingly, the final judgment was delivered on 20.11.1998 which is reported in 1999 (2) AWC 1220 holding that the recovery could not include the amount of collection charges on mere issuance of a citation. The judgment was given a prospective effect.

15. At this juncture, it would be relevant to point out that in respect of recovery under the U.P. Agricultural Credit Act, 1973 read with Agricultural Credit Rules 1975, there is a specific provision in Rule 29 of the U.P. Agricultural Credit Rules authorizing recovery of 10% of expenses of recovery once the process has started.

16. The aforesaid Division Bench was noticed by a learned single Judge of this Court in the decision of Smt. Vidya Devi Vs. Collector, Mahoba and others, 1999 (3) AWC 1885, wherein the learned single Judge in paragraph no.5 ruled as follows:-

"5. Sub-section (2) of Section 279 provides that the cost of any of the processes mentioned in sub-section (1) shall be added to be recoverable in the same manner as the arrears of land revenue. Sub-section (2) was added by U.P. Act No.12 of 1965 with retrospective effect. It is clear from this provision that the costs of process can be recovered even if the sale had not taken place if the realisation of the amount has been made as arrears of land revenue by any of the modes prescribed under Section 279 of the Act."

17. The Court further went on to consider the impact of the Division Bench judgement and held that the recovery of cost in each of the different processes are different. The conclusions drawn are in paragraph Nos. 8 to 10 of the said judgment.

18. Faced with the aforesaid legal position pronounced by this Court, the State Government in order to justify such collections enacted U.P. Act No.37 of 2001 titled as Revenue Recovery (U.P. Amendment) Act 2001 giving it a retrospective effect from 30.8.1974. This was obviously enacted to overcome the ratio of the decision in Mahalakshmi Sugar Mill's case (supra). The provision that was brought forth clearly indicates the reason for the same as stated in objects and reasons quoted below:-

"STATEMENT OF OBJECTS AND REASONS

The Revenue Recovery Act, 1890 inter alia, provides for the procedure for recovery of an arrear of land revenue or a sum recoverable as an arrear of land-revenue. The State Government has, vide G.O. No.285/11-69 (II-876)-Revenue-7, dated August 26, 1974, directed for recovery of collection charge equal to ten per cent of the amount stated in the recovery certificate, in addition to the amount stated in the recovery certificate. The High Court of Judicature at Allahabad has, vide its order dated November 20, 1998 in Writ Petition No.29612 of 1992, M/s. Mahalaxmi Sugar Mills Ltd. V. State of U.P. and others, quashed the said Government Order mainly on the ground that the said Act as also the Uttar Pradesh Revenue Recovery Rules, 1966 do not provide for recovery of collection charge in addition to the amount stated in the recovery certificate. The State Government filed Special leave Petition No.6192 of 1999 against the said order of the High Court. The Supreme Court while granting the leave applied for, did not stay the operation of the said order of the High Court. It has, therefore, been decided to withdraw the said Special Leave Petition and to amend the said Act to provide for the recovery of collection charge also at the rate not exceeding ten per cent of the amount stated in the recovery certificate and to validate the recoveries already made in pursuance of the said Government Order.

The Revenue Recovery (Uttar Pradesh Amendment) Bill, 2001 is introduced accordingly."

19. The amendments that have been incorporated for authorising the realisation of costs to the maximum of 10% would be evident from the same which is quoted below:-

"THE REVENUE RECOVERY (UTTAR PRADESH AMENDMENT) ACT, 2001
(U.P. Act No.37 of 2001)
(As passed by the Uttar Pradesh Legislature)
AN
ACT

Further to amend the Revenue Recovery Act, 1890 in its application to Uttar Pradesh.

It is hereby enacted in the Fifty-second Year of the Republic of India as follow:

1.**Short title, extent and commencement.--** (1) This Act may be called the Revenue Recovery (Uttar Pradesh Amendment) Act, 2001.

(2)It shall extend to the whole of Uttar Pradesh.

(3)It shall be deemed to have come into force on August 30, 1974.

2. **Amendment of Section 3 of Act No.1 of 1890.--** In Section 3 of Revenue Recovery Act, 1890, hereinafter referred to as the principal Act, for sub-section (3) the following sub-sections shall be substituted, namely:

"(3) The Collector of the other district shall, on receiving the certificate, proceed to recovery the amount stated therein, together with the costs of the recovery, as if it were an arrear of land revenue which had accrued in his own district.

(3-a) The costs of the recovery under sub-section (3) shall be such as may be specified by the State Government by notification but the amount of such costs shall not exceed ten per cent of the amount stated in the certificate."

3. Amendment of Section 4.-- In Section 4 of the principal Act,--

(a) in sub section (1)--

(i) for the words "pays the same" the words "pays the same together with the costs referred to in sub-section (3a) of the said section" shall be substituted;

(ii) for the words "repayment of the amount" the words "repayment of the amount stated in the certificate" shall be substituted;

(b) after sub-section (4) the following sub-section shall be inserted, namely:

"(5) where a suit instituted under sub-section (2) is decreed, wholly or partly, the Court shall also direct that the defaulter shall be repaid the proportionate costs paid by him under sub-section (1)."

4. **Amendment of Section 5.--** In Section 5 of the principal Act, for sub-section (3) the following sub-sections shall be substituted, namely:

"(3) The Collector shall, on receipt of the certificate under sub-section (1), proceed to recover the amount stated therein, together with the costs of the recovery as if the amount stated in the certificate were payable to himself and such costs were also an arrear of land revenue.

(3a) The costs of the recovery under sub-section (3) shall be such as may be specified by the State Government by notification but the amount of such costs shall not exceed ten per cent of the amount stated in the certificate."

5. **Amendment of Section 6.--** In Section 6 of the principal Act, --

(a) in sub-section (2) for the words "in the certificate" the words "in the certificate together with the costs of the recovery" shall be substituted;

(b) In sub-section (3) for the words "in the certificate" the words "in the certificate or the costs of such recovery" shall be substituted;

(c) in sub-section (4) for the words "in a certificate" the words "in a certificate or the costs of such recovery" shall be substituted;

6. **Amendment of Section 10.--** For Section 10 of the principal Act, the

following section shall be substituted, namely:

"10. Duty of Collectors to remit moneys collected in certain cases.-- Where a Collector receives a certificate under this Act from the Collector of another district or from any other public officer or from any local authority he shall remit the sum recovered by him by virtue of that certificate to the Collector or the other public officer or the local authority after deducting the sum recovered as costs of the recovery."

7. **Validation and Consequential provisions.--** Notwithstanding any judgment, decree or order of any Court, the costs of a recovery recovered over and above the amount stated in the certificate referred to in Section 3 or Section 5 of the principal Act from a defaulter under an order of the State Government, shall be deemed to have been validly recovered under the principal Act as amended by this Act and no defaulter shall be entitled for refund of such costs, and if such costs have not been so recovered the same shall be recoverable from the defaulter under the corresponding provisions of the principal Act as amended by this Act as if the provisions of the principal Act as amended by this Act were in force at all material times."

20. A perusal of sub-section 2 of Section 279 of the 1950 Act empowers the Collector to add the cost of any of the processes mentioned in sub-section (1) in the Recovery Citation and the same has been made recoverable in the same manner as arrears of land revenue. The aforesaid provision, therefore, being the charging section , clearly empowers the recovery of costs of processes mentioned in sub-section (1). Clause (a) of sub-section 1 is also one of the processes provided for making recovery of an arrears of land revenue. The said sub-section recites that the recovery can be made by serving a writ of demand or a citation to appear on any defaulter. Thus, the provision itself indicates the service of a writ of demand or a Citation as one of the processes by which the recovery can be made. The other processes thereafter follow namely arrest, detention, adjustment and sale or lease including movable and immovable property. In the instant case, we are only concerned with the issuance of a Citation as according to the appellant, the other processes of arrest, detention, adjustment and sale have not been undertaken and it is at the stage of issuance of the Citation that the appellant had filed the writ petition.

21. The contention on behalf of the appellant that no such collection charges can be realised, to our mind, does not appear to be correct inasmuch as sub-section (2) also empowers the Collector to realise costs of recovery even where the processes adopted is by serving a writ of demand or a Citation to appear. Sub-section 2 of Section 279 does not contemplate that some other actual process apart from the issuance of Citation should be undertaken for raising a liability of recovery charges. Sub-section 2 would apply independently to clause (a) of sub-section 1. The provisions of the Revenue Recovery Act 1890 and the Rules framed thereunder as noted above supplement the aforesaid procedure for realising collection charges as well.

22. The impact of the said provisions have not been noticed in any of the other cases that have been relied upon by the learned counsel for the petitioner. The judgment in detail with regard to realisation

of collection charges which has been referred to in para 16 of the decision in the case of Mirza Javed Murtaza (supra) is in relation to the processes of sale of immovable property under Rule 284 of the U.P. Z.A. & L.R. Rules. The Division Bench observed that the loan that was sought to be recovered therein was extended by the U.P. Financial Corporation and the Managing Director of the Corporation can only ask the Collector to recover the amount as arrears of land revenue. The Court further went on to observe that what would be the actual cost of the proceeding would naturally be ascertained when the costs are actually incurred. The said observations were made in relation to Rule 284 of the U.P. Zamindari Abolition and Land Reforms Rules which are in relation to sale of immovable property. The ratio of the said decision would not be attracted hereunder inasmuch as that was a case where a process of distress by sale of immovable property had been undertaken. The said decision has nowhere considered the impact of sub-section 2 of Section 279 of the U.P. Zamindari Abolition & Land Reforms Act as referred to herein above. In view of the said position as also the subsequent amendments as noticed above, the ratio of the said decision would, therefore, not apply on the facts that have emerged in the present case.

23. Accordingly, we are of the opinion that so far as the law is concerned, the provisions of sub-section 2 of Section 279 do not contain any provision for an absolute waiver of recovery charges where a Citation has been issued under sub-section 1 of the said provision. The charging section itself empowers the Collector to raise such demand subject to the rules and the provisions of the Revenue Recovery Act (U.P. Act No.37 of 2007) referred to herein above.

24. There are no provisions introduced in the U.P. Zamindari Abolition and Land Reforms Act 1950 for the levy of 10% collection charges but the Revenue Recovery Act 1890 has been amended as noted above. There is no challenge to the vires of the amendments introduced through U.P. Act No.37 of 2007. Accordingly, we do not propose to examine the issue any further.

25. It is something different that the High Court in the exercise of its extra ordinary jurisdiction under Article 226 of the Constitution of India proceeds to make certain observations or grant concessions on the peculiar facts of individual cases. The same, in our opinion, would not amount to laying down an absolute proposition that the recovery charges cannot be realized even where only a Citation has been issued. The Court in it's discretion may pass orders but that would not amount to dilute the impact of the provisions of sub-section 2 of Section 279 of the 1950 Act. The contention, therefore, raised by the learned counsel for the appellant that the decision relied upon by him mandate complete waiver of collection charges cannot be accepted.

26. The appellant has not raised any challenge to the procedure adopted by the respondents and there is no foundation for the same. He has agreed to the repayment in easy instalments. There is no pleading or material to demonstrate as to why and how the amount of 10% collection charges now reduced to half under the impugned judgment is excessive or miscalculated. The statute as quoted above provides for an outer limit of recovery of 10% of the principal amount as collection charges. It,

therefore, can be a matter of contest before the competent authority if the collection charges are in violation of any procedure or are being imposed excessively. In the absence of any material or foundation to that effect in the writ petition, this issue cannot be made the basis for interference with the discretion exercised by the learned single Judge.

27. So far as the grant of concession is concerned, we have examined the judgment of the learned single Judge and we find that the learned single Judge has, taking a compassionate view of the matter, waived off 50% of the recovery charges.

28. In such an event and in view of the reasons given herein above, we are not inclined to exercise our jurisdiction to interfere with the impugned order. The appeal, accordingly, fails and is hereby dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.07.2010

BEFORE
THE HON'BLE S.P. MEHROTRA, J.
THE HON'BLE A.K. ROOPANWAL, J.

First Appeal From Order No. 1845 of 2010

The Oriental Insurance Company Ltd.
...Appellant
Versus
Smt. Rajkali and another ...Respondent

Counsel for the Appellant:
Sri S.K. Mehrotra

Workmen's Compensation-section 30-Appeal-Act 1923-Section 2(1)(e)-Definition-'Workman'- includes a person employed in any Capacity-without being prejudice with nature of employment may be either regular or temporary, or casual or contractual-deceased employed with Corporation on contractual basis-finding recorded by workmen's compensation commissioner-justified based on record-can not be interfered-under writ jurisdiction.

Held: Para 28 and 29

It has been established on record that the said Devendra Singh sustained injuries while driving the aforesaid Bus, and he died on account of the said injuries. Therefore, the death of the said Devendra Singh took place on account of the injuries sustained by him by accident arising out of and in the course of his employment with the respondent no.2.

In the circumstances, we are of the opinion that the Workmen's Compensation Commissioner was justified in awarding compensation to the claimant-respondent no. 1 on account of the death of the said Devendra Singh in the aforesaid accident.

(Delivered by Hon'ble Satya Poot Mehrotra, J.)

1. The present Appeal has been filed under Section 30 of the Workmen's Compensation Act, 1923 against the judgment and Order dated 30.3.2010 passed by the Workmen's Compensation Commissioner, Bulandshahr whereby compensation amounting to Rs. 3,01,304/- with simple interest at the rate of 6% per annum has been awarded to the claimant-respondent no.1 on account of the death of Devendra Singh, son of the claimant-respondent no.1 in an accident, which took place at 9 A.M. on 29.12.2005.

2. The claimant-respondent no.1 filed Claim Case being W.C.A. No. 07 of

2006 before the Workmen's Compensation Commissioner, Bulandshahr, inter-alia, stating that her son Devendra Singh was employed on the post of Driver at Sohrab Gate Depot, Merrut of the respondent no. 2 for driving Bus bearing Registration No. U.P. 15-L/6738; and that on 29.12.2005, the said Devendra Singh was taking the said Bus from Meerut to Bareilly; and that at 9 A.M. on the said date, when the said Bus reached village-Megha Nangla, Police Station-Shahjadnagar on National Highway, Bareilly, a Tractor bearing Registration No. U.P. 22A 2567 coming from the opposite direction and being driven rashly and negligently collided with the said Bus as a result of which the said Devendra Singh was seriously injured, and he died in the Government Hospital, Rampur.

3. The Appellant-Insurance Company as well as the respondent no. 2 (U.P. State Road Transport Corporation) filed their respective Written Statements.

4. In the Written Statement filed on behalf of the respondent no. 2, it was, inter-alia, stated that the deceased Devendra Singh was engaged as a contract driver, and there was no relationship of master and servant between the respondent no.2 and the said Devendra Singh; and that the said Devendra Singh used to run Bus on payment of 50 paise per kilometer; and that the Bus was duly insured with the Appellant-Insurance Company.

5. In the Written Statement filed on behalf of the Appellant-Insurance Company, it was, inter-alia, stated that there was collusion between the claimant-respondent no.1 and the respondent no.2 in order to make illegal gain.

6. The claimant-respondent no.1 filed documentary evidence in support of her case. On behalf of the respondent no.2, Insurance Policy was filed showing that the Bus was insured with the Appellant-Insurance Company for the period with effect from 13.12.2005 to 12.12.2006.

7. The claimant-respondent no.1 (Smt. Rajkali) examined herself before the Workmen's Compensation Commissioner, Bulandshahr. In her statement, the claimant-respondent no.1 (Smt. Rajkali), inter-alia, reiterated the averments made in her Claim Case. The claimant-respondent no. 1 also examined Harendra Singh who stated that he was travelling in the Bus. He proved the occurrence of accident, the Driver Devendra Singh sustaining injuries in the accident, and the death of Devendra Singh in Rampur Hospital.

8. On behalf of the respondent no.2, Phool Singh was examined as a witness. The said Phool Singh, inter-alia, stated that the deceased Devendra Singh was engaged as a contract driver, and he was paid at the rate of 50 paise per kilometer; and that there was no fixation of salary to be paid to the said Devendra Singh; and that the contract with the said Devendra Singh was made on 3rd July, 2003.

9. Santosh Kumar Sharma, who was the conductor of the aforesaid Bus, was also examined. The said Santosh Kumar Sharma, inter-alia, stated that the accident took place in his presence; and that at the time of accident, the said Devendra Singh was driving the Bus; and that the said

Devendra Singh was driving the Bus rashly. In his cross-examination, the said Santosh Kumar Sharma admitted that in the report lodged by him in regard to the accident, it was stated that the accident took place on account of fog, and there was no mention of the negligent driving by the said Devendra Singh in the said Report.

10. On a consideration of the evidence on record, the Workmen's Compensation Commissioner held that the deceased Devendra Singh was engaged as contract driver by the respondent no.2; and that the said Devendra Singh died on account of injuries sustained by him in the aforesaid accident, which took place on 29.12.2005; and that the case set-up by the respondent no. 2 that the accident took place on account of negligence of the said Devendra Singh, was liable to be rejected; and that as per the Post-Mortem Report and the Driving Licence, the age of the deceased was assessed as 35 years at the time of his death; and that the deceased Devendra Singh was paid Rs. 3058/- in the month of November, 2005, and the compensation to be awarded was to be computed on the said basis.

11. The Workmen's Compensation Commissioner further held that whatever might be the category of the workman, compensation was to be awarded under the Workmen's Compensation Act, 1923, in case, the death of such workman took place by an accident arising out of and in the course of his employment.

12. Accordingly, the Workmen's Compensation Commissioner awarded compensation amounting to Rs.3,01,304/-. Further, simple interest at the rate of 6% per annum was to be paid with effect from the date of filing of the Claim Case till the date of actual payment, in case, the payment was not made within the prescribed period.

13. Against the said Judgment and Order dated 30.3.2010 passed by the Workmen's Compensation Commissioner, Bulandshahr, the present Appeal has been filed by the Appellant-Insurance Company.

14. We have heard Shri S.K. Mehrotra, learned counsel for the Appellant-Insurance Company, and perused the record.

15. Shri S.K. Mehrotra, learned counsel for the Appellant-Insurance Company submits that in view of the findings recorded by the Workmen's Compensation Commissioner that the deceased Devendra Singh was engaged as a contract employee for driving the Bus, he was not covered under the category of "workman", and there was no relationship of master and servant between the respondent no.2 and the said Devendra Singh.

16. Having considered the submissions made by Shri S.K. Mehrotra, learned counsel for the Appellant-Insurance Company, we find ourselves unable to accept the same.

17. Sub-section (1) of Section 3 of the Workmen's Compensation Act, 1923 (in short "the W.C. Act"), inter-alia, provides that if personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay

compensation in accordance with the provisions of Chapter II of the said Act.

18. The word "employer" has been defined in clause (e) of sub-section (1) of Section 2 of the W.C. Act as under:

"(e) "employer" includes any body of persons whether incorporated or not and any managing agent of an employer and the legal representative of a deceased employer, and, when the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, means such other person while the workman is working for him;"

19. The word "workman" has been defined in clause (n) of sub-section (1) of Section 2 of the W.C. Act as under:

"(n) "workman" means any person [***] who is-

(i) a railway servant as defined in [clause (34) of section 2 of the Railway Act, 1989 (24 of 1989)], not permanently employed in any administrative, district or sub-divisional office of a railway and not employed in any such capacity as is specified in Schedule II, or

[(ia) (a) a master, seaman or other member of the crew of a ship,

(b) a captain or other member of the crew of an aircraft,

(c) a person recruited as driver, helper, mechanic, cleaner or in any other capacity in connection with a motor vehicle,

(d) a person recruited for work abroad by a company,

and who is employed outside India in any such capacity as is specified in Schedule II and the ship, aircraft or motor vehicle, or company, as the case may be, is registered in India, or]

(ii) employed [***] [***] in any such capacity as is specified in Schedule II, whether the contract of employment was made before or after the passing of this Act and whether such contract is expressed or implied, oral or in writing; but does not include any person working in the capacity of a member of the Armed Forces of the Union [***]; and any reference to a workman who has been injured shall, where the workman is dead, include a reference to his dependants or any of them."

20. Reading the definition of "employer", as contained in clause (e) of sub-section (1) of Section 2 of the W.C. Act, with the definition of "workman", as contained in clause (n) of sub-section (1) of Section 2 of the said Act, it is evident that in case a person is ***employed*** in any such ***capacity*** as is specified in Schedule II to the said Act, the person would be covered under the definition of "workman" whether the ***contract of employment*** is expressed or implied, oral or in writing.

21. Hence, it follows that for a person to be covered under the definition of the word "workman" under the W.C. Act, he must be employed under a contract of employment in any such capacity as is specified in Schedule II to the said Act. Such contract of employment may be expressed or implied, oral or in writing. However, there is no mention in the W.C. Act regarding nature of employment which results from such

contract of employment, namely, as to whether the nature of employment should be permanent, temporary, casual or contractual etc. In absence of any such restriction in the W.C. Act, we are of the opinion that irrespective of the nature of employment, the person may be covered under the category of "workman" provided various requirements as contained in clause (n) of sub-section (1) of Section 2 of the W.C. Act read with Schedule II to the said Act are fulfilled.

22. It is pertinent to note that prior to the amendment made by Act No. 46 of 2000 in clause (n) of sub-section (1) of Section 2 of the W.C. Act, the words "any person" occurring in clause (n) were followed by the following brackets and words: "(other than a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business)".

23. The said words were omitted by Act No. 46 of 2000 with effect from 8.12.2000. This amendment further shows that the definition of the word "workman", as contained in clause (n) of sub-section (1) of Section 2 of the W.C. Act, does not contemplate any particular kind of employment, namely, permanent, temporary, casual or contractual etc. Whatever may be the nature of employment, the person may be covered under the definition of "workman" provided the requirements laid down in clause (n) of sub-section (1) of Section 2 of the W.C. Act read with Schedule II to the said Act are fulfilled.

24. In the present case, it is established on record that the deceased Devendra Singh was engaged as a driver by the respondent no. 2 on contractual basis. The factum of employment of the deceased Devendra Singh with the respondent no. 2 was thus established.

25. In view of the above discussion, the fact that the deceased Devendra Singh was engaged as a driver on contractual basis was not relevant.

26. The said Devendra Singh was thus employed under a contract of employment in the capacity of driver.

27. Therefore, the said Devendra Singh was covered within the definition of "workman" as defined in clause (n) of sub-section (1) of Section 2 of the W.C. Act, read with Item (xxv) of Schedule II to the said Act.

28. It has been established on record that the said Devendra Singh sustained injuries while driving the aforesaid Bus, and he died on account of the said injuries. Therefore, the death of the said Devendra Singh took place on account of the injuries sustained by him by accident arising out of and in the course of his employment with the respondent no.2.

29. In the circumstances, we are of the opinion that the Workmen's Compensation Commissioner was justified in awarding compensation to the claimant-respondent no. 1 on account of the death of the said Devendra Singh in the aforesaid accident.

30. As regards the findings recorded by the Workmen's Compensation Commissioner, the same have been recorded on a consideration of the evidence on record. No illegality or

perversity has been shown in the said findings.

31. In view of the above discussion, we are of the opinion that no substantial question of law is involved in the present Appeal. The Appeal is, therefore, liable to be dismissed, and the same is accordingly dismissed.

32. However, on the facts and in the circumstances of the case, there will be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.07.2010

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.

Civil Misc. Writ Petition No. 1882 of 2007

P.B.R. No. 1326/2006 Mahtab Khan
...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Sudhakar Pandey

Counsel for the Respondents:
Sri Vijendra Singh
C.S.C.

Constitution of India Art.-226-Cancellation of Candidature- Petitioner fairly disclosed in his application regarding pendency of Criminal Case-appointment on post of constable-on verification due to criminal cases candidature cancelled-subsequent fair acquitted-shall be presumed never involved any criminal case-entitled for fresh consideration for appointment-accordingly direction issued.

Held: Para 12

However, in view of the subsequent development which indicates an advantage in favour of the petitioner, in my opinion, requires the matter to be reconsidered in the light of the order of acquittal. The petitioner after having been acquitted will be presumed to have never been involved in any criminal case. A perusal of the judgement indicates that it was a clean acquittal. The stain having been erased on a judicial verdict by the competent court washes out the effect of involvement. This has to be viewed from another angle. A person if falsely implicated runs the risk of losing the opportunity to get a job and it is here that injustice should not be allowed to dislodge an otherwise valid claim.

(Delivered by Hon'ble Amreshwar Pratap Sahi, J.)

1. Heard learned counsel for the petitioner Sri Sudhakar Pandey and the learned Standing Counsel.

2. Affidavits have been exchanged between the parties and therefore the matter is being disposed of finally at this stage.

3. The petitioner having been selected as a constable for being appointed in the Uttar Pradesh Police Services was subjected to police verification. His verification report was received to the effect that the petitioner was involved in a criminal case prior to his selection and therefore such involvement does not entitle him to seek employment in the police services. Accordingly, his candidature was cancelled. The petitioner made a representation which was not being considered as a result whereof he filed writ petition No. 69759 of 2006 which was disposed of on 20th December, 2006 to examine the claim of the petitioner and pass an appropriate order.

4. In compliance of the aforesaid direction the impugned order dated 5th

January, 2007 was passed on the ground that the petitioner was involved in a criminal case and therefore such involvement does not entitle him for employment in the police services.

5. After passing of the said order, the petitioner was honorably acquitted by the criminal court in Case Crime No. 616 of 2006 and the decision was rendered by the Trial Court on 29th January, 2007. It is, therefore, clear that the said judgment was not before the Senior Superintendent of Police when he passed the order dated 5th January, 2007.

6. The petitioner has approached this Court questioning the correctness of the impugned order and has brought on record the order of acquittal through a supplementary affidavit.

7. This Court after examining the said acquittal order dated 29th January, 2007 passed an interim order on 28.2.2007 staying the operation of the order dated 5th January, 2007 till the next date of listing. The matter was contested and after the State had filed appearance, the writ petition was admitted on 25th May, 2007 by the following order:

"Learned counsel for the petitioner submits that petitioner's selection was cancelled on the ground of registration of Case Crime No. 616 of 2005. He submits that petitioner has disclosed the said criminal case in the affidavit filed in the recruitment. Copy of the said affidavit has been filed as Annexure-3 to the writ petition. In paragraph 4 of the said affidavit there is mention of criminal case. Learned counsel for the petitioner filed an application and affidavit bringing on record the acquittal order dated 29.1.2007. Learned counsel for the petitioner further submits that other constables have been sent for training but by the impugned order petitioner's selection has been cancelled.

The Senior Superintendent of Police in the impugned order has taken a view that since criminal case is pending, hence petitioner is not fit to be appointed as constable. The affidavit filed by the petitioner in the recruitment discloses the fact of registration of Case Crime No. 616 of 2005 against the petitioner. The Senior Superintendent of Police has cancelled the selection on the ground that criminal case against the petitioner being registered he is not a fit person to be appointed. The copy of the acquittal order in the above criminal case has been brought on the record. In view of the facts of the present case and submissions of the petitioner, as noted above, the petitioner has made out a case for permitting him to be sent for training.

Admit.

In view of the above, the order dated 5th January, 2007 is stayed to the effect that petitioner shall be sent for training, which shall be subject to result of the final order. No appointment letter shall be issued to the petitioner after training without leave of the Court."

8. A counter affidavit has been filed on behalf of the State and the same position has been taken namely that the petitioner being involved in a criminal case was not entitled for being selected and appointed. It is to be noted that in view of the interim orders passed by this Court the petitioner was sent on training which fact is not disputed.

9. Learned counsel for the petitioner submits that the acquittal of the petitioner entitles him for employment. It is submitted that the impact of the acquittal order is that the petitioner was never involved in any criminal case and even otherwise the petitioner had filed an affidavit before the authorities disclosing his involvement. He submits that this honest disclosure was in accordance with rules and keeping in view the subsequent acquittal the claim of the petitioner deserves to be reconsidered in the light of the same.

10. Learned Standing Counsel on the other hand contends that the petitioner had an antecedent of being involved in a criminal case and therefore it cannot be said that the impugned order is erroneous. He further submits that the order was passed on the basis of the material that was available and in the absence of the order of acquittal it cannot be said that the order suffers from any infirmity.

11. Having heard learned counsel for the parties, the contention of the learned Standing Counsel to the effect that the order of acquittal was not in existence when the impugned order was passed appears to be correct.

12. However, in view of the subsequent development which indicates an advantage in favour of the petitioner, in my opinion, requires the matter to be reconsidered in the light of the order of acquittal. The petitioner after having been acquitted will be presumed to have never been involved in any criminal case. A perusal of the judgment indicates that it was a clean acquittal. The stain having been erased on a judicial verdict by the competent court washes out the effect of involvement. This has to be viewed from another angle. A person if falsely implicated runs the risk of losing the opportunity to get a job and it is here that injustice should not be allowed to dislodge an otherwise valid claim.

13. Accordingly, the Senior Superintendent of Police is required to reconsider the candidature of the applicant and as such for the said purpose the order impugned dated 5th January, 2007 is quashed. The Senior Superintendent of Police will pass a fresh order keeping in view the observations made hereinabove within eight weeks from the date of presentation of a certified copy of this order before him.

14. The writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.07.2010

BEFORE
THE HON'BLE V.K. SHUKLA, J

Civil Misc. Writ Petition No. 2476 of 2009

Nanhey ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri M.A. Qadeer
Sri Iqbal Ahmad Siddiqui

Counsel for the Respondents:
Sri P.S. Baghel
Sri B.K. Pandey
S.C.

U.P. Panchayat Raj Act.,1947-Section-95(i)(g)-Removal of Village Pradhan-allegation of contesting the election by changing his name and father's name to suppress the pendency of criminal cases

relating to moral turpitude- on Show Cause Notice no proper reply submitted even before this court-held-removal order-proper warrant no interference.

Held: Para 11

Facts and circumstance clearly disclose that it was deliberate act on the part of the petitioner in getting his name changed in the electoral roll, inasmuch as he was conscious of this fact that two cases which are pending against him with same name involved moral turpitude and in such a situation nomination would not be entertained. Petitioner in well calculated manner, got his name changed and contested the election. Once said fact came to the knowledge and notice of the authority concerned, then after recording finding that petitioner is involved in cases involving moral turpitude, then in such a situation District Magistrate formed opinion. Petitioner has got no explanation to furnish qua two criminal cases pending against under Section 409 I.P.C. him and even before this court no attempt or endeavour has been made to demonstrate that said two criminal case wherein he has been charged are cases not involving moral turpitude.

Case Law discussed:
1999 RD 246

(Delivered by Hon'ble V.K. Shukla, J.)

1. Present writ petition has been filed by the petitioner questioning the validity of the action taken by the District Magistrate, Rampur, respondent no.2 proceeding to pass order directing removal of the petitioner from the office of the Pradhan in exercise of authority of external control, vested under Section 95(i)(g) of U.P. Panchayat Raj Act, 1947.

2. Brief background of the case is that petitioner claims that he is permanent resident of village Dadhiyal, Mustakham, Tehsil swar, District Rampur. Petitioner claims that his original name is Gulam Hussain alias Nanhey son of Shahabuddin alias Lalla and he became famous with his alias name Nanhey son of Lalla. Petitioner submits that on 23.4.2005 petitioner filed an application before the Sub Divisional Officer for entering his name as Nanhey son of Lalla in place of Gulam Hussain son of Shahabuddin in the voter list as well as in revenue record of his agricultural land. Petitioner submits that said prayer made, was accepted. Petitioner has stated that he contested the election of Pradhan with the name of Nanhey son of Lalla and won the said election. Petitioner stated that on account of party politics and on account of having proximity with different political boss namely Sri Azam Khan, first information report had been lodged against him being Case Crime No. 588 of 2006, under Sections 420,467,468 and 471 I.P.C. on account of the fact that petitioner has changed his name. In the said criminal case, charge sheet had been filed. Thereafter, petitioner had filed Criminal Misc. Application under section 482 Cr. P.C. being Criminal Misc. Application No. 12661 of 2008 wherein this court has stayed the further proceeding therein. Petitioner submits that Nawab Kazim Ali Khan on account of political rivalry written a letter to District Magistrate, Rampur on 30.8.2008 mentioning therein that he is sending Mr. Mohd. Farook in relation to the fact that petitioner has contested election by changing his name and further against the petitioner various criminal cases has been mentioned and as such action be taken against the petitioner in accordance with law. Petitioner submits that thereafter Civil Misc. Writ Petition No. 37951 of 2008 had been filed before this court and this court therein as inquiry

was not being concluded, proceeded to pass order directing the District Magistrate, Rampur to conclude the inquiry into the matter after affording opportunity of hearing to Pradhan of the village. As the said order was not being complied with within the time framed provided for, in this background Civil Misc. Contempt Petition No. 37337 of 2008 had been filed and this court on 24.10.2008 afforded one more opportunity to District Magistrate to comply with the order passed by this court within period of three weeks from the date of production of certified copy of this order. Thereafter, District Magistrate on 31.10.2008 issued show cause notice to the petitioner mentioning therein that petitioner had contested the election with change name and further petitioner has been made an accused in criminal cases, which are still pending, as such as to why action under Section 95(1)(g)(ii) of U.P. Panchayat Raj Act,1947 be not undertaken. Petitioner after receiving the said show cause notice, submitted his reply on 10.11.2008. After the said reply was submitted, District Panchayat Raj Officer on 28.11.2008 appraised the petitioner to submit reply along with necessary details, as requisite particulars were lacking and missing. Petitioner submitted his reply and thereafter, District Panchayt Raj Officer made recommendation on 30.12.2008 on 5.12.2008 and said recommendation being made, District Magistrate on 5.1.2009 proceeded to pass order of removal. At this juncture present writ petition has been filed.

3. Counter affidavit has been filed on behalf of the State Government, short counter affidavit has been filed on behalf of the complainant in question Mohd. Farook Azad.

4. Supplementary affidavit, supplementary counter affidavit and rejoinder affidavit have also been filed.

5. After pleadings mentioned above, have been exchanged, thereafter, present writ petition has been taken up for final hearing/disposal with the consent of the parties.

6. Sri. M.A. Qadeer, Senior Advocate, appearing with Sri Iqbal Ahmad Siddiqui, Advocate contended with vehemence that in the present case entire proceedings undertaken against the petitioner is unjustifiable, arbitrary and unreasonable and prescribed procedure as is provided for under Section 95(1)(g) of U.P. Panchayat Raj Act, and the 1997 Rules has not at all been complied with and as such order passed, is liable to be quashed.

7. Countering the said submission, learned Standing Counsel as well as Sri B.K. Pandey, Advocate appearing on behalf of the complainant on the other hand contended that in the present case on admitted position, deliberately and wilfully petitioner has tried to manipulate things to his advantage and this is undisputed position that he has been charged with offence involving moral turpitude, then in this background once this is accepted position that charged offence involves moral turpitude, and reasonable opportunity has been afforded to him, in such a situation, writ petition as it has been framed and drawn deserves to be dismissed.

In order to appreciate respective argument, Section 95(1)(g) of U. P. Panchayat Raj Act, 1947 is being extracted below.

"U.P. Panchayat Raj Act, 1947

"95. Inspection.- (1) The State Government may-

(a).....

(b).....

(c).....

(d).....

(e).....

(f).....

(g) Remove a Pradhan, Up-Pradhan or member of a Gram Pachayat or a Joint Committee or Bhumi Prabandhak Samiti, or a Panch, Sahayak Sarpanch or Sarpanch of a Nyaya Panchayat if he -

(i) absent himself without sufficient cause for more than three consecutive meetings or sittings.

(ii) Refuses to Act or becomes incapable of acting for any reason whatsoever or if he is accused of or charged for an offence involving moral turpitude.

(iii) has abused his position as such or has persistently failed to perform the duties imposed by the Act or rules made hereunder or his continuance as such is not desirable in public interest, or

(iii-a) has taken the benefit of reservation under sub-section (2) of Section 11-A or sub-section (5) of Section 12, as the case may be, on the basis of a false declaration subscribed by him stating that he is a member of the Scheduled Castes, the Scheduled Tribes or the Backward Classes, as the case may be .

(iv) Being a Sahayak Sarpanch or a Sarpanch of the Nyaya Panchayat takes active part in politics, or

(v) suffers from any of the disqualifications mentioned in clauses (a) to (m) of Section 5-A.

Provided that where, in an enquiry held by such person and in such manner as may be prescribed, a Pradhan or Up-Pradhan is prima facie found to have committed financial and other irregularities such Pradhan or Up-Pradhan shall cease to exercise and perform the financial and administrative powers and functions, which shall , until he is exonerated of the charges in the final enquiry be exercised and performed by a Committee consisting of three members of Gram Panchayhat appointed by the State Government.

(gg) (***)

(h) (***)

Provided that

(i) no action shall be taken under clause (f), clause (g) (***) except after giving to the body or person concerned a reasonable opportunity of showing cause against the action proposed.

Rules, 1997 is also being extracted below.:-

"The Uttar Pradesh Panchayat Raj (Removal of Pradhans, Up-Pradhans and Members) Enquiry Rules, 1997

3. **Procedure relating to complaints.-** (1) any person making complaint against a Pradhan or Up-Pradhan may send his complaint to the State Government or any other officer empowered in this behalf by the State Government.

(2) every complaint referred to in sub-rule (1) shall be accompanied by the complainant's own affidavit in support thereof and also affidavit of all persons from whom he claims to have received information of facts relating to accusation, verified before a notary, together with all documents in his possession or power pertaining to accusation.

(3) Every complaint and affidavit under this rule as well as any schedule or annexure thereto shall be verified in the manner laid down in the Code of Civil Procedure, 1908 for the verification of pleadings and affidavits respectively.

(4) Not less than three copies of the complaint as well as each of its annexure shall be submitted by the complainant.

(5) A complaint which does not comply with any of the foregoing provisions of this Rule shall not be entertained.

(6) It shall not be necessary to follow the procedure laid down in the foregoing provisions of this rule if a complaint against a Pradhan or Up-Pradhan is made by a public servant.

4. Preliminary Enquiry.- (1) The State Government may, on the receipt of complaint or report referred to in Rule 3 or otherwise order the Enquiry Officer to conduct a preliminary enquiry with a view to finding out if there is prima facie case for a formal inquiry in the matter.

5. Enquiry Officer- Where the State Government is of the opinion , on the basis of report referred to in sub-rule (2) of Rule 4 or otherwise that an enquiry should be held against a Pradhan or Up-Pradhan or Member under the proviso to clause (g) of sub-section (1) of Section 95 it shall forthwith constitute a committee envisaged by proviso to clause (g) of sub-section (1) of Section 95 of the Act and by an order ask an Enquiry Officer, and by an order ask an Enquiry Officer, other than the Enquiry Officer nominated under sub-rule (2) of Rule 4, to hold enquiry.

6. Procedure of the enquiry.-(1) The substance of imputations, and a copy of the complaint referred to in Rule 3, if any, shall be forwarded to the Inquiry officer by the State Government.

(2) The Inquiry officer shall draw up-

(a) the substance of imputations into definite and distinct articles of charge; and

(b) a statement of imputations in support of each article of charge, which shall contain a statement of all relevant facts and a list of documents by which, and list of witnesses by whom, the articles of charge are proposed to be sustained.

(3) The Inquiry Officer shall deliver or cause to be delivered to the person against whom he is to hold the enquiry, a copy of the articles of charge, the statement of imputations and a list of documents and witnesses by which each article of charge is proposed to be sustained and shall require that person by

a notice in writing, to submit within such time as may be specified, a written statement of his defence and to state whether he desires to be heard in person, and to appear in person before him on such day and at such time as may be specified.

(4) On receipt of the written statement of defence, the inquiry officer shall inquire into such of that articles of charges as are not admitted and where all articles of charges have been admitted in the written statement of defence, the Inquiry officer shall record his findings on each charge after taking such evidence as he may think fit.

(5) If the person who has not admitted any of the articles of charges in his written statement of defence, appears before the Inquiry Officer, he shall ask him where he is guilty or has any defence to make and if he pleads guilty to any of the articles of charges, the Inquiry officer shall record he plea, sign the record and obtain the signature of that person, and return a finding of guilt in respect of those charges.

(6) If the person fails to appear within the specified time or refuses or omits to plead, the Inquiry officer shall take the evidence, and if there is a complaint, require him to produce the evidence by which he proposes to prove the articles of charges and shall adjourn the case to a later date not exceeding fifteen days, after recording an order that the said person may, for the purpose of preparing his defence,-

(a) inspect within five days of the order or within such further time not exceeding five days as the Inquiry Officer may allow, the documents specified in the list referred to in sub-rule (2);

(b) submit a list of witnesses to be examined on his behalf;

(c) give a notice within ten days of the order or within such further time not exceeding ten days as the Inquiry Officer may allow, for discovery or production of any documents that are relevant to the inquiry an are in the possession of the State Government, but not mentioned in the list referred to in sub-rule (2).

(7) The person against whom enquiry is being held may take the assistance of any other person to present the case on his behalf, and the inquiry office may appoint any person as a presiding Officer to assist him in conducting the inquiry:

Provided that a legal practitioner shall not be engaged or appointed under this sub-rule.

(8) If the person applies orally or in writing for the supply of copies of the statement of witnesses mentioned in the list referred to in sub-rule 92), the Inquiry officer shall furnish him with such copies as early as possible, and in any case, not later than three days before the commencement of the examination of the witnesses by whom any of the articles of charge is proposed to be proved.

(9) The Inquiry officer shall, on receipt of the notice for the discovery or production of documents, forward the same or copies thereof to the authority in whose custody or possession the documents are kept, with a requisition for the production of the documents by such

date as may be specified in such requisition:

Provided that the Inquiry officer may; for the reasons to be recorded in writing , refuse to requisition such of the documents as are, in his opinion, not relevant to the case.

(10) On receipt of the requisition referred to in sub-rule (9, every authority having the custody or possession of the requisitioned documents shall produce the same before the Inquiry Officer:

Provided that if the authority having the custody or possession of the requisitioned documents is satisfied for reasons to be recorded in writing that the production of all or any such documents would be against the public interest o security of the State, it shall inform the Inquiry officer accordingly and such Inquiry Officer shall, on being so informed, communicate the information to the person against whom the inquiry is being held and withdraw the requisition made by him for the production or discovery of documents.

(11) On the date fixed for enquiry, the oral and documentary evidence by which the articles of charge are proposed to be proved shall be produced and the witnesses shall be examined, by the Inquiry officer by or on behalf of the complainant, if there is one and may be cross-examined by or on behalf of the person against whom the inquiry is being held. The witnesses may be examined by the Inquiry officer or the complainant, as the case may be, on any point on which they have been cross-examined, but not on any new matter, without the leave of the Inquiry officer.

(12) The Inquiry officer may allow production of evidence not included in the list given to the person against whom the inquiry is being held , or may itself call for new evidence or recall and re-examine any witness and in such case the said person shall be entitled to have if her demands it, a copy of the list of further evidence proposed to be produced and an adjournment of the Inquiry Officer for three clear days before the production of such evidence, exclusive of the day of adjournment and the day to which the inquiry is adjourned. The Inquiry Officer shall give the said person an opportunity of inspecting such documents before they are taken on the record, the Inquiry officer may also allow the said person to produce new evidence, if he is of the opinion that the production of such evidence is necessary in the interest of justice.

Note- Now evidence shall not be permitted or called for or any witness shall not be recalled to fill up any gap in the evidence. Such evidence may be called from only when there is an inherent lacuna or defect in the evidence which has been produced originally.

(13) When the evidence for proving the articles of charge against the person against whom inquiry is being held is closed, the said person shall be required to state his defence orally or in writing as he may prefer. If the defence is made orally, it shall be recorded and the said person shall be required to sign the record. In either case, a copy of the statement of defence shall be given to the complainant, if any.

(14) The evidence on behalf of the person against whom the inquiry is being held shall then be produced. The said

person may examine himself in his own behalf if he so prefers. The witnesses produced by the said person shall then be examined and shall be liable to cross-examination, re-examination and examination by the Inquiry officer according to the provisions applicable to the witnesses for proving the articles of charge.

(15) The Inquiry officer may, after the person against whom inquiry is being held closes his case, and shall, if the said person has not examined himself, generally question him on the circumstances appearing against him in the evidence for the purpose of enabling him to explain any circumstances appearing in the evidence against him.

(16) The inquiry officer after completion of the production of evidence, hear the complainant, if any and the person against whom enquiry is being held, or permit them, or him, as the case may be, to file written briefs of their respective cases.

(17) If the person to whom a copy of the articles of charge has been delivered does not submit the written statement of defence on or before the date specified for the purpose or does not appear in person before the Inquiry officer o otherwise fails or refuses to comply with the provisions of this rule, the Inquiry officer may hold the enquiry ex parte.

(18) Whenever Inquiry officer after having heard and recorded the whole or any part of the evidence in an enquiry, ceases to exercise jurisdiction therein and is succeeded by another Inquiry Officer, the inquiry Officer so succeeding may act on the evidence so recorded by his predecessor or partly or recorded by himself.

Provided that if the succeeding inquiry officer is of the opinion that further examination of any of the witnesses whose evidence has already been recorded is necessary in the interest of justice he may recall, examine, cross-examine and re-examine any such witness as herein before provided.

7. Report of the inquiry officer.- After the conclusion of the enquiry, the Inquiry Officer shall prepare a report which shall contain-

(a) the articles of charge and the statement of the imputations;

(b) the defense of the person against whom the enquiry has been held;

(c) the assessment of the evidence in respect of each article of charge;

(d) the findings on each article of charge and reasons therefor.

***Explanation*.-** If in the opinion of the Inquiry Officer the proceedings of the enquiry establish any article of charge different from the original articles of charge, he may record his findings on such article of charge.

Provided that the findings on such article of charge shall not be recorded unless the person against whom enquiry has been held has either admitted the facts on which such article of charge is based or has had a reasonable opportunity of defending himself against such article of charge.

8. The Inquiry Officer shall conclude the enquiry within six months from the date of receipt of complaint and forward

to State Government the records of the enquiry, which shall include-

(a) the report prepared by him under rule 7;

(b) the written statement of defence, if any, or the person against whom enquiry has been held;

(c) the oral and documentary evidence produced during the course of the enquiry;

(d) written briefs, if any, filed during the course of the enquiry; and

(e) the order, if any, made by the State Government and the Inquiry officer in regard to the enquiry."

8. Under Chapter VII of the U.P. Panchayat Raj Act, State Government has been vested with the authority to remove a Pradhan, Up-Pradhan or Members of Gram Panchayat on account of the activities carried out by Pradhan, Up-Pradhan or Members of Gram Panchayat mentioned in sub-clauses (i) to (iv) of Clause (g) of Sub-Section (1) of Section 95 of the U.P. Panchayat Raj Act. It has also been provided therein to seize financial as well as administrative powers and functions of the aforementioned persons, viz. Pradhan, Up-Pradhan or Members of Gram Panchayat when in enquiry held against such persons by such person in such manner as may be prescribed, a Pradhan or Up-Pradhan is found to have committed financial and other irregularities and then he has to face formal enquiry. In exercise of powers vested under Section 110 read with clause (g) of sub-section (1) of Section 95 of the U.P. Panchayat Raj Act, 1947, Rules have been framed dealing with removal of Pradhan, Up-Pradhan and Members. Rule 3 deals with procedure relating to complaints. Rule 4 clearly provides that the State Government on the receipt of complaint or report referred to in Rule 3 or otherwise may order the Enquiry Officer to conduct a preliminary enquiry with a view to finding out if there is prima facie case for a formal inquiry in the matter. Enquiry Officer is thereafter obliged to conduct preliminary enquiry as expeditiously as possible and submit report to the State Government. Rule 5 clearly provides that where the State Government is of the opinion on the basis of report referred to in sub-rule (2) of Rule 4 or otherwise that an enquiry should be held against a Pradhan or Up-Pradhan or Member under the proviso to clause (g) of sub-section (1) of Section 95 it shall forthwith constitute a committee envisaged by proviso to clause (g) of sub-section (1) of Section 95 of the Act and by an order ask an Enquiry Officer other than the Enquiry Officer nominated under sub-rule (2) of Rule 4, to hold enquiry. Rule 6 gives procedure, which is to be followed in the enquiry. The substance of imputations, and a copy of the complaint referred to in Rule 3, if any, has to be forwarded to the Inquiry Officer by the State Government, and the Inquiry Officer thereafter shall draw up the substance of imputations into definite and distinct articles of charge; and further statement of imputations in support of each article of charge, which shall contain a statement of all relevant facts and a list of documents by which, and list of witnesses by whom, the articles of charge are proposed to be sustained. Enquiry Officer is obliged to deliver the person against whom he is to hold the enquiry, a copy of the articles of charge, the statement of imputations and a list of documents and witnesses by which each article of charge is proposed to be sustained and shall require that person by a notice in writing, to submit within such

time as may be specified, written statement of his defence and to state whether he desires to be heard in person, and to appear in person before him on such day and at such time as may be specified. After receipt of the written statement of defence, the Inquiry Officer has to enquire into such of that articles of charges as are not admitted and where all articles of charges have been admitted in the written statement of defence, the Inquiry officer shall record his findings on each charge after taking such evidence as he may think fit. If the person who has not admitted any of the articles of charges in his written statement of defence, appears before the Inquiry Officer, the Inquiry Officer is obliged to ask him where he is guilty or has any defence to make and if he pleads guilty to any of the articles of charges, the Inquiry Officer shall take evidence, and if there is a complaint, require him to produce the evidence by which he proposes to prove the articles of charges. The provision of assistance has also been provided. Copies of the statement of witnesses are also liable to be supplied. Inquiry Officer is duty bound to fix the date, time and place of enquiry and is further duty bound to provide opportunity to cross examination from the witnesses produced. Evidence is also permitted. After evidence is closed, then defence is permitted to be made orally or in writing, if the evidence is given orally, it has to be recorded. Thereafter, evidence on behalf of the person against whom the inquiry is being held shall then be produced. The Inquiry officer after completion of the production of evidence, hear the complainant, if any and the person against whom enquiry is being held, or permit them, or him, as the case may be, to file written briefs of their respective cases. After the enquiry is concluded, the Inquiry Officer shall prepare a report containing the articles of charge and the statement of the imputations; the defence of the person against whom the enquiry has been held; the assessment of the evidence in respect of each article of charge; the findings on each article of charge and reasons therefor. Inquiry officer has to submit report as prepared under rule 7, which shall include written statement of defence, if any, or the person against whom enquiry has been held; oral and documentary evidence produced during the course of the enquiry; written briefs, if any, filed during the course of the enquiry; and the order, if any, made by the State Government and the Inquiry officer in regard to the enquiry.

9. This Court in the case of ***Smt. Sandhya Gupta Vs. District Magistrate, Auriya 1999 RD 246*** has given guidelines to District Magistrates so that in future, they are cautious enough to deal with affairs of Pradhan, Up-Pradhan and Members in accordance with law, leaving no scope for unnecessary litigation as follows:

"1. It may clearly understood that Pradhan, Up Pradhan or Member of the Gram Panchayat is virtually a constitutional elected functionary and he cannot be removed or stripped off his statutory powers and obligations in a casual manner without there being solid foundation for initiating action against him.

2. The power of the removal of the above functionaries is conferred on the State Government in view of the provisions of Section 95(1)(g) of the Act which power ultimately has been

delegated to all the District Magistrate in the State.

3. A Pradhan, Up-Pradhan or a member of the Gram Panchayat etc. may be removed from the office on a number of grounds. Generally in most of the cases, the ground mentioned in sub-Clause (iii) of Clause (g) of Section 95 of the Act, which relates to that person who has abused his position as such or has persistently failed to perform the duties imposed by the Act or Rules made thereunder or his continuance as such is not desirable in public interest, in invoked. This omnibus clause embraces within its ambit the financial and administrative irregularities committed by Pradhan, Up-Pradhan and others.

4. The action for removal may be initiated on receiving the complaints and after observing the provisions made in the Up-Pradhan and Members) Enquiry Rules, 1997.

5. The complaint can be entertained only when the procedure prescribed in Rule 3 of the Rules of 1997 is specified though the procedure laid down in Rule 3 to entertain the complaints is not necessary to be followed, if the complaint is made by a public servant. Any complaint which does not specify the procedure prescribed under Rule 3 has to be thrown out as not entertainable.

6. After the complaint if validity entertained a preliminary enquiry under Rule 4 is to be conducted by the District Panchayat Raj Officer with all expedition.

7. After the receipt of the preliminary enquiry report submitted by the District Panchayat Raj Officer the District Magistrate may pass an appropriate order as contemplated by First proviso to clause (g) which was inserted by U.P. Act No. 9 of 1994, which provides that it a Pradhan or Up-Pradhan is primafacie found to have committed financial and other irregularities, such Pradhan or Up-Pradhan shall cease to exercise and perform financial and administrative power and functions, which shall, until he is exonerated of the charges in the final enquiry, be exercised and performed by a committee consisting of three members of the Gram Pradhan.

8. The provisions of the aforesaid proviso relating to stripping of the administrative and financial power of the Pradhan, Up Pradhan can be invoked only after a show cause notice is served on the Pradhan or Up-Pradhan, as the case may be and he is afforded a reasonable opportunity of showing cause against the action proposed as is contemplated in second proviso to clause (g). Any order passed by the District Magistrate without calling for the explanation and without giving reasonable opportunity of sowing cause against the action proposed would be vitiated and would invite judicial intervention.

9. Once financial and administrative powers of the Pradhan or Up-Pradhan are ceased, taking into consideration the preliminary enquiry report submitted by the District Panchayat Raj Officer and after consideration of the reply to show cause notice, if any, submitted by him they shall not be restored until the Pradhan or Up-Pradhan is exonerated of the charge in the final enquiry. It is seen that after passing of the order stripping of the Pradhan or Up-Pradhan of their financial and administrative powers of

functions, the District Magistrates restore these powers even though the final enquiry has not been concluded. It is made clear that once aforesaid powers have been ceased, they cannot be restored unless the formal enquiry is concluded and the Pradhan or Up-Pradhan is exonerated of the charges. The District Magistrate cannot resort to any mid-way course.

10. After the receipt of the preliminary enquiry report a final enquiry is to be ordered by the District Magistrate by appointing an enquiry officer, as contemplated in Rule 5.

11. The enquiry officer shall conduct the enquiry strictly in accordance with the provisions of Rule 6, which are to be followed rigorously and meticulously.

12. After conclusion of the enquiry and preparation of the report, the enquiry officer shall submit the report to the District Magistrate, as required in Rules 7 and 8.

13. After the receipt of the report of final enquiry, the District Magistrate shall not remove the Pradhan or Up-Pradhan on one or more of the grounds mentioned in clause (g) (i) to (v) unless he has given a show cause notice of the proposed action alongwith a report of enquiry to the Pradhan or Up-Pradhan and had afforded him an opportunity of showing cause. The reasonable period to show cause against the proposed action shall not be less than 20 days from the date of receipt, of, or service on the Pradhan or Up-Pradhan.

14. If an opportunity of personal hearing is sought by the Pradhan or Up-Pradhan, it shall not denied by the District Magistrate and he shall pass final orders one way or the other after affording a personal hearing to the Pradhan or Up-Pradhan. The District Magistrate shall bear in mind that any order passed under Section 95(1) (g) of the Act in contravention of the above guidelines which are based on salutary principles of natural justice flowing from the statutory provisions shall stand vitiated."

10. Scheme of things provided for is clear and unambiguous, that enquiry under the first proviso of Section 95(1) (g), as per the procedure prescribed under 1997 is to be undertaken only when Pradhan has committed financial and other irregularities. This Court, in the case of Sandhya Gupta (Supra) mentioned that Pradhan can be removed from his office on number of grounds; generally in most of the cases, the grounds mentioned in sub-clause (iii) of clause (g) of Section 95 of the Act which relates to that person who has abused his position as such or has persistently failed to perform the duties imposed by the Act or rules made thereunder or his continuance is not desirable, is invoked. This omnibus clause embraces within its fold administrative and financial irregularities. In class of cases where Pradhan is accused of or charged for an offence involving moral turpitude, enquiry contemplated under the first proviso of Section 95(1) (g) read with 1997 Rules, is not at all attracted as enquiry is not at all going to be made qua financial irregularities or other irregularities, and the only relevant factor to see would be that Pradhan is accused of or charged for an offence involving moral turpitude or not. The expression accused of an offence means person against whom formal accusation relating to the commission of an offence has been

levelled, which in the normall course may result in his prosecution. "Charge for an offence", signifies an accusation made in legal manner, and means something more than suspected or accused of crime. Once criminal forum has been set in motion, and therein Pradhan is alleged to be accused of or charged for an offence involving moral turpitude, then enquiry is limited to the extent of finding out, as to whether the Pradhan accused of or charged for the offence, the said accusation or charge has the element of involvement of moral turpitude or not ?. Merely being an accused of or charged for an offence, will not confer authority on the State Government to take action for removal, until and unless the said offence, accused of or charged, has the tapping of involvement of moral turpitude also. The first proviso of Section 95(1)(g) read with 1997 Rules, has no application; whatsoever, in the facts of present case, as enquiry was limited to the extent of finding out, as to whether Pradhan was accused of or charged for an offence involving moral turpitude or not, and for this purpose as per the second proviso, he was only entitled for reasonable opportunity of showing cause against the action proposed, and nothing beyond the same.

11. On the parameter as set out, once it is accepted position that provision, as contained under the first proviso to section 95(1)(g) read with 1997 Rules are not at all attracted, and reasonable opportunity has to be afforded qua the action propose, as to whether reasonable opportunity has been afforded or not. In the present case, petitioner has been given opportunity to put forth his version, qua his complicity in criminal cases, which involved moral turpitude. Show cause notice was issued to petitioner by District Magistrate concerned on 31.10.2008. to the said show cause notice reply was submitted by petitioner on 10.11.2008, and then as on various facets satisfactory reply had not been submitted, petitioner was asked to do the needful, and petitioner thereafter furnished material available at his end and then action has been taken. In the present case, thus reasonable opportunity has been provided to petitioner, before proceeding to take action in the matter. Two first information report had been lodged against the petitioner being Case Crime No. 2279 of 2004 and Case Crime No. 2280 of 2004 under Section 409 I.P.C. In both the cases petitioner has been charge sheeted and was confined to jail. Nature of cases, qua which petitioner was charged involved moral turpitude and to the said show cause notice, which has been issued to the petitioner on 31.10.2008, petitioner had accepted this position that this two sets of criminal cases are of the year 2004 and were pending in the court and in respect of Case Crime No. 588 of 2008 under Sections 420,467,468 and 471 I.P.C., petitioner had given reply that further proceeding had been stayed. Merely because further proceeding had been stayed against the petitioner, same would not have the effect of wiping out the effect of the said proceedings, and its only effect would be that from the date of passing of interim order, further proceeding will not take place, till matter is not decided by this Court. Once petitioner was accused and charged for an offence involving moral turpitude, the State Government had full authority to take action. Petitioner had accepted this fact that he got his name changed when the election process was to take place and before it has been notified. Petitioner

claims that said act of his was bona fide act. Facts and circumstance clearly disclose that it was deliberate act on the part of the petitioner in getting his name changed in the electoral roll, inasmuch as he was conscious of this fact that two cases which are pending against him with same name involved moral turpitude and in such a situation nomination would not be entertained. Petitioner in well calculated manner, got his name changed and contested the election. Once said fact came to the knowledge and notice of the authority concerned, then after recording finding that petitioner is involved in cases involving moral turpitude, then in such a situation District Magistrate formed opinion. Petitioner has got no explanation to furnish qua two criminal cases pending against under Section 409 I.P.C. him and even before this court no attempt or endeavour has been made to demonstrate that said two criminal case wherein he has been charged are cases not involving moral turpitude.

12. Once this is factual scenario that petitioner has been charged for the offence involving moral turpitude and qua the same no reasonable explanation has been furnished, consequently, in the fact of the present case, this court refuses to interfere with the order impugned. Writ petition is accordingly dismissed.

13. No order as to cost.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.07.2010

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

Criminal Appeal No. 5365 of 2009

Suresh and another ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri P.N. Mishra
Sri Apul Mishra
Sri B.K. Solanki
Sri Swetashwa Agarwal

Counsel for the Opposite Parties:
Sri Surendra Tiwari
Sri Ajat Shatru Pandey
A.G.A.

Code of Criminal Procedure-Section 439-Bail pending Appeal-conviction under 120-B-merely on basis of motive and evidence of fleeing away from the place of accurance no other evidence-main accused got fair acquittal-even in FIR neither the name of appellant disclosed not specific role assigned-held-entitle for bail subject to payment of half of the amount of fine.

Held: Para 7

As regards the appellants Suresh and Babloo S/o Mon Raj, their names did not find place in the FIR nor the number of vehicle, which was used by them to flee away, was mentioned therein. Even the written report given by the son of the deceased later on, which is Ext. Ka-18 did not make any mention of these two appellants nor there is any mention of any money having been given to them by the deceased. They were charged only under Section 120B IPC but except motive and evidence of fleeing away

from the scene of occurrence in a Car, there is no evidence against them. The police witnesses have named them in their statement but surprisingly their names does not find place in the FIR or the recovery memo. In view of these facts, we are inclined to grant bail to the appellants Suresh and Babloo S/o Mom Raj.

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

1. We have heard learned counsel for the appellants, learned AGA for the State, learned counsel for the complainant and perused the impugned judgment and trial court's record.

2. Since both the aforementioned criminal appeals arise out of a common judgment and order, the prayer for bail in both the appeals is being heard and disposed of by a common order.

3. Sri P.N. Mishra, Senior Advocate, learned counsel for the appellants Suresh and Babloo S/o Mom Raj submitted that these two appellants were not arrested on spot but are alleged to have fled away from the scene of crime in a car alongwith co-accused Lokesh, Arif and Kamal but co-accused Lokesh, Arif and Kamal were acquitted by the trial court and these two appellants were convicted under Section 120B IPC. It was contended that there was no evidence to show the involvement of Suresh and Babloo S/o Mom Raj in the murder of Jai Prakash Goel, father of P.W.-7. It was argued that the motive alleged by the prosecution is that these two appellants have taken a sum of Rs. 2.5 lacs from the deceased on the pretext of providing him land but neither land was transferred to the deceased nor the money was returned and that the deceased had gone to Sikandrabad to meet Suresh and Babloo S/o Mom Raj. It was contended that initially, the written report Ext. Ka-18 submitted by the son of the deceased to the police after receiving the information of murder of his father, did not mention that the deceased had gone to Sikandrabad to meet these two appellants nor there was any mention therein that the deceased had given any money to these two appellants. It was further argued that the independent witnesses cited in the FIR lodged at the instance of a Senior Police Officer, there was no mention of five persons including these two appellants running away from the scene of crime in a Santro car. It has not been shown by the prosecution as to how the police witnesses came to know the names of these two appellants.

4. Sri Dilip Kumar, learned counsel for the appellant Arun @ Vinne submitted that Arun @ Vinne is alleged to have been arrested on the spot and a country-made pistol 315 bore and four live cartridges were recovered from his possession. It was contended that the bullets found inside the dead-body were not sent to the Forensic Science Laboratory for verification that these bullets were fired from the pistol recovered from appellant Arun @ Vinne. It was submitted that Arun @ Vinne had no enmity with the deceased and had no reason to commit his murder. It was further submitted that no independent eye witness of the incident has been examined by the prosecution and all the police witnesses examined during the trial were not eye witnesses of the crime and had reached at the place of occurrence after the incident.

5. Learned AGA and learned counsel for the complainant submitted

that the deceased Jai Prakash Goel had given Rs. 2.5 lacs to Suresh and Babloo S/o Mom Raj for purchasing land but land was not provided nor the money was returned. The deceased was pressurising these two appellants to return money and this provided the motive to Suresh and Babloo S/o Mom Raj to plan the murder of Jai Prakash Goel with the help of other co-accused. It was further submitted that the police witnesses examined during the trial were passing nearby and after hearing the firing of two shots, they reached the place of occurrence and found that five persons Suresh, Babloo S/o Mom Raj, Kamal Yadav, Lokesh and Arif running away from the place of occurrence in Car No. D.L.4C-AP 5246 whereas two persons armed with country-made pistol were running away on foot, who were chased by the police and were apprehended. They disclosed their names as Arun @ Vinne and Babloo S/o Chandra Pal. Country-made pistol 315 bore and live cartridges were recovered from their possession. There was a spent cartridge case in the barrel of pistol recovered from Babloo S/o Chandra Pal whose case was later sent to Juvenile Justice Court for trial. It was contended that both the pistols and empty cartridges recovered from Arun @ Vinne and Babloo S/o Chandra Pal were sent to Forensic Science Laboratory, which found that the barrel of both the pistols contained firing residue including Nitrite, Lead, Copper and Nickel. Spent cartridge case found in the barrel was fired from the pistol recovered from Babloo S/o Chandra Pal.

6. Two fire-arm wounds of entry were found on the body of the deceased. The appellant Arun @ Vinne was found running from the place of occurrence with a fire-arm in his hand, which was recently fired as is apparent from the report of Forensic Science Laboratory and after considering the submissions of both the parties, we are of the considered opinion that Arun @ Vinne is not entitled to bail.

7. As regards the appellants Suresh and Babloo S/o Mon Raj, their names did not find place in the FIR nor the number of vehicle, which was used by them to flee away, was mentioned therein. Even the written report given by the son of the deceased later on, which is Ext. Ka-18 did not make any mention of these two appellants nor there is any mention of any money having been given to them by the deceased. They were charged only under Section 120B IPC but except motive and evidence of fleeing away from the scene of occurrence in a Car, there is no evidence against them. The police witnesses have named them in their statement but surprisingly their names does not find place in the FIR or the recovery memo. In view of these facts, we are inclined to grant bail to the appellants Suresh and Babloo S/o Mom Raj.

8. The bail application of appellant Arun @ Vinne is rejected.

9. Let the appellants Suresh and Babloo S/o Mom Raj, convicted and sentenced by the Addl. District and Sessions Judge, Court No. 5, Bulandshahar in S.T. No. 1053 of 2007 arising out of Case Crime No. 499 of 2007, under Section 120B IPC, P.S. Sikandrabad, District- Bulandshahar be released on bail on their furnishing a personal bond with two sureties each in the like amount to the satisfaction of the Court concerned on depositing 50 % amount of fine imposed by the trial court.

10. The realisation of remaining 50 % amount of fine shall remain stayed during the pendency of appeal.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.07.2010

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

Writ Petition No. 6792 of 2010

Committee of Management ...Petitioner
Versus
State of U.P. and others ...Respondent

Constitution of India Art.226-Grant of permanent affiliation-while granting Temporary affiliation- No such condition set-up-institution started classes of 3 years graduation-course-before expiry of Temporary affiliation applied for permanent affiliation-objections duly meetout by management-held-Once affiliation granted an institution started functioning-hardly any justification for the authority to withheld or refuse permanent affiliation-except on exceptional circumstances-direction issued to take necessary decision within two week.

Held: Para 8

Institutions are allowed to be opened by the private persons for facilitating education to all those who are interested in getting higher studies. Once the State Government grants no objection for establishing an institution, particularly where courses like B.A., B.Sc. and B.Com, are taught and due affiliation is granted by the University, may be temporary or permanent, there would hardly be any ground for closure of such an institution by not granting permanent affiliation or keeping the matter pending, unless, of course, there is some very exceptional and pertinent reason for refusal of affiliation.

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

1. Notice on behalf of respondent no.1 has been accepted by the learned Chief Standing Counsel, on behalf of respondent no.2 by Dr. Ravi Kumar Misra and on behalf of respondent no.3 by Sri D.K. Upadhyaya.

2. With the consent of the parties' counsel, the petition is being disposed of finally at the admission stage.

3. The petitioner institution was granted due affiliation by the University on 10.8.05 for three academic sessions. Before the said period could expire, the petitioner applied for permanent affiliation. The course in question is B.A. (Art Faculty).

Despite the petitioner having approached for grant of permanent affiliation, before the expiry of the period of temporary affiliation, the State Government, despite recommendations made by the University, did not grant approval for affiliation and rather raised two objections on 14.7.08, namely, (i) though the land of the institution was recorded in its name, but it was not clear as to how much land of the total area of 2.06 hectare was in the name of the institution and how much land was in the name of law college. The same objection was raised with respect to certain other plots; and (ii) it was not clear whether the boundary wall was constructed or not.

The petitioner institution submitted its reply on 18.7.08. Alongwith the said reply, the petitioner also furnished the

report of the Tehsildar, Sadar in respect of the said objections and also the letter of the State Government.

4. Despite the aforesaid objections being removed, the State Government is sitting tight over the matter and now an order has been passed that the petitioner institution would not take any admission till the affiliation is granted, the temporary affiliation having come to an end on 30.6.08.

Dr. Ravi Kumar Misra, appearing for the University, says that the University has forwarded its recommendations, after being satisfied with the reply, to the State Government on 11.7.09.

No reason has been given by the University for not forwarding its recommendations, after the receipt of objections, for a period of more than one year, but in any case, there cannot be any justification also with the State Government to keep the matter pending and not to take an appropriate decision in the matter, knowing fully well that the petitioner institution is an existing institution where temporary affiliation had come to an end on 30.6.08 and, therefore, the college would be deprived of, taking admissions unless further affiliation is granted.

We can appreciate that if any substantive objection would be levelled against the institution asking for permanent affiliation, to refuse or require the institution to remove such a defect, but we do not find any reason that when the institution, as in the instant case, was given temporary affiliation under the same conditions, then how these objections were relevant for granting permanent affiliation.

5. The order granting temporary affiliation dated 10.8.05 (Annexure-2) does not indicate anywhere that the institution was required to meet any condition with respect to the land over which the same was constructed, the terms and conditions having not changed and the institution having not incurred any shortcomings during the course of affiliation, there would apparently no justification, either to withhold or refuse permanent affiliation.

6. It can also not be appreciated that while considering the grant of permanent affiliation, frivolous objections be raised by the State Government, which, as a matter of fact, are not at all relevant. Besides, once the institution has furnished the details and so to say, the objections stood removed as far back as on 18.7.08, there could not be any ground for refusing the permanent affiliation and much less, not considering the grant thereof and keeping it pending for no rhyme and reason.

7. It cannot be presumed that the State Government is oblivious of the fact that once the temporary affiliation has been granted for three academic sessions, not only the students who are admitted in the first academic session would have a right to continue, to complete their studies of three years irrespective of the fact whether permanent affiliation is granted or not, but also those students, who have been admitted in the subsequent two academic sessions would also be entitled to continue with their studies and complete their courses irrespective of the fact that affiliation is further granted or not.

8. Institutions are allowed to be opened by the private persons for facilitating education to all those who are interested in getting higher studies. Once the State Government grants no objection for establishing an institution, particularly where courses like B.A., B.Sc. and B.Com, are taught and due affiliation is granted by the University, may be temporary or permanent, there would hardly be any ground for closure of such an institution by not granting permanent affiliation or keeping the matter pending, unless, of course, there is some very exceptional and pertinent reason for refusal of affiliation.

9. The persons, who invest huge amount in establishing a college, are always in a state of suspense as to whether their institutions would be allowed to take admissions, after the period of temporary affiliation is expired, or not.

10. Such a situation cannot be appreciated.

11. We, under the circumstances, dispose of the writ petition finally with the direction that the State Government shall forthwith take a decision regarding approval for grant of affiliation, say within a maximum period of two weeks from the date of receipt of a certified copy of this order, in the light of the observations made above, and the said decision shall be communicated to the petitioner forthwith.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.07.2010

BEFORE
THE HON'BLE SHYAM SHANKAR TIWARI, J.

Criminal Misc. Writ Petition No. 7899 of 2010

Karam Chand Thapar Brother (C.S.) Limited ...Petitioner
Versus
Nandini Roofing System Private Limited and others ...Respondent

Counsel for the Petitioner:
Sri Ajay Bhanot

Counsel for the Respondents:
A.G.A.

Practice of Procedure- Interim Order-granted for limited period-case listed for hearing on several dates but no further extension-held-stay would not continue automatically unless extended by specific terms.

Held: Para 13

In that case an injunction order was passed for a limited period and thereafter, it could not be extended. Since on the date fixed the Presiding Officer was on leave and later on, the case having been transferred to another court, the order was neither extended nor vacated. Despite the fact that even the application for extension was pending. The High Court took the view that once no order of extension of the interim order was passed and the interim order was operating till particular date it would not continue automatically and would cease on the date on which it was granted.

Case Law discussed:
2009 (3) AWC 3115, 2007(3) SCC-470, 2008 (8) SCC-348.

(Delivered by Hon'ble Shyam Shankar Tiwari, J.)

1. Heard learned counsel for the petitioner and the learned AGA and perused the record.

2. This writ petition has been filed by the petitioner under Article 226 of the Constitution of India for quashing the orders dated 9.11.2009, 7/8.2.2010 and 30.4.2010 (filed as Annexure-6 to the writ petition) passed by the learned trial court in Case Crime No.1780 of 2006 (Karam Chand Thapar and Brothers (C.S.) Ltd. Vs. Nandini Roofing System Pvt. Ltd. and others and also to issue a mandamus commanding the learned trial court to proceed with the trial in the aforesaid Case immediately without any further delay.

3. Briefly stated the facts giving rise to the present petition are that the petitioner required a supplier having the capacity and expertise of the manufacturing/fabrication of customized GCI sheets, which were required by the petitioner for construction work at Tehri Dam. The respondents misrepresented to the petitioner that they had the required expertise of manufacturing/fabrication of customized GCI sheets. They were fully aware of the fact that their representation was false only in order to induce the petitioner to part with their property. They falsely represented to have that capacity. The petitioner parted with a huge money amounting to Rs. 24 lacs and further an amount of Rs.18 lacs towards raw materials. The respondents failed to deliver the GCI sheets to the petitioner as per requirement. The respondents retained the entire amount of money with them. The petitioner demanded the money back from them, but they not only refused to return that money, but also threatened to sell the entire raw materials and the machinery in the open market.

4. The petitioner instituted criminal proceedings against the respondents before the court of learned CJM, Ghaziabad. A Criminal Case was registered on Case Crime No.7780 of 2006 against the respondents.Subsequently, the learned Special CJM (CBI), Ghaziabad by an order dated 31.7.2006 directed the respondents to appear before the court. The respondents did not appear. Accordingly, process of bailable warrant was issued against them by the trial court.

5. The respondents challenged the above proceedings pending before the court below under section 482 Cr.P.C. before this Court, which was registered as Criminal Misc. Application No.12371 of 2006 (Nandini Roofing System Pvt. Ltd. Vs. Special Judicial Magistrate (CBI) on 17.10.2006. An interim stay order was granted by this Court on 17.10.2006 in the aforesaid criminal Misc.Application in favour of the applicants, who were respondents before the court below. This interim stay order was extended till the next date of listing by an order dated 13.3.2008. Thereafter, Criminal Misc. Application No.12371 of 2006 was listed for hearing on several dates, but the interim stay order was not extended.

6. Since, further proceedings before the trial court came to stand still on account of the interim stay order dated 17.10.2006, the petitioner accordingly, filed an application before the trial court in Case Crime No.1780 of 2006 with a prayer to proceed with that case further , as there was no stay order in existence in respect of the proceedings pending before the court below. The learned trial court declined to

proceed further with the trial pending before it, hence the present petition has been filed.

7. It is submitted by the learned counsel for the petitioner that since there is no stay order in existence, the learned trial court has wrongly declined to proceed further with that case. There is no justification for not proceeding with the case before trial court.

8. A very short question of law is involved in this case as to whether an interim stay order granted by this Court earlier on a particular date is still in existence justifying the trial court not to proceed with the case pending before it, though that stay order has not been specifically extended on future dates.

9. A perusal of the record reveals that after 20.3.2008 no extension of interim stay order has been granted by this Court. It is also apparent from the record that in the beginning proceedings pending before the court below were stayed by order dated 17.10.2006 and lastly it was extended on 13.3.2008. Subsequently, on future dates it was not extended. A perusal of the ordersheet of the learned court below filed on record shows that the proceedings before the court are being adjourned with the remark that the proceedings are stayed by this Court. Even after the petitioner moved an application before the court below specifically stating that there is no stay order, the trial court did not take any notice of it rather continued to mention in the ordersheet that further proceedings are stayed by this Court. in this regard order dated 9.11.2009, 7/8.2.2010 and 30.4.2010 may be mentioned. It is apparent from the record that the interim stay order granted earlier has not been extended after some dates, but the proceedings before the court below are still being adjourned on the ground that the proceedings are stayed by this Court.

10. It is further argued by the learned counsel for the petitioner that once the interim stay order granted is discontinued on record, though, there is no specific mention that the stay order is not extended it has got the same force and it should be treated that there is no interim stay order staying further proceedings pending before the court below. This matter has been considered at length by a Division Bench of this Court in the case of **State of U.P. and others Vs. Committee of Management, DAV Inter College, Mahoba, reported in 2009 (3) AWC 3115** in which it has been observed as follows :

"It cannot be said that an interim order passed for a limited period would continue automatically, if for the one or the other reason the case could not be taken up by the court. If the court has passed an interim order for a limited period unless that order is extended, it would not continue automatically."

11. The Hon'ble Apex Court in the case of **Ashok Kumar Vs. State of Haryana and another, 2007(3) SCC-470** has held as follows :

"There is no warrant for the proposition, as was stated by the High Court that unless an order of stay passed once even for the limited period is vacated by an express order or otherwise ; the same would continue to operate. We, therefore, are of the opinion that the judgment of the High Court cannot sustain, which is set aside accordingly."

12. Similar view has been taken by the Apex Court in the case of **Arjan Singh Vs. Punit Ahluwalia, 2008 (8) SCC-348.** In that case it was held as follows :

"We agree with the High Court on this issue. if the order of injunction was operative up to a particular date, technically the order of injunction shall not remain operative thereafter."

13. In that case an injunction order was passed for a limited period and thereafter, it could not be extended.Since on the date fixed the Presiding Officer was on leave and later on, the case having been transferred to another court, the order was neither extended nor vacated. Despite the fact that even the application for extension was pending. The High Court took the view that once no order of extension of the interim order was passed and the interim order was operating till particular date it would not continue automatically and would cease on the date on which it was granted.

14. In the present case it appears that lastly, the interim order was granted on 13.3.2008 by this Court.Thereafter, the case had been listed for hearing on 20.3.2008, 25.8.2008, 1.9.2008, 17.10.2008, 6.11.2008, 17.11.2008, 17.2.2009 and on 7.4.2009 and so on but the interim order was never extended on those dates.

15. In view of the foregoing discussions and the facts and circumstances of the case, the impugned order passed by the learned trial court on 9.11.2009, 7/8.2.2010 and on 30.4.2010 cannot be justified and accordingly, the order passed by the learned court below is hereby set aside. There should be no doubt in the mind of the court below that interim stay order once granted by this Court for a limited period will continue to be effective even in future though not specifically extended on future dates. The case is remanded back to the trial court to pass a fresh order in the light of the law laid down by the Apex Court in the aforementioned case and to proceed further with the case.

16. With the aforesaid observations, the petition is finally disposed of.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.07.2010

BEFORE
THE HON'BLE SABHAJEET YADAV, J.
THE HON'BLE BALA KRISHNA NARAYANA, J.

Criminal Writ Petition No. 9489 of 2010

Smt. Nagina Devi and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri V.N. Pandey
Sri V.K. Sharma
Sri Rahul Sripat
Sri V.R. Tiwari

Counsel for the Respondents:
Sri Nagendra Kumar Singh
A.G.A.

Constitution of India Art-226-Power of writ court interference with mode of investigation-offence under section 147, 148, 452, 324, 325, 504, 506 IPC-FIR lodged as counter blast-as the Police personal already facing investigation for offence under section 147, 376, 354, 504 and 506 IPC-petitioner No. 2 and 3 minor girl who were brought in Police Station, S O. and other constables raped her along with village Pradhan-Court came of definite opinion about commission of

cognizable offence of rape and outraging the modesty of unmarried girl-investigation officer as well as superior officer trying hush up said crime-for providing credibility and confidence in investigation-C.B.I. directed to under take investigation and such officer must be the rank of S.P.-till submission of chargesheet arrest stayed-full security be provided to the petitioners-without being prejudice with the provisions of govt. orders

Held: Para 46

Thus, from totality of facts and circumstances of the case, we are of the prima facie opinion that commission of cognizable offence of rape and outraging the modesty of unmarried girls in the night of 19/20.4.2010 at Police Station Kuber Sthan, District Kushi Nagar, and involvement of Police personnel in the said crime as accused is prima facie established. We are also constrained to say that the investigating officer and superior police officers are trying to hush up the said crime and shield the offenders, thus it is exceptional situation and fit case where this Court should direct the investigation of aforesaid case crime be made by C.B.I. for providing credibility and confidence in investigation and for doing complete justice to the victims of said crime. Accordingly, we direct the Director General of C.B.I. to undertake the investigation of aforesaid Case Crime No. 221/2010 registered at P.S. Kuber Sthan, District Kushi Nagar, under Sections 147, 376, 354, 504 and 506 I.P.C. and depute an officer not below the rank of Senior Superintendent of Police as in our opinion the conduct of Investigating Officer and Superintendent of Police is also subject matter of scrutiny and complete the investigation within a period of three months from the date of supply of certified copy of this order to Sri N.I. Jafri, learned advocate appearing for C.B.I. in this Court.

Case law discussed:

A.I.R. 1966 S.C. 81, A.I.R. 1987 S.C. 537, 1993 Supp. (4) SCC 595, A.I.R. 1999 SC 2979, A.I.R. 2010 SC 1476, A.I.R. 2002 S.C. 2225, A.I.R. 2010 S.C. 1476, A.I.R. 2002 S.C. 2235, JT 2010(4) SC 651,

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

1. By this petition, petitioners have sought relief of writ of certiorari for quashing the First Information Report dated 17.5.2010 lodged against them under Sections 147, 148, 452, 324, 323, 504, 506 I.P.C. registered as Case Crime No. 244-A of 2010 at P.S. Kuber Sthan, District Kushi Nagar, contained in Annexure-1 of the writ petition and further relief in the nature of mandamus commanding the respondents and their sub-ordinate officials not to arrest the petitioners in pursuance of aforesaid case crime and to issue any other suitable writ, order or direction which this Court may deem fit and proper in the circumstances of the case have also been sought for.

2. The aforesaid reliefs are grounded on the facts that the aforesaid F.I.R. dated 17.5.2010 was lodged against the petitioners by respondent no.4 as counter-blast of two F.I.R. lodged by the petitioners; one of which was registered as Case Crime No. 244 of 2010 under Sections 147, 323, 504, 506 I.P.C. at P.S. Kuber Sthan, District Kushi Nagar, on 16.05.2010 though it was not registered in proper sections and another F.I.R. was registered as Case Crime No.221 of 2010 under Sections 147, 376, 354, 504, 506 I.P.C. at P.S. Kuber Sthan, District Kushi Nagar.

3. It is stated in the writ petition that on 19.4.2010 (wrongly typed in Annexure-2 of the writ petition as 13.4.2010) in collusion and conspiracy of village Pradhan, namely Ramayan Prasad

Chauhan S/o Ram Raksha Chauhan, Village Badgaon, P.S. Kuber Sthan, District Kushi Nagar, the Station Officer of said police station namely Sri Mohan Ram, Constables Munna Upadhyay, Vimal Kumar Pandey and Jai Prakash Singh, P.S. Kuber Sthan had arrested the petitioner no. 1 Smt. Nagina Devi W/o Aadya Singh and her husband Aadya Singh and two minor daughters namely Vandana aged about 15 years and Archana aged about 14 years about 4 P.M. from her house and brought them at police station Kuber Sthan District Kushi Nagar. Thereafter, in the night at about 11 P.M. on 19.4.2010 Sri Mohan Ram Station Officer, P.S. Kuber Sthan had raped her daughter Km. Vandana in police station and Constables Munna Upadhyay, Vimal Kumar Pandey and Jai Prakash Singh of P.S. Kuber Sthan and Ramayan Prasad Chauhan S/o Ram Raksha Chauhan, Village Pradhan of village Badgaon P.S. Kuber Sthan had outraged the modesty of her another younger daughter namely Archana in the police station in the said night (in the manner disclosed in the FIR). And while doing so the aforesaid police personnels had also threatened the petitioner no.1 and her husband and daughters that in case they will speak about the same they may be falsely implicated in other serious offences like smuggling of Ganja and Charas.

4. It is stated that on 20.4.2010 the Station Officer, P.S. Kuber Sthan, District Kushi Nagar had challaned/sent the petitioners no.1, 2 and 3 alongwith Adya Singh under Section 107, 116, 151 Cr.P.C. and had brought them before Sub Divisional Magistrate, Padrauna. When they were brought before Sub Divisional Magistrate, Padrauna, they had moved application to be released on bail but Sub Divisional Magistrate concerned did not accept their request instead thereof sent them to District Jail, Deoria. Thereafter, they were bailed out on 22.4.2010 and released from jail on 23.4.2010. Thereafter the petitioner no.1 had approached the Police Station Officer, P.S. Kuber Sthan to register the aforesaid case but by abusing the petitioner no.1 Station Officer of said Police Station had refused to register the FIR against himself and other police personnels and Ramayan Prasad Chauhan. Aggrieved by said refusal the petitioner no.1 had sent an application through registered post for registering the aforesaid case crime to the Superintendent of Police, District Kushi Nagar purported to be U/s 154 (3) of Cr. P. C. but when no F.I.R. was lodged against the aforesaid police personnels and Ramayan Prasad Chauhan, then on 1.5.2010 an application was moved before A.C.J.M., Kasia District Kushi Nagar for lodging an F.I.R. against the aforesaid police personnels and Ramayan Prasad Chauhan, Village Pradhan of the said village. Thereupon on 3.5.2010 while exercising the power U/s 156(3) Cr. P. C. A.C.J.M., Kasia had directed the Circle Officer, Sadar, Padrauna, District Kushi Nagar to lodge an FIR of aforesaid crime at P.S. Kuber Sthan against the aforesaid persons and investigate the same. Thereupon on 4.5.2010 an FIR was lodged against Sri Mohan Ram, Station Officer, P.S. Kuber Sthan, District Kushi Nagar, Constables Munna Upadhyay, Vimal Kumar Pandey, Jai Prakash Singh, P.S. Kuber Sthan, District Kushi Nagar and Ramayan Prasad Chauhan S/o Ram Raksha Chauhan, Village Pradhan of Badgaon, P.S. Kuber sthan, District-Kushi Nagar under Sections 147, 376, 354, 504 and 506 IPC and registered as Case Crime

No. 221 of 2010 at P.S. Kuber Sthan, District Kushi Nagar . The copy of aforesaid FIR is on record as Annexure-2 of the writ petition.

5. It is further stated in the writ petition that on 16.5.2010 at 6.00 A.M. in the morning Sri Suresh Chauhan S/o Ram Raksha Chauhan and Sri Bhuwali alongwith several other persons, mentioned in Annexrue-3 of the writ petition, had approached the petitioners no. 1, 2 and 3 and threatened them to compromise in the rape case lodged by the petitioner no.1. On refusal to do compromise in the said case, the aforesaid persons had beaten the petitioners No.1, 2 and 3 and their other family members and caused several injuries including fractures upon six persons from petitioners side. Thereupon the petitioners had lodged FIR against them on 16.5.2010 which was registered as Case Crime No. 244 of 2010 under Sections 147, 323, 452, 504, 506 IPC at P.S. Kuber Sthan, District Kushi Nagar but the said FIR was not registered under proper sections according to the nature of injuries sustained by the persons of petitioners' side. A copy of aforesaid FIR and the copies of injury reports of Nagina Devi, Archana Singh, Vandana Singh, Sindu Singh and X-ray report of Vishwamber Singh are filed as Annexures-3 and 4 of the writ petition. It is stated that the present case against the petitioners is counter-blast of aforesaid two criminal cases filed by the petitioners. It is stated that in a Case Crime No.244-A of 2010 lodged against the petitioners under Section 147, 148, 452, 324, 323, 504 and 506 IPC the police are trying to arrest the petitioners, as such they have approached this Court seeking relief for quashing of aforesaid FIR and stay of arrest with further prayer for issuance of any other suitable writ, order or direction as this Court may deem fit and proper in the circumstances of the case.

6. The writ petition was filed in the Summer vacation on 2.6.2010 but the same was taken up as fresh for hearing on 9.6.2010 by this Court. Having regard to the gravity of offences alleged to have been committed by Sri Mohan Ram, Station Officer and three constables namely Munna Upadhyay, Vimal Kumar Pandey and Jai Prakash Singh of P.S. Kuber Sthan, District Kushi Nagar and Ramayan Prasad Chauhan S/o Ram Raksha Chauhan R/o Village Badgaon, P.S. Kuber Sthan, District Kushi Nagar under Sections 147, 376, 354, 504 and 506 IPC registered as Case Crime No. 221 of 2010 at said police station, the learned counsel for the petitioners has urged that the F.I.R. under Sections 147,148,452,324, 323, 504,506 IPC registered as Case Crime No. 244-A of 2010 at P.S. Kuber Sthan, District Kushi Nagar was lodged by respondent no.4 against the petitioners as counter blast to the aforesaid criminal cases against them, at the instance of Station Officer namely Mohan Ram and other police personnels of Police Station Kuber Sthan and Village Pradhan who are involved in the case of rape and outraging the modesty of petitioner nos. 2 and 3 for pressurising the petitioners to compromise with the accused persons of Case Crime No. 221 of 2010 and to withdraw the aforesaid criminal case lodged against them. He has further submitted that in spite of order passed by A.C.J.M., Kasia District Kushi Nagar on 3.5.2010 and on publication of aforesaid incident in daily newspapers circulated in the locality, no step has yet been taken by superior police officers against the police personnels, instead of

thereof the police personnels are harassing the petitioners and are trying to arrest them in Case Crime No. 244-A of 2010 registered at P.S. Kuber Sthan, District Kushi Nagar.

7. Having considered the aforesaid submission of learned counsel for the petitioners and having regard to the gravity of crimes alleged to have been committed by police personnels of Police Station Kuber Sthan, Kushi Nagar and said village Pradhan under Section 147,376,354,504 and 506 IPC registered as case crime No. 221 of 2010 at P.S. Kuber Sthan, Kushi Nagar, in the night of 19/20.4.2010 and action expected to be taken by investigation officer in the said case crime and disciplinary measures expected from Superintendent of Police, District Kushi Nagar, the case was ordered to be put up as fresh on 11.6.2010 and the Superintendent of Police, Kushi Nagar was directed to appear in person before the Court and show cause as to why appropriate action has not yet been taken against the erring police personnels. However, on that day as interim measure until further orders of this Court, the petitioners' arrest in Case Crime No. 244-A of 2010 under Sections 147,148,452,324,323,504 and 506 IPC registered at P.S. Kuber Sthan, District Kushi Nagar has also been stayed.

8. On 11.6.2010 this case was taken up again by this Court and in pursuance of direction given by us Superintendent of Police, Kushi Nagar appeared before us and has also shown Case Diary of Case Crime No. 221 of 2010. We have gone through the Case Diary wherein statements of prosecutrix Vandana and Archana and other prosecution, witnesses have been recorded under Section 161 Cr.P.C., whereby the allegations levelled against Mohan Ram Station Officer of P.S. Kuber Sthan for committing rape with Kumari Vandana (petitioner no. 2) and against police personnels and Ramayan Prasad Chauhan, Pradhan for outraging the modesty of Km. Archana daughters of Aadya Singh in the night of 19/20 .4.2010 in police station Kuber Sthan have been fortified and supported. After going through the case diary of said crime we have directed the Superintendent of Police, Kushi Nagar to take appropriate action against the police personnels in administrative side and also directed the Superintendent of Police, District Kushi Nagar and Principal Secretary (Home), Government of Uttar Pradesh to provide adequate security for protection to the complainant and prosecutrix of aforesaid Case Crime No. 221 of 2010 by deputing two armed police with them at their residence with a further direction to file an affidavit about the action taken by him by the next date while putting the case afresh for hearing on 18th June, 2010.

9. On 18.6.2010 the Superintendent of Police, Kushi Nagar has again appeared before the Court and filed an affidavit of compliance. From the perusal of aforesaid affidavit, it appears that he has merely attached the police personnels at police line vide order dated 15.6.2010 passed by him, contained in Annexure-8-A of the said affidavit and vide order dated 15.6.2010 he has deputed Sri Bajrangbali Chaurasia, Circle Officer, Kasia to hold preliminary inquiry in respect of case crime no. 221 of 2010 under Section 147,376,354,504,506 IPC registered at P.S. Kuber Sthan, District Kushi Nagar and in Case Crime No. 244-A of 2010 registered at said police station

under Sections 147, 148, 452,324,323,504,506 IPC. However it appears that the Superintendent of Police has provided two armed police to the complainants and prosecutrix referred herein before.

10. The pertinent averments made in para 4 to 10 of the said compliance affidavit filed by Superintendent of Police, Kushi Nagar on 18.6.2010 are extracted as under:-

"4. That after the registration of the case (Supra) the investigation of the same was handed over to Circle Officer, Sadar in compliance of the direction of the Hon'ble court. However, since the aforesaid post was vacant the investigation was handed over to the link officer namely Circle Officer, Khandda and subsequently when the Circle Officer Sadar took over the charge and pursuant to the letter of Circle Officer, Khadda dated 10.5.2010 the investigation was transferred to Circle Officer, Sadar so that the same could be completed without any unnecessarily delay. Copies of communications dated 10.5.2010 and 19.5.2010 (transferring the investigation) are being filed hereto and marked as Annexure 1and 2 to this affidavit.

5. That on 16.5.2010 the complainant namely Nagina Devi had an altercation with some villagers and as consequent of the quarrel two cross first information reports were lodged as Case Crime No. 244 of 2010 under Sections 147, 323,504,506 and 452 of I.P.C lodged by Nagina Devi against Suresh Chauhan and 14 others on 16.5.2010 and other was lodged by Ram Ashrey against Nagina Devi being case crime no. 244-A of 2010 , under Section 147, 148,452 323, 324 504, and 506 of I.P.C on 17.5.2010.

6. That considering the seriousness of the incident, and in order to ensure proper, transparent and impartial investigation the aforesaid two cases were shifted form police station Kuber sthan to police station Kotwali, Padrauna on 28.5.2010 and the investigation was handed over to Sub-Inspector Sri Rajesh Kumar Singh. A copy of transfer order dated 28.5.2010 is being filed hereto and marked as Annexure -3 to this affidavit.

7. That as per the direction of this Hon'ble Court and since serious allegations have been made against police personnel, the deponent under took the following steps to ensure a fair and proper investigation, which culminate in legal consequence4s and to ensure that justice is done.

8. That in compliance of directions of this Hon'ble court and to ensure that a fair and impartial investigation could be completed at the earliest without any fear in the mind of the complainant by order dated 12.6.2010 two armed Constables namely constable 17 Ali Hasan and Constable 74 Dharmsher Saroj has been deployed for the security of the complainant and the prosecutrix. It is further submitted that the Principal Secretary, Home, Government of U.P. has also requested to extend the period of security by letter dated 16.6.2010, since the deponent can only provide security for a limited period and security shall be extended on the direction of Principal Secretary, Home after expiry of the period of security which the deponent can provide. Copies of two orders for providing security dated 12.6.2010 and

communication to the Principal Secretary, Home dated 16.6.2010 are is being filed hereto and marked as Annexure -4,5 and 6 to this affidavit.

9. That in compliance of the direction of this Hon'ble Court, since the accused persons are police personnel departmental action has been initiated against them on 15.6.2010 in which Bajrang Bali Chaurasiya, Circle Officer, Kasaya was appointed as enquiry officer. As per the procedure further action shall be taken against the accused personnel upon receipt of report of preliminarily enquiry by the aforesaid enquiry officer. The deponent under takes to ensure that strict action shall be taken in accordance with the law. A copy of order for taking departmental proceeding against the accused persons dated 15.6.2010 is is being filed hereto and marked as Annexure -7 to this affidavit.

10. That in compliance to ensure the investigation is fair, impartial and transparent, the accused police personnel have been attached to the Police Line, Kushi Nagar by order dated 15.6.2010. Copies of orders dated 15.6.2010 are is being filed hereto and marked as Annexure -8 and 8A to this affidavit.

11. After going through the aforesaid affidavit and having regard to the case diary perused on 11.6.2010 of Case Crime No. 221 of 2010 at P.S. Kuber Sthan, District Kushi Nagar, we were not satisfied about the action taken by the Superintendent of Police, Kushi Nagar as in our opinion that was not proper action against the police personnels who are involved in aforesaid criminal case, as such we have directed the case to be listed on 2nd July, 2010 as part heard before us. On that day Superintendent of Police, Kushi Nagar was again directed to appear before the Court and file an affidavit stating the action taken by him on the date fixed.

12. On 2.7.2010 in pursuance of our earlier direction given on 18.6.2010 the Superintendent of Police, Kushi Nagar has again appeared before us and filed compliance affidavit whereby he has informed the court that Sri Mohan Ram, the then Station Officer of P.S. Kuber Sthan, Constables Munna Upadhyay, Vimal Kumar Pandey and Jai Prakash Singh of said police station have been placed under suspension vide order dated 20.6.2010 passed by him during the pendency of disciplinary inquiry against them. A copy of the order dated 20.6.2010 passed by him was also enclosed therewith. Since the FIR was lodged against the police personnels in respect of commission of offence of rape and outraging the modesty of girls in police station and from perusal of case diary of said case crime it appears that the prosecution witnesses have supported the story of F.I.R. in their statements recorded by the Investigating Officer under Section 161 Cr.P.C., therefore, in given facts and circumstances of the case, in our opinion, instead of taking action under **Rule 17 (1)(a) of U.P. Police Officers of the Sub-Ordinate Ranks (Punishment and Appeal) Rules, 1991**, and placing the police personnels under suspension during the pendency of inquiry, it was proper course to place them under suspension under Rule-17 (1)(b) of the said Rules during the pendency of investigation, inquiry and trial of the said case crime. As such, we have again directed the Superintendent of Police, Kushi Nagar to take proper action in administrative side

against police personnels involved in the aforesaid criminal case and also inform the Court about the progress of investigation in Case Crime No. 221 of 2010 registered at P.S. Kuber Sthan, District Kushi Nagar. Since at earlier occasion we have been told that the statements of prosecutrix Vandana and Archana D/o Aadya Singh were not recorded under Section 164 Cr.P.C. before the concerned Magistrate but before 2.07.2010 the same were recorded before the Magistrate concerned, therefore, we have also directed the A.C.J.M., Kasia to produce the aforesaid statements before us on the next date fixed by us and the case was directed to be listed on 9th July, 2010 before us as part heard.

13. Today on 9.07.2010 Superintendent of Police, Kushi Nagar has again appeared before this Court and filed a compliance affidavit stating therein that he has placed the police personnels under suspension vide order dated 5.07.2010 during the pendency of investigation, inquiry and trial of Case Crime No.221/2010 u/s 147, 376, 354, 504, 506 I.P.C. registered at Police Station Kuber Sthan, District Kushinagar by modifying the earlier order dated 20.06.2010. The copy of the aforesaid order has also been enclosed as Annexure-1 of the said affidavit. In para 3 of the affidavit he has also stated that Investigating Officer/Circle Officer has also been directed to conclude the aforesaid investigation as soon as possible. A true copy of the direction issued by him on 07.07.2010 is on record as Annexure-2 of the said affidavit. He has also filed status report of investigation submitted by the Investigating Officer to him on 07.07.2010 which has also been enclosed as Annexure-3 of the said affidavit, whereby the Investigating Officer has informed that after investigation of Case Crime No.221/2010 u/s 147, 376, 354, 504, 506 I.P.C. registered at Police Station Kuber Sthan, District Kushinagar in pursuance of direction of A.C.J.M., Kasiya u/s 156(3) Cr.P.C. in absence of any evidence against the accused persons final report has been submitted as report no.7/2010 by concluding the investigation. But subsequently in pursuant to order and direction of Superintendent of Police dated 1.07.2010 he has further started the investigation and has taken the clothes of Km. Vandana on 06.07.2010 and has sent the same to Vidhi Vigyan Laboratory, Police Lines, Varanasi for examination.

14. Besides this, Sri Suresh Chandra Savita A.C.J.M., Kasiya District Kushinagar has also produced the statements of prosecutrix namely Vandana and Archana daughters of Aadya Singh recorded u/s 164 Cr.P.C. before the Magistrate and after perusal of the same we have returned the aforesaid statements to Sri Suresh Chandra Savita, A.C.J.M., Kasiya District Kushinagar. In the aforesaid statements recorded u/s 164 Cr.P.C. before Magistrate Km. Vandana has stated that Mohan Ram Sub Inspector Police has raped her in the night of 19/20.04.2010 in police station and Km. Archana has stated that aforesaid three constables and village Pradhan Ramayan Prasad Chauhan have outraged her modesty in police station in the said night.

15. One application has also been moved by Sri Rahul Sripat, Advocate on behalf of Ramayan Prasad Chauhan S/o Ram Raksha Chauhan of Village Badgaon P.S. Kuber Sthan, District Kushi Nagar

with a prayer that he may be allowed to intervene in the matter so that some real facts of the case may be placed before the Court. The aforesaid application is supported by an affidavit of Sri Ramayan Prasad Chauhan, wherein he has stated that in Case Crime No.221/2010 u/s 147, 376, 354, 504, 506 I.P.C. registered at Police Station Kuber Sthan, District Kushinagar he has been falsely implicated. It is stated in the said affidavit that story set up against him in aforesaid case is counter blast of the proceedings initiated by District Administration against the petitioners no.1 to 4. It is stated that the petitioners no.1 and 9 are real sisters and petitioner no.4 is son-in-law of petitioner no.9, who had forcibly occupied the village pond No. 384 since long back and had constructed building over half portion of the pond. Being village Pradhan he made efforts to dispossess the petitioner no.4 from the pond in question in accordance with the provisions of law by making measurement of the said pond on 19.4.2010, during which the petitioners had forcibly opposed and threatened the revenue authorities and lady police personnels, ultimately they were arrested on the spot and were sent to jail to maintain the law and order. For measurement of the pond (pokhari) on 19.04.2010 by Land Revenue Inspector and Area Lekhpal one lady Sub Inspector of Police and six lady police constables were provided by Superintendent of Police, Kushinagar on the request of Sub Divisional Magistrate, Padrauna, Kushi Nagar. True copies of the various correspondence made by the Revenue authorities and order dated 18.04.2010 passed by Superintendent of Police providing lady police constables and Sub-Inspector have been filed as Annexures, 2, 3 and 4 of the said affidavit.

16. It is further stated in said affidavit of Ramayan Prasad Chauhan that on 20.04.2010 the petitioners no.1, 2 and 3 were medically examined but they did not offer any internal medical examination of their persons and even before the Sub Divisional Magistrate, Padrauna, they did not whisper a single word about the rape case. It is also stated that the petitioner no.2 was again medically examined on 5.05.2010, wherein neither any spermatozoa was found in her vaginal smear nor any sign of injury in private part of her body was seen. The photostat copy of medical report dated 20.04.2010 and 5.05.2010 are on record as Annexures-5 and 6 of the aforesaid affidavit. It is also stated that coming to know about the F.I.R. against the deponent of the aforesaid affidavit, people residing nearby villages were deeply shocked and more than hundreds of people went to the District Magistrate, Kushinagar demanding a magisterial inquiry into the matter. The demand of mob duly published in daily news papers "Rashtriya Sahara" and "Dainik Jagaran" dated 02.07.2010 is on record as Annexure-8 of the said affidavit.

17. Heard learned counsel for the petitioners, learned A.G.A. for State respondents and Sri Rahul Sripat for intervener Ramayan Prasad Chauhan, Village Pradhan of Village Badgaon, P.S. Kuber Sthan District Kushinagar.

18. The submission of learned counsel for the petitioners is that having regard to the facts and circumstances of the case and direct involvement of Sub Inspector Police and three constables of

P.S. Kuber Sthan as accused in Case Crime No.221/2010 u/s 147, 376, 354, 504, 506 I.P.C. registered at Police Station Kuber Sthan, District Kushinagar, it is clear that police officers are not properly responding in the investigation of said case crime, instead thereof Investigating Officer of aforesaid case crime and superior police officers of the State Government are trying to hush-up the aforesaid crime and shield the police personnels involved in that case, as such the petitioners have no hope of justice from such investigating agency of Uttar Pradesh police. In such backdrop of the case, learned counsel for the petitioners has prayed that only an independent investigating agency can properly and fairly investigate the aforesaid case crime and bring the accused persons to book. He has requested that C.B.I. should be asked to investigate the aforesaid case crime so that police personnels of State police who are accused in the aforesaid case crime and village Pradhan of the said village may be brought to book.

19. Having regard to facts and circumstances of the case and rival submissions of the learned counsel for the parties, first question arises for consideration is as **to whether in given facts and circumstances of the case this Court can grant such relief without any specific prayer in the writ petition or not and as to whether the relief sought for in the writ petition can be moulded by this Court and appropriate relief can be granted without any specific prayer in writ petition under the general prayer of " to issue any other suitable writ, order or direction as in circumstances of the case this Court may deem fit and proper"?**

20. In this connection, it would be useful to refer some decisions of Hon'ble Apex Court which have material bearing on the question in issue. In ***Dwarka Nath Vs. Income Tax Officer, Special Circle, Kanpur and another A.I.R. 1966 S.C. 81*** Hon'ble Apex Court while dealing with the content and scope of power of this Court under Article 226 of the Constitution of India in para 4 of the decision observed as under:-

"..... This article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Court to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. ..... That apart, High Courts can also issue directions orders or writs other than the prerogative writs. It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this country....."

21. The aforesaid decision has also been followed by Hon'ble Apex Court in ***Comptroller and Auditor General of India Vs. K. S. Jagannathan and another A.I.R. 1987 S.C. 537, and in Shri Anandi Mukta Sadguru Shree Muktajee Vandasjiswami Suvarna Jayanti Mahotsav Smarak Trust and others Vs. V. R. Rudani and others A.I.R. 1989 S.C. 1607***

22. In ***S. Nagraj Vs. State of Karnataka 1993 Supp. (4) SCC 595***, the Hon'ble Apex Court has observed that "justice is a virtue which transcends all barriers. Neither the rule of procedure nor technicalities of law can stand in its way.

Even the law bends before justice. Entire concept of writ jurisdiction exercised by the higher courts is founded on equity and fairness."

23. In ***Common Cause Vs. Union of India and others A.I.R. 1999 SC 2979***, while dealing with the power of review the Hon'ble Apex Court in para 170 of the decision has observed that the powers of this Court under Article 32 and that of High Court under Article 226 are plenary powers and are not fettered by any legal constraints.

24. The view earlier taken by Apex Court in ***Dwarka Nath's case (supra)*** has again been reiterated by the Apex Court in ***West Bengal and others Vs. Committee of Protection of Democratic Rights West Bengal A.I.R. 2010 SC 1476***. In para 37 of the decision Hon'ble Apex Court observed as under:-

"37. In Dwarkanath's case (AIR 1966 SC 81) (supra), this Court had said that Article 226 of the Constitution is couched in comprehensive phraseology and it ex facie confers a wide power on the High Court to reach injustice wherever it is found. This Article enables the High Courts to mould the reliefs to meet the peculiar and extraordinary circumstances of the case. Therefore, what we have said above in regard to the exercise of jurisdiction by this Court under Article 32, must apply equally in relation to the exercise of jurisdiction by the High Courts under Article 226 of the Constitution."

25. Thus, from the legal position stated by Hon'ble Apex Court from time to time there can be no scope for doubt to hold that the Constitution has conferred wide power on the High Courts under Article 226 which is plenary power and is not fettered by any legal constraints. Neither the rule of procedure nor technicalities of law can stand in its way to reach injustice wherever it is found. This article also enables the High Court to mould the reliefs to meet peculiar and extraordinary circumstances of the case. **Therefore, in our opinion if the basic facts are founded in the writ petition or brought before the Court through affidavits or otherwise, this Court is quite competent to mould the relief and grant appropriate relief to meet peculiar and extraordinary circumstances of the case, even if such relief is not specifically sought for in the writ petition. In any view of the matter an appropriate relief can be granted by this Court under general relief usually prayed for in the writ petition to the effect that " to issue any other suitable writ, order or direction as in circumstances of the case this Court may deem fit and proper"**.

26. Now next question arises for consideration is that as to **whether in given facts and circumstances of the case it would be appropriate to direct the C.B.I. to investigate the Case Crime No.221/2010 U/s 147, 376, 354, 504, 506 IPC registered at P.S. Kuber Sthan District Kushi Nagar against police personnels and Village Pradhan namely Ramayan Prasad Chauhan by moulding the relief prayed for in the writ petition** and to investigate the other criminal cases allegedly used by the parties as counter-blast of each other such as case crime No. 244 of 2010 and case crime No.244-A of 2010 registered at same police station?

27. In order to answer aforesaid question it would be useful to refer some decisions of Hon'ble Apex Court, wherein the Apex Court has occasion to consider similar issue. In **Secretary, Minor Irrigation and Rural Engineering Services, U.P. and others Vs. Sahngoo Ram Arya and another, A.I.R. 2002 S.C. 2225,** while considering the power of High Court to direct the investigation by C.B.I. in para-5 of the decision Hon'ble Apex Court observed as under:-

*"5. **While none can dispute the power of the High Court under Article 226 to direct an inquiry by the CBI, the said power can be exercised only in cases where there is sufficient material to come to a prima facie conclusion that there is a need for such inquiry. It is not sufficient to have such material in the pleadings. On the contrary, there is a need for the High Court on consideration of such pleadings to come to the conclusion that the material before it is sufficient to direct such an inquiry by the CBI. This is a requirement which is clearly deducible from the judgment of this Court in the case of Common Cause (supra).** This Court in the said judgment at paragraph 174 of the report has held thus:*

"The other direction, namely, the direction to CBI to investigate "any other offence" is wholly erroneous and cannot be sustained. Obviously, direction for investigation can be given only if an offence is, prima facie, found to have been committed or a person's involvement is prima facie established, but a direction to CBI to investigate whether any person has committed an offence or not cannot be legally given. . . . . ."

28. In ***State of West Bengal and others and Committee for Protection of Democratic Rights, West Bengal and others A.I.R. 2010 S.C. 1476***, the question for consideration before the Constitution Bench of Apex Court was as to whether any direction can be given by writ court to C.B.I. to investigate the offence committed in territory of State even in absence of consent of the that State? In paras 45 and 46 of the said decision the Hon'ble Apex Court has answered the aforesaid question as under:-

" 45. In the final analysis, our answer to the question referred is that a direction by the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, to the CBI to investigate a cognizable offence alleged to have been committed within the territory of a State without the consent of that State will neither impinge upon the federal structure of the Constitution nor violate the doctrine of separation of power and shall be valid in law. Being the protectors of civil liberties of the citizens, this Court and the High Courts have not only the power and jurisdiction but also an obligation to protect the fundamental rights, guaranteed by Part III in general and under Article 21 of the Constitution in particular, zealously and vigilantly.

46. Before parting with the case, we deem it necessary to emphasise that despite wide powers conferred by Articles 32 and 226 of the Constitution, while passing any order, the Courts must bear in mind certain self-imposed limitations on the exercise of these Constitutional powers. The very plenitude of the power under the said Articles requires great caution in its exercise. In so far as the

question of issuing a direction to the CBI to conduct investigation in a case is concerned, although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but time and again it has been reiterated that such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police. This extra-ordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations or where such an order may be necessary for doing complete justice and enforcing the fundamental rights. Otherwise the CBI would be flooded with a large number of cases and with limited resources, may find it difficult to properly investigate even serious cases and in the process loss its credibility and purpose with unsatisfactory investigations."

29. Thus from a close analysis of aforesaid decisions of Hon'ble Apex Court, **it is clear that so far as power to issue direction to C.B.I. to investigate the cognizable offences alleged to have been committed within the territory of State without the consent of that State is concerned, there appears no doubt about existence of such power with the High Court under Article 226 of the Constitution of India. Not only this but being the protectors of civil liberties of the citizens, the High Courts have not only the power and jurisdiction but also an obligation to uphold the Constitution and the majesty of law.** However, despite wide powers conferred by Article 226 of the Constitution, while passing any order, this Court must bear in mind certain self-imposed limitations on the exercise of these Constitutional powers. Hon'ble Apex Court further observed that although no inflexible guidelines can be laid down to decide whether or not such power should be exercised but such an order is not to be passed as a matter of routine or merely because a party has levelled some allegations against the local police. **This extra-ordinary power must be exercised sparingly, cautiously and in exceptional situations where it becomes necessary to provide credibility and instil confidence in investigations or where such an order may be necessary for doing complete justice to the party.**

30. Now applying the aforesaid legal proposition in given facts and circumstances of the case, we find that in F.I.R. dated 4.5.2010 registered as Case Crime No. 221 of 2010 at Police Station Kuber Sthan, District Kushi Nagar in pursuance of direction of A.C.J.M. Kushi Nagar dated 3.5.2010 under Section 156(3) Cr.P.C., the allegations of committing rape by Sri Mohan Ram, Sub-inspector, Police/Station Officer of P.S. Kuber Sthan with Kumari Vandana daugher of Sri Aadya Singh and outraging the modesty of Kumari Archana by Police Constables Munna Upadhyay, Vimal Kumar Pandey and Jai Prakash Singh, P.S. Kuber Sthan District Kushi Nagar and Ramayan Prasad Chauhan are clearly levelled. The aforesaid version of F.I.R. also finds support from statements of prosecution witnesses and prosecutrix recorded under Section 161 Cr.P.C. by the Investigating Officer. The same version of F.I.R. has been again supported by Kumari Vandana and Kumari Archana both daughters of Sri Aadya Singh in their statements recorded under Section 164 of Cr.P.C. before the Magistrate concerned.

Therefore, we are of the prima facie opinion that the commission of cognizable offences viz. committing rape and outraging the modesty of women by aforesaid police personnels and Ramayan Prasad Chauhan have been prima facie established on the basis of averments made in pleadings of the writ petition and case diary of the aforesaid case crime inasmuch as statements of Kumari Vandana and Kumari Archana daughters of Aadya Singh recorded before the Magistrate U/s 164 Cr.P.C., placed before us.

31. At this juncture we would like to state that it is well settled that the conviction for offence u/s 376 I.P.C. can be based on sole testimony of a rape victim. In ***State of Rajasthan Vs. Om Prakash A.I.R. 2002 S.C. 2235*** while placing reliance upon earlier decisions Hon'ble Apex Court in para 13 and 14 of the decision observed as under:-

"13. The conviction for offence under Section 376 IPC can be based on the sole testimony of a rape victim is well settled proposition. In ***State of Punjab Vs. Gurmit Singh & others (1996) 2 SCC 384)****, referring to State of Maharashtra vs. Chandraprakash Kewal Chand Jain (1990) 1 SCC 550), this Court held that it must not be overlooked that a woman or a girl subject to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were in an accomplice. It has also been observed in the said decision by Dr. Justice A.S. Anand (as his Lordship then was), speaking for the court, that the inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury.*

14. ***In State of H.P. v. Gian Chand (2000) 1 SCC 71)*** *Justice Lahoti speaking for the Bench observed that the Court has first to assess the trustworthy intention of the evidence adduced and available on record. If the court finds the evidence adduced worthy of being relied on, then the testimony has to be accepted and acted on though there may be other witnesses available who could have been examined but were not examined."*

32. The view taken in **Gurmit Singh's case (supra)** has been again reiterated by Hon'ble Apex Court in recent decision rendered in **Santhosh Moolya and another Vs. State of Karnataka JT 2010(4)SC 651.** The observation made by Hon'ble Justice Dr. A.S.Anand (as His Lordship then was) speaking for the Apex Court has been quoted in para-7 of the decision as under:-

"7. . . . . .In ***State of Punjab Vs. Gurmit Singh and others {JT 1996 (1) SC 298 : 1996 (2) SCC 384}*** *speaking for the Bench Dr. A.S. Anand,J.(as His Lordship then was) has observed thus:*

".....The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her*. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook.* ***The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion?*** *The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her****, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused****. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding****. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. "***

33. In para-8 **of Santosh Moolya's case (supra)** Hon'ble Apex Court went on further observing that **"any statement of rape is an extremely humiliating experience for a woman and until she is victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of prosecutrix, the Courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her** and, therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for."

34. Hon'ble Apex Court in para-9 of **Santosh Moolya's case (supra)** has placed reliance upon another decision of Apex Court and quoted the observations made therein as under:-

"9. *In* ***Sohan Singh and another Vs. State of Bihar {JT 2009 (13) SC 161 : 2010 (1) SCC 68}****, this Court has observed as under*:-

"When FIR by a Hindu lady is to be lodged with regard to commission of offence like rape, many questions would obviously crop up for consideration before one finally decides to lodge the FIR. It is difficult to appreciate the plight of the victim who has been criminally assaulted in such a manner. Obviously, the prosecutrix must have also gone through great turmoil and only after giving it a serious thought, must have decided to lodge the FIR."

35. Now viewing the case from the angle of legal proposition stated hereinbefore vis-a-vis submissions of rival parties, it is not in dispute that on 19.4.2010 only petitioners no. 1 to 3 and Sri Aadya Singh were arrested by the police of Police Station Kuber Sthan, District Kushi Nagar, whereas in averments made in para 4 and 5 of the affidavit filed by Ramayan Prasad Chauhan in support of intervening application, it is alleged that petitioner no.1 Smt. Nagina W/o Aadya Singh and petitioner no.9 Prabhavti W/o Satya Narayan Singh are real sisters and petitioner no.4 Vishambhar Singh is son-in-law of the petitioner no.9 who had illegally occupied the village pond No.384 since long back and had constructed building over half portion of the said pond and for dispossessing him from the said pond measurement was done by Land Revenue Inspector and area Lekhpal with the with the help of six lady police constables on 19.04.2010. While doing said measurement the petitioner no.1 to 3 and Aadya Singh husband of petitioner no.1 had forcibly opposed the same, as such they were arrested by the police on 19.4.2010 and were brought to Police Station Kuber Sthan **but there is nothing to indicate in the said affidavit of Ramayan Prasad Chauhan or other affidavits filed by S.P. Kushi Nagar as to why the petitioner no.4 and his other family members could not be arrested by the police, who had allegedly occupied the said pond of the village illegally. Without going into further details of story of allaged measurement, we are of the prima facie view that for the benefit of respondent no.4 who is alleged to be remote relation of petitioner no.1 she cannot lodged such F.I.R. allegating the commission of rape with her unmarried daughters Kumari Vandana and outraging the modesty of her another unmarried daughter Kumari Archana and put the reputation and prestige of her unmarried daughters and family at stake.** Therefore, in our opinion, story set up by Ramayan Prasad Chauhan that aforesaid F.I.R. dated 4.05.2010 was lodged by the petitioner no.1 through A.C.J.M. against him and police personnels as a counter blast of aforesaid administrative action of District Administration appears to be wholly misplaced and cannot be accepted for the reason that **in case of rape the reputation and prestige of family and career or life of victim is involved, that is why Hon'ble Apex Court has repeatedly held that the victim of rape is not an accomplice to the crime but is victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion treating her as accomplice.** Besides said F.I.R. Kumari Vandana and Kumari Archana have also stated in their statements recorded U/s 161 and 164 Cr.P.C. about the commission of aforesaid crime and involvement of the aforesaid persons in said crime. Apart from it, the Hon'ble Apex Court in **Santosh Moolya**

case has observed that "any statement of rape is an extremely humuliating experience for a woman and until she is victim of sex crime, she would not blame anyone but the real culprit."

36. Further submission of Sri Rahul Sripat, learned counsel for Ramayan Prasad Chauhan that arrest of Smt. Nagina and her two daughters Km. Vandana and Kumari Archana was effected by Lady Police provided by S.P. Kushi Nagar, therefore, it was highly improbable of commission of rape with Kumari Vandana by Station Officer and outraging the modesty of Kumari Archana by other constables named in F.I.R. and Ramayan Prasad Chauhan in the Police Station Kuber Sthan in the night of 19/20.4.2010, in our prima facie opinion, also appears to be misplaced for the reason that Lady Sub-Inspector and constables seems to have been provided by S.P. Kushi Nagar vide order dated 18.4.2010 from police lines of Kushi Nagar, merely for the purposes of effectuating the measurement and removal of encroachment from pond in question to be carried on 19.4.2010 and after arresting the petitioners no. 1 to 3 and Aadya Singh and bringing them at Police Station Kuber Sthan they might have been returned to Police Line in the evening of 19.4.2010. It is also not case of respondents that Kumari Vandana and Kumari Archana were in actual physical custody of those Lady Police constables throughout the whole night of 19/20.4.2010 in the said Police Station, therefore, in our view, on this count also the allegation made in F.I.R. of Case Crime No. 221 of 2010, could not be rejected by the investigation officer at the stage of investigation of said crime.

37. After said incident of committing rape with Kumari Vandana and outraging the modesty of Kumari Archana in the night of 19-20.4.2010, they alongwith her mother Smt. Nagina and father Adya Singh were brought before Sub-Divisional Magistrate, Padrauna on 20.4.2010 under Sections 107, 116 and 151 Cr.P.C. but when they moved bail application before Sub-Divisional Magistrate, Padrauna on that day the concerned Sub-Divisional Magistrate did not grant bail instead thereof sent them to District Jail, Deoria, thereafter, they were bailed out on 22.4.2010 and released from jail on 23.4.2010. Although, in the various affidavits filed by Superintendent of Police, District Kushi Nagar, he did not disclose that before sending the petitioners no. 1 to 3 and Sri Aadya Singh in District Jail, Deoria on 20.04.2010, they were brought for medical examination at Primary Health Centre, Kuber Sthan on 20.4.2010 but in the affidavit filed by Sri Ramayan Prasad Chauhan in support of the intervening application he has filed the injury reports dated 20.4.2010 of the aforesaid persons and submitted that while examination of their injuries, Kumari Vandana and Kumari Archana did not offer internal examination of their person while examination of external injuries of their persons on that day. Beside this, he has further submitted that after lodging of said F.I.R., Kumari Vandana was medically examined on 5.5.2010 in the District Hospital, Kushi Nagar and her vaginal smear was also examined by Mahila Chikitsalaya, Padrauna but neither any spermatozoa was found in the said vaginal smear nor any sign of injury was seen on the private part of her body, so as to establish the case of rape by Mohan Ram,

Sub-inspector/Station Officer of P.S. Kuber Sthan with Kumari Vandana. As such, story of rape with Km. Vanda and outraging the modesty of Km. Archana in the night of 19-20.4.2010 at P.S. Kuber Sthan, District Kushi Nager set up in the said F.I.R. dated 4.5.2010 is wholly false.

38. In this connection, at this juncture, it would be useful to refer Section 164-A of Cr.P.C. which is inserted by the Code of Criminal Procedure (Amendment Act, 2005) w.e.f. 23.6.2006, which provides specific procedure for medical examination of the victim of rape. The provisions of Section 164-A of Cr.P.C. are extracted in extenso as under:-

"164-A. Medical examination of the victim of rape.- *(1) Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offence.*

(2) The registered medical practitioner, to whom such woman is sent, shall without delay, examine her person and prepare a report of his examination giving the following particulars, namely:-

(i) the name and address of the woman and of the person by whom she was brought;

(ii) the age of the woman;

(iii) the description of material taken from the person of the woman for DNA profiling;

(iv) marks of injury, if any, on the person of the woman;

(v) general material condition of the woman; and

(vi) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The person competent to give such consent on her behalf to such examination had been obtained.

(5) The exact time of commencement and completion of the examination shall also be noted in the report.

(6) The registered medical practitioner shall, without delay, forward the report to the investigating officer who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of sub-section (5) of that section.

(7) Nothing in this section shall be construed as rendering lawful any examination without the consent of the woman or of any person competent to give such consent on her behalf.

Explanation- For the purpose of this section, "examination" and "registered medical practitioner" shall have the same meaning as in section 53."

39. From a careful reading of Section 164-A of Cr.P.C. it appears that where during the stage of investigation of offence committing the rape, it is

proposed to get the person of woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, the investigation officer is duty bound to send the victim of rape for medical examination with the consent of such woman or of a person competent to give such consent on her behalf, to registered medical practitioner employed in a hospital run by Government or local authority, within twenty four hours from the time of receiving the information relating to the commission of such offence. Thereupon the registered medical practitioner to whom such woman is sent, shall without delay examine her person and prepare a report of his examination in the manner stated in sub sections (2),(3), (4), (5) and (6) of Section 164-A of Cr.P.C. and forward to the Investigating Officer who shall forward it to the Magistrate referred to in Section 173 as part of the documents referred to in Clause (a) of sub section (5) of that Section.

40. In instant case the concerned Police Station and S.P. Kushi Nagar, alleged to have refused to lodge F.I.R. of the aforesaid crime. However, after expiry of 14-15 days from the date of incident by intervention of A.C.J.M., Kasia on 3.5.2010, the said F.I.R. could be lodged at Police Station Kuber Sthan, District Kushi Nagar on 4.5.2010. In case, local police of Police Station Kuber Sthan, Kushi Nagar or S.P. Kushi Nagar would have registered the aforesaid F.I.R. without causing any delay in the matter, the medical examination of Kumari Vandana would have conducted u/s 164-A Cr.P.C. within twenty four hours from the time of receiving the information relating to the commission of such offence, in that event of the matter the genuineness of alleged commission of rape would have been verified on the basis of such medical examination but on account of aforesaid delay caused by District Police Administration, it is clear that they have tried to defeat the aforesaid provisions of law and thereby hushed up the said crime for saving the offender of the rape.

41. Not only this but the Sub Divisional Magistrate, Padrauna, District Kushi Nagar has also sent the petitioners no. 1, 2 and 3 and Adya Singh in jail on 20.04.2010 and after expiry of two days he has granted bail on 22.04.2010 and thereafter they have been released on bail on 23.04.2010. Even assuming that on 20.04.2010 they were forwarded to Primary Health Centre for their medical examination, even then such medical examination of persons of Kumari Vandana and Kumari Archana could not be conducted by such medical officer as contemplated u/s 164-A Cr.P.C. for the reason that by that time F.I.R. in respect of alleged rape was not lodged at all and on that day Kumari Vandana victim of alleged rape was not forwarded by Investigating Officer for medical examination of her person during the investigation of alleged rape, as such the submission of Sri Rahul Sripat, learned counsel appearing for intervener that inspite of the petitioners no.1, 2 and 3 were brought before medical officer of Primary Health Centre, Kuber Sthan, they did not offer medical examination of internal part of body of Km. Vandana and Kumari Archana nor they whisper any word about such examination before Sub Divisional Magistrate, appears to be wholly misplaced, for the simple reason that by that time neither F.I.R. for alleged rape was lodged nor the investigation of

Case Crime No.221 of 2010 in respect of alleged rape and outraging of modesty of woman was started by the Investigating Officer, instead thereof at that time the arrest of aforesaid persons was effected u/s 107, 116, 151 Cr.P.C. Thus, such medical examination of Kumari Vandana could not be done by medical officer on her said presentation before Medical Officer as required under Section 164-A Cr.P.C.

42. In this connection, it is to be noted that even if the aforesaid injury reports of Kumari Vandana enclosed with affidavit filed in support of intervening application of Ramayan Prasad Chauhan for the sake of argument assumed to be correct, even then, since incident of rape was allegedly committed with her in the night of 19/20.4.2010 by Sri Mohan Ram Sub-inspector Police/Station Officer of P.S. Kuber Sthan and vaginal smear was taken for examination on 5.5.2010 after lapse of 15 days from the date of incident, therefore, in our opinion, it can not be said that spermatozoa of alleged rape dated 19/20.4.2010 could have remained in vagina of Kumari Vandana after such long lapse of time of 15 days from the date of alleged rape. Since, her age in the said medical examination was recorded as 20 years and on the basis of X-ray report also she was found to be major as her vagina reported to be admitting two fingers and she was fully grown -up lady, therefore, absence of sign of injury in private part of her body, and absence of spermatozoa in vaginal smear after lapse of 15 days, from the date of incident can also not automatically falsify the story of said rape case. Therefore, In our opinion, the submission of Sri Rahul Sripat, Advocate is wholly misplaced, accordingly, same can not be accepted. The view taken by us also finds support from the recent decision rendered by Apex Court in **Santosh Moolya's case (supra)** wherein it was held by Apex Court that absence of injuries on private part of the victim of rape after a month and 14 days from the date of incident of a married woman having children, does not lead to an inference that rape was not committed.

43. At this juncture, we must also state that inspite of continuous monitoring of the Case Crime No. 221 of 2010 registered at, Police Station Kuber Sthan, Kushi Nagar, by this Court, it appears that the statements of Kumari Vandana and Kumari Archana, could be recorded before the Magistrate concerned on 26.6.2010 after lapse of about more than 1 and 1/2 months from the date of said F.I.R., which goes to show that investigating officer has unduly delayed in producing them before Magistrate concerned with certain ulterior and oblique motive. Not only this but subsequent conduct of investigating officer and superior police officers of District also does not inspire confidence in the investigation of said case crime in stead thereof strengthen the case of petitioners that for pressurising them to do compromise in the said case crime the accused persons of Case Crime No. 244 of 2010 have also attacked the petitioner no. 1 to 4 and other persons who came to rescue them on 16.5.2010 and further F.I.R. in Case Crime No. 244A of 2010 was also registered against them at instance of police officers of District Kushi Nagar, to achieve the same goal.

44. In this connection, it would be useful to refer the letter dated 07.07.2010 of, Sri Mahendra Pratap Chauhan, Circle

Officer, Sadar, Kushi Nagar who is investigation officer of the case crime No. 221 of 2010 registered at P.S. Kuber Sthan, District Kushi Nagar, whereby, he has informed the Superintendent of Police, Kushi Nagar, that in absence of any evidence against the accused persons of said case crime, he has closed up the investigation on 28.6.2010 and submitted Final Report No. 7/2010, but on account of some instructions of Superintendent of Police, Kushi Nagar he has taken the cloths of Kumari Vandana, victim of rape and sent the same on 06.07.2010 to Vidhi Vigyan Prayogshala, Police Lines, Varanasi for examination as contained in Annexure-1 to the affidavit filed by Sri Lav Kumar, Superintendent of Police, Kushi Nagar dated 09.07.2010 before this court, inspite of fact that in the statements recorded under Section 161 of Cr.P.C. the prosecution witnesses and victim of rape and victim of Section 354 I.P.C. have supported the said prosectuion case and further in their statements Kumari Vandana and Kumari Archana recorded under Section 164 of Cr.P.C. before Magistrate concerned they have also supported their case. **As such, we are of the prima facie opinion that investigation officer could not reject the aforesaid statements of prosecution witnesses and prosecutrix by treating the same as false at investigation stage, for the simple reason that if as such statements would be made by them during trial of said case it can hardly be disbelieved by the trial court in view of law laid down by Hon'ble Apex Court in various decisions referred herein before. Therefore, we are of the view that investigation officer, instead of investigating the aforesaid case crime in a fair and proper way, has tried to hush up the aforesaid crime for shielding the police personnels of Police Station Kuber Sthan, Kushi Nagar and Ramayan Prasad Chauhan allegedly involved in the said case crime.**

45. Apart from it, we are also constrained to say that the Superintendent of Police, Kushi Nagar did not discharge his duties in a trustworthy and fair manner in the aforesaid case. We are of the prima facie opinion that on alleged refusal of lodging F.I.R. in respect of aforesaid case crime by concerned Police Station he was under obligation to register the aforesaid case crime under Section 154(3) of Cr.P.C. Beside this, on receipt of information of the aforesaid case crime, he did not take proper administrative action in the matter against the police personnels allegedly involved in the said case as indicated in preceding part of this judgement. Despite pendency of writ petition and direction of this Court dated 11.06.2010 asking his explanation about the action taken by him, in his affidavit dated 18.6.2010 filed before this Court Superintendent of Police, Kushi Nagar has stated that on 15.6.2010 he has merely attached the police personnels involved in the said case crime on Police Line, though, the F.I.R. was lodged against the police personnels on 4.5.2010 much earlier atleast one month ten days ago, which indicates that he has also unduly delayed in taking any administrative action against the police personnels involved in the said crime and permitted them to win over the prosecution witness by hook and crook. On finding the aforesaid action unsatisfactory, he was again directed by this Court to take proper action in administrative side, in pursuance thereof, he could place the police personnels under suspension vide his order dated 20.6.2010 but the aforesaid

order of suspension was also not properly issued by him. Thereafter, in pursuance of subsequent direction of this Court, vide his order dated 5th July, 2010 he could modify the order of suspension dated 20th June, 2010. The aforesaid facts clearly indicate that the action and conduct of Sri Lav Kumar, Superintendent of Police, Kushi Nagar in respect of case crime in question was not fair and proper and free from undue pressure.

46. Thus, from totality of facts and circumstances of the case, **we are of the prima facie opinion that commission of cognizable offence of rape and outraging the modesty of unmarried girls in the night of 19/20.4.2010 at Police Station Kuber Sthan, District Kushi Nagar, and involvement of Police personnel in the said crime as accused is prima facie established. We are also constrained to say that the investigating officer and superior police officers are trying to hush up the said crime and shield the offenders, thus it is exceptional situation and fit case where this Court should direct the investigation of aforesaid case crime be made by C.B.I. for providing credibility and confidence in investigation and for doing complete justice to the victims of said crime.** Accordingly, we direct the Director General of C.B.I. to undertake the investigation of aforesaid Case Crime No. 221/2010 registered at P.S. Kuber Sthan, District Kushi Nagar, under Sections 147, 376, 354, 504 and 506 I.P.C. and depute an officer not below the rank of Senior Superintendent of Police as in our opinion the conduct of Investigating Officer and Superintendent of Police is also subject matter of scrutiny and complete the investigation within a period of three months from the date of supply of certified copy of this order to Sri N.I. Jafri, learned advocate appearing for C.B.I. in this Court.

47. Since two other cases as Case Crime No. 244 of 2010 under Sections 147, 323, 504 and 506 I.P.C. registered at Police Station Kuber Sthan, Kushi Nagar and Case Crime No. 244-A of 2010, under Sections 147, 148, 452, 324, 323, 504 and 506 I.P.C. registered at said Police Station are also alleged to be counter blast of the aforesaid case crime, therefore, the C.B.I. shall also investigate the aforesaid case crimes alongwith Case Crime No. 221 of 2010, under Sections 147, 376, 354, 504 and 506 I.P.C. registered at Police Station Kuber Sthan, Kushi Nagar within the same period. However, C.B.I. shall investigate the aforesaid crimes without being influenced by any observation made by us as we have recorded aforesaid findings and have made observations only for the purpose of directing the C.B.I. to investigate the said crimes, therefore, those findings and observations shall not be binding upon the C.B.I. while investigating the aforesaid crimes.

48. Before parting with the judgment, we must further clarify that interim order granted by us earlier staying the arrest of petitioners in Case Crime No. 244-A of 2010, under Sections 147, 148, 452, 324, 323, 504 and 506 I.P.C. on 9.6.2010 shall continue till filing of charge sheet against the petitioners under Section 173 of Cr.P.C. Since we have already directed the Superintendent of Police, Kushi Nagar and Principle Secretary of Home Govt. of U.P. for providing adequate security to the petitioners no. 1, 2 and 3 during investigation, enquiry and trial of the

aforesaid Case Crime No. 221 of 2010 registered at Police Station Kuber Sthan, Kushi Nagar, therefore, we further reiterate that this security arrangement shall continue with the petitioners no. 1, 2 and 3 and shall not be withdrawn by the respondents without leave of the Court as it is extension of security by this Court for protection of witnesses of criminal case. In our view, providing such security to protect the witness of prosecution in a pending criminal case, does not fall within purview of Government Order wherein provisions for providing security of armed police or gunner to other persons have been given.

49. After completion of investigation the C.B.I. shall proceed in accordance with the provisions of law without any further reference to this Court.

50. With the aforesaid observation and direction, writ petition stands disposed of finally.

Note- Office is directed to supply a copy of this order to Sri N.I. Jafri, learned Advocate appearing for C.B.I. before this Court, by 22nd July, 2010 for communication and necessary action. A copy of this order shall also be sent by the office to Superintendent of Police, Kushi Nagar for necessary information and action and to A.C.J.M. Kasia, District Kushi Nagar for keeping the same on record of the case.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.02.2010

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

Civil Misc. Writ Petition No. 20867 of 2003

Vijay Pal Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Krishna Raj Singh 'Jadaun'

Counsel for the Respondents:
C.S.C.

Constitution of India Art-226-interest-petition while working in Jalaun selected by as English lecturer by the Commission and posted in Aligarh on 1.7.96-immediately applied for transfer of G.P.S account from earlier College-inspite of direction issued by the authority new account open only on 10.2.99-claim of interest during intervening period-can not be denied-No laps or negligence on part of petitioner attributed-can not be penalized.

Held: Para 5

Apparently, no lapse or negligence has been attributed to the petitioner in the counter affidavit filed on behalf of the State respondents. It is also apparent that the delay is on the part of the State respondents in transferring the account and therefore, the petitioner cannot be penalized for the delay and as such he is entitled for addition of the interest on the principle amount without any gap of the intervening period and should also be entitled to recurring amount of interest which became due. It is settled principle of law that a person cannot be penalized or deprived of his legal due without attributing any commission or

omission on his part. On his appointment as Lecturer in English at Aligarh the petitioner immediately had informed the Authorities which took time in finalizing the transfer and therefore, the petitioner is entitled to the relief claimed.

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

1. Heard learned counsel for the parties.

2. The petitioner has sought a mandate for payment of the interest amount for the delay in transfer from his old G.P.F. account to the new account.

3. The admitted facts are that the petitioner was initially appointed as a Lecturer of English in M.P. College, Konch, District Jalaun on 24.10.1980. While working as such he was selected by the Higher Education Service Commission, Allahabad and appointed as Lecturer in English in D.S. College, Aligarh where he joined on 1.7.1996 after demitting office in his earlier college on 30.6.1996. On account of the aforesaid the petitioner requested for transfer of his G.P.F. account from his earlier College to the D.S. College, Aligarh and the Director of Higher Education vide order dated 13.1.1998 issued the necessary orders to the District Inspector of Schools, Jalaun. In pursuance thereof, the G.P.F. amount was transferred to his new account no. 321 only on 10.2.1999. However, the interest of the intervening period was not added while transferring the aforesaid amount and on the representation of the petitioner the Directorate passed another order on 21.6.1999 yet the accrued interest of Rs. 18886.75/- has not been added in his transferred G.P.F. account and thus this petition.

4. The stand taken by the respondents in their counter affidavit is that they have done their best but due to the delay involved in the procedure for transferring the account, they cannot be held responsible.

5. Apparently, no lapse or negligence has been attributed to the petitioner in the counter affidavit filed on behalf of the State respondents. It is also apparent that the delay is on the part of the State respondents in transferring the account and therefore, the petitioner cannot be penalized for the delay and as such he is entitled for addition of the interest on the principle amount without any gap of the intervening period and should also be entitled to recurring amount of interest which became due. It is settled principle of law that a person cannot be penalized or deprived of his legal due without attributing any commission or omission on his part. On his appointment as Lecturer in English at Aligarh the petitioner immediately had informed the Authorities which took time in finalizing the transfer and therefore, the petitioner is entitled to the relief claimed.

6. For the reasons above, this petition succeeds and is allowed and it is held that the petitioner is entitled for his interest on the principle amount while it stood deposited in the treasury at Jalaun. He is also entitled to get the amount included in the principle amount without any intervening gap and also for recurring amount of interest which became due thereon. Accordingly, the respondents are directed to add Rs.

18,886/- along with pendentilite interest at the admissible rate and addition in the principal amount of G.P.F. at the prevailing rate of interest.

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

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.07.2010

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

Civil Misc. Writ Petition No. 22903 of 2010

Matsya Jivi Sahkari Samiti Ltd. and another ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Virendra Singh
Sri Anjani Kumar
Sri Shashi Kant Shukla

Counsel for the Respondents:
Sri Mukesh Prasad,
Sri Vijay Kumar Dixit
Sri V.K. Nagaich
C.S.C.

Northern India Ferries Act-1978-Section-8-Settlement of ferries Ghat-lease granted without approved of commissioner-held-no right acured-direction issued for expediting the consideration.

Held: Para 14

In view of above, we are of the view that the approval of bid is required to be taken from the Commissioner. It is relevant to note that the condition of advertisement Clause 4 clearly contemplates approval of the Commissioner. Hence, we are satisfied that approval of the Commissioner is mandatory. The above bid having not yet been approved by the Commissioner, we are of the view that the Commissioner may take an appropriate decision with regard to the bid alleged to be held on 31.12.2009 after considering the objection of the petitioner within four weeks from the date a certified copy of this order is produced before him. Learned counsel for the Zila Panchayat submits that all the papers have already been forwarded to the Commissioner.

Case law discussed:
2002 (93) RD 778

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

1. Heard learned counsel for the petitioner. Sri V.K. Dixit has appeared on behalf of respondent nos. 3 and 4. Sri Mukesh Prasad has appeared on behalf of respondent no. 5. Learned Standing Counsel appears for respondent nos. 1 and 2.

2. Counter and rejoinder affidavits have been exhcanged between the parties and with the consent of both the parties, the petition is being finally disposed of.

3. By this writ petition, the petitioner has prayed for quashing the order dated 09.02.2010 issued by respondent no. 3. A mandamus has also been sought commanding respondent nos. 2 and 3 to grant the ferry rights of ghats Bhedi Kharda, Bhedi Jalalpur, Himmanpura, Bhedi Khurd, District Hamirpur in favour of the petitioner.

4. Petitioner's case in the writ petition is thatthe petitioner is a registered Cooperative Society of fishermen and boatmen registered with the Registrar

Matsya under the Provisions of U.P. Cooperative Socieities Act 1965. A lease for three years was gratned by the Zila Panchayat, Jalaunwhich expired on 30.09.2009. A letter dated 04.09.2009 by Nagar Panchayat, Jalaun was written that in view of the Government Order dated 04.08.2006, the ghats will be settled by Zila Panchayat, Hamirpur for the year 2009-10. A notice was issued by Zila Panchayat, Hamirpur inviting application/auction on 31.08.2003 fixing 21.09.2009. The Condition No. 4 provided that the lease shall be executed after receiving the approval of the Commissioner, Chitrakoot Dham.

5. The petitioner's case is that the petitioner has given an application on 11.09.2009. A writ petition WP No. 54877/2009 was filed by the petitioners which was however dismissed on 28.10.2009 observing that the ghat shall be settled by the concerned respondent by following proper procedure. It appears that after subsequent order of this court, 30.12.2009 was the date fixed. Petitioner's case is that no auction took place on 30.12.2009, whereas as per respondents, the auction was held on 30.12.2009, in which the respondent no. 5 had given bid which was accepted by the Zila Panchayat and order was also given to respondent no. 5 on 08.01.2010 communicating that his approval is upto 30.09.2010.

6. Learned counsel for the petitioner contended that till date, no approval has been obtained from the Commissioner for the bid which is said to have been given by respondent no. 5.

7. We have heard learned counsel for the parties and perused the record.

The first question to be considered in the writ petition is, that as to whether the approval of ferry ghat is required to be given by the Commissioner or by the Adhyaksh, Zila Panchayat as is alleged by the respondents by producing a copy of the order issued by Adhyaksh, Zila Panchayat dated 09.02.2010. Section 7, 7-A and 8 of the Northern India Ferries Act, 1878 are quoted below: -

"7. Management may be vested in Municipality -The State Government may direct that any public ferry situate within the limits of a town be managed by the officer or public body charged with the superintendence of the municipal arrangements of such town;

(and thereupon that ferry shall be managed accordingly).

7-A. Management may be vested in District Council or District or Local Board -The State Government may direct that any public ferry, wholly or partly within the area subject to the authority of a District Council or District Board or a Local Board in the State be managed by that Council or Board, and thereupon that ferry shall be managed accordingly.

8. Letting ferry-tolls by auction- The tolls of any public ferry may, from time to time , be let by public auction for a term not exceeding five years, with the approval of the Commissioner or by public auction, or otherwise than by public auction for any term with the previous sanction of the State Government.

8. The lease shall conform to the rules made under this act for the management and control of the ferry, and

may be called upon by the officer in whom the immediate superintendence of the ferry is vested, or, if the ferry is managed by a municipal or other public body under Sec. 7 or Sec. 7-A, then by that body, to give such security for his good conduct and for the punctual payment of the rent a the officer or body, as the case may be, thinks fit.

9. When the tolls are put to public auction, the said officer or body, as the case may be, or the officer conducting the sale on his or its behalf, may, for reasons recorded in writing, refuse to accept the offer of the highest bidder, and may accept any other bid, or may withdraw the tolls from auction."

Learned counsel for the petitioner submits that by virtue of Section 8 of the aforesaid Act, the ferry right needs approval of the Commissioner and without the approval, neither any lease can be granted, nor any auction can be settled, whereas learned counsel for respondent no. 5 submits that the approval is required u/s 7-A by the body which is managing the ferry ghat. He submits that the approval of the Commissioner has been mentioned in first part of Section 8 only pertaining to approval for the period for which the ferry is to be let out

10. We have considered the submissions of learned counsel for the parties and persued the record.

11. Section 7 and 7-A of the Act deals with the management and the vesting of the ferry ghat in a District Council or District Board or Local Board. The first part of Section 8 provides that tolls of any public ferry may from time to time let by public auction for a term not exceeding five years with the approval of the Commissioner. Thus, any ferry not exceeding five years can be let out with the approval of the Commissioner. The second part of the same first paragraph of the Section provides that with the sanction of the State Government, a ferry right can be let out by public auction or otherwise for any term. Thus, the submission of learned counsel for the respondent that approval of the Commissioner is only with relation to the period for which ferry is to be let out is not acceptable.

12. The first part of Section 8 clearly provides that it is to be let out with the approval of the Commissioner. The third paragraph of Section 8 provides for acceptance of the offer by the officer which is conducting the sale and the right has been given to the officer conducting the sale to refuse to accept the highest bid or withdraw the toll from auction or accept any other bid. The above is clearly the power of officer conducting the sale and there is no conflict with the said power with the approval which is contemplated of the commissioner in first part of Section 8.

13. A Division Bench judgement referred by learned counsel reported in 2002 (93) RD 778 Navik Sahkari Majdoor Theka Samiti, Bewari Gola, Gorakhpur vs. Commissioner, Gorakhpur Division, Gorakhpur and Others also lays down that no auction can be settled without the approval of the Commissioner. Following was laid down in paragraph 3 of the judgement: -

"The other kind of auction is where the auction is subject to approval by some authority until approval is granted by the authority concerned. Under Section 8 of

the Northern India Ferries Act, 1978 approval of the Commissioner is necessary. Since, admittedly, no approval was granted by the Commissioner, no auction has been settled in favour of the petitioner and hence no right has accrued in its favour. Hence, there is no question of giving opportunity of hearing, because opportunity of hearing has to be given only in those cases where some right has accrued and thereafter it is sought to be cancelled. Since in this case no right has accrued in favour of the petitioner, hence there is no need to give opportunity of hearing. There is no force in the writ petition. It is, accordingly, dismissed."

14. In view of above, we are of the view that the approval of bid is required to be taken from the Commissioner. It is relevant to note that the condition of advertisement Clause 4 clearly contemplates approval of the Commissioner. Hence, we are satisfied that approval of the Commissioner is mandatory. The above bid having not yet been approved by the Commissioner, we are of the view that the Commissioner may take an appropriate decision with regard to the bid alleged to be held on 31.12.2009 after considering the objection of the petitioner within four weeks from the date a certified copy of this order is produced before him. Learned counsel for the Zila Panchayat submits that all the papers have already been forwarded to the Commissioner.

15. The writ petition is **disposed** of with the aforesaid observations.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.07.2010

BEFORE
THE HON'BLE V. M. SAHAI, J.
THE HON'BLE MRS. JAYASHREE TIWARI, J.

Civil Misc. Writ Petition No. 26810 of 2010

M/s Uma Stone Crushing Company and another ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri S.S. Chauhan
Sri Madan Lal Srivastava

Counsel for the Respondents:
S.C.

U.P. Minerals (Prevention of illegal mining Transportation and Storage) Rules 2002-13(2)-Notice to seizer of Bolder and other article-before expiring of One month-as provided in statuary enactment illegal direction issued-if reply to Show Cause Notice filed-same shall be considered and decided-in between seized articles be released.

Held: Para 9

If the petitioner is required to obtain any licence for storage of boulders within the area for which he had been leased then such an order should have been passed by the respondents only after one month from the date of service of show cause notice, giving detailed reasons but without expiry of one month of show cause notice the boulders could not be seized by the respondents in view of clear provision of Rule 13(2) of the Rules 2002. Therefore, show cause notice dated 19.4.2010 and simultaneous seizure of boulders is contrary to Rule 13(2) of the Rules 2002.

(Delivered by Hon'ble V.M. Sahai, J.)

1. The short question that arises for consideration in this petition is whether under Rule 13 of the U.P. Minerals (Prevention of illegal Mining, Transportation and Storage) Rules, 2002 (in brief the Rules 2002) the stored minerals (boulders) could be seized by the respondents simultaneously while issuing a show cause notice by the Mines Officer.

2. The petitioner was granted a mining lease on 23.3.2006 on part of plot no. 7347 Ka area 1.25 acre by the District Magistrate, Sonebhadra under Form MM3 of the Uttar Pradesh Minor Minerals (Concession) Rules, 1963. The lease was for a period of ten years from 23.3.2006 to 23.3.2016. Form MM11 was issued for mining as well as for transportation of boulder and gitti. According to the petitioner he did not violate any terms of the mining lease and his stone crusher was installed on the boundary at a distance of 70 meters from the mining quarry within the mining area leased out to the petitioner. The boulders were kept on the mining area of the petitioner which were being crushed by the petitioner and gitti was manufactured.

3. It appears that on the basis of some complaint dated 9.4.2010 by one Anoop Tripathi the stone crusher was inspected by the respondents and it was found that boulders were lying near the crushing machine which was being crushed by the petitioner and Gitti was manufactured which was to be transported. The Mining Officer/District Magistrate, Sonebhadra issued a show cause notice to the petitioner on 19.4.2010 stating therein that the petitioner has illegally stored 11500 sq.m. of gitti and 4500 sq. m. boulders. The petitioner had no licence to store boulders and the petitioner was asked to furnish information that the boulders were obtained by the petitioner from which mining lease holders; under which agreement they have supplied the boulders to the petitioner; if gitti have been transported by the petitioner then copies of Form MM 11 be furnished; the details of name and address of the mining lease holders who have supplied boulders to the petitioner be also furnished. In the show cause notice it was also stated that the petitioner has been carrying out illegal mining operation and therefore stock of boulders found near the crusher of the petitioner as mentioned above was seized by the mining officer while issuing show cause notice on 19.4.2010.

4. The question is whether the Mining Officer could seize the boulders simultaneously while issuing notice under Section 13(2) of the U.P. Minerals (Prevention of illegal Mining, Transportation and Storage) Rules, 2002. It is necessary to extract the Rule 13 of the aforesaid Rules.

Rule 13. Inspection and checking of the storage of minerals - (1) For the purpose of checking of the stored minerals or for any purposes connected with the Act or rules made thereunder, the District Officer or the Officer authorised by the State Government may,

(a) enter, inspect any such storage premises,

(b) weigh, measure or take measurement of stock of mineral(s) lying in the store,

c) examine any document, book, register or record in the possession,

(d) take extracts from or make copies of such document, book, register or records,

(e) summon on order the production of any such document, book, register or records as is referred to in clause (c),

(f) summon or examine any person having the control of or connected with any stock of the mineral,

(g) call for such information or return as may be considered necessary.

2. If any illegality is found in the stock of the minerals, the District Officer or the officer authorised by the State Government in this behalf may issue a notice to such licensee to explain his case within thirty days from the receipt of the notice and if no explanation is submitted within stipulated time or the explanation so submitted is not found satisfactory then the licence may be determined by the District Officer and if the stock so checked is found without any lawful authority, the same may be seized and confiscated.

5. Rule13(1) gives power to the Mining Officer to check and inspect the stored minerals, take measurement and inspect books etc. Rule 13(2) provides that if any illegality is found by the Mining Officer or the District Officer or the officer authorised by the State Government in the stock of the minerals then show cause notice has to be issued to the petitioner calling his explanation within thirty days and if the explanation submitted by the petitioner is not found satisfactory then the authorities have the power to come to the conclusion that the stock of mineral checked by them were stored without any lawful authority, and the authority could direct for its seizure and confiscation.

6. Learned Standing Counsel has vehemently urged that since the petitioner was not holding any licence for storage of boulders, therefore after the mining operation, the storage of boulders had become illegal.

7. The petitioner had stated that the stone crusher had been established on the boundaries of the lease area and no licence is required to store boulders as after mining and excavation the boulders are stored on the leased area. The distance between stone crusher and the quarry is only 70 meters whereas in the counter affidavit the respondents have stated that the distance is about 150 meters. However, if after mining operation the boulder coming out after excavation are kept on the area which had been leased to the petitioner then there is no occasion for the petitioner for obtaining licence for the storage of the boulders as provided by Rule 11(a) of the Rules 2002.

8. From the reply given by the Mines Officer under the Right to Information Act filed as Annexure -3 to the rejoinder affidavit it is clear that no mining lease holder had obtained any licence for storage of minerals on the area which had been leased out to him. The petitioner who is a mining lease holder is not required to obtain any licence for storage of boulders excavated by him from his mines which were stored on the mining area for which the petitioner was holding a valid lease.

9. If the petitioner is required to obtain any licence for storage of boulders within the area for which he had been leased then such an order should have been passed by the respondents only after one month from the date of service of

show cause notice, giving detailed reasons but without expiry of one month of show cause notice the boulders could not be seized by the respondents in view of clear provision of Rule 13(2) of the Rules 2002. Therefore, show cause notice dated 19.4.2010 and simultaneous seizure of boulders is contrary to Rule 13(2) of the Rules 2002.

10. Therefore, we direct that the seizure of boulders by the respondents simultaneously alongwith show cause notice dated 19.4.2010 is wholly illegal and is liable to be quashed. However, if the petitioner submits his reply to the show cause notice within the period of one month from today it shall be considered by the respondents and the respondents shall pass a detailed reasoned order after considering each and every point raised by the petitioner in his reply to the show cause notice.

11. In the result, the writ petition succeeds and is allowed. The show cause notice dated 19.4.2010 so far as it directs seizure of the petitioner's boulders is quashed. The boulders which had been seized by the respondents shall be released to the petitioner forthwith. However, the petitioner shall submit his reply to the show cause notice within the period of one month from today which shall be considered by the respondents and the respondents shall pass a detailed reasoned order after considering each and every point raised by the petitioner in his reply to the show cause notice.

12. Parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.07.2010

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

Civil Misc. Writ Petition No. 40033 of 1993

Sashi Bhushan Pandey ...Petitioner
Versus
U.P.P.S.C., Allahabad and another ...Respondents

Counsel for the Petitioner:
Sri B.D. Pandey
Sri Abhishek Rai
Sri Chandan Sharma
Sri Vinay Malviya
Sri V.K. Goel

Counsel for the Respondents:
Sri M.A. Qadeer
S.C.

Constitution of India, Art-226-Writ Petition-Challenging the selection of reserve category candidate in General Category-effected/selected person not impleded-selection made much prior to 18 years-can not be Questioned-most of them have been promoted-held-in absence of necessary party-Petition not maintainable.

Held: Para 9

In this case we further find that the three candidates who belonged to O.B.C. category and were selected in general category, giving the cause of action for filing the writ petition, have not been impleaded. They were appointed in the year 1992 and most of them would have served for more than 18 years as District Audit Officers and may have been promoted to the higher posts in the department. In the absence of necessary parties, no relief can be granted to the petitioner.

Case Law discussed
(2010) 3 SCC 119, (1992) Supp (3) SCC 217,

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

1. Heard Sri Abhishek Rai, Advocate holding brief of Sri Chandan Sharma for the petitioner. Learned Standing Counsel appears for the respondents.

2. The petitioner appeared in the selections for the post of District Audit Officer advertised by the U.P. Public Service Commission at Allahabad, vide advertisement dated 23.12.1989. Out of the advertised 18 vacancies, 10 vacancies were for General category candidates. The remaining vacancies were divided between other categories in the following manner:-

(1) 03 vacancies for Other Backward Class category.

(2) 03 vacancies for Scheduled Caste category.

(3) 01 for Dependant of Freedom Fighter.

(4) 01 for Ex-Army Men.

3. The petitioner was allotted Roll No. 01258. He qualified for interviews held on 2nd May, 1992, as a general category candidate.

4. The petitioner submits that respondents wrongly allowed other backward class candidate to be included in the select list of general category candidates, and thus deprived the petitioner from getting selected against the three vacancies filed up by the other backward class candidates in general category.

5. In the counter affidavit it is stated that the petitioner was not selected as he scored only 407 out of 700 marks, whereas, the last general category candidate scored 423 out of 700 marks. There were three vacancies reserved of the O.B.C. candidates but six candidates were declared successful. Three additional candidates of O.B.C. category namely Mahendra Prasad Chaudhary (Roll No. 6), Santosh Kumar (Roll No. 608) and Shankar Prasad Chaurasia (Roll No. 15) secured 427, 482 and 421 marks respectively. They were included on the basis of their merit in the general category.

6. Learned counsel for the petitioner submits that the selections were notified in the year 1989 whereas, the Government Orders, for adjustment of O.B.C. candidates scoring more marks than general category candidates were issued on 11.09.1991 and 19.12.1991. He submits that the final result was declared on 08.05.1992. The reservation rules applicable on the date of announcement of result more particularly on the last date of filling up of the form should be applied to the selections.

7. The petitioner has filed an amendment application stating that O.B.C. candidates included in the merit list on the basis of their merit had been included by giving relaxation in age and thus they were entitled to compete only in the O.B.C. category. They cannot be included in the general category. He has also requested for summoning the records of the selections.

8. Recently in **Jitendra Kumar Singh Vs. State of U.P. (2010) 3 SCC 119,** the Supreme Court, has reiterated the

law as it was laid down in **Indra Sawhney Vs. Union of India (1992) Supp (3) SCC 217**, as follows:-

"49. It is permissible for the State in view of Articles 14, 15, 16 and 38 of the Constitution of India to make suitable provisions in law to eradicate the disadvantages of candidates belonging to socially and educationally backward classes. Reservations are a mode to achieve the equality of opportunity guaranteed under Article 16(1) of the Constitution of India. Concessions and relaxations in fee or age provided to the reserved category candidates to enable them to compete and seek benefit of reservation, is merely an aid to reservation. The concessions and relaxations place the candidates on a par with general category candidates. It is only thereafter the merit of the candidates is to be determined without any further concessions in favour of the reserved category candidates.

50. It has been recognised by this Court in ***Indra Sawhney*** *that larger concept of reservation would include incidental and ancillary provisions with a view to make the main provision of reservation effective. In* ***Indra Sawhney*** *it has been observed as under: (SCC pp. 692-93, para 743)*

"743. The question then arises whether clause (4) of Article 16 is exhaustive of the topic of reservations in favour of backward classes. Before we answer this question it is well to examine the meaning and content of the expression 'reservation'. Its meaning has to be ascertained having regard to the context in which it occurs. The relevant words are ***'any*** *provision for the reservation of appointments or posts'. The question is whether the said words contemplate only one form of provision namely reservation simpliciter, or do they take in other forms of special provisions like preferences, concessions and exemptions. In our opinion, reservation is the highest form of special provision, while preference, concession and exemption are leser forms. The constitutional scheme and context of Article 16(4) induces us to take the view that larger concept of reservations takes within its sweep all supplemental and ancillary provisions ... and relaxations, consistent no doubt with the requirement of maintenance of efficiency of administration - the admonition of Article 335. The several concessions, exemptions and other measures issued by the Railway Administration and noticed in* ***Karmchari Sangh*** *are instances of supplementary, incidental and ancillary provisions made with a view to make the main provision of reservation effective i.e. to ensure that the members of the reserved class fully avail of the provision for reservation in their favour."*

(emphasis in original)

In our opinion, these observations are a complete answer to the submissions made by Mr. L.N. Rao and Dr. Rajeev Dhavan on behalf of the petitioners.

52. In the present case, the concessions availed of by the reserved category candidates in age relaxation and fee concessions has no relevance to the determination of the inter se merit on the basis of the final written test and interview. The ratio of the aforesaid judgment in fact permits reserved category candidates to be included in the

general category candidates on the basis of merit."

9. In this case we further find that the three candidates who belonged to O.B.C. category and were selected in general category, giving the cause of action for filing the writ petition, have not been impleaded. They were appointed in the year 1992 and most of them would have served for more than 18 years as District Audit Officers and may have been promoted to the higher posts in the department. In the absence of necessary parties, no relief can be granted to the petitioner.

10. In the end it is submitted that one vacancy of the S.C. category was not filled up and that two persons from the general category did not joined.

11. We do not find any good ground for calling of the record after 18 years, to find out as to which general category candidate has not joined, on the averments made in amendment application, after 16 years of the filing of the writ petition. The vacancy must have been filled up in the subsequent recruitment.

12. The writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.07.2010

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

Civil Misc. Writ Petition No. 49545 of 2007

Smt. Kamlesh Agnihotri and another ...Petitioners

Versus

State of U.P. and others ...Respondents

Counsel for the petitioner:
Sri D.P.S. Chauhan
Sri Shesh Kumar

Counsel for the Respondents:
Sri Neeraj Tiwari
C.S.C.

Constitution of India Art-226- Regularisation of services-Petitioner working as teacher in campus school of University for last 20 years-school established by decision of executive council of University-government refused to provide any financial assistance-subsequently executive council decides to close down the school after at the end of academic session 2006-07-running of school did not fall down under statuary obligation-No mandamus can be issued.

Held: Para 9

A perusal of the said paragraph would clearly demonstrate that there are several factors which are required to be fulfilled before the criteria of deep and pervasive control can be pressed into service in order to maintain a writ petition against a body running such an institution. Undoubtedly, the University is a State within the meaning of Article 12 of the Constitution but the present activity of running a Campus School would not fall within its statutory

obligation and, therefore, in the absence of such obligation on the part of the University particularly without any corresponding right in favour of the petitioner and keeping in view the tests laid down in the case of Pradeep Kumar Biswas (supra), in my opinion, the present case on behalf of the petitioner cannot be entertained for the reliefs claimed.

Case Law discussed:
(2002) 5 SCC 111.

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

1. Since common questions of law and fact are involved in these petitions, therefore, they are being disposed of by a common judgement by this Court.

2. Heard Sri Shesh Kumar, learned counsel for the petitioner and Sri Neeraj Tiwari for the respondent - University.

3. The petitioners claim themselves to be the Teachers of a Campus School which was established under an administrative decision of the Executive Council of the University dated 3.8.1980. This institution was established for the purpose of providing education to the children of the employees of the University. During the course of its functioning, the said institution was got affiliated with the Central Board of Secondary Education.

4. Gradually, it appears that the number of students dwindled which impelled the University to review the continuance of such an institution and for that the University took into account the Audit Report which indicated huge deficiencies in expenditure being incurred by the University itself. Learned counsel for the petitioner Sri Shesh Kumar vehemently contends that all the teachers have been continuing for almost 20 years and, therefore, their discontinuance by the University is an act which can be termed arbitrary being violative of Article 14 of the Constitution of India.

5. Sri Shesh Kumar further contends that as a matter of fact, the University being a State and an authority within the meaning of Article 12 of the Constitution, they ought to have proceeded to make adjustment of the petitioners against any available post sanctioned by the State Government for the University. He submits that as a matter of fact certain class-IV employees have been accommodated by the University and, therefore, such an attitude should not be adopted by the University in respect of these petitioners, who have spent their life time within the campus and have lost all other avenues of employment.

6. Sri Neeraj Tiwari, learned counsel for the respondents, contends that the University may have all sympathy for the petitioners but so far as law is concerned, it is evident that this campus school was never funded by any State funds and it was out of the income of the institution that the salary etc. was paid by the University. Whatever deficiency was found was aided by the University to which serious objections have been taken by the Audit Department inasmuch as the State Government has not extended any financial aid for running the Campus School within the University.

7. Sri Tiwari further submits that so far as the engagement of the petitioners are concerned, they have

been engaged under the executive instructions of the University and further their engagement was in accordance with the by-laws framed for running the said institution. He further submits that so far as the adjustment of class-IV employees is concerned, the petitioners do not belong to that class and, therefore, they cannot complain of violation of Article 14 of the Constitution of India. Sri Tiwari has further invited the attention of the Court to the averments contained in the counter-affidavit indicating that the institution was affiliated to the Central Board of Secondary Education and the Campus School was closed down in view of the decision taken and intimated through the letter dated 30.6.2007 after completion of the session 2006-07. He submits that so far as the claim of the petitioners in the teaching profession is concerned, there is no equivalent post against which the petitioners can be considered sympathetically for their engagement. They having no right to continue, the writ petition as framed cannot be entertained.

8. Having heard learned counsel for the parties and keeping in view the submissions advanced, the fact remains undisputed that the institution was established under the resolution of the executive council and was to run as a Campus School for the purpose of providing education to the children of the employees of the University. The viability of this institution was adjudged keeping in view the performance and the number of students and the University ultimately found that it was not possible to continue with the said Campus School and accordingly ordered its closure. There is no material on the record, which may indicate that there is any financial aid, extended by the State or by any authority for the establishment of the institution or for the payment of salary to the teacher. The deep and pervasive control test has now been laid down by the Supreme Court in the case of Pradeep Kumar Biswas Vs. Indian Institute of Chemical Biology and others, (2002) 5 SCC 111. Paragraph No.40 of the said decision lays down as under:-

"40. The picture that ultimately emerges is that the tests formulated in *Ajay Hasia* are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be - whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control most be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State."

9. A perusal of the said paragraph would clearly demonstrate that there are several factors which are required to be fulfilled before the criteria of deep and pervasive control can be pressed into service in order to maintain a writ petition against a body running such an institution. Undoubtedly, the University is a State within the meaning of Article 12 of the Constitution but the present activity of running a Campus School

would not fall within its statutory obligation and, therefore, in the absence of such obligation on the part of the University particularly without any corresponding right in favour of the petitioner and keeping in view the tests laid down in the case of Pradeep Kumar Biswas (supra), in my opinion, the present case on behalf of the petitioner cannot be entertained for the reliefs claimed.

10. Sri Shesh Kumar then contends that keeping in view the nature of the engagement of the petitioner which has continued for the past almost 20 years, the University should have formulated a scheme for the absorption of adjustment of the petitioners. In this regard, suffice it to say, that no mandamus is required to be issued by this Court and it is expected that keeping in view this peculiar situation of the teachers, who have spent almost half of their life in the institution, it would be in the interest of justice for the University to consider the request of the petitioner sympathetically and take an appropriate decision in the matter. The University is expected to take a decision as expeditiously as possible.

11. With the aforesaid observations, these writ petitions stands disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.07.2010

BEFORE
THE HON'BLE B.K. NARAYANA, J.

Civil Misc. Writ Petition No. 62742 of 2007

Dinesh and others ...Petitioners
Versus
The Additional Commissioner, Agra and others ...Respondents

Counsel for the Petitioners:
Sri Vishal Khandelwal

Counsel for the Respondents:
Sri K.P. Singh
Sri V.K. Singh

U.P. Z.A. & L.R. Act, 1950-Section 333-Revision against cancellation of lease for Abadi purpose-cancellation Order set-aside by Revisional Court-On recall application by without issuing any Notice without hearing to the petitioner-order recalled receiving notices-recall application with candonation of delay-Rejected by impugned order the delay application without any discussion for no satisfaction explaination apart from revision itself was not maintainable-held-misconceived-illegal-Patta was granted under Rule 115-P and not under 122(C)-Law laid dawn in Wahajuddin case fully applicable-direction issued to consider recall application in accordance with law.

Held: Para 8

In the instant case also the application for cancellation of the allotment made in favour of the petitioners was filed under Rule 115-P of the Rules and the allotment of land in favour of the petitioners is not alleged to have been made under Section 122 (C) of the Act, since the petitioners are neither agricultural labourers nor village

artisans of members of schedule caste and schedule tribes. Hence the law laid down by this court in the case of Wahajuddin (supra) applies with full to the facts of the present case, In view of the aforesaid this court is of the view that the impugned order passed by the respondent no.3 is not sustainable in the eyes of law and is liable to be set aside

Case law discussed:

2002 (1) AWC 833, 2002 Vol. 1 833.

(Delivered by Hon'ble B.K. Narayana, J.)

1. Heard Sri Vishal Khandelwal learned counsel for the petitioner and the learned standing counsel appearing on behalf of respondent nos. 1, 2 and 3, Sri V.K. Singh appeared on behalf of respondent nos.1 and Sri K.P. Singh for respondent no. 5.

This writ petition has been filed by the petitioner for quashing the orders dated 11.10.2006 and 18.03.2004 passed by the Addl. Commissioner Agra(Annexure Nos. 5 and 3) and the order dated 29.04.2000 (Annexure No. 1 to the writ petition) passed by the Additional Collector(City), Aligarh.

2. Brief facts of the case as stated in the writ petition are that allotment of land was made in favour of the petitioner on 20.09.1992 for abadi construction. The respondent no 4 filed an application before the respondent no. 2 for cancellation of allotment made in his favour. On the application of the respondent no 4 the respondent no. 2 cancelled the allotment made in favour of the petitioners vide his order dated 29.4.2000. The said order was challenged by the petitioner by filing a revision before the Commissioner, Agra Division, Agra, which was numbered as Revision No. 49 of 2000 and transferred for disposal before the respondent no. 1 and allowed by him by order dated 28.05.2002 whereby the order dated 29.04.2000 passed by the respondent no 2 cancelling the allotment made in favour of the petitioners was set aside. It appears that the respondent no. 4 moved an application before the respondent no. 2 for restoration of revision no 49 of 2000 and recall of order dated 28.05.2002 on 07.05.2003 which was allowed by him by his order dated 18.03.2004 without issuing any notice to the petitioners and without affording him any opportunity of hearing. By the said order the revision no. 49 of 2000 was restored to its original number and summons were issued to the petitioners fixing 19.05.2004 for hearing of the said revision.

3. Upon being served with the summons the petitioners appeared before the respondent no 2 on 19.05.2004 and got knowledge of the order dated 16.03.2004 for the first time on 19.05.2004. Petitioners on the same date applied before respondent no, 2 for recall of the order dated 18.03.2004 alongwith an application for condonation of delay under section 5 of the Limitation Act. By the impugned order the respondent no. 2 dismissed the petitioners delay condonation application as well as the revision no. 49 of 2000 as not maintainable.

4. Learned counsel for the petitioners submitted that the reasons given in the impugned order for rejecting the Section 5 application are totally erroneous and unsustainable as the petitioner has sufficiently explained the reasons for delay in moving the

recall application. Learned counsel for the petitioner further submitted that the respondent no 1 clearly fell into error in holding that the revision preferred by the petitioners against the order of cancellation of allotment made in his favour, was not maintainable, although an order passed under Rule 115-P of the U.P.Z.A. & L.R. Act 1950 (herein after referred to as 'the Act') is clearly revisable as held by this Court in **Wahajuddin Vs. Board of Revenue and others reported in 2002 (1) AWC 833.** Learned counsel for the petitioners lastly submitted that the reason given by the respondent no 2 in the impugned order for holding that the revision against an order passed under the rule 115-P of the U.P.Z.A. & L.R. Rules, was not maintainable, is totally misconceived and erroneous.

5. Learned standing counsel appearing for the respondent Nos. 1, 2, and 3 submitted that the impugned orders which are supported by cogent reasons, do not suffer from any illegality or infirmity warranting any interference under Article 226 of the Constitution of India.

6. I have examined the submissions made by the learned counsel for the parties and have also perused the record. The facts which are not in dispute are that the allotment of land made in favour of the petitioners for abadi construction was cancelled by the respondent no.2 vide order dated 29.04.2000 which was challenged by the petitioner in Revision No. 49 of 2000 before the Commissioner, Agra Division Agra, which was transferred for disposal before the Addl.Commissioner, Agra and allowed by him by order dated 28.05.2002 Order dated 28.05.2002 was recalled and the revision no 49 of 2000 restored to its original number on the application of respondent no.4 by the respondent no 2 vide his order dated 18.03.2004 without issuing any notice to the petitioners and without affording them any opportunity of hearing. Notice was issued to the petitioners fixing 19.05.2004.for hearing of the Revision. The petitioners for the first time became aware of the order dated 18.03.2004. Copies of recall and delay condonatiion applications have been filed as Annexure nos. 4 and 5 to the writ petition). In paragraph 2 of the delay condonation application, the petitioners have categorically stated that prior to 19.05.2004 they had not knowledge of the order dated 18.03.2004 as the said order had been passed without issuing notice to the petitioners and hence the delay in moving the recall application was liable to be condoned. A perusal of the impugned order shows that the explanation of delay in moving the recall application furnished by the petitioners, has been rejected by the respondent no. 1 by a single sentence that the same was not satisfactory. The order does not contain any reason as to why the respondent no. 1 did not find petitioners' explanation for delay in moving the recall application satisfactory. Such consideration of explanation, in my opinion is no consideration in the eyes of law and cannot be sustained.

7. Record of the case shows that the order dated 25.05.2002 by which the respondent no. 1 had earlier allowed the petitioners' revision was recalled by the respondent no.1 without notice to the petitioners. Hence the petitioners'

version that they for the first time became aware of the order dated 18.03.2007 when summons for hearing of revision no. 49 of 2000 was served upon them cannot be doubted or disbelieved. There is nothing on record which may indicate that the petitioners were noticed by the respondent no.1 prior to passing of order dated 18.03.2007. Thus it is clear that the respondent no.1 manifestly erred in rejecting the petitioners' application for condoning the delay in moving the recall application and the finding recorded by the respondent no.1 in the impugned order that the petitioners failed to explain the delay in moving the recall application satisfactory is erroneous and is accordingly set aside. Reasons given by the petitioners for delay in moving the recall application are satisfactory and delay in moving the recall application is condoned.

The next question which arises for consideration in this writ petition is as to whether the view taken by the respondent no.1 that the order passed under rule 115-P of the U.P.Z.A. And L.R. Rules(herein after referred to as' the Rules') is not revisable under Section 333 of U.P.Z.A. and L.R. Act, 1950, is correct. The question whether a revision against the order passed by the Additional Collector under Rule 115-P of the Rules is maintainable or not, is no longer res integra and has been set at rest by the decision of this Court in the case of **Wahajuddin Vs. Board of Revenue reported in 2002 Vol. 1 833,** wherein the learned single judge of this court in para no. 14 of the aforesaid judgement has held as under:

"The law laid down by the aforesaid Division Bench is fully applicable to an order passed by the Collector under Rule 115-P. Thus despite sub-rule(5) of Rule 115P making the order of the Collector under Rule 115P final, the revision is maintainable under Section 333 of the U.P. Zamindari Abolition and Land Reforms Act. In the present case the application was filed under Rule 115-P and the allotment is not claimed under Section 122C since the respondent no. 3 is neither agricultural labourer nor village artisan or member of the Schedule Caste or Scheduled Tribe. Thus, the order of the Collector is not referable to sub-Section (6) of the Section 122C: hence sub-section (7) of Section 122C is not attracted and revision is maintainable under Section 333 against the order of the additional Collector dated 23.03.1990.

8. In the instant case also the application for cancellation of the allotment made in favour of the petitioners was filed under Rule 115-P of the Rules and the allotment of land in favour of the petitioners is not alleged to have been made under Section 122© of the Act, since the petitioners are neither agricultural labourers nor village artisans of members of schedule caste and schedule tribes. Hence the law laid down by this court in the case of Wahajuddin (supra) applies with full to the facts of the present case, In view of the aforesaid this court is of the view that the impugned order passed by the respondent no.3 is not sustainable in the eyes of law and is liable to be set aside.

9. This Court holds that the order passed under rule 115-P of the Rules is revisable under section 333 of the U.P.Z.A. & L.R. Act.

The respondent no. 1 is directed to consider and decide the recall application moved by the petitioners for recalling the order dated 18.03.2003 in accordance with law.

10. Necessary exercise in this regard shall be completed within a month from the date of production of a certified copy of this order after considering all the objections raised by the parties.
