ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.05.2010

BEFORE
THE HON'BLE YATINDRA SINGH, J.
THE HON'BLE B.N. SHUKLA, J.

Criminal Contempt No. 30 of 2006

C.J.M. Fatehpur ...Applicant
Versus
Sri Prakash Singh and another ...Contemnor

Counsel for the Applicant:
A.G.A.

Counsel for the Contemnor:
Sri Prabaht Agarwal

Contempt of Court Act 1971-Section-10-Contemnor the practicing Advocate-not only interrupted the court functioning but also scandalise the Court-plea of bar of Section 10 of the Act not available-charges fully proved but considering the relation of Bench and Bar punishment of fine shall meet the end of justice.

Held: Para 36 and 57

The Vishwanath Case cited by the contemner was decided on its own facts. In that case the Court held that the case was covered by section 228 IPC whereas, in the present case, the incidents and the charges are not so covered. The contempt proceedings are not barred by the proviso to section 10 of the 1971 Act.

However, sometime a Judge has to remain firm; use strong language. This is what happened in this case. The CJM might have used strong language to control the court proceeding. There is nothing objectionable in it. But the contemners in the complaint insisted that the Judge should apologies and claimed damages of Rs. 5 lakhs. This clearly indicates that their intention was to intimidate and terrorise the court thereby scandalising and lowering down the authority of the court, thus obstructing the justice.

Case law discussed:
AIR 1038 Alld 358, 1984 CrlJ 337 SC, 2001 CrlJ 4204 SC, 2001 CrLJ 1702 SC, 2002 CrLJ 1814 SC.

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

1. The bar and the bench are wheels of the same chariot and it is painful to exercise contempt proceeding against one of them. But our duty is to see that the chariot moves on and does not stop due malfunctioning of one of them.

THE FACTS

2. Three cases are being decided by this judgement: two of them are the contempt references sent by the Chief Judicial Magistrate, Fatehpur (the CJM) involving four contemners; and the third one is criminal revision against the order dated 20.11.2006 dismissing the criminal complaint of one of the contemner.

3. Three of contemners are practising advocates in the Fatehpur judgeship: they are Sri Prakash Singh, Sri Prachitya Paurav and Sri Gyanendra Singh. They were enrolled as the advocates in 1972, 1991, and 2004 respectively. The fourth one, Ms. Shivali is the daughter of one of the contemner Sri Prakash Singh. She obtained her LLB degree in 2003 but is not enrolled as an Advocate.

First Contempt

4. Criminal Contempt No. 30 of 2006 arises out of an incident happened

on 27.10.2006 and about a book titled as 'Nyaya Palika Mein Apradhikaran' (न्यायपालिका में अपराधीकरण) (the Book) written by Sri Prakash Singh and his daughter Ms. Shivali. The relevant facts in this regard are as mentioned in the succeeding paragraph.

5. One Hori Lal was accused in criminal case No. 1866 of 2005 pending in the court of the CJM. In this case, 2.9.2006 was fixed. On that date, Horilal did not appear. An application was filed to exempt his presence. It was dismissed on the same date on the ground that court fee stamp was not affixed. Thereafter an order was passed on 16.10.2006 for summoning the accused for 3.1.2007 through non bailable warrant (NBW).

6. On 27.10.2006, an application was filed to cancel the NBW. On this application, two orders of the same date are mentioned. The first order states the use of insulting words by Sri Prakash Singh and initiating Criminal Contempt reference through the District Judge. The second order records that the case was taken up at 1:30pm and as accused was not present, the application was dismissed. However, on 30.10.2006, on a fresh application, NBW against Hori Lal was recalled.

7. Subsequently, the CJM sent a reference on 3.11.2006 through the District Judge, Fatehpur to this Court for initiating criminal contempt against Sri Prakash Singh. It has been registered as criminal contempt No. 30 of 2006 (the first contempt) for the incident in his court on 27.10.2006 as well as for writing the Book.

Second Contempt

8. The second contempt is about a complaint and an incident in the CJM's court on 14.11.2006. The relevant facts are mentioned in the succeeding paragraphs.

9. Sri Prakash Singh, advocate sent a notice dated 28.10.2006 to the CJM requiring him to apologies for the incident on 27.11.2006, failing which legal proceeding would be taken against him.

10. He filed a criminal complaint no. 4299 of 2006 (the Complaint) against the CJM on 14.11.2006. This went to the same court. It was accompanied with application to transfer the Complaint as it was against the CJM.

11. The CJM passed an order on 14.11.2006 that as the Complaint is against him it may be placed before the Sessions Judge, Fatehpur for necessary direction.

12. The Complaint and transfer application were received by the Sessions Judge on the same date i.e. 14.11.2006. He passed an order requiring sadar munsrim to give his report on the following points:

- Whether Sri Prakash Singh, Advocate, Fatehpur has filed the Complaint with his signature;

- Whether it was filed through Sri Gyanendra Singh, advocate.

13. The sadar munsirim submitted its report on 15.11.2006 verifying that it was signed by Sri Prakash Singh and was

filed by Sri Gyanendra Singh, advocate in the computer room.

14. The Sessions Judge passed an order on 15.11.2006 transferring the complaint to the ACJM, Court No. 10, Fatehpur (the ACJM) for adjudication.

15. After the Complaint was sent to the Sessions Judge for necessary action, another incident happened in the court of CJM on 14.11.1986 involving Sri Prakash Singh, Sri Prachtiya Paurav, and Sri Gyanendra Singh.

16. The CJM has sent another reference dated 23.11.2006 through the District Judge for initiating contempt proceeding against Sri Prakash Singh, Prachitya Paurav, and Sri Gyanendra Singh. This was registered as criminal contempt No. 1 of 2007 (the second contempt).

Criminal Revision

17. In the meantime, the ACJM, Fatehpur dismissed the Complaint of Sri Prakash Singh on 20.11.2006. Sri Prakash Singh has filed criminal revision no. 577 of 2007 against the same.

Charges In Contempt

18. The notices in criminal contempt reference no. 30 of 2006 were issued on 7.12.2006 and in contempt No. 1 of 2007 on 19.2.2007. These three cases arise out of the same chain of incidents. It is proper that they should be decided together. They were consolidated.

19. These cases were taken up on 21.12.2009. On that date, a preliminary objection was raised on behalf of the contemners that there was no reference in the eyes of law and the criminal contempt case should be dismissed.

20. After hearing, Sri Prakash Singh and the counsel for the other contemners, the order on the preliminary objection was reserved on the same day. The preliminary objection was overruled on 5.2.2010 and charges were framed on the same day.

21. Five charges were framed against Sri Prakash Singh. They are as follows:

(i) Firstly, that you, on 27-10-2006, when the court of Chief Judicial Magistrate, Fatehpur was busy in hearing bail applications, entered in the court room and spoke loudly and asked as to why the application for exemption from personal appearance of the accused was being rejected by the court. When the Presiding officer of the said court tried you to calm down and keep silence, you created rowdy scenes and insulted and abused the Presiding Officer and also gave threatening to him and when the litigants and the advocates present in the court tried to calm down, you uttered **"TUM LOGON KO DHIKKAR HAI, 'TUM LOG MERA SAATH NAHI DE RAHE HO AUR YEH KI IS NYAYALAYA KE PEETHASEEN ADHIKARI KA DIMAGH KHARAB HO GAYA HAI."** and thereby scandalised, and lowered down the authority of, the court and interfered with the judicial proceedings of the court and obstructed the administration of justice and by doing so committed the criminal contempt under section 2(C) of the Contempt of Courts Act, 1971 and within the cognizance of this Court.

(ii) Secondly, that you, on 27.10.2006, with the assistance of co-contemnor Km. Shivali, have written the book **"Nyaypalika Me Apradhikaran"** and got it printed, published, circulated and sold in public, wherein derogatory, scandalous and contemptuous statements against the subordinate judiciary, High Court, Supreme Court and also against the Judges have been made particularly at pages 116, 117, 123, 124, 127, 140, 152, 159, 171 and 172 and thereby scandalised, and lowered down the authority of, the judges and the courts and by doing so committed the criminal contempt under section 2(C) of the Contempt of Courts Act, 1971 and within the cognizance of this Court.

(iii) Thirdly, that you, on 14-11-2006, filed a false, scandalous and frivolous complaint through co-contemnor Sri Gyanendra Singh, advocate, in the court of Chief Judicial Magistrate, Fatehpur against the presiding officer of that court stating therein not only scandalous language against the presiding officer but also demanded a sum of Rs. five lac as compensation from him with intent to intimidate and terrorise him to pass judicial orders in your favour and thereby scandalised, and lowered down the authority of, the court and interfered with the judicial proceedings of the court and obstructed the administration of justice and by doing so committed the criminal contempt under section 2(C) of the Contempt of Courts Act, 1971 and within the cognizance of this Court.

(iv) Fourthly, that you, on 14.11.2006, after the lunch recess, alongwith co-contemnors Sri Prachitya Paurav and Sri Gyanendra Singh, advocate entered in the court room of the Chief Judicial Magistrate, Fatehpur under intoxication and disturbed the court proceedings and judicial work by raising hue and cry and thereby scandalised, and lowered down the authority of, the court and interfered with the judicial proceedings of the court and obstructed the administration of justice and by doing so committed the criminal contempt under section 2(C) of the Contempt of Courts Act, 1971 and within the cognizance of this Court.

(v) Fifthly, that you, before filing the aforesaid complaint case, sent a notice dated 28.10.2006 to the presiding officer of the aforesaid court, using therein not only scandalous language against him but also demanded a sum of Rs. five lac as compensation from him with intent to intimidate and terrorise him and thereby scandalised, and lowered down the authority of, the court and interfered with the judicial proceedings of the court and obstructed the administration of justice and by doing so committed the criminal contempt under section 2(C) of the Contempt of Courts Act, 1971 and within the cognizance of this Court.

22. One charge each was framed against Sri Prachitya Paurav and Ms. Shivali. Two charges were framed against Sri Gyanendra Singh. They are similar to the charges framed against Sri Prakash Singh. Their similarities are as follows:

- The charge against Sri Prachitya Paurav is similar to charge no. 4 of Sri Prakash Singh.

- The charge against Sri Shivali is similar as charge no. 2 of Sri Prakash Singh.

- Charge nos 1 and 2 of Sri Gyanendra Singh are similar to charge nos. 3 and 4 of Sri Prakash Singh.

23. Sri Gyanendra Singh filed an application dated 19.2.2010 alongwith his personal affidavit. He regretted the incident dated 14.11.2006 and tendered his unconditional apology.

24. In this case, several counter and supplementary counter affidavits were filed on behalf of the contemners. Sri Prakash Singh and Sri Prachitya Paurav filed a joint affidavit on 12.4.2010 incorporating their previous replies. They have nothing further to add.

POINTS FOR DETERMINATION

25. We have heard Sri Prakash Singh, contemner personally; Sri Prabhat Agrawal, counsel for Sri Prachitya Paurav and Ms. Shivali; Sri Raja Singh for Gyanendra Singh; and Sri Sudhir Mehrotra, AGA as the prosecuting counsel1. As Sri Prakash Singh argued the case personally and other contemners were heard through counsel, they are referred to as the Contemners in the judgement.

26. The following points arise for determination:

(i) Whether proviso to section 10 of the Contempt of Court Act, 1971 (the 1971 Act) bars the present proceedings;
(ii) In case the answer to the first point is in negative, then on whom lies the burden to prove the contempt;
(iii) Whether the charges are proved;
(iv) Whether the order dated 20.11.2006 impugned in the revision is legal;
(v) Whether apology of Sri Gyanendra Singh should be accepted?
(vi) In case any charge is proved against the contemners then, what punishment be awarded to them.

1ST POINT: BAR NOT APPLICABLE

27. The counsel for the appellant cited State Vs. Vishwanath Singh Yadav; 1990 ACC 264 (All) (the Vishwanath case) and submitted that:

- Charge no. 1 and charge no. 4 (similar to the only charge against Sri Prachitya Paurav and the second charge of Sri Gyanendra Singh) relate to the incident happened in the court.
- Even if they are correct, they at the most would amount to intentional insult or interruption to public servant sitting in judicial proceedings and would be covered under section 228 of IPC;
- The proceedings on these charges are barred under proviso to section 10 of the 1971 Act.

28. The High Court being superior court of record always had power to punish its own contempt. However, it was debatable whether the High Court had power to punish the contempt of the subordinate courts. It is in order to remove this doubt that the Contempt of Courts Act, 1926 (the 1926 Act) was enacted. This is clear from the statement of object and reason of the 1926 Act.

29. The 1926 Act specifically provided same power and procedure for the contempt of the subordinate court as it has for its own contempt. However, it restricted the power to protect subordinate courts against contempts which were not already provided for in the Indian Penal Code (IPC).

30. Section 2 of the 1926 Act is entitled as 'Power of the Superior Courts to punish contempts of courts'. It empowered the High Courts to punish for contempt of the subordinate court. Sub-section (1) and (2) of Section 2 of the 1926 Act conferred similar power, authority, and procedure in respect of contempts of subordinate courts as it has in respect of its own contempt. However, sub section (3) of section 2 barred the High Court from taking cognisance of contempt of the subordinate courts where such contempt was an offence punishable under the IPC.

31. The Contempt of Courts Act 1952 (the 1952 Act) replaced the 1926 Act but contained similar provision in section 3. The 1952 Act was replaced by the 1971 Act. Section 10 of the 1971 Act is entitled 'Power of High Court to punish contempt of subordinate courts'. The main section retains the power as was granted in section 2(1) (2) of the 1926 Act or section 3(1) (2) of the 1952 Act and the bar contained in sub-section (3) of the relevant sections of the earlier Acts is contained in form of a proviso to the main section 10 of the 1971 Act.

32. As far back as in 1938, a division bench2 of our court interpreted the bar of taking cognizance of contempt of the subordinate courts. The court held,

'An Act may amount to the offence under the Penal Code and it may also amount to contempt of Court. In such case the act will be punishable both under the Penal code and as contempt of Court. The only exception to this rule that has been enacted by the Contempt of Courts Act is that if the act is punishable by the Penal Code as contempt of court then that act can not form the subject of contempt proceedings by the High Court. S. 228, Penal Code provides for punishment of intentional insult or interruption to a public servant sitting in judicial proceeding. This section provides for punishment of contempt of court and the offence contemplated by that section cannot therefore in view of the provisions of CI(3) of section 2, form the subject of proceedings for contempt by this court'.

The Court clarified,

'The purpose of contempt proceedings is however entirely different. The object of such proceedings is to vindicate the dignity and honour of the Courts subordinate to this Court and this purpose could not have been served by the institution of complaints by the judicial officers. For the reason given above we hold that CI (3) of S. 2, Contempt of Courts Act [the 1926 Act] is no bar to the present proceedings.'

This was reiterated by the Supreme Court in State of MP Vs. Revashankar; AIR 1959 SC 102 (the Revashankar case).

33. In the Revashankar case, the High Court had dismissed the contempt application on the ground that the act committed was an offence under section 228 IPC and as such the jurisdiction of the High Court to punish for the contempt was barred. The Supreme Court allowing the appeal held:

'The High Court had the right to protect subordinate courts against contempt, but subject to this restriction, that case of contempt which have already been provided for in the Indian Penal

Code should not be taken cognizance of by the High Court.

...

We are of the opinion that the learned Judges were wrong in their view that prima facie the act complained of amounted to an offence under section 228, Indian Panel Code and no more. We are advisedly saying prima facie, because the High Court did not go into the merits and we have no desire to make any final pronouncement at this stage on the merits of the case.

...

The essential ingredients of the offence [under section 228 IPC] are (1), intention, (2) insult or interruption to a public servant and (3) the public servant insulted or interrupted must be sitting in any stage of a judicial proceeding.

...

The true test is: is the act complained of an offence under section 228, Indian Panel Code, or is it something more than that? If in its true nature and effect, the act complained of is really 'scandalising the court' rather than a mere insult, then it is clear that on the ratio of our decidion in Ramkrishna Reddy's case (AIR 1952 SC 149) the jurisdiction of the High Court is not ousted by reason of the provision in section 3(2) of the Act.

34. The Revashankar case has been followed by a full bench3 of Delhi High Court and a division bench4 of our court. In these cases, the contempt proceedings were not dropped but were continued.

35. Section 228 IPC is only concerned with the intentional insult or interruption to public servant while acting in a judicial proceeding. In the present case, the incidents not only amount to insult and interruption in the judicial proceedings but also scandalise the court, lower its authority, and are obstruction in administration of justice. They are not covered by section 228 IPC.

36. The Vishwanath Case cited by the contemner was decided on its own facts. In that case the Court held that the case was covered by section 228 IPC whereas, in the present case, the incidents and the charges are not so covered. The contempt proceedings are not barred by the proviso to section 10 of the 1971 Act.

2ND POINT: CHARGE TO BE PROVED--BEYOND REASONABLE DOUBT.

37. The contemners cited the following decisions in support of the second point:

(i) MR Parasar Vs. Dr. Farooq Abdullah and others:1984 CrlJ 337 SC (the Parasar case)l;
(ii) Chotu Ram Vs. Urvashi Gulati and others: 2001 CrLJ 4204 SC;
(iii) Mrityunjoy Das and others Vs. Sayed Hasbur Rahman and others: 2001 CrLJ 1702 SC;
(iv) Anil Ratan Sarkar Vs. Hirak Ghosh: 2002 CrLJ 1814 SC.

38. In case the charges are proved in the contempt proceedings then the contemner can be sent to jail and can be fined. These proceedings are quasi criminal in nature and the charges are to be proved beyond reasonable doubt. This was also held in the ruling cited by the contemners. However, these rulings are on their facts:

- In the first case, a statement of the Chief Minister was reported in the

newspaper. It is on the basis of this report that the contempt proceeding was initiated. The Chief Minister denied making the statement reported in the newspaper. The court held that the charges were not proved;

- In the remaining cases the question was whether the contemners in those cases violated the orders passed by the court. The court on the facts of the second and third case held that the contempt was not proved whereas in the fourth case the contempt was held to be proved.

These cases were decided on their facts and have no relevance so far as the present contempt proceedings are concerned except for the proposition of law as stated above.

3RD POINT: CHARGES PARTLY PROVED

39. Five charges have been levelled against Sri Prakash Singh, Advocate. Two charges have been levelled against Sri Gyanendra Singh, one charge has been levelled against Sri Prachitya Paurav and Ms. Shivali. Some charge levelled against Sri Prakash Singh are similar to the charges framed for other contemners. They are being decided together.

1st Charge Against Sri Prakash Singh-- Proved

40. Horilal and Phaguni were accused in different criminal cases. They had not appeared on the date fixed for them and NBW were issued against them. Sri Prakash Singh filed two applications on their behalf on 27.10.2006 to recall the orders issuing NBW.

41 . The aforesaid two applications were placed before the CJM concerned and in the case of Phaguni, NBW were cancelled on 27.10.2006. However, on the back of the application of Hori Lal the following order is recorded:

वारण्ट निरस्त करने के प्रार्थना पत्र पर अपना पक्ष रखने के बजाय अधिवक्ता श्री प्रकाश सिंह ने न्यायालय में अपशब्दों का इस्तेमाल प्रारम्भ कर दिया । न्यायालय को धमकी दी कि मेरा नाम प्रकाश सिंह है, न्यायालय को ही उससे मॉफी मांगनी होगी भरी अदालत में यह कहना कि न्यायालय का दिमाग खराब हो गया है, न्यायालय की अवमानना है। मामला जनपद न्यायधीश के माध्यम से अपराधिक अवमानना के लिए माननीय उच्च न्यायालय को संदर्भित किया जाय।

हस्ताक्षर

27.10.2006

न्यायालय में कार्य पूर्ण होते ही 1.30 पर पुनः इस पत्रावली में आवाज लगायी गयी तो अधिवक्ता जा चुके हैं उन्होंने अधिवक्ताओं को भी धिक्कारा क्योंकि उनके शोर पर अधिवक्ताओं ने भी आपत्ति की थी।

यह प्रार्थना पत्र वारण्ट निरस्त करने के लिए दिया गया है, लेकिन अभियुक्त उपस्थित नहीं है।

प्रार्थनापत्र खारिज किया जाता है।

हस्ताक्षर,

27.10.2006

42. The Contemners submitted that:

- This order was not recorded on 27.10.2006;
- It was recorded subsequently after the notice sent by Sri Prakash Singh to the CJM;
- It is fortified by the fact that no order is recorded in the order sheet.

43. Photocopy of the order sheet is on record. In the order sheet, an order is recorded on 16.10.2006 and thereafter half page is empty. Then on the next page order dated 30.10.2006 is recorded.

44. In the courts, sometime, the orders are recorded on the order sheet and sometime they are recorded on the

application itself. After the order dated 16.10.2006, half page space was empty. In case, order was subsequently recorded then it could have been easily recorded on the space left after the order dated 16.10.2006. This shows that the CJM chose to record the order on the application.

45. The CJM, in the reference, has mentioned that he had recorded the order on the back of the application. There is nothing to doubt that it was not recorded on 27.10.2006. In our opinion the order was recorded on 27.10.2006 and not subsequently.

46. The order on the back of the application records that Sri Prakash Singh had used abusive language and he insisted that the court would have to apologise. In the reference, signed and sent by the CJM to this court, the abusive language has been mentioned. It is indicated in the first charge. The Parasar case is different. It was about the statement said to be made by the Chief Minister in a meeting but here abusive language was used in the court, in front of the CJM and is recorded by him. Merely denying it in the counter affidavit does not disprove it.

47. The utterance that the court had gone mad and should apologies shows that the contemner not only wanted to scandalise the court but also lowered down its authority and obstructed the administration of justice.

48. In our opinion, the first charge is proved beyond reasonable doubt.

2nd Charge Against Sri Prakash Singh, the Only Charge against Ms. Shivali—Not Proved.

49. The second charge against Sri Prakash Singh and the only charge against Ms. Shivali is for writing the Book. It contains criticism of some decisions; some suggestions for improvement in the judicial system; and some paper cuttings relating to some Judges showing them in poor light.

50. At places, the language of the Book could have been better; it leaves sourly taste and has room for improvement. However, as Lord Atkin said5: 'Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men.'

51. Justice Frankfuter in 'Mr. Justice Holmes and the Supreme Court' said:

'It is a mistake to suppose that the Supreme Court is either honoured or helped by being spoken of as beyond criticism. On the contrary the life and character of its justices should be objects of constant watchfulness by all and its judgements subject of freest criticism. The time is past in the history of the world when any living man or body of men can be set on a pedestal and decorated with halo. True many criticism may be, like their authors, devoid of good taste but better all sorts of criticism then no criticism at all. The moving water are full of life and health. Only in the still waters is stagnation and death'.

52. We do have short comings; our judicial system is not perfect; we are taking steps to improve. The adverse comments are not to be suppressed under threat of contempt but require removal with correction. The Book may be taken

in the constructive way; like a caution or a reminder, rather than anything else.

53. Considering the Book as a whole, we have our doubts whether the second charge against Sri Prakash Singh and the only charge against Ms. Shivali is proved.

3rd Charge against Sri Prakash Singh and Ist charge against Sri Gyanendra Singh—Proved.

54. It is not disputed that the Complaint was filed by Sri Prakash Singh through Sri Gyanendra Singh. This Complaint was regarding the incident dated 27.10.2006, which is subject matter of discussion in charge no. 1 against Sri Prakash Singh.

55. A good Judge is not only learned and honest but knows how to control the court proceedings. At times, he has to deal tactfully; at times has to deal strongly though ideally he should always remain cool.

56. Lord Denning in his book "The Due Process of Law' (page 6) narrates an incident:

'On every Monday morning we hear litigants in person. Miss Stone was often there. She made an application before us. We refused it. She was sitting in the front row with a book-case within her reach. She picked up one of Butterworth's Workmen's Compensation Cases' and threw it at us. It passed between Lord Justice Diplok and me. She said, "I am running out of ammunition". We took little notice. She had hoped we would commit her for Contempt of Court—just to draw more attention herself. As we took no notice, she went towards the door. She left saying: "I congratulate your Lordship on your coolness under fire"'.

The matter was handled coolly. This is the best policy.

57. However, sometime a Judge has to remain firm; use strong language. This is what happened in this case. The CJM might have used strong language to control the court proceeding. There is nothing objectionable in it. But the contemners in the complaint insisted that the Judge should apologies and claimed damages of Rs. 5 lakhs. This clearly indicates that their intention was to intimidate and terrorise the court thereby scandalising and lowering down the authority of the court, thus obstructing the justice.

58. In our opinion, the third charge against Sri Prakash Singh and first charge against Sri Gyanendra Singh is proved beyond reasonable doubt.

4th Charge Against Sri Prakash Singh, IInd Charge Against Sri Gyanendra Singh and the only Charge against Sri Prachitya Paurav—Partly proved.

59. The Complaint was against the CJM and was filed in his court alongwith application to transfer. On this Complaint, the CJM passed the order that it may be placed before the Sessions Judge, Fatehpur for necessary direction. The complaint and transfer application were received by the Sessions Judge on the same date i.e. 14.11.2006. Thereafter he called for the report mentioned earlier (See sub-heading 'Second Contempt' under the heading 'THE FACTS').

60. The CJM in his reference has mentioned that on 14.11.2006, Sri Prakash Singh, Sri Prachitya Paurav and Sri Gyanendra Singh appeared in his court after lunch. They disturbed the court, raised hue and cry, and claimed Rs. 5 lakhs as compensation.

61. The contemners submit that:

- The CJM has mentioned in the second reference that Sri Prakash Singh, Sri Prachitya Paurav and Sri Gyanendra Singh appeared in his court on 14.11.2006, after the case was transferred by the Sessions Judge to the ACJM;
- The case was transferred on 15.11.2006 and not on 14.11.2006;

- An incorrect statement has been mentioned in the second reference.

62. The CJM had sent the Complaint to the Sessions Judge on 14.11.2008. The file had already gone from his court on 14.11.2006. The CJM had no information on what date actual transfer was made. The reference was sent by the CJM on 23.11.2006. On that, the only information CJM had that the Complaint was dismissed on 20.11.2006. This is also mentioned in the reference.

63. It is correct that the complaint was transferred from the court of CJM on 15.11.2006 and not on 14.11.2006. In the reference, it is wrongly mentioned that the file was transferred to the ACJM. In fact, it had gone from the CJM's court on 14.11.2006. However, this neither falsifies the incident on 14.11.2006 after lunch nor it makes the reference bad. Mere denial in the counter affidavit is nothing especially when Sri Gyanendra Singh has filed his apology regretting the incident on 14.11.2006.

64. The file of the criminal contempt had already gone from the court of CJM. The disturbance, hue and cry was raised in front of him; the demand of Rs. 5 lakhs as damages was made in front of him. There is nothing to show that the facts stated in the reference that Sri Prakash Singh, Sri Gyanendra Singh and Sri Prachitya Paurav appeared in his court after lunch is incorrect. There is nothing to doubt veracity of this part of the reference.

65. In this reference, it is mentioned that from the appearance of the advocates it appeared that they were under influence of some alcoholic drink. They were not examined medically at that time. A counter affidavit has been filed in which it is indicated that the contemners neither drink nor were they drunk at that time.

66. In view of above, a part of 4th charge against Sri Prakash Singh and second charge against Sri Gyanendra Singh and only charge against Sri Prachitya Paurav is not proved that they were under influence of intoxicants. The rest of the charges that they entered the court room disturbed the court proceedings by a raising hue and cry and thereby scandalised and lowered down the authority of the court is proved.

67. In our opinion, fourth charge against Sri Prakash Singh, second charge agaisnt Sri Gyanendra Singh and the only charge against Sri Prachitya Paurav is partly proved beyond reasonable doubt.

5th Charge against Sri Prakash Singh—Partly Proved.

68. The sending of the notice dated 28.10.2006 by Sri Prakash Singh is accepted. The notice insists that the CJM should accept his mistake and apologise and otherwise he would take recourse to legal proceeding.

69. In this notice, compensation of Rs. 5 lakhs is not claimed. The part of the charge is not proved.

70. The contents of the notice prove that it was intended to intimidate and terrorise the court thereby scandalising and lowering down the authority of the court thus obstructing the administration of justice.

71. In our opinion, this charge is also partly proved beyond reasonable doubt. 4th

4th POINT: NO MERIT IN THE REVISION

72. The ACJM dismissed the complaint filed by Sri Prakash Singh on 20.11.2006 on the ground that there is no sanction. Sri Prakash Singh cited; BS Shambhu Vs. TS Krishna Swamy; 1983 CrLJ 158 (the Shambhu case) and submitted that

- The CJM while using the words was not discharging the official duty; and
- No sanction was required.

73. In the Shambhu case, a transfer application was filed. The remarks of the Judge were called for and in these remarks, the Judge had mentioned with the applicant seeking transfer was 'rowdy, gambler, and mischievous elements'. The Court held that these words were not connected with the discharge of official duty and as such no sanction under section 197 CrPC was unnecessary. However, this is not the case here.

74. The CJM was sitting in the court discharging judicial functions. He has to manage his court. In case a lawyer disturbs the court then at time he may have to use strong language. This is discussed while dealing the third charge against Sri Prakash Singh under previous point. The CJM was discharging official function: sanction under section 197 was necessary. There is no illegality in the order dated 20.11.2006. The revision has no merits.

5th POINT: APOLOGY OF SRI GYANENDRA SINGH ACCEPTED

75. Sri Gyanendra Singh has filed an application dated 19.2.2010 alongwith an affidvit. He has regretted the incident dated 14.11.2006 and has also tendered his unconditional apology.

76. He is junior than Sri Prakash Singh. He might have been party to it in deference to his senior.

77. In our opinion his unconditional apology is bonafide and should be accepted. The contempt notice against Sri Gyanendra Singh is discharged.

6TH POINT : PUNISHMENT

78. Such incidents make mockery of process of law. They deserve condemnation. It is all the more reprehensible in a lawyer, who has undertaken to uphold the law and secure justice for his countrymen. Who will uphold the dignity of the courts if not the lawyers.

79. Let the contemners learn a lesson. Let's hope that such incidents will become a thing of past and will not happen again.

80. We have given our anxious consideration. After all, we are not happy to invoke contempt proceeding against one of the wheels of the chariot of which we are also a part.

81. Considering the entire circumstances of the case, hoping that contemners would ponder, and such incidents do not recur—we think that ends of justice would be met by imposing a sentence of fine only. After all, lawyers and judicial officers both have to cooperate and maintain decorum in the court. We, therefore, impose the following sentence:

- Sri Prakash Singh is fined Rs. 15,00/- (Rupees one thousand and five hundred) with default stipulation of three weeks simple imprisonment; and

- Sri Prachitya Paurav is fined Rs. 5,00/- (Rupees five hundred) with default stipulation of one week simple imprisonment.

CONCLUSIONS

82. Our conclusions are as follows:

(i) The contempt proceedings are not barred by a proviso to section 10 of the Contempt of Courts Act, 1971.

(ii) A charge in a contempt case has to be proved beyond reasonable doubt;

(iii) The charges proved or partly proved against the contemners are as follows:

- Sri Prakash Singh: Charge no. 1 and 3 are fully proved; Charge no. 4 and 5 are partly proved; Charge No. 2 is not proved.

- Ms. Shivali: Charge is not proved.

- Sri Gyanendra Singh: Charge no. 1 is fully proved; Charge no. 2 is partly proved.

- Sri Prachitya Paurav: Charge is partly proved.

(iv) In view of unconditional apology of Sri Gyanendra Singh, he is discharged from contempt proceedings;

(v) For the reason given above, we do not impose the sentence of imprisonment but the following fine is imposed:

- Sri Prakash Singh is fined Rs. 15,00/- (Rupees one thousand five hundred) with default stipulation of three weeks simple imprisonment;

- Sri Prachitya Paurav is fined Rs. 500/- (Rupees five hundred) with default stipulation of one week simple imprisonment.

83. In view of our conclusions, the criminal revision No. 577 oif 2007 is dismissed whereas the criminal contempt no. 30 of 2006 and 1 of 2007 are disposed of. Sri Prakash Singh and Sri Prachtiya Paurav are granted three months' time to deposit the fine, failing which they will be taken into custody to undergo the default period of imprisonment.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 07.05.2010

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE DR. SATISH CHANDRA, J.

First Appeal From Order No. 72 of 2004

Union of India ...Petitioner
Versus
Makrand Kumar Rawat and another ...Respondent

Counsel for the Petitioner:
Sri Anil Srivastava

Counsel for the Respondent:
Sri Rajendra Jaisawal

Railways Claims Act, 1927, Section-23- Appeal against award by Railway claim Tribunal-on ground contributory negligence of deceased itself-finding regarding bonafide passenger-confirmed-in case passenger fell down because of jerk-passenger can not be blamed-held-award does not suffer from any impropriety or illegality warrant, no interference.

Held: Para 9

In a over-populated country, in case the Government or the railway fails to provide sufficient number of trains and regulate the entry in the compartment and a person enters into the compartment after purchasing a ticket, he shall be bona fide passenger and in case he fell down from the train because of jerk, then for such accident, the passenger may not be blamed.
Case Law discussed:
2009(27) LDC 240

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

1. Heard Mr. Anil Srivastava, learned counsel appearing for the appellant and Mr. Rajendra Jaisway, learned counsel for the respondents.

2. Present appeal under Section 23 of the Railway Claims Act, 1927 (in short, Act) has been preferred against the impugned award dated 3.12.2003, passed by the Railway Claims Tribunal, Lucknow in Case No.-O.A. - 0000002.

3. Brief facts, giving rise to the instant First Appeal from Order relate to the accident occurred on 6.11.1999. The deceased Anand Kumar Rawat was travelling by Lucknow Gonda passenger train on 6.11.1999 and accidentally, he fell down from train at a place between Jhangirabad Raj and Raffi Nagar railway station. He succumbed to the injuries at the spot. The tribunal framed four issues, out of which, the first issue relates to as to whether the deceased was bona fide passenger, second relates to cause of death, the third relates to dependency and the fourth relates to what relief can be granted.

4. The tribunal recorded a finding that the deceased was a bona fide passenger and he was having ticket. On account of sudden jerk, he fell down from the train. The tribunal awarded compensation of Rs.4 lacs to the claimants treating the deceased as bona fide passenger and the accident caused because of sudden jerk. The deceased was standing at the door of the compartment because of over-crowded by passengers and fell down due to sudden jer1.25"k.

5. While assailing the award, in question, solitary argument advanced by the appellant's counsel is that the deceased was standing on the door of the moving train and by both the hands, he was

holding only one iron bar of the door. Hence, he put himself in danger as he could not balance himself while moving with the train. Hence his action was violative of Section 154 of the Act.

6. However, the appellant's counsel has not invited the attention of this Court to any evidence on record to indicate as to whether there was some alternative space for the deceased in the moving training to accommodate him comfortably. In the over-crowded train, in case a person after purchasing ticket does not find sufficient space for comfortable journey, then under compulsion, he may catch hold of the iron rod put on one side of the door and during this, if he falls down due to jerk, he cannot be blamed for such action.

7. Under Section 154 of the Act, it shall be necessary for the railways to establish that the person has put himself in danger even if there was sufficient accommodation in the train. In case there is no space to accommodate a passenger in a compartment and the person caught hold only one side of the iron bar, then in such situation, he cannot be blamed for such action, unless otherwise it is proved that he has done so in spite of availability of sufficient space in the compartment concerned. In the over-crowded train, a person after purchasing a ticket wants to complete the journey by boarding the train concerned to reach the destination. It is for the railway to make necessary arrangement and regulate the entry in the compartment adopting appropriate ways and means. The passengers cannot be faulted for travelling by standing near door.

8. While deciding identical issue with regard to negligence on the part of the passenger, in a case reported in **2009(27)LCD 240 Smt. Akhtari versus Union of India and others**, a Division Bench of this Court, of which one of us(Hon'ble Devi Prasad Singh, J) was a member, considered this aspect of the matter.

9. In a over-populated country, in case the Government or the railway fails to provide sufficient number of trains and regulate the entry in the compartment and a person enters into the compartment after purchasing a ticket, he shall be bona fide passenger and in case he fell down from the train because of jerk, then for such accident, the passenger may not be blamed.

10. Time has come when the railway has to think over and make necessary arrangement as observed in the case of Smt. Akhtari (supra) so that once a train leaves the platform, the doors are closed either mechanically or manually.

11. It has been vehemently argued by the appellant's counsel that to obtain compensation under the Act, the provisions have been abused by undeserving persons. In case it is so, then it is for the government or the railways to take appropriate steps to persecute the culprit. Only because the procedure prescribed by law has been abused by certain anti-social elements or undeserving persons, it does not mean that the courts should not discharge its constitutional obligation to meet out justice. We have to secure the fundamental and statutory right of the citizens within the constitutional ambit. Only because some hardship has been caused to the railway or the government,

the court cannot close its doors in discharge of its constitutional obligations.

12. It is not uncommon in this country where statutory provisions are abused but it is not because the courts are not discharging their obligations properly but it is because of the failure on the part of the administration. They have to punish such persons who are indulged in anti-social activities. The law has given ample power to meet out such contingencies and it is the duty of the bureaucracy to give its effect and check the abuse of the statutory provisions. They cannot shift their burden on others.

13. In view of above, we do not find any reason to interfere with the impugned award which does not seem to suffer from any impropriety or illegality. The appeal is devoid of merit. It is accordingly dismissed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 26.05.2010

BEFORE
THE HON'BLE S.N.H. ZAIDI, J.

Criminal Revision No. 113 of 2010

Naththan Lal and another ...Petitioners
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Mohammad Naseerullah

Counsel for the Respondent:
G.A.

Code of Criminal Procedure-Criminal Revision-against order of remand by Appellant court-on ground no sufficient compliance of mandatory provision of Section 313 Cr.P.C.-held-if the Trial Court fails to properly comply the statutory provision-Appellate court acted well within power-can not be interfered under revisional justification.

Held: Para 10

The benefit of the above observation of the Apex Court can not be extended to the revisionists because, firstly, the ratio of the case is that non compliance of section 313 Cr.P.C. can be objected only by the accused and not by the complainant, and secondly, in this case it is the accused revisionists who are complaining about the improper compliance of section 313 Cr.P.C. and not the complainant. Moreover, under clause (b) of sub-section (1) of section 313 Cr.P.C., it is mandatory for the Court in every inquiry or trial to put questions to the accused to enable him personally to explain any circumstance that has appeared in the evidence against him after the prosecution witnesses are examined and before the accused is called on for his defence, and if the Court fails to properly comply with this statutory requirement, the appellate court is well within its powers to remand the case to the trial court for proper compliance of its statutory duty in order to secure the ends of justice.

Case law discussed:
AIR 1962 SC 1239, 2008(62) ACC 669, 2000(41) ACC 1013.

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

1. This revision has been directed against the common judgment and order dated 10.2.2010 passed by the Special Additional Sessions Judge, Pratapgarh in Criminal Appeal Nos. 26 of 1998 and 28 of 1998, whereby the appeals were allowed and the judgment and order dated 16.9.1998 of the Chief Judicial Magistrate, Pratapgarh, passed in Criminal Case No. 1558 of 1993 Brahm

Dutta vs. Sheetla Prasad Maurya and others was set aside and the case was remanded to the trial Court for recording the statement of accused appellants under section 313 of the Code of Criminal Procedure, 1973, for short Cr.P.C, and for deciding the case afresh on merits after giving them opportunity to adduce evidence in defence.

2. The brief facts giving rise to this revision are that a complaint case no. 1558 of 1993 was instituted by opposite party no. 2 against the revisionist and four others, who were summoned to face the trial by the Magistrate. On the basis of evidence recorded under section 244 Cr.P.C., the accused persons were tried for the offences of sections 218 and 120-B I.P.C. During the trial one accused died. The trial Magistrate acquitted two accused and convicted the remaining three, including the revisionists, under the said sections by judgment and order dated 16.9.1998. The convicted persons, preferred appeals against the same. During the appeals, one of the appellants died. The learned lower appellate court allowed both the appeals by a common judgment and after setting aside the impugned judgment and conviction order remitted the case to the trial court with the directions as aforesaid.

3. I have heard learned counsel for the revisionists, learned A.G.A. for the State and perused the record.

4. One of the grounds that was mainly raised before the lower appellate court and found favour by it is that the trial court had not properly complied with the requirement of section 313 Cr.P.C. as the questions relating to incriminating circumstances that had appeared against the accused persons in the prosecution evidence were not put to them to enable them to explain about those circumstances and thus such evidence could not be read against the accused persons. It appears that the trial Court had only put the following three questions to the accused persons under section 313 Cr.P.C., namely:-

"1:- You have heard the statement of the witnesses. Why they are deposing against you?

2:- Do you want to give evidence in defence?

3:- Do you want to say anything more?."

5. The Supreme Court in the case of Ajmer Singh vs. State of Punjab 1953 SCR 418, while considering the scope of section 342 of the old Code, which corresponds to section 313 Cr.P.C. held that it is not a sufficient compliance with the section to generally ask the accused that "having heard the prosecution evidence what he has to say about it". The accused must be questioned separately about each material circumstance which is intended to be used against him. The whole object of section is to afford the accused a fair and proper opportunity of explaining the circumstance which appeared against him and the question put to him must be fair and be couched in a form which even an ignorant or illiterate person may be able to appreciate and understand.

6. In the case of Ram Shanker Singh and others vs. State of West Bengal reported in AIR 1962 SC 1239, the Supreme Court while elaborating the scope of section 342 of the old Code, has held:-

"Section 342 of the Code of Criminal Procedure by the first sub-section provides, in so far as it is material : 'For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court....shall.... question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.' Duty is thereby imposed upon the Court to question the accused generally in a case after the witnesses for the prosecution have been examined to enable the accused to explain any circumstance appearing against him. This is a necessary corollary of the presumption of innocence on which our criminal jurisprudence is founded. The object of the section is to afford to the accused an opportunity of showing that the circumstances relied upon by the prosecution which may be prima facie against him, is not true or is consistent with his innocence. The opportunity must be real and adequate. Questions must be so framed as to give to the accused clear notice of the circumstances relied upon by the prosecution, and must give him an opportunity to render such explanation as he can of that circumstance. Each question must be so framed that the accused may be able to understand it and to appreciate what use the prosecution desires to make of the evidence against him. Examination of the accused under section 342 in not intended to be an idle formality, it has to be carried out in the interest of justice and fair play to the accused : by a slipshod examination which is the result of imperfect appreciation of the evidence, idleness or negligence the position of the accused cannot be permitted to be made more difficult than what' it is in a trial for an offence".

7. In a recent case of Asraf Ali Vs. State of Assam 2008 (62) ACC 669, the Apex Court has held that all the circumstances which appear against the accused and upon which the prosecution relies should be specifically put to the accused in order to give him an opportunity to explain those circumstances.

8. In the light of above observations of the Apex Court, it is evident that by putting the questions to the accused persons, as mentioned above, the trial Court had not properly complied with the requirements of section 313 Cr.P.C. as the attention of the accused persons was not drawn towards any incriminating circumstance that had appeared against them in the prosecution evidence while putting questions to them so as to enable them personally to give explanation in respect thereof.

9. The contention of the learned counsel for the revisionists is that due to improper compliance of the mandatory provisions of section 313 Cr.P.C., the trial had vitiated and as such the lower appellate court should have acquitted the revisionists instead of remitting the case to the trial court with any direction. In support of this contention reliance has been placed upon the observation of the Supreme Court made in the case of Basavaraj R. Patil and others Vs. State of Karnataka and others, 2000(41) ACC 1013, wherein the trial Court had recorded the statement of certain accused persons under section 313 Cr.P.C. and allowed the statement of three absent accused persons to be recorded through counsel and after hearing the arguments passed a judgment acquitting all the accused of the offence charged. In the revision filed by the complainant of the case before the High Court challenging the order of acquittal, learned Single Judge of the High Court observed that the trial court has no discretion to dispense with the personal examination of the accused persons under

section 313 Cr.P.C. and after setting aside the order of acquittal remanded the case to the trial court with the direction to dispose it of afresh after examining the three accused persons under section 313 Cr.P.C. The Supreme Court while considering the necessity of the compliance of section 313 Cr.P.C., has observed that non compliance of section 313 Cr.P.C. can be objected only by the accused and not by the complainant or the prosecution and in the absence of any complaint by the accused for its non compliance, there was no justification to remand the case to the trial Court only for the purpose of examining the concerned accused personally and to pass fresh order on merits.

10. The benefit of the above observation of the Apex Court can not be extended to the revisionists because, firstly, the ratio of the case is that non compliance of section 313 Cr.P.C. can be objected only by the accused and not by the complainant, and secondly, in this case it is the accused revisionists who are complaining about the improper compliance of section 313 Cr.P.C. and not the complainant. Moreover, under clause (b) of sub-section (1) of section 313 Cr.P.C., it is mandatory for the Court in every inquiry or trial to put questions to the accused to enable him personally to explain any circumstance that has appeared in the evidence against him after the prosecution witnesses are examined and before the accused is called on for his defence, and if the Court fails to properly comply with this statutory requirement, the appellate court is well within its powers to remand the case to the trial court for proper compliance of its statutory duty in order to secure the ends of justice.

11. In view of all the aforesaid, the order of learned lower appellate court remanding the case and directing the trial court to record the statement of the accused appellants under section 313 Cr.P.C. in accordance with law, does not suffer with any illegality or material irregularity so as to warrant the interference of this Court in exercise of its revisional jurisdiction. This revision is, therefore, devoid of any merit and is, accordingly, dismissed.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.05.2010

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

Civil Revision No.127 of 2008

Smt. Tahira Beghum ...Petitioner
Versus
Additional District Judge/Court No. 2 Raebareli ...Respondent

Counsel for the Petitioner:
Sri Avadhesh Shukla

Counsel for the Respondent:
Sri Atiya Abid
Mohd. Abid Ali

Code of Civil Procedure-Section-115(III) (I) and (II)-Revision-by impugned Order amendment application allowed-by which neither admission withdrawn nor changed the nature of suit but a man on additional plea taken-Revisionist has been given opportunity to file additional written statement-held-can not be interfered under revisional jurisdiction.

Held: Para 20

Sub-section (3) of Section 115 C.P.C., as applicable in State of U.P., clearly indicates that the superior court shall not vary or reverse any order made except when the impugned order comes within the purview of sub-clause (i) or sub-clause (ii) of sub-section (3). In the instant case, the plaintiffs' application

for amendment in the plaint has been allowed. If the said amendment application would have been rejected and the order would have been passed in favour of the revisionist/defendant, the appeal would not have been disposed of finally. On the other hand, if the impugned order is allowed to stand, it would neither occasion a failure of justice nor would cause irreparable injury to the revisionist/defendant. This view has been fortified by the principles of law laid down by the Hon'ble Supreme Court in the case of Prem Bakshi & others (supra) and Baldev Singh & others etc. (supra). Besides it, the revisionist/defendant has also been provided an opportunity to file additional written statement to the amended plaint vide impugned order dated 12.08.2008. Since the impugned order does not come within the purview of sub-clause (i) or sub-clause (ii) of sub-section (3) of Section 115 C.P.C., no interference is called for in the said order by this Court in exercise of it's revisional powers.

Case law discussed:

2005(23) LCD 1250, 2006(24) LCD 874, 2007(25) LCD 1756, 2006(24) LCD 1705, AIR 1979.

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

1. This Civil Revision under Section 115 of the Code of Civil Procedure has been preferred against the impugned order and the formal order dated 12-08-2008 passed by the learned Additional District Judge, Court No. 2, Raebareli, in Civil Appeal No. 09 of 2007, Liyakat Khan and others Versus Tahira Begum and another, whereby, he allowed the appellants/plaintiff's' application 20-Ka for amendment in the plaint on payment of Rs.500/- as cost.

2. The brief facts, giving rise to this revision, are that the plaintiffs filed O.S. No. 781 of 1999, Liyakat Khan and others Versus Smt. Tahira Begum and another, for partition in the court of Civil Judge(Junior Division), Sadar Raebareli with the prayer that plaintiff's' 2/3rd share in the disputed property may be partitioned and separated on the ground that parties ancestor Sri Mardan Khan had acquired the property in suit, detailed and described in the plaint and parties have inherited the said property in accordance with the provisions of Mohammedan Law and they are joint owners in possession of the said property. In the said property, the plaintiffs have 2/3rd share and the defendants have 1/3rd share. Their share may be partitioned and separated as the defendants are not ready for mutual partition. The defendants filed Written Statement and denied the plaintiffs' version. Their version is that the defendants along with family members are residing in the property in suit for the last about 50 years and the plaintiffs and their family members are residing in the house of their share situated at village-Pure Meharvan Khan Ka Purva, hamlet of oya, Tahsil-Maharajganj,District-Raebareli.

Abdul Majid Khan was the owner of disputed house, who was the maternal grand-father of the defendant. Smt. Sabira Bibi was the daughter of Abdul Majid Khan and defendant no. 1 is the daughter of Smt. Sabira Bibi. The marriage of Sabira Bibi was performed with Mardan Khan and Mardan Khan died during life time of Sabira Bibi. Thus, Sabira Bibi became the sole owner of the house of Abdul Majid Khan and Mardan Khan did not become the owner of the said house. Smt. Sabira Bibi provided the house in suit to her daughter, defendant no. 1, through a will deed dated 07-05-1992. Mardan Khan was the resident of Village-Pure Meharvan Khan Ka Purva, district-Raebareli and he provided the house situated there to his sons, Kasim and Liyakat and they are

residing in the said house alongwith their family members. Sri Mardan Khan was never the owner of the disputed house. The defendant is the owner in possession of the said house as per terms of the will deed. The plaintiffs have no share in the said house and hence, the suit for partition is liable to be dismissed.

3. On the pleadings of the parties, learned Civil Judge (Junior Division), Raebareli, framed three issues. After considering the evidence produced by the parties, learned Civil Judge held that the plaintiffs have failed to establish that the property in suit was acquired by Mardan Khan and the plaintiffs have 2/3rd share in the said property. Consequently, the suit was dismissed vide judgment and order dated 27-02-2007 passed by the learned Civil Judge (Junior Division), Raebareli. Feeling aggrieved by the said judgment and decree, the plaintiffs preferred a Civil Appeal No. 09 of 2007, Liyakat Khan and others Versus Smt. Tahira Begum and another, in the court of District Judge, which was transferred to the court of Additional District Judge, Court No. 2, Raebareli.

4. During pendency of the appeal, an application under Order 6 Rule 17 readwith Section 151 C.P.C. was moved on behalf of the appellants-plaintiffs for amendment in the plaint on the ground that the parties are related to late Mardan Khan and his wife Smt. Sabira Bibi and they have inherited the property left by them jointly or severally. If it is found that the disputed property was acquired by late Smt. Sabira Bibi, parties are entitled to get their respective share by decree of partition and hence, proposed amendment is essential and after amendment, no additional evidence is required. The plaintiffs have sought amendment in para 2 of the plaint to the effect that it may be added that "Yadi Sampatti Vad Swargiya Sabira Bibi Ki Arjit Bad Mrityu Chhodi Sabit Pai Jaye To Bhi Pakshkar Swargiya Mardan Khan Ankit Sajra Ki Arjit Va Bad Mrityu Chhodi Sampatti Ke Saman Hi Hissa Bantwara Se Pane Ke Hakdar Honge."

5. The respondent No.1/defendant filed objection against the said application to the effect that after dismissal of the suit, the plaintiffs want to introduce in the plaint that if it is found that the property in suit was acquired by Smt. Sabira Bibi, even then, the plaintiffs are entitled to get partition. The self-contradictory plea cannot be introduced by way of amendment. The plaintiffs cannot be permitted to withdraw the admission made by them earlier. The amendment application is liable to be rejected.

6. After considering the record and hearing the learned counsel for the parties, learned Additional District Judge, Court No. 2, Raebareli, allowed the appellants/plaintiffs' application 20-Ka for amendment in the plaint, as referred to above, vide order dated 12-08-2008. Feeling aggrieved by the said order the defendant no. 1, Smt. Tahira Begum, has preferred this revision.

7. I have heard Sri Avadhesh Shukla, learned counsel for the revisionist, Sri Mohd. Abid Ali, learned counsel for the opposite parties nos. 3 to 11 and perused the record.

8. Learned counsel for the revisionist has submitted that the said facts were within the knowledge of the plaintiffs, but, the application for

amendment in the plaint has been moved after dismissal of the suit and during pendency of the appeal, which is not in consonance with the proviso appended to order VI Rule 17 of the Code of Civil Procedure, but, inspite of it, learned appellate court has allowed the amendment application; that the plaintiffs cannot be permitted to withdraw admission made by them earlier; that the learned appellate court has committed illegality and material irregularity in exercise of its jurisdiction by allowing the amendment application and hence, the impugned order is liable to be set aside. In support of his contentions, he has placed reliance on the following decisions of the Hon'ble Supreme Court as well as of this court:-

1. [2005(23) LCD 1250] Supreme Court, Salem Advocate Bar Association, Tamil Nadu Versus Union of India.

2. [2006(24) LCD 874] Allahabad High Court, Ali Jan Versus 2nd Additional District Judge and Others.

3. [2007(25) LCD 1756] Supreme Court, Ajendra Prasad Ji N.Pandey And Another Versus Swami Keshav Prakash Das Ji N. And Others.

9. Learned counsel for the opposite parties nos. 3 to 11 has submitted that the revision is not maintainable against the impugned order of the appellate court; that by way of amendment, legal plea has been taken on the basis of admitted facts; that Smt. Sabira Bibi was not competent to execute the will deed in respect of whole property and she could execute the will deed in respect of 1/3rd portion of the said property only in accordance with the provisions of Mohammedan Law; that no admission has been withdrawn by the plaintiffs by way of amendment and an alternative plea is being taken; that the order passed by the learned appellate court is perfectly valid and it calls for no interference. In support of his contentions, he has placed reliance on the following decisions of the Hon'ble Supreme Court as well as of this court:-

1. [2006(24) LCD 1705] Supreme Court, Baldev Singh and Others Etc. Versus Manohar Singh And Another Etc.

2. AIR 1979 Allahabad 218 (Full Bench) M/s. Jupiter Chit Fund (Pvt.) Ltd., Versus Dwarka Diesh Dayal and Others.

10. In the case of M/s. Jupiter Chit Fund (Pvt.) Ltd.(Supra), Hon'ble Supreme Court in para nos. 22,23 & 34 of its judgment has held as under :-

22. An appeal or a revision is for some purposes treated as a continuation of a suit. The appeal or the revision is the case which arises out of the suit. But when the appeal or the revision is decided, such decision creates a different or a fresh case which arises out of the appeal or the revision. It has an identity and existence different and apart from the case which arose out of the suit.

23. It is settled law that a judicial order passed by the trial court merges in the order passed by the appellate or revisional court : Shankar Ramchandra Vs. Krishnaji Dattatraya (AIR 1970 SC 1). How can it be said that an appellate or revisional decision in which the decision of the trial court has merged, is still a

case arising out of the original suit. After merger, that case, i.e. the decision arising out of the original suit vanishes. The decision of the appeal or revision brings into existence a case which can properly be said to be arising out of the appeal or revision. The decision of an appeal or revision is hence not amenable to the revisional jurisdiction under S. 115 even after the amendment in 1973.

34. The words "or other proceedings" in the phrase "cases arising out of original suits or other proceedings" refer to proceedings of final nature. These words have been added in order to bring within the purview of the revisional jurisdiction orders passed in proceedings of an original nature, which are not of the nature of suits, like arbitration proceedings. This phrase cannot include decisions of appeals or revisions; because then the legislature will be deemed to have contradicted itself. The words "or other proceedings" have to be read ejusdem generis with the words "original suits." They will not include appeals or revisions.

11. In the instant case, the amendment application has been allowed during the pendency of the appeal. Neither the appeal has been disposed of finally nor the order of the learned Trial Court has merged in the order of the appellate court. Hon'ble Supreme Court has held that the decision of the appeal or revision is not amenable to the revisional jurisdiction under Section 115 C.P.C., but, in the instant case, the order passed during the pendency of the appeal has been impugned in the present revision. The appeal is treated as continuation of the suit. Since, the appeal has not been disposed of finally and the impugned order has been passed during the pendency of the appeal, I am of the definite view that the revision is maintainable against the impugned order and the decision of the Hon'ble Supreme Court relied upon by the opposite parties is of no help to them. Besides it, Section 115 C.P.C. has been amended, as applicable in U.P., w.e.f. 01-07-2002. The contention of the learned counsel for the opposite parties that the revision is not maintainable stands rejected.

12. Learned counsel for the revisionist has placed reliance on para 27 of the judgment rendered by Hon'ble Supreme Court in the case of Salem Advocate Bar Association, Tamil Nadu (Supra) and the same may be quoted as under:-

27. Order VI Rule 17 of the Code deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it has to be shown that in spite of due diligence, such amendment could not have been sought earlier. The object is to prevent frivolous applications which are filed to delay the trial. There is no illegality in the provision.

13. In the case of Ajendra Prasad Ji N.Pandey and Another (Supra), Hon'ble

Supreme Court has held that the date of settlement of issues is the date of commencement of trial and it has to be shown that the matters now sought to be introduced by the amendment could not have been raised earlier inspite of due diligence.

14. In the case of Ali Jan (Supra), Hon'ble Single Judge of this court has held in para 10 of its judgment as under:-

10. Having heard learned counsel for both the parties, I am of the opinion that the amendment sought by the petitioner was not only delayed but also with an intention to resile from the earlier evidence and the evidence which had been given by him earlier would definitely be contradictory to the amendment which he was seeking. In my opinion, both the Court below committed no illegality in dismissing the petitioner's application for amendment.

15. In the case of Baldev Singh and others etc.(Supra), Hon'ble Supreme Court has held that it is well settled by various decisions of this court as well as the High Courts in India that courts should be extremely liberal in granting the prayer for amendment of pleadings unless serious injustice or irreparable loss is caused to the other side.

16. In paras nos. 2,3,5, & 6 of the Judgment, reported in 2002 (1) AWC 484 (SC), Prem Bakshi and Others Versus Dharam Dev and Others, the Hon'ble Supreme Court has held as under:-

2. The short question for determination is whether the impugned order was revisable by the High Court by exercising powers under Section 115 C.P.C. The said section runs as follows:

*"**115. Revision**.-(1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears -*

(a) to have exercised a jurisdiction not vested in it by law, or
(b) to have failed to exercise a jurisdiction so vested, or
(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity.

The High Court may make such order in the case as it thinks fit:

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where-

(a) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding, or
(b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.
Explanation.-In this section, the expression "any case which has been decided" includes any order made, or any

order deciding an issue, in the course of a suit or other proceedings."

3. The proviso to sub-sections (1) and (2) with Explanation was added by the amending Act of 1976. By this amendment, the power of the High Court was curtailed: the intention of the Legislature being that High Court should not interfere with each and every interlocutory order passed by the trial court so that the trial of a suit could proceed speedily and that only the interlocutory order coming under Clause (a) or (b) of the proviso would be entertained by the High Court.

5. The proviso to sub-section (i) of Section 115 puts a restriction on the powers of the High Court inasmuch as the High Court shall not, under this section, vary or reverse any order made or any order deciding an issue, in course of a suit or other proceedings except where (i) the order made would have finally disposed of the suit or other proceedings or, (ii) the said order would occasion a failure of justice or cause irreparable injury to the party against whom it is made. Under Clause (a), the High Court would be justified in interfering with an order of a subordinate court if the said order finally disposes of the suit or other proceeding. By way of illustration, we may say that if a trial court holds by an interlocutory order that it has no jurisdiction to proceed with the case or that suit is barred by limitation, it would amount to finally deciding the case and such order would be revisable. The order in question by which the amendment was allowed could not be said to have finally disposed of the case and, therefore, it would not come under Clause (a).

6. Now the question is whether the order in question has caused failure of justice or irreparable injury to respondent No. 1. It is almost inconceivable how mere amendments of pleadings could possibly cause failure of justice or irreparable injury to any party. Perhaps the converse is possible, i.e. refusal to permit the amendment sought for could in certain situations result in miscarriage of justice. After all, amendments of the pleadings would not amount to decisions on the issue involved. They only would serve advance notice to the other side as to the plea, which a party might take up. Hence, we cannot envisage a situation where amendment of pleadings, whatever be the nature of such amendment, would even remotely cause failure of justice or irreparable injury to any party.

17. Section 115 C.P.C. has been amended w.e.f. 01-07-2002 in its applicability to the State of U.P. and the same may be quoted as under :-

***"115. Revision**.-(1) A superior court may revise an order passed in a case decided in an original suit or other proceeding by a subordinate court where no appeal lies against the order and where the subordinate court has -*

(a) Exercised a jurisdiction not vested in it by law; or
(b) Failed to exercise a jurisdiction so vested; or
(c) acted in the exercise of its jurisdiction illegally or with material irregularity;

(2) A revision application under sub-section (1), when filed in the High Court, shall contain a certificate on the first page of such application, below the

title of the case, to the effect that no revision in the case lies to the district court but lies only to the High Court either because of valuation or because the order sought to be revised was passed by the district court.

(3) The superior court shall not, under this section, vary or reverse any order made except where,-

(i) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding; or
(ii) The order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it is made.

(4) A revision shall not operate as a stay of suit or other proceeding before the court except where such suit or other proceeding is stayed by the superior court.

Explanation I.- In this section,-

(i) The expression "superior court' means-
(a) the district court, where the valuation of a case decided by a court subordinate to it does not exceed five lakh rupees;
(b) the High Court, where the order sought to be revised was passed in a case decided by the district court or where the value of the original suit or other proceedings in a case decided by a court subordinate to the district court exceed five lakh rupees;

(ii) The expression "order' includes an order deciding an issue in any original suit or other proceedings.

Explanation II.- The provisions of this section shall also be applicable to orders passed, before or after the commencement of this section, in original suits or other proceedings instituted before such commencement."

18. The case of Prem Bakshi and others (Supra) was decided by the Hon'ble Supreme Court on January 09,2002, but, the amended provision of Section 115 C.P.C. has been enforced in the State of U.P. w.e.f. 01-07-2002. On comparison of Section 115 C.P.C., I find that the proviso (a) and (b) of unamended Section 115 C.P.C. are pari materia with that of sub-section (3) of amended Section 115 C.P.C., as applicable in the State of U.P. Hence, the principle of law laid down by the Hon'ble Supreme Court is still good, even after the amendment in Section 115 C.P.C. by the State of U.P.

19. In the instant case application for amendment in the plaint has been moved after dismissal of the suit and during the pendency of the appeal. After considering the objection of the defendant, learned Appellate Court has held that the proposed amendment is not amounting to withdrawal of admission, but, it is an additional version/plea. It has further held that the application for amendment in the pleading cannot be rejected merely on the ground of delay and it can be allowed even at the appellate stage and the nature of suit would not change by the proposed amendment and it would resolve the controversy between the parties effectively. No amendment has been sought in the prayer clause and it would not change the nature of suit for partition. The contention of the learned counsel for the opposite parties is that the proposed amendment has been sought on the basis of

admitted facts and no additional evidence is required. He has further submitted that Smt. Sabira Bibi was not competent to execute the will in respect of the whole property and she could execute the will deed only in respect of 1/3rd portion of the said house, as per the provisions of Mohammedan Law. The merits of the amendment application cannot be considered by the appellate court at the time of its disposal and the said point has to be considered by the concerned court at an appropriate stage. It appears that no admission made by the plaintiffs, has been withdrawn by way of amendment. Instead of it, additional plea has been taken by the plaintiffs to get their alleged share partitioned. It is true that the learned appellate court has not considered the impact of proviso appended to Order VI Rule 17 of C.P.C. specifically in it's order. Now the point for determination is as to whether any interference can be made in the impugned order by this court in exercise of it's revisional powers under Section 115 C.P.C.

20. Sub-section (3) of Section 115 C.P.C., as applicable in State of U.P., clearly indicates that the superior court shall not vary or reverse any order made except when the impugned order comes within the purview of sub-clause (i) or sub-clause (ii) of sub-section (3). In the instant case, the plaintiffs' application for amendment in the plaint has been allowed. If the said amendment application would have been rejected and the order would have been passed in favour of the revisionist/defendant, the appeal would not have been disposed of finally. On the other hand, if the impugned order is allowed to stand, it would neither occasion a failure of justice nor would cause irreparable injury to the revisionist/defendant. This view has been fortified by the principles of law laid down by the Hon'ble Supreme Court in the case of Prem Bakshi & others (supra) and Baldev Singh & others etc. (supra). Besides it, the revisionist/defendant has also been provided an opportunity to file additional written statement to the amended plaint vide impugned order dated 12.08.2008. Since the impugned order does not come within the purview of sub-clause (i) or sub-clause (ii) of sub-section (3) of Section 115 C.P.C., no interference is called for in the said order by this Court in exercise of it's revisional powers.

21. .In view of the aforesaid discussion, I am of the view that this revision lacks merit. Consequently, it is dismissed with costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.05.2010

BEFORE
THE HON'BLE PRADEEP KANT, J.
THE HON'BLE ANIL KUMAR, J.

Special Appeal No. 182 of 2010

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

Constitution of India Art.-226-Right to Continue in Service-Contractual appointment-extended from time to time-on certain complaint by local M.L.A.-extension refused-Single Judge rightly declined to interfere-Contractual appointee has no right to continue-Appeal dismissed.

Held: Para 18
Keeping in view the facts and circumstances stated hereinabove the reply to the said question would be in negative. As the appointment of the

appellant being for a fixed term, he has no right to continue beyond the period of indicated in his appointment letter which is a time bound for a fix period. Extension of appointment by judicial order is not permissible under law as a fixed term appointment would come to an end automatically by efflux of time. In case, the contention of the appellant is accepted, it would be amount to rewriting the appointment letter allowing the appellant to continue without their being letter of appointment issued by the competent authority for a period after the term of his term/tenure of engagement is over.

Case law discussed:

(2009) 4 UPLBEC 3333, 1992(4) SCC 33, IT 2006 (4) SC 420, 1994 (12) LCD, 76, 1992 (5) SLR 86, (2002) 2 UPLBEC1373.

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

1. Heard Sri Manish Kumar, learned counsel for the appellant, Sri A.M. Tripathi, Sri Virender Nath Verma on behalf of the respondents.

2. By means of present special appeal, the order dated 23.03.2010 passed by the learned Single Judge in Writ Petition No. 1251(SS) of 2009 (Nagesh Singh Vs. State of U.P. & Others) is under challenge.

3. Factual matrix in brief of the present case are that in the State of Uttar Pradesh in order to provide Basic Education, a project/scheme has been initiated known as 'Serv Shiksha Abhiyan' (hereinafter referred to as the 'scheme') which is to be implemented in all the districts of Uttar Pradesh. In order to implement the Scheme, one of the decision taken by the State Government is to appoint a person on the post of District Coordinator (construction).

4. Accordingly, for the District Sultanpur an advertisement was issued by the Director (opposite party no.2) to appoint a person on the contract basis on the post of District Coordinator (construction) in order to look after the construction work to be carried out for the implementation the Scheme, the said appointment is to be made through District level Committee consisting of the following members:

1. District Magistrate
2. District Basic Education Officer, member secretary
3. District Social Welfare Officer
4. Executive Engineer PWD, member

5. In response to the said advertisement, the petitioner and other candidates submitted their candidature and thereafter the petitioner was selected and an order dated 13.02.2007 was issued appointing him on the post of District Coordinator(Construction), Sultanpur on ad-hoc basis for a fixed term of one year and the petitioner joined his duties accepting the term of his appointment order, thereafter the said contract of appointment was extended time and again and the last extension was given with effect from 13.02.2008 for a period of one year.

6. While the petitioner was working and discharging his duties, an inspection was done in respect to the construction work in Primary School and High School which were constructed in Block Jaisinghpur, District Sultanpur, as per the submission made on behalf of the appellant, the place where the work was performed falls under the legislative Constituency of one Sri O.P. Singh, M.L.A. who submitted a report dated

06.07.2009 against him in respect to some alleged defect and irregularities in the construction of the aforesaid schools and taking into consideration the same, the services of the petitioner were terminated by order dated 26.08.2009.

7. Aggrieved by the said order of termination, the petitioner approached this Court by filing the writ petition no. 5538 of 2009 (Nagesh Singh Vs. State of U.P. and others) on 04.09.2009, disposed off with the following directions:-

"The contention of petitioner is that the term of petitioner has been renewed but on the basis of complaint, the order impugned has been passed. Further submission has been made that in view of letter dated 8th December, 2008, Director of Education (Basic) has power to pass appropriate orders terminating the term of petitioner but Basic Shiksha Adhikari has passed an order, therefore, the order impugned is bad. After consideration of submission made by petitioner, I am of view that admittedly, appointment of petitioner is on contract basis for a period of one year subject to renewal. The appointment of petitioner has not been made under any relevant Rules. Therefore, if order terminating the contract has been passed that cannot be said to be illegal. In view of aforesaid fact, I am not inclined to interfere. The writ petition is dismissed, however, without imposing any cost. However, dismissal of the present writ petition will not come in the way of petitioner to approach respondent No.2 regarding his grievances, which have been stated in the present writ petition."

8. Order dated 04.09.2009 passed in Writ Petition No. 5538 was challenged by way of Special Appeal No. 667 of 2009 by the appellant and on 06.10.2009, an interim order has been passed in his favour. Operative portion of the same is as under:-

"In view of the arguments of the learned counsel for the appellant that the order terminating the term of the contract appointment has been passed by an authority, who is not competent to pass the impugned order as per Office Memorandum dated 8.12.2008, and also the fact that the renewal of the term of the contract appointment of the appellant was done after considering the entire record, extending the term of the appellant from 14.2.2009 to 13.2.2010 coupled with the argument that the impugned order has been passed without affording any opportunity to the appellant, though it terminates the already extended term of contract appointment, we, stay the operation and implementation of the impugned under dated 04.09.2009 under challenge in the instant special appeal, passed by the learned Single Judge and also the order of termination dated 26.8.2009, till further orders of the Court or till completion of the period of contract appointment i.e. 13.2.2010, whichever is earlier. However, it will be open for the respondents to move application for vacation of stay order alongwith the counter affidavit."

9. Thereafter, the contractual appointment of the petitioner on the post in question had come to an end on 13.02.2010. Further, the Zila Education Project Committee had taken a decision not to renew the contractual appointment of the petitioner for the year 2010-11, accordingly an order was passed by the District Basic Education Officer,

Sultanpur on 16.02.2010 terminating the contractual appointment of the petitioner. The same was challenged by means of Writ Petition No. 1251(SS) of 2010 (Nagesh Singh Vs. State of U.P. and others), dismissed by order dated 23.03.2010 with the following directions:-

"Two points have been put forward by the learned counsel for the petitioner. First is that the order passed by the opposite parties is without jurisdiction and it ought to have been passed by the Director but it is clarified that a Circular was issued wherein it has been clarified that the power of termination and appointment is vested with the District Project Committee and in the present case the District Project Committee has taken into consideration the entire working of the petitioner of the preceding year and passed the impugned order, therefore, the question of jurisdiction as argued by the learned counsel for the petitioner fails. The next argument is that the renewal of the petitioner has been refused only on account of bias prevailing with the MLA who wrote a letter against him. The question of bias at the behest of the MLA could have got some force but the decision was taken by the BSA at earlier point of time. Now the decision has been taken by the District Project Committee and there is no allegation of bias against the members of the District Project Committee. The District Project Committee is supposed to undertake all exercise and consider the entire working of the petitioner in the preceding year. The petitioner's working in the preceding year has been taken into consideration and the District Project Committee has found that the work of the petitioner is unsatisfactory. Once the working of the petitioner has been found to be unsatisfactory while reviewing the entire working of the petitioner, there was no question for renewal of the contractual appointment of the petitioner. The argument of the learned counsel for the petitioner in regard to bias also fails. In this view of the matter, the petition is devoid of merit and it is accordingly dismissed."

10. Aggrieved by the said order dated 23.03.2010, the instant Special Appeal has been filed by appellant.

11. Sri Manish Kumar, learned counsel for the appellant while assailing the order dated 23.03.2010 submits that the action on the part of the respondent no. 4 thereby not renewing the contractual appointment of the appellant for the period of 2010-11 and passing the order date 16.02.2010 is per se illegal as there was no material or reason before the Committee on whose recommendation the impugned order was passed, so the same is liable to be set aside

12. He further submits that the order in question has been passed only due to the political pressure exerted by sitting B.S.P. MLA and report submitted by him who was personally prejudiced and annoyed against the petitioner as he had submitted an adverse report against his relative. Except the said report there was no other material against the petitioner which was taken into consideration while passing the impugned order, so the said order passed under the garb of political influence is arbitrary in nature, thus violative of Article 14 of the Constitution of India and in contravention to the principles of natural justice, liable to be quashed. In support of his argument Sri Manish Kumar, learned counsel for the

appellant placed reliance on the case of ***Rashmi Awasthi & Others Vs. State of U.P. and others [(2009) 4 UPLBEC 3333].***

13. In rebuttal, the learned counsel for the respondents submits that the appointment of the petitioner on the post of District Coordinator (Construction), Sultanpur was a contractual appointment which came to an end on 13.02.2010 and was not renewed for the next year i.e. 2010-11 by the competent authority. As such, the petitioner who was appointed on the contract basis has got no right or locus to file the present writ petition to get this contractual appointment renewed, so the present writ petition filed by him lacks merit and liable to be dismissed.

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

15. Admittedly, in the present case, the petitioner was initially appointed on the post of District Coordinator(Construction) by order dated 13.02.2007 for a fixed term which was renewed subsequently thereafter and last term/tenure of the appellant was up till 13.02.2010.

16. So, it is not disputed as per the terms of appointment/engagement the appellant was entitled to work on the post of District Coordinator (Construction) in the District Sultanpur only up till 13.02.2010 and thereafter by the efflux of time, the same came to an end.

17. Now, in the light of the above said facts, the question which is to examine in the instant case whether the appellant can claim as a matter of right to continue on the post in question despite the aforesaid condition of appointment order and when admittedly letter of appointment had also lost it's efficacy due to efflux of time so moto after expiry of term and whether the appellant in such circumstances can be directed to continue even beyond the said period to work and discharge his duties to be question answer in the present case.

18. Keeping in view the facts and circumstances stated hereinabove the reply to the said question would be in negative. As the appointment of the appellant being for a fixed term, he has no right to continue beyond the period of indicated in his appointment letter which is a time bound for a fix period. Extension of appointment by judicial order is not permissible under law as a fixed term appointment would come to an end automatically by efflux of time. In case, the contention of the appellant is accepted, it would be amount to rewriting the appointment letter allowing the appellant to continue without their being letter of appointment issued by the competent authority for a period after the term of his term/tenure of engagement is over.

19. In the case ***Director, Institute of Management Development, U.P. Vs. Pushpa Srivastava(Smt.), 1992(4) SCC 33.,*** the Hon'ble Apex Court held as under:-

"The appointment, which is made for a fixed tenure comes to an end on the expiry of the period of appointment provided in the letter of appointment and the incumbent need not be terminated as the termination of employment comes automatically by efflux of time. In this case, admittedly, the appointment of the petitioner is for fixed tenure and in case

the contention of petitioner is accepted, it will amount to giving an appointment by this Court for the period subsequent there to substituting itself to the position of appointing authority. This is neither permissible in law nor should be done. When a procedure is prescribed to do a thing in a particular manner, it should not be done otherwise."

20. Further a Constitution Bench of the Apex Court in ***Secretary, State of Karnataka and others Vs. Uma Devi and others, IT 2006 (4) SC 420***, in Para 34 of the judgment has observed as under:-

"If it is contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued."

21. In the case of ***L.I.C. Vs. Sri Rajiv Kumar Srivastava 1994 (12) LCD, 76*** this Court has held placing reliance on the case of ***Director Institute of management Development,U.P. Vs. Pushpa Srivastava 1992 (5) SLR 86*** where the appointment is purely ad-hoc appointment and is contractual and by efflux of time, the appointment comes to an end. The person holding such post has no right to continue on the said post.

22. In the case of ***Alok Kumar Singh (Dr.) and 15 others Vs. State of U.P. and others [2002) 2 UPLBEC1373]***, it is held as under :-

"In view of the averments made in the counter affidavit of the State Government it is evident that the petitioners are working only on contact basis without any regular selection through the Commission, and they cannot be equated with regularly selected teachers. Hence, they have no right to the post. Their appointment was under the Government Order dated 07.04.1998 to deliver lecturers for a very short span of time and they cannot claim regularization. Their duties and function are arise different from the regularly selected teachers. These appointments were made only due to the shortage of regularly selected candidates so that the teaching work may not suffer. However, the appointees cannot claim any right to continue. Only these who have been regularly selected by the Commission have a right to continue."

23. So far as the submission made by the learned counsel for the appellant that the contractual appointment of the appellant was not renewed only due to report submitted by the sitting MLA and the same cannot be a basis of not extending the contractual appointment of the appellant cannot be accepted. As in the case of ***Uma Devi (Supra)***, the Apex Court in Para 36 of the judgment has observed as under:-

It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be true that he is not in a position to bargain not at arms length since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If

the Court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the Court to grant any relief to that employee. A total embargo on such causal or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or causally, would not be getting even that emploi6yment when securing of such employment brings at least some succour to them. After all, innumerable citizens of our vast, contrary are in search of employment and one is not compelled to accepts the casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flewing from it. In other words, even while accepting the employment, the person concerned knows the nature o f his employment. It is not an appointment to a post in the real sense of the term."

24. For the foregoing reasons, there is neither any illegality nor infirmity in the order dated 23.03.2010 passed by the learned Single Judge. Accordingly, the present appeal filed by the appellant lacks merit and is accordingly dismissed.

No order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.05.2010

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE DR. SATISH CHANDRA, J.

First Appeal From Order No. 279 of 2001

Union of India and another ...Petitioner
Versus
Smt. Chandrakali Chaturvedi and others ...Respondent

Councel for the Petitioner:
Sri K. D. Nag

Counsel for the Respondent:
Sri Deepak Kumar Agarwal

Motor Vehicle Act, 1998, Section 173- read with Employees State insurance Act 1948-Section 53-deceased an employee of Telecom Depott-sustained injury due to rashness and negligence of Zeep Driver of Depott.-Tribunal awarded Rs 287520 under motor vehicle Act-award Challenged on ground-deceased being member of employees state insurance Act-not entitled for any amount toward compensation-held Motor Vehicle Act Specifically deals with accidental death, injuries-while insured workman entitled for sickness cash benefit, materily benefit, disablement and dependents benefits including medical care.

Held: Para 12 & 14

It is settled law that in case special law does not cover the controversy, then it shall be dealt with by general law. The Motor Vehicles Act, 1988, specifically deals with the accidental death, injuries and compensation payable thereon. The Tribunal has rightly paid the compensation to the claimants in pursuance of the power exercised under the Motor Vehicles Act 1988.

The aims and objects further clarify that the insured workmen will be entitled for sickness cash benefit, maternity benefit, disablement and dependents benefit. Workmen shall also be entitled for medical care and treatment and related dispute shall be decided by the Workmen State Insurance Court.

Thus, the statement of the aims and object (supra) for promulgation of the Act is to provide necessary assistance for the welfare of employee workmen with regard to their health under the scheme. The various fields covered by the Act have been enumerated in Section 28 discussed hereinafter.

Case law discussed:

(209) 4 SCC, 2006 (1) T. A.C. 965 (S.C.).

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

1. Heard Sri K. D. Nag, learned counsel for the appellant and Sri Deepak Kumar Agarwal, learned counsel for the respondents.

Appeal under Section 173 of Motor Vehicles Act, 1988 has been preferred against the impugned award dated 09.02.2001 passed by the Motor Accident Claims Tribunal, Lucknow in Claim Petition No. 21 of 1989 (Badri Prasad Chaturvedi and others v. Union of India and others).

2. In brief, the deceased Siddh Nath Chaturvedi was an employee of Telecoms Department, Lucknow, working on the post of Assistant Engineer. On 04.10.1988, while he was coming from Sultanpur to Lucknow in the department's jeep no. UAE-7465, because of rashness and negligence on the part of Jeep driver, the Jeep suffered with an accident and by loosing its balance, Sri Siddh Nath Chaturvedi suffered grievous injuries and later on scummed to injuries in the medical college. At the time of death, his monthly income was Rs.3,357/- per month. The FIR was lodged and dependents/legal heirs have approached the Tribunal for payment of compensation. The Tribunal framed five issues. Out of which, the first relates to accident occurred on 04.10.1988 because of rashness and negligence on the part of Jeep driver. The second issue relates is to entitlement of the claimants for payment of compensation. The Tribunal on the basis of recorded evidence and after providing due opportunity to the parties held that the accident occurred because of rashness and negligence on the part of Jeep driver. The Jeep belonged to the Telecoms department and accordingly, Tribunal held that the department is liable to pay compensation.

3. The Tribunal awarded a compensation to the tune of Rs 2,87,520/- and divided to legal heirs and successors of the deceased. Out of which, Km. Saroj, Sarita and Vinay Chaturvedi were minors. Feeling aggrieved, the appellant approached under Section 173 of the Motor Vehicles Act, 1988.

4. Sri K. D. Nag learned counsel for the appellant submitted that the deceased was insured under the Employees State Insurance Act, 1948 in short 'Act'. Hence, in view of the above provision contained in Section 53 and 61 of the Act, no compensation be paid under the Motor Vehicles Act. For convenience, Section 53 and 61 of the Act are reproduced as under:

***"Section 53: Bar against receiving or recovery of compensation or damages under any other law**. - An insured person or his dependents shall not be entitled to receive or recover, whether from the employer of the insured person or from any other person, any compensation or*

damages under the Workmen's Compensation Act, 1923 (8 of 1923), or any other law for the time being in force or otherwise, in respect of an employment injury sustained by the insured person as an employee under this Act.

Section 61: Bar of benefits under other enactments. - *When a person is entitled to any of the benefits provided by this Act, he shall not be entitled to receive any similar benefit admissible under the provisions of any other enactment."*

5. The provision contained in Section 53 and 61 of the Act may be made applicable only in case the accident in question may be covered under the provisions contained in the Act.

6. Needless to say that the Act being a special law, in case the case of claimants-respondents is covered under the said Act, then they may not be entitled for the payment of compensation under the Motor Vehicles Act. However, the close scrutiny of the Act shows that the case of the deceased was not covered under Section 28 of the Act. From the reading of the Act, it appears that Act deals with the health insurance of the industrial workers and not with the accident occurred on the road while moving in vehicle. The statement of objects and reasons of the Act is reproduced as under:

"Statement of Objects and Reasons: *The introduction of a scheme of Health Insurance for industrial workers has been under the consideration of the Government of India for a long time. The necessity for such a scheme has become more urgent in view of the conditions brought about by war. The scheme envisaged is one of compulsory State Insurance providing for certain benefits in the event of sickens, maternity and employment injury to workmen employed in or in connection with the work in factories other than seasonal factories.*

(2) A scheme of this nature has to be planned on an all-India basis and administered uniformly throughout the country. With this object, the administration of the Scheme is proposed to be entrusted to a Corporation constituted by central legislation.

(3) The functions of the Corporation will be performed by a Central Board constituted of representatives of Central and Provincial Governments, and of employers, workers and the medicals profession. The Board will also include certain members elected by the Central Legislative Assembly. A standing committee of the Board will act as the executive of the Board, and a Medical Benefit Council will also be set up to advise on matters relating to the administration of medicals benefit.

(4) The insurance fund will be mainly derived from contributions from employers and workmen. The contributions payable in respect of each workman will be based on his average wages and will be payable in the first instance by the employer. The employer will be entitled to recover the workman's share from the wages of the workmen concerned. Workmen whose earnings do not exceed 10 annas a day will be totally exempt from payment of any share of the contribution, the entire contribution on account of such workmen being met by employer. Provision has been made for the preparation of proper budgets and the audit of accounts.

(5) The insured workman will be entitled to the following benefits:-

(a) Sickness Cash Benefit.- a workman, if certified sick and incapable of working, will receive for a period not exceeding 8 weeks in any continuous 12 monthly period a cash allowance equal approximately to half average daily wages during previous six months. He will also be entitled to receive medical care and treatment at such hospitals, dispensaries or other institutions to which the factory in which he is employed may be allotted.

(b) Maternity Benefit.- Women workers will be entitled to receive a maternity benefit at 12 annas a day for 12 weeks. They will also be entitled to medical aid at the aforesaid medical institutions.

(c) Disablement and Dependants' Benefit.- A workman disable by employment injury will receive for the period of disablement or life depending on whether the disablement is temporary or full and permanent, as the case may be a monthly pension equivalent to half his average wages during the previous twelve months, subject to a maximum and minimum. Where disablement is partial, the pension will be proportionately reduced. In case of death resulting from employment injury the pension will be payable to the widow or widows' minor sons and minor and unmarried daughters or in case there are no widow and legitimate children, to other dependents of the deceased workman. The workman will also be entitled to medical care and treatment.

(6). Medical care and treatment to insured workman will be provided by Provincial Governments at such hospitals, dispensaries and other institutions as may be prescribed for the purpose. The cost of the medical benefit will be shared between the Provincial Government and the Corporation in such proportions as may be agreed upon between them. In case the average incidence of sickness cash benefit in any Province is in excess of the all-India average, Provincial Government will also bear such share of the cost of the excess incidence as may be agreed upon between it and the Corporation.

(7). Workmen's State Insurance Courts will be set up to decide disputes and adjudicate on claims. The cost of the tribunal will be paid by the insurance fund.

(8)Central Government will make rules on matters relating to the administration of the Corporation, such as nomination and election of members of the Board, Standing Committee, Medical Benefit Council, powers and duties of the principal officers, raising of loans, investment of funds, accounts to be maintained by the Corporation, their audit and publication. Provincial Government will make rules on matters relating to the Workmen's insurance Courts to be set up under the Act, establishment of hospitals, dispensaries, medical institutions, etc. and the scale of medical benefit to be provided to insured persons. The Board will make regulations on matters relating to the working of the scheme, e.g., collection of contributions, payment of benefits, returns and other particulars to be submitted by employers in respect of workmen employed by them, the conditions to the observed by insured persons, in receipt of benefits, etc."

7. The statement of aims, objects and reasons for the promulgation of Act is to formulate a scheme of health insurance for

industrial worker and not to deal with accidental death. It has been planned on all India basis uniformly throughout the country managed by Central Board consisting representatives of the Central and Provincial Government. The insurance fund is derived from contribution of the employees and workmen, which is based on average wages and employer has been authorized to recover the workmen's share from their wages.

8. The aims and objects further clarify that the insured workmen will be entitled for sickness cash benefit, maternity benefit, disablement and dependents benefit. Workmen shall also be entitled for medical care and treatment and related dispute shall be decided by the Workmen State Insurance Court.

Thus, the statement of the aims and object (supra) for promulgation of the Act is to provide necessary assistance for the welfare of employee workmen with regard to their health under the scheme. The various fields covered by the Act have been enumerated in Section 28 discussed hereinafter.

9. Apart from above, the payment under the Act is made from the fund generated in accordance to the statutory provisions. Section 26 provides that there shall be contribution in the State Insurance Fund and all contributions paid under this Act and all other moneys received on behalf of the Corporation shall be paid into a fund called the 'Employees State Insurance Fund'.

10. The fund so generated under Section 26 of the Act shall be used for the purpose enumerated in Section 28 of the Act. For convenience, Section 28 of the Act is reproduced as under:

Section 28. *Purposes for which the Fund may be expended : Subject to the provisions of this Act and of any rules made by the Central Government in that behalf, the Employees' State Insurance Fund shall be expended only for the following purposes, namely:--*

(i) payment of benefits and provision of medical treatment and attendance to insured persons and, where the medical benefit is extended to their families, the provision of such medical benefit to their families, in accordance with the provisions of this Act and defraying the charges and costs in connection therewith;

(ii) payment of fees and allowances to members of the Corporation, the Standing Committee and the Medical Benefit Council, the Regional Boards, Local Committees and Regional and Local Medical Benefit Councils;

(iii) payment of salaries, leave and joining time allowances, travelling and compensatory allowances, gratuities and compassionate allowances, pensions, contributions to provident or other benefit fund of officers and servants of the Corporation and meeting the expenditure in respect of offices and other services set up for the purpose of giving effect to the provisions of this Act;

(iv) establishment and maintenance of hospitals, dispensaries and other institutions and the provision of medical and other ancillary services for the benefit of insured persons and, where the medical benefit is extended to their families;

(v) payment of contributions to any State Government, local authority or any private body or individual, towards the cost of medical treatment and attendance provided to insured persons and, where the medical benefit is extended to their families, including the cost of any building and equipment, in accordance with any agreement entered into by the Corporation;

(vi) defraying the cost (including all expenses) of auditing the accounts of the Corporation and of the valuation of its assets and liabilities;

(vii) defraying the cost (including all expenses) of the Employees' Insurance Courts set up under this Act;

(viii) payment of any sums under any contract entered into for the purposes of this Act by the Corporation or the Standing Committee or by any officer duly authorized by the Corporation or the Standing Committee in that behalf;

(ix) payment of sums under any decree, order or award of any Court or Tribunal against the Corporation or any of its officers or servants for any act done in the execution of his duty or under a compromise or settlement of any suit or other legal proceeding or claim instituted or made against the Corporation;

(x) defraying the cost and other charges of instituting or defending any civil or criminal proceedings arising out of any action taken under this Act;

(xi) defraying expenditure, within the limits prescribed, on measures for the improvement of the health, and welfare of insured persons and for the rehabilitation and re-employment of insured persons who have been disabled or injured; and

(xii) such other purposes as may be authorized by the Corporation with the previous approval of the Central Government."

11. The plain reading of Section 28 of the Act, does not seem to make out a case that it shall cover the accidental death taken place while travelling in the vehicle on road. The fund may be utilized for the treatment and provide medical aid etc. to the employees whose case is covered under the Act. Learned counsel for the appellant also could not point out any provision under the Act, which may cover the accidental death occurred while travelling in a vehicle may be of the employer itself.

12. It is settled law that in case special law does not cover the controversy, then it shall be dealt with by general law. The Motor Vehicles Act, 1988, specifically deals with the accidental death, injuries and compensation payable thereon. The Tribunal has rightly paid the compensation to the claimants in pursuance of the power exercised under the Motor Vehicles Act 1988.

13. Apart from above learned counsel for the appellant submits that the interest paid to the claimant @12% is excessive.

On the other hand, learned counsel for the respondents submits that in the year 2001, when the award has been passed by the Tribunal, the rate of interest was around 12%.

While considering the question with regard to quantum of compensation or rate of interest, we have to look into the controversy on the basis of the facts,

circumstances and situation of the relevant period, when the award was rendered by the Tribunal.

The petitioner counsel has cited the case reported in ***(209) 4 SCC 377 Uttaranchal Transport Corporation Limited v. Vimla Devi (Smt.) and others*** and submits that the interest may be reduced.

14. So far as quantum of compensation and interest is concerned, it depend upon the facts and circumstances of each case as some time, the interest will be higher and the other time, the interest may be lower. It depends upon the banking and market rate. No material has been placed on record by the appellant's counsel to indicate that in the year 2001, when the Tribunal has granted 12%, what was the ordinary interest payable by the Bank to its customers, hence interest paid by Tribunal does not call for reduction. In a case reported in ***2006 (1) T. A.C. 965 (S.C.), Oriental Insurance Co. Ltd. v. R. Swaminathan and others*** their lordships of Hon'ble Supreme Court had awarded interest @12% per annum from the date of filing of the claim petition while affirming the compensation under the Motor Vehicles Act.

15. In our view, the impugned award passed by the Tribunal does not seem to be suffer from any impropriety or illegality.

The appeal is dismissed.

In case some amount has not been deposited by the appellant, it shall be deposited before the Tribunal within two months from today and the Tribunal may proceed in terms of the award. The amount deposited in this Court shall be remitted to the Tribunal forthwith.

No order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.05.2010

BEFORE
THE HON'BLE DEVENDRA KUMAR ARORA, J.

Service Single No. 2867 of 2010

Haridaya Nand Sharma ...Petitioner
Versus
State of U P & others ...Respondent

Counsel for the Petitioner:
Sri A M Tripathi

Counsel for the Respondent:
C.S.C

U.P. Government Servant (Discipline and Appeal) Rules 1999. Rule-4-Suspension order-without application of own independent mind of the appointing authority-order passed at behest of superior officer-not sustainable.

Held: Para-7

A perusal of the impugned order reveals that the suspension order dated 16.02.2010 has been passed in pursuance of the directions issued by the Special Secretary, Rural Development dated 3rd February, 2010 and apparently the suspension order has not been passed by the competent authority after due application of independent mind. As such the suspension order cannot be sustained and the same deserves to be quashed.

Case Law discussed:
AIR 1970 SC 1894
(2001) 6 SCC 260:
(AIR 2001 SC 2524)

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

1. Heard learned counsel for parties and perused the record.

By means of this writ petition, the petitioner has prayed for a writ in the nature of certiorari for quashing of the impugned order dated 16.02.2010, passed by opposite party no. 3, as contained in Annexure No. 1 to the writ petition. Petitioner has further prayed for a writ in the nature of mandamus commanding the opposite parties to allow the petitioner to continue to work and discharge his duties on the post of Senior Clerk/Accountant and to pay him salary regularly.

2. The facts of the case, in brief, are that the petitioner is working as Senior Clerk/Accountant in the office of the District Development Officer, Balrampur who has been placed under suspension by means of order dated 16.02.2010. Submission of learned counsel for the petitioner is that the impugned order of suspension has been passed at the behest of the directions issued by Special Secretary, Rural Development Department, Government of U.P., Lucknow dated 3rd February, 2010 (Annexure No.2 to the writ petition), without application of mind by the competent authority.

3. In support of his contention, learned counsel for the petitioner relies on a Division Bench Judgment of this Court dated 07.03.1994 passed in *Special Appeal No. 8 (SB) of 1994 Dinesh Kumar Srivastava Vs State of U.P. & others* in which it is held as under:-

"*A bare perusal of the documents, indicated above, including the order of suspension shown that there was a kind of clear direction on the part of the higher authorities to place the petitioner under suspension immediately.*"

He further relies on judgment and order dated 12.01.2010 passed by this Court in *Writ Petition No. 8410 (SS) of 2009 Ram Saharey Verma Vs. State of U.P.& others* in which this Court has held as under:-

"In the instant case, the appointing authority of the petitioner is Director. Though the Director has passed the suspension order, but it has been passed on the basis of the letter written by the Special Secretary dated 03.02.2010, contained in Annexure No.4 to the writ petition. Further, the Opposite Party No. 2, without applying his mind, has passed the suspension order. It is settled law and normally, when an appointing authority or the disciplinary authority seeks to suspend a delinquent employee, pending inquiry or contemplated inquiry or pending investigation into grave charges of misconduct or deflection of funds or serious acts of omission and commission, the order of suspension would be passed after taking into consideration the gravity or misconduct sought to be inquired and nature of evidence placed before the appointing authority and the authority concerned should consider all aspects and decide whether suspension is expedient or not and the same not be in an administrative routine and automatic manner."

Learned Standing counsel does not dispute that the impugned suspension order has been passed at the dictates of the Special Secretary, Rural Development

Department, Government of U.P., Lucknow.

Since the only legal question involved in the present writ petition is as to whether action of the appointing authority/ competent authority in passing the suspension order at the dictates of the higher authority is justifiable or not, the present writ petition is being considered and disposed of finally at the admission stage itself.

4. I have considered the arguments of the learned counsel for the respective parties and gone through the record.

Rule 4 of U.P. Government Servant (Discipline & Appeal) Rules 1999 provides that a government servant against whose conduct an inquiry is contemplated, or is proceeding, may be placed under suspension pending the conclusion of the inquiry in the discretion of the Appointing Authority. It is further provided that the suspension should not be resorted to unless the allegations against the government servant are so serious that in the event of their being established may ordinarily warrant major penalty.

5. In sum and substance, an employee can be placed under suspension in contemplation of an inquiry or during pendency of inquiry at the discretion of the Appointing Authority. This discretion is to be exercised by the Appointing Authority, if the allegations against a government servant are so serious that in the event of there being established, may warrant imposition of major penalty against the delinquent employee. Therefore, a discretion has to be exercised by the competent authority subjectively taking into consideration the entire material against the delinquent employee independently and the same cannot be exercised mechanically at the dictates of the higher authority. The higher authority at the most can request the appointing authority/competent authority to examine the case independently and pass appropriate orders after independent application of mind.

6. It is settled proposition of law that when Statute confers power on a particular authority or person to perform certain functions, it cannot be exercised by any other person.

In the **Purtabpur Company Ltd. V. Cane Commissioner of Bihar, AIR 1970 SC 1894**, the Hon'ble Supreme Court has observed as under (Paras 13 and 14):-

"The powers exercisable by the Cane Commissioner under Clause 6 (1) is statutory power. He alone could have exercised that power, while exercising that power, he cannot obligate his responsibilities in favour of any one, not even in favour of the State Government or the Chief Minister. It was not proper for the Chief Minister to have interfered with the functions of the Cane Commissioner……the Executive Officers, entrusted with statutory discretion, may, in some cases, be obliged to take into account consideration of public policy and in some context the policy of the Minister or the Government as the whole when it is relevant factor in weighing the policy but this will not absolve them from the duty to exercise the personal judgment in individual case unless explicit statutory provisions have been made for them to be given binding instructions by a superior."

Similarly, in **Tarlochan Dev Sharma v. State of Punjab, (2001) 6 SCC 260: (AIR 2001 SC 2524),** the Hon'ble Supreme Court, after placing reliance upon a large number of its earlier judgment, observed as under:-

"In the system of Indian democratic governance, as contemplated by the constitution, senior officers occupying good position as Secretaries, are not supposed to mortgage their own discretion, volition and decision-making authority and be prepared to give way or being pushed back or pressed ahead at the behest of the politicians for carrying out command having no sanctity in law……No Government servant shall in the performance of his official duties, or in the exercise of power conferred on him, act otherwise than in his best judgment except when he is acting under the direction of his official superior."

7. A perusal of the impugned order reveals that the suspension order dated 16.02.2010 has been passed in pursuance of the directions issued by the Special Secretary, Rural Development dated 3rd February, 2010 and apparently the suspension order has not been passed by the competent authority after due application of independent mind. As such the suspension order cannot be sustained and the same deserves to be quashed.

8. Writ petition is, therefore, allowed. The impugned suspension order dated 16.02.2010 is hereby quashed. However, it is open for the competent authority to pass afresh order if the material available on record against the petitioner is found so grave which may warrant awarding of major punishment against the petitioner, as per rules.

There is no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.05.2010

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE DR. SATISH CHANDRA, J.

Misc. Bench No. 3049 of 2010

Ram Nagar Refrigeration and Ice (Cold Storage) Private Limit ...Petitioner
Versus
State Of U.P ...Respondent

Counsel for the Petitioner:
Sri R.C. Pathak

Counsel for the Respondent:
C.S.C.,
Sri Pratyush Tripathi

U.P. Regulation of cold storage Act 1976-Section-35-pending Statuary Appeal-No interim order passed-due to non availability of member-inspite of direction of Court neither State Standing Counsel nor Additional Solicitor General produced any instruction-once the State as well as Central Govt. fails to discharge their statuary obligation-Court issued Mandamus to fulfill those vacancy within two months-recovery proceeding stayed till consideration of interim stay Application

Held: Para-8 and 9

We feel that State of U.P. as well as Government of India has failed to discharge the statutory duty in not filling the vacancy of the Tribunal. On account of failure on the part of the respondents, we are of the view that a direction may be issued to fill up the vacancy within a reasonable period to safeguard the litigant's interest.

Keeping in view the facts and circumstances of the case and public interest involved, we mould the relief with regard to filling up the vacancy of the Tribunal.

Accordingly, we allow the writ petition and a writ in the nature of mandamus is issued directing the opposite parties to fill up the vacancy of the Tribunal keeping in view the provision contained in Section 35 of the U.P. Regulation of Cold Storage Act 1976 and other law time being in force expeditiously preferably within a period of two months. The recovery proceedings shall remain suspended till the disposal of the interim relief application by the Tribunal, whenever it is duly constituted.

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

1. Heard Sri R. C. Pathak learned counsel for the petitioner, Sri H. P. Srivastava, learned Additional Chief Standing Counsel for the State of U.P. and Sri Pratyush Tripathi learned counsel for the Union of India. With the consent of parties, we proceed to decide the present writ petition finally at the admission stage.

2. The brief matrix of the present controversy relates to a pending appeal filed by the petitioner before the Cold Storage Tribunal, U.P. Lucknow established in pursuance to provision contained in U.P. Regulation of Cold Storage Act 1976.

3. Submission of the petitioner's counsel is that he has preferred a statutory appeal before the Tribunal on 05.01.2010 under the U.P. Regulation of Cold Storages Act, 1976. However, the application for interim relief could not be taken up since the members of the Tribunal are not available.

4. It has been stated that since 09.03.2010, the Tribunal is not functional on account of absence of members. The submission is that irreparable loss and injury would be caused to the petitioner in case this Court does not stay the recovery proceedings, which has been initiated in pursuance to impugned order, which is subject matter of the appeal pending before the Tribunal.

5. We had directed the learned Standing Counsel to receive instruction why the members for the Tribunal in question have not been appointed. In spite of repeated orders passed by this Court, neither Standing Counsel nor Assistant Solicitor General of India could receive any instruction.

6. It appears that the respondents are not conscious to the plight of the litigant whose matter is pending with the Tribunal. Section 35 of the Act provides the persons, who shall be member of the Tribunal. For convenience, Section 35 of the Act is reproduced as under:

***"35. Constitution of Tribunal**. – There shall be Tribunal consisting of the following members namely –*

a) The Agricultural Marketing Adviser the Government of India who shall be the Chairman;

b) the Legal Remembrance to the Government of Uttar Pradesh Officer of his department nominated by him not below the rank of Joint Legal Remembrance;

c) the Secretary to the Government in the Agriculture Department or an officer of that department nominated by

him not below the rank of Joint Secretary."

7. In the absence of member appointed for the purpose, the Tribunal is not functional. It is statutory duty of the State of U.P. as well as the Union of India to fill up the vacancies within the reasonable period. Once the retirement of an officer is known or an officer is transferred from the Tribunal to other place, then it shall be incumbent upon the State Government and the Central Government to fill up the vacancies immediately. The aims and objects of the Act is for licensing, supervision and control of Cold Storage in the State of U.P. and for matters connected therewith. In the absence of members constituting Tribunal, litigants have no option but to approach this Court under Article 226 and 227 of the Constitution of India.

8. We feel that State of U.P. as well as Government of India has failed to discharge the statutory duty in not filling the vacancy of the Tribunal. On account of failure on the part of the respondents, we are of the view that a direction may be issued to fill up the vacancy within a reasonable period to safeguard the litigant's interest.

Keeping in view the facts and circumstances of the case and public interest involved, we mould the relief with regard to filling up the vacancy of the Tribunal.

9. Accordingly, we allow the writ petition and a writ in the nature of mandamus is issued directing the opposite parties to fill up the vacancy of the Tribunal keeping in view the provision contained in Section 35 of the U.P. Regulation of Cold Storage Act 1976 and other law time being in force expeditiously preferably within a period of two months. The recovery proceedings shall remain suspended till the disposal of the interim relief application by the Tribunal, whenever it is duly constituted.

10. The registry shall send the copy of this order to the Chief Secretary, Government of U.P. as well as Secretary, Government of India, Agricultural Department within a week.

11. Let compliance report be filed to this Court within three months from today. The learned Standing Counsel as well as the Assistant Solicitor General of India shall also informed to the respective authorities accordingly.

With the aforesaid direction the writ petition is allowed.

No costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.05.2010

BEFORE
THE HON'BLE PRADEEP KANT, J.
THE HON'BLE ANIL KUMAR, J.

Misc. Bench No. 4489 of 2010

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

Counsel for the Petitioner:
Sri Bhaskar Pratap Dubey

Counsel for the Respondent:
C.S.C.

Constitution of India, Art-226-Writ Petition laches unexplained delay-

compensation-claimed for negligence of Doctor-who done sterlisation-failed-cause of action arose in 2002,-Petition filed 2010-can not be considered by writ court on highly below stage-liberty given to file Civil Suit if so advised.

Held: Para 18

In view of the abovesaid facts, as in the present case, the original cause of action had arisen on the part of the petitioner in the year 2002, so at this belated stage, the said issue comes within the ambit and scope of stale/dead issue cannot be adjudicated and decided at this belated stage and the present writ petition is liable to be dismissed on the ground of delay and laches.

Case law discussed:

2005 (7) SCC, 2003 (8) SCC 369, 2005 (6) SCC, (1957) 2 AIIER 118 (QBD), 2005 (7) SCC, (2000) 5 SCC 192.

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

1. Heard Sri Bhaskar Pratap Dubey, learned counsel for the petitioner and learned Standing Counsel on behalf of the respondents and perused the record.

2. Factual matrix of the present case are that the petitioner Smt. Sharda Devi, W/o Sri Vijay Kumar Dubey, R/o Village Malawan (Nandlal Ka Pura) Block Tarun, Tehsil Bikapur, District Faizabad had got five issues out of the wedlock, so they took a decision that they do not want any further issue taking into consideration the economic condition of the family. Accordingly it was mutually considered by petitioner Nos. 1 and 2 to go for Tebectomy operation. Accordingly, the same was performed on 19.01.2001 at the health centre Tarun, District Faizabad under the supervision of Dr. Ganga Ram who is the incharge of the said health centre and performed by the Surgeon namely Dr. Ram Sumer. In spite of the abovesaid fact, after expiry of nearly one and a half year, the petitioner No. 1 again became pregnant and gave birth a female child namely Kumari Satya Bhama (Petitioner No. 1) on 22.11.2002.

3. In view of the abovesaid circumstances, the present writ petition has been filed on behalf of the petitioner on the ground that due to medical negligence on the part of the Doctors of health centre, Known as Tarun, District Faizabad, an unwanted child was born on 22.11.2002. As the petitioner Nos. 1 and 2 have no other source to maintain their unwanted child, a compensation to the tune of Rs.8,00,000/- has been claimed by the Petitioner Nos. 1 and 2 for upbringing their unwanted child i.e. petitioner No. 1 who is born only due to sheer negligence on the part of respondent Nos. 4 and 5 and further a sum of Rs.5,00,000/- was claimed for marriage of petitioner No. 3.

4. In support of the relief as claimed by the petitioners, on their behalf Sri Bhaskar Pratap Dubey, learned counsel for the petitioner had relied on the following judgments namely:-

(a) Smt. Shakuntala Sharma and others Vs. State of U.P. and others 2002 UPLBEC 1084 and

(b) Sobha and others Vs. Government of NCT of Delhi and others 2002 AIC 236.

5. A preliminary objection raised by the learned Standing Counsel appearing on behalf of the State, Sri Anuj Kudesia in regard to the maintainability of the writ petition, he submits on the ground that in case of medical negligence, the relief as

claimed by the petitioner cannot be granted under Article 226 of the Constitution of India in view of the law as laid down by the Apex Court in the case of **State of Punjab Vs. Shiv Ram and others 2005 (7) SCC Volume 1.**

6. We have heard counsel for the parties and perused the record.

7. In our country population is one of the major problem and in order to control population, which is increasing by a tick of every second of the clock, the Central Government as well as State Government have taken family planning as an important programme under public policy and for implementation of the same various steps have been taken to create awareness in the citizen of the Country, one of the method to control the family planning is sterlisation operation.

8. Further, Family planning programme is one of the foremost need of the day in order to control population in our Country which is the second most populous country in the world and in order that it enters into an era of prosperity and progress, it is necessary that the growth of population is checked. As such the doctor who is performing the sterlisation operation in order to implement the family planning programme must perform the same with due care and caution. Further if there is failure on account of the negligence on the part of the doctor, and as a result of which an unwanted child has taken birth, which undoubtedly create additional economic burden on the person who has undergone sterlisation and he must be adequately compensated.

9. Failed sterlisation has been defined in **Halsbury's Laws of England, 4th Edn. (reissue), Vol.12 (1)**, while considering the question of "failed sterlisation", it is stated in para 896 as under:

"Failed sterlisation-Where the defendant's negligence performance of a sterlisation operation results in the birth of a healthy child, public policy does not prevent the parents from recovering damages for the unwanted birth, even though the child may in fact be wanted by the time of its birth.

Damages are recoverable for personal injuries during the period leading up to the delivery of the child, and for the economic loss involved in the expense of losing paid occupation and the obligation of having to pay for the upkeep and care of an unwanted child. Damages may include loss earnings for the mother, maintaining the child (taking into account child benefit), and pain and suffering to the mother"

10. Now the question which is to be determined in such type of cases, in order to award damages, where there is negligence on the part of the doctor who has performed the sterlisation operation or not, if there is any negligence on the part of the doctor, then up to what extent the damages is to be awarded to a person who has given birth to an unwanted child after sterlisation operation.

11. In the case of **Javed Vs. State of Haryana 2003 (8) SCC 369** popularly known as 'Two-child Norm' case. Hon'ble the Apex Court has held that the problem of increasing population, the danger which it poses for the progress of the

nation and equitable distribution of its resources and upheld the validity of the Haryana legislation imposing a disqualification on persons having more than two children from contesting for an elective office. The fact cannot be lost sight of that while educated persons in the society belonging to the middle-class and the upper class do voluntarily opt for family planning and are careful enough to take precautions or remedial steps to guard against the consequences of failure of sterilization, the illiterate and the ignorant and those belonging to the lower economic strata of society face the real problem. To popularize family planning programmes in such sections of society, the State Government should provide some solace to them if they, on account of their illiteracy, ignorance or carelessness, are unable to avoid the consequences of a failed sterilization operation. Towards this end, the State Governments should think of devising and making provisions for a welfare fund or taking up with the insurance companies, a proposal for devising an appropriate insurance policy or an insurance scheme, which would provide coverage for such claims where a child is born to woman who has undergone a successful sterilization operation, as in the present case.

12. Further, the Apex Court in the case of **Jacob Mathew Vs. State of Punjab 2005 (6) SCC volume 1** has approved the test as laid down in **Bolam Vs. Friern Hospital Management Committee (1957) 2 AIIER 118 (QBD)** popularly known as Bolam's test has held as under:-

"The basis of liability of a professional in tort is negligence. Unless that negligence is established, the primary liability cannot be fastened on the medical practitioner. Unless the primary liability is established, vicarious liability on the State cannot be imposed. Both in criminal jurisprudence and in civil jurisprudence, doctors are liable for consequences of negligence. In Jacob Mathew even while dealing with criminal negligence, this Court has indicated the caution needed in approaching a case of medical negligence having regard to the complexity of the human body which is subjected to treatment and the uncertainty involved in medical procedures. A doctor, in essence, needs to be inventive and has to take snap decisions especially in the course of performing surgery when some unexpected problems crop up or complication sets in. If the medical profession, as a whole, is hemmed in by threat of action, criminal and civil, the consequence will be loss to the patients. No doctor would take a risk, a justifiable risk in the circumstances of a given case, and try to save his patient from a complicated disease or in the face of an unexpected problem that confronts him during the treatment or the surgery. It is in this background that this Court has cautioned that the setting in motion of the criminal law against the medical profession should be done cautiously and on the basis of reasonably sure grounds. In criminal prosecutions or claims in tort, the burden always rests with the prosecution or the claimant. No doubt, in a given case, a doctor may be obliged to explain his conduct depending on the evidence adduced by the prosecution or by the claimant.

13. Again in the case of **State of Punjab Vs. Shiv Ram and others (2005) and others 2005 (7) SCC 1 in para 25 and 30,** the Apex Court has held as under:-

"Para - 25 - *We are, therefore, clearly of the opinion that merely because a woman having undergone a sterilization operation became pregnant and delivered a child, the operating surgeon or his employer cannot be held liable for compensation on account of unwanted pregnancy or unwanted child. The claim in tort can be sustained only if there was negligence on the part of the surgeon in performing the surgery. The proof of negligence shall have to satisfy Bolam's test. So also, the surgeon cannot be held liable in contract unless the plaintiff alleges and proves that the surgeon had assured 100 % exclusion of pregnancy after the surgery and was only on the basis of such assurance that the plaintiff was persuaded to undergo surgery. As noted in various decisions which we have referred to hereinabove, ordinarily a surgeon does not offer such guarantee.*

Para - 30- *The cause of action for claiming compensation in cases of failed sterilization operation arises on account of negligence of the surgeon and not on account of child birth. Failure due to natural causes would not provide any ground for claim. It is for the woman who has conceived the child to go or not to go for medical termination of pregnancy. Having gathered the knowledge of conception in spite of having undergone sterilization operation, if the couple opts for bearing the child, it ceases to be an unwanted child. Compensation for maintenance and upbringing of such a child cannot be claimed."*

14. In view of the said facts, if a lady undergone sterlization operation under Teberctomy operation and even then an unwanted child is born then such lady in order to claim a damages has to file a suit for compensation as in the suit on the basis of evidence and the documents filed by the parties etc. it can be ascertained that where the doctor who has performed the operation up to what extent he is negligent due to which the operation fails and accordingly thereafter it can be judged that what compensation can be awarded in a particular case which cannot be done while exercising the power of judicial review under Article 226 by this Court because the matter in respect to the negligence, if any, performed by the doctor performing sterilization/operation cannot be judged before this Court as the same needs elaborate evidence and materials including investigation and further this Court can also not with any other district can come to the conclusion what amount of compensation is to be awarded in a particular case.

15. The above view taken by us also gets support from case of **State of Haryana and another Vs. Santara reported in (2000) 5 SCC 192**, where a poor lady underwent a sterilisation operation at the General Hospital, Gurgaon, as she already had seven children an wanted to take advantage of the scheme of sterilization launched by the State Government of Haryana. She was then issued a certificate that her operation was successful. She was assured that she would not conceive a child in future. But, she conceived and ultimately gave birth to a female child. She filed a suit against the State and its officers for recovery of Rs. 2 lakh as damages for medical negligence. The explanation offered by the officers, of the appellant State who were defendants in the suit, was that at the time of the sterilization operation, only the right Fullopian tube

was operated upon and the left Fullopian tube was left untouched. This explanation was rejected by the trial court, which decreed the suit for a sum of Rs. 54,000 with pendente lite and future interest @ 12 % per annum. The decision was confirmed by the appellate court and the High Court and thereafter the appeal filed by the State of Haryana & others was also dismissed by the Hon'ble Apex Court.

16. Further as per the facts of the present case, the sterilization/operation was performed on 19.01.2001 and thereafter the unwanted child (petitioner No. 3) was born on 22.11.2002 and the present writ petition for the alleged negligence and grant of compensation has been filed in the year 2010. So, the present writ petition is liable to be dismissed on the ground of delay and laches alone as the petitioners have not given any reason whatsoever in approaching this Court at a belated stage for redressal of their grievances.

17. Needless to mention herein that previously Courts did show lenience and latitude in dealing with matter filed at a belated stage. Thereby considering the delay in challenging the order which are otherwise barred by limitation. It is high time a changed perspective and attitude should be adopted, since the Courts are already overburdened with cases resulting in inordinate delay in disposal of cases. Those days of condonation of dalliance and delay would now be over and in cases where no sufficient and proper reason is assigned for delay, the Court must adopt the stern attitude and refuse relief. That will also help in transmitting a message that the Court will no more be indulgent and parties beware.

18. In view of the abovesaid facts, as in the present case, the original cause of action had arisen on the part of the petitioner in the year 2002, so at this belated stage, the said issue comes within the ambit and scope of stale/dead issue cannot be adjudicated and decided at this belated stage and the present writ petition is liable to be dismissed on the ground of delay and laches.

19. For the foregoing reasons, we are not inclined to interfere in the matter while exercising the power under Article 226 of the Constitution of India.

20. Thus, for the reasons stated above, the present writ petition is dismissed. However, if the petitioners are so advised, they may seek their remedy, in the appropriate forum i.e. by filing a civil suit, as may be permissible in law.

21. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 21.05.2010

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.

Service Single No.1034 of 1999

Ram Lal ...Petitioner
Versus
Managing Director U.P. Cooperative Bank Ltd ...Respondent

Counsel for the Petitioner
Sri Sandeep Dixit,
Sri H.K. Misra,
Sri H.S. Jain

Counsel for the Respondent
Sri N.K. Seth

U.P. Co-operative Societies Employees Regulation-1975-Regulation 85- Dismissal order-without holding enquiry without opportunity of personal hearing even the period of medical leave duly sanctioned not considered-order set-a-side-with all consequential benefits with 50% salary.

Held: Para 11

In the facts and circumstances of the case, at least, it is not a case which shall warrant major punishment from dismissal from service. Once, leave has been sanctioned by the competent authority, then the period of absence from duty does not seem to constitute the allegation of misconduct. There may be procedural illegality on the part of the petitioner but that shall not warrant to make out a case for imposition of major penalty. In view of the above, the writ petition deserves to be allowed.

Case law discussed

(2006) 5 SCC 88, (2002) 7 SCC 142, 1983 (1) LCD 169, 1984(2) LCD 396, (2001) 1 UPLBEC 331, .2003 (21) LCD 610, (2010) 2 SCC 772.

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

1. Heard Sri Hemant Kumar Mishra, Sri D.P. Sombanshi, learned counsel for the petitioner and Sri Vijai Kumar holding brief of Sri B.L. Verma, learned counsel for the respondents.

2. Facts of the case in brief, available on record, are that the petitioner was appointed as Sahyogi in the World Bank Project Division, Lucknow in 1978. Thereafter, he was transferred to U.P. Cooperative Bank Limited, Lucknow on the same post of Sahyogi in 1990. On 10.10.1993, the petitioner was transferred to the Head Office of the U.P. Cooperative Bank Talkatora Branch, Lucknow and on 11.12.1993, he was appointed on the post of Sahyogi in Class IV cadre on the recommendations of the U.P. Cooperative Institutional Service Board against regular vacancy. On account of absence from duty, the petitioner was suspended by order dated 31.5.1997 (Annexure No.5 to the writ petition), in contemplation of departmental inquiry.Chargesheet dated 14.7.1997 (Annexure No.6 to the writ petition), was served on the petitioner in response to which, he while submitting reply dated 31.7.1997 (Annexure No.7 to the writ petition), stated that the period, during which he remained absent from duty, was already condoned and leave had been accepted and medical leave was granted by the competent authority.

3. After receipt of reply of the petitioner, the inquiry officer submitted report. Thereafter, show cause notice dated 31.8.1997 (Annexurre No.9 to the writ petition), was served on the petitioner. The petitioner submitted reply dated 13.9.1998 (Annexure No.11 to the writ petition) and after receipt of the reply, by the impugned order dated 19.12.1998 (Annexure No.12 to the writ petition), the petitioner was dismissed from service.

4. While assailing the impugned order, the petitioner's counsel raised two fold arguments: (a) since the medical leave was sanctioned by the competent authority for the period of 200 days, the allegation of absence from duty, shall not constitute "misconduct" and (b), the inquiry officer has not recorded any oral evidence nor has given any opportunity to cross examine the prosecution witness nor opportunity to lead evidence in defence coupled with personal hearing was given to the petitioner.

Hence the inquiry vitiates because of non-compliance of principles of natural justice. The disciplinary authority has also not provided any opportunity of personal hearing.

5. It is settle proposition of law that departmental enquiry means service of chargesheet with opportunity to delinquent employee to submit a reply thereafter it shall be necessary to record oral evidence to prove the allegations contained in chargesheet. In case the delinquent employee does not cooperate then it shall be incumbent upon the enquiry officer to proceed exparte and record oral evidence in support of allegations contained in the chargesheet. Thereafter, it shall be necessary to provide and opportunity to the delinquent employee to lead evidence in defence coupled with opportunity of personal hearing. After receipt of report from enquiry officer it shall be necessary for the punishing authority to serve a show cause notice along with copy of enquiry report and thereafter pass appropriate order in accordance with law vide, **M.V.Bijlani Vs. Union of India and others (2006) 5 SCC 88 Sher Bahadur Vs. Union of India and others (2002) 7 SCC 142 B.P. Chaurasia Vs. State of U.P. and others 1983 (1) LCD 169 Onkar Singh Vs. State of U.P. and others 1984(2) LCD 396 Hardwari Lal Vs. State of U.P. and others (2001) 1 UPLBEC 331 Radhey Kant Khare Vs. U.P. Cooperative Sugar Factories Fedration Ltd. 2003 (21) LCD 610.**

6. In the present case, admittedly, neither any evidence was recorded nor the petitioner was given opportunity to lead evidence in defence to substantiate that no misconduct is made out because of the fact that the medical leave was sanctioned by the competent authority with continuity of service.

7. Apart from the above, attention has been invited to recent judgment of Hon'ble Supreme Court reported in **(2010) 2 SCC 772 (State of Uttar Pradesh and others. Vs. Saroj Kumar Sinha)**, where their lordships of Hon'ble Supreme Court while reiterating the earlier settled proposition of law (supra) held that failure on the part of the inquiry officer to grant opportunity of cross examination by the delinquent employee and also the opportunity to lead evidence in defence, vitiated the inquiry. For convenience, relevant portion from the judgment of Saroj Kumar Sinha (supra), is reproduced as under:

"28. An inquiry officer acting in a quasi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/ Government. His function is to examine the evidence presented b the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved and could not have been taken into consideration to conclude that the charges have been proved against the respondents.

29. Apart from the above, by virtue of Article 311 (2) of the Constitution of India the departmental enquiry had to be conducted in accordance with the rules of

natural justice. It is a basic requirement of the rules of natural justice that an employee be given a reasonable opportunity of being heard in any proceedings which may culminate in punishment being imposed on the employee.

30. When a departmental enquiry is conducted against the government servant it cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with a closed mind. The inquiry officer has to be wholly unbiased. The rules of natural justice are required to be observed to ensure not only that justice is done but is manifestly seen to be done. The object of rules of natural justice is to ensure that a government servant is treated fairly in proceedings which may culminate in imposition of punishment including dismissal/removal from service."

8. Apart from the judgment of Hon'ble Supreme Court referred and discussed hereinabove, Regulation 85 of the U.P. Cooperative Societies Employees Regulations, 1975 also provides that delinquent employee shall be given opportunity to submit reply to chargesheet and shall also be given opportunity produce at his own cost or to cross-examine witnesses in his defence and shall also be given an opportunity of being hearing in person. Regulation 85 (i) (a), (b) and (c) of the aforesaid Regulations is reproduced as under:

85. Disciplinary proceedings.---(i) The disciplinary proceedings against an employee shall be conducted by the Inquiring Officer [referred to in clause (iv) below with due observance of the principles of natural justice for which it shall be necessary that---

(a) the employee shall be served with a charge-sheet containing specific charges and mention of evidence in support of each charge and he shall be required to submit explanation in respect of the charges within reasonable time which shall not be less than fifteen days;

(b) such an employee shall also be given an opportunity to produce at his own cost or to cross-examine witnesses in his defence and shall also be given an opportunity of being heard n person, if he so desires;

(c) if no explanation in respect of charge-sheet is received or the explanation submitted is unsatisfactory the competent authority may award him appropriate punishment considered necessary."

9. Thus, the statutory provisions also provide that while holding disciplinary proceedings the delinquent employee must be given reasonable opportunity to defend his cause. In case the procedure prescribed under law, is not followed, then it shall vitiate the inquiry proceeding. In view of settled proposition of law, it shall be incumbent to inquiry officer to provide reasonable opportunity to the delinquent employee to defend his cause. Denial of opportunity shall be hit by Article 14 of the Constitution of India.

10. Now, coming to the next limb of argument. The inquiry officer himself while submitting report, observed that during period of absence of leave, the petitioner moved an application to sanction medical leave. The competent authority has sanctioned the medical leave. This fact was brought to the notice of the inquiry officer by the letter of the

Chief Manager dated 16.12.2007. However, the inquiry officer though, not disbelieved the letter but observed that appropriate entry has not been made in the book to debit the leave period. Whatever entry has been made it is after institution of proceeding. Even if necessary entry has not been made in book immediately and has been recorded after institution of proceeding, the submission of delinquent employee carries weight.

11. In the facts and circumstances of the case, at least, it is not a case which shall warrant major punishment from dismissal from service. Once, leave has been sanctioned by the competent authority, then the period of absence from duty does not seem to constitute the allegation of misconduct. There may be procedural illegality on the part of the petitioner but that shall not warrant to make out a case for imposition of major penalty. In view of the above, the writ petition deserves to be allowed.

12. Accordingly, the writ petition is allowed. A writ in the nature of certiorari is issued quashing the impugned order dated 19.12.1998 (Annexure No.12 to the writ petition), with all consequential benefit of service. The petitioner shall be restored in service forthwith with continuity of service and all consequential benefits. However, since the petitioner has not discharged duty the payment of salary is confined to 50% admissible under Rules. Liberty is given to respondents to proceed afresh in case, advised to do so.

No costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.05.2010

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 10970 of 2010

Abdul Sattar and others ...Petitioner
Versus
State of U.P. and others ...Respondent

Counsel for the Petitioner
Sri Krishan Ji Khare,
Sri A.P.M. Tripath

Counsel for the Respondent
C.S.C.

U.P. Direct Recruitmnet Group-D Post Rules 1986-appointemnt on class 4th post-recognised aided Intermediate education-governed by Regulation 101-107 of the Education Act-No procedure regarding mode of appointment-Rule 86-provides one nominee of D.M. in committee- in absense of nominee of D.M. The selection Committee with entire selection vitiated-keeping it open to re-advertise the vacancy.

Held: Para 4

In view of the aforesaid, it is now a settled legal position that appointment on Class-IV posts which can be approved, have to be made through a Selection Committee which must comprise of a member nominated by the District Magistrate. Since the Selection Committee, in pursuance whereof petitioner nos.10 to 16 have been appointed, did comprise of a nominee of District Magistrate, the selection are held to be illegal

Case law discussed:
2010 (1) ADJ 403"

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

1. Heard learned counsel for the petitioners Sri Krishna Ji Khare, Advocate, learned Standing counsel on behalf respondent nos.1, 2, 3, 4 & 9 as well as counsel for respondent nos. 10 to 16.

2. Counsel for the parties agree that the writ petition may be disposed of at this stage without calling any counter affidavit specifically in view of the order proposed to be passed today.

3. It may be record that the learned Standing counsel has produced a copy of the Government order dated 11.5.2001, wherein it has been specifically mentioned that the provisions of the U.P. Direct Recruitment Group-D Posts Rules, 1986 (hereinafter referred to as Rules, 1986) notified on 8.9.1986, are in force and no appointment on Class-IV posts in recognized and aided Intermediate colleges shall be approved except when made in accordance to said Rules, 1986. It may be recorded that under Regulation 101 to 107 of Chapter III of the Regulation framed under the Intermediate Education Act, no procedure has been prescribed for such appointment. The Government order dated 11.5.2001 is referable to the powers vested in the State Government under Section 9(4) of the Intermediate Education Act. The controversy with regard to the procedure to be followed in the matter of appointment of ministerial and Class-IV employees in Intermediate colleges has been explained in detail by this Court in the case of "***Principal Adarsh Inter College, Umari, Bijnor Vs. State of U.P. And others; reported in 2010 (1) ADJ 403***". The judgment of the Single Judge stands affirmed by a Division Bench of this Court with the dismissal of Special Appeal No.1851 of 2009 "Principal, Adarsh Inter-College Umari Vs. State of U.P. & others." filed against the same, vide judgment and order dated 3.12.2009.

4. In view of the aforesaid, it is now a settled legal position that appointment on Class-IV posts which can be approved, have to be made through a Selection Committee which must comprise of a member nominated by the District Magistrate. Since the Selection Committee, in pursuance whereof petitioner nos.10 to 16 have been appointed, did comprise of a nominee of District Magistrate, the selection are held to be illegal.

5. In view of the aforesaid, this Court finds that the petitioner is entitled to the relief prayed for the reasons that the selections held are not in accordance with law. As a result, the entire proceedings stands vitiated. The order of approval dated 20.11.2009 is hereby set-aside. The writ petition is allowed. The Principal of the institution is directed to re-advertise the vacancy in accordance with law and to hold fresh selections having regard to the Government order applicable and the procedure prescribed, within eight weeks from the date a certified copy of this order is filed before him. Respondent nos.10 to 16 are at liberty to apply.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.04.2010

BEFORE
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No. 12330 of 2007

Raj Kumar and another ...Petitioner
Versus
Rajasv Parishad Uttar Pradesh Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri Surya Pratap Yadav

Counsel for the Respondents:
Sri Rajesh Pandey
Sri Anuj Kumar
C.S.C.

U.P. Z.A. & L.R. Act-122-B(U-E)-Cancellation of allotment of Patta allottee a widow lady already possessing 0.866 hectare land-not within.meaning of landless agricultural labour-against statute sympathy has no role to play nor entitle for any benefit of section 122-B(u-F)-suit dismissed.

Held: Para 16

In my considered view, the aforesaid quoted portion from the judgment of the Apex Court is equally applicable to the facts of the present case notwithstanding the fact that the said observations were made while considering a case of workmen under the Labour Laws. Moreover, in the present case, the plea of sympathy in favour of the plaintiff respondent no.3 is misplaced one as she has got two grown up sons who are well placed in life as they are in police service. She has, admittedly, got a piece of land in her own name. There may be other persons in the village having no land or source of income or having no earning member in their family. The two judgment and orders of the Appellate Authorities are based on irrelevant considerations and they cannot be allowed to stand.

Case law discussed:
AIR 2005 SC 851, (2004) 7 SCC 112, (JT 2003(2) SC 88).

(Delivered by Hon'ble Prakash Krishna, J.)

1. The present writ petition arises out of Suit No.97 instituted by Lachi Devi, respondent no.3 herein under Section 229 B of the U.P.Z.A. & L.R. Act for declaration of her right in respect of Araji No.479 area 0.454 situate in village Maharkhan, Pargana Mahuari, Tehsil-Sakaldiha, District Chandauli on the ground that she is a landless agriculturist and is member of Scheduled Caste community. She is entitled to get the benefit as provided for under Section 122 B (4-F) of the U.P.Z.A. & L.R. Act and her name may be recorded in the revenue record and the entry of 'Navin Parti' be corrected accordingly.

2. The suit was contested by Gaon Sabha on the pleas inter alia that the plaintiff does not fall in the category of landless agriculturist. Her two sons are major and they are in government service. They are jointly residing with their mother. An other suit in respect of same land being suit No.110 of 2001 under Section 229 B read with Section 122 B (4-F) of the Act has been filed by Gulab and others which is pending before the Court. Possession of the plaintiff Lachi Devi or Gulab and others was denied by Gram Pradhan.

3. Parties led evidence in support of their respective cases. Lachi Devi in her deposition stated that her two sons are leaving separately from her and she is an agriculturist. Earlier, her husband was

carrying on agricultural operations over the land in question and now, she is earning her livelihood therefrom. She also produced other witnesses in support of her case. The defence also produced evidence to show that Lachi Devi has not matured her right over the land in question and her two sons are in Police Department and she has got an Araji No.478 area 0.866 hectare.

4. The trial Court after considering the evidence led by the respective parties, held that she does not fall in the category of landless agricultural labourer. She failed to prove her alleged possession of thirty years as she has not filed any revenue record in support thereof such as Khasra or any documentary evidence. The suit was dismissed by the order dated 30th of March, 2005. The decree was challenged in appeal No.13 of 2005 before the Additional Commissioner (Jud.), who by the order dated 16.6.2005 allowed the appeal and set aside the judgment and decree of the trial Court and decreed the suit by passing necessary direction for recording the name of Lachi Devi over the plot in question.

5. The order of the First Appellate Authority has been confirmed in second appeal No.70 of 2004-2005 by the Board of Revenue, U.P. at Allahabad.

6. The learned counsel for the petitioners submits that both the Appellate Authorities have committed mistake in decreeing the suit of Smt. Lachi Devi on the ground that she is a widow. Merely because, the plaintiff is a widow, unless the requirements of Section 122 B (4-F) of the Act are fulfilled, no right shall accrue in her favour. None of the Appellate Authorities has found possession of Lachi Devi over the land in dispute.

7. The learned counsel for the respondents, on the other hand, supports the impugned orders.

8. Considered the respective submissions of the learned counsel for the parties and perused the record. Section 122 B(4-F) of the Act, for the sake of convenience is reproduced below:-

"122B (4-F). Notwithstanding anything in the foregoing sub-sections, where any agricultural labourer belonging to Scheduled Caste or Scheduled Tribe is in occupation of any land vested in a Gaon Sabha under Section 117 (not being land mentioned in Section 132) having occupied it from before June 30, 1985 and the land so occupied together with land, if any, held by him from before the said date as Bhumidhar, Sirdar or Asami, does not exceed 1.26 hectares (3.125 acres), then no action under this section shall be taken by the Land Management Committee or the Collector against such labourer, and it shall be deemed that he has been admitted as bhumidhar with non-transferable rights of that land under Section 195."

9. Section 122 B (4-F) of the Act provides that notwithstanding anything in the foregoing sub-sections, where any agricultural labourer belonging to Scheduled Caste or Scheduled Tribe is in occupation of any land vested in a Gaon Sabha under Section 117 (not being land mentioned in Section 132) having occupied it from before June 30, 1985 and the land so occupied together with land, if any, held by him from before the said date

as Bhumidhar, Sirdar or Asami, does not exceed 1.26 hectares (3.125 acres), then no action under this section shall be taken by the Land Management Committee or the Collector against such labourer, and it shall be deemed that he has been admitted as bhumidhar with non-transferable rights of that land under Section 195.

10. The said provision does not give any special or additional right to a widowed agricultural labourer belonging to Scheduled Caste or Scheduled Tribe. One of the essential conditions for conferment of Bhumidhari with non transferable rights is that the claimant must be in occupation of the land in dispute on the relevant cut off date. Besides the other things, in other words, occupation of land is also one of the requirements or ingredients so far as Section 122 B (4-F) of the Act is concerned.

11. The trial Court found as a fact that the plaintiff Smt. Lachi Devi has failed to prove her possession over the land in dispute. She failed to substantiate her claim that she has been in possession of the said land for the last thirty years. No documentary evidence such as Khasra was filed to corroborate her plea regarding possession. Indisputably, the said finding recorded by the Trial Court has not been disturbed or reversed by the First Appellate Authority. A perusal of the judgment of the First Appellate Authority would show that it proceeded to allow the appeal by setting aside the judgment and decree of the Trial Court simply on the ground that the plaintiff is a widow. The order of the First Appellate Authority has been confirmed by the Second Appellate Authority. The question which falls for consideration is whether such an approach is justified or not.

12. The learned counsel for the petitioners is right in his submission that merely because the plaintiff respondent no.3 is a widow, the law does not grant her any such concession or benefit under the aforesaid Section. A person can succeed only on the fulfillment of ingredients of Section 122 B (4-F) of the Act and not otherwise. The finding recorded by the Trial Court that the plaintiff has failed to prove her possession on the relevant date over the land in question having not been reversed, it follows that the plaintiff has failed to satisfy the ingredients as provided by Section 122 B (4-F) of the Act.

13. The learned counsel for the respondents submits only this much that the plaintiff being a widow deserves sympathy of the Court. The said argument is merit-less and does not advance the case of the plaintiff respondent no.3.

14. While considering a Statute "sympathy has no role to play". The Apex Court has laid down that a Court can not interpret a provision binding decisions of the Constitution Bench of this Court only by way of sympathy to the concerned person. In **Maruti Udyog Ltd. Vs. Ram Lal, AIR 2005 SC 851** the Apex Court has noticed its earlier judgments and held that ordinarily Court would not pass an order on the ground of sympathy which would be in contravention of Statutory provision. The relevant paragraphs are extracted below from the aforesaid judgment:-

"44. While construing a statute, 'sympathy' has no role to play. This Court

cannot interpret the provisions of the said Act ignoring the binding decisions of the Constitution Bench of this Court only by way of sympathy to the concerned workmen.

45. In A. Umarani v. Registrar, Co-operative Societies and others (2004) 7 SCC 112, this Court rejected a similar contention upon noticing the following judgments: AIR 2004 SC 4504: 2004 AIR SCW 4462: 2004 Lab IC 3206 Paras 67, 68 and 69,

"In a case of this nature this court should not even exercise its jurisdiction under Article 142 of the Constitution of India on misplaced sympathy.

In Teri Oat Estates (P) Ltd. v. U.T., Chandigarh and others (2004) 2 SCC 130, it is stated;

"We have no doubt in our mind that sympathy or sentiment by itself cannot be a ground for passing an order in relation whereto the appellants miserably fail to establish a legal right. It is further trite that despite an extra-ordinary constitutional jurisdiction contained in Article 142 of the Constitution of India, this Court ordinarily would not pass an order, which would be in contravention of a statutory provision.

As early as in 1911, Farewell L.J. in Latham v. Richard Johnson and Nephew Ltd. 1911-13 AER reprint p.117) observed:

"We must be careful not to allow our sympathy with the infant plaintiff to affect our judgment. Sentiment is a dangerous Will O' the Wisp to take as a guide in the search for legal principles."

15. Yet again recently in Ramakrishna Kamat and others v. State of Karnataka and others (JT 2003(2) SC 88), this Court rejected a similar plea for regularization of services stating : AIR 2003 SC 1530 : 2003 AIR SCW 890 : 2003 Lab IC 1196 : 2003 AIR -Kant HCR 702
Para 7

"... We repeatedly asked the learned counsel for the appellants on what basis or foundation in law the appellants made their claim for regularization and under what rules their recruitment was made so as to govern their service conditions. They were not in a position to answer except saying that the appellants have been working for quite some time in various schools started pursuant to resolutions passed by zilla parishads in view of the government orders and that their cases need to be considered sympathetically. It is clear from the order of the learned single Judge and looking to the very directions given a very sympathetic view was taken. We do not find it either just or proper to show any further sympathy in the given facts and circumstances of the case. While being sympathetic to the persons who come before the court the courts cannot at the same time be unsympathetic to the large number of eligible persons waiting for a long time in a long queue seeking employment..."

16. In my considered view, the aforesaid quoted portion from the judgment of the Apex Court is equally applicable to the facts of the present case notwithstanding the fact that the said observations were made while considering a case of workmen under the Labour Laws. Moreover, in the present case, the plea of sympathy in favour of the plaintiff

respondent no.3 is misplaced one as she has got two grown up sons who are well placed in life as they are in police service. She has, admittedly, got a piece of land in her own name. There may be other persons in the village having no land or source of income or having no earning member in their family. The two judgment and orders of the Appellate Authorities are based on irrelevant considerations and they cannot be allowed to stand.

17. In the result, the writ petition succeeds and is allowed. The suit filed by the plaintiff respondent no.3 under Section 229 B read with Section 122 B (4-F) of the Act stands dismissed.

18. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.05.2010

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

Civil Misc. Writ Petition No. 13821 of 2010

U.P. Power Corporation Limited and another ...Petitioners
Versus
National Human Rights Commission and another ...Respondents

Counsel for the Petitioner:
Sri Arvind Kumar

Counsel for the Respondents:
S.C.

Constitution of India-Art.226- readwith Section 18 of Protection of Human Rights, 1993- Finding regarding violation of human right-based upon enquiry and the award of compensation of Rs. 300000/- held well within jurisdiction-so for argument regarding compensation of Rs. 1 Lac by Corporation can not be enhanced-held-.misconceived-second part relating to compensation of Rs. 4 Lac for electric shot to the wife of petitioner in connected petition reduced to Rs. 2,50,000/- keeping in view the amount expended in treatment is only Rs. 70,000 + 1 Lac with these alternative order passed by commission upheld.

Held: Para 13, 15 &17

According to section 18(a) where inquiry discloses the commission of violation of human rights or negligence in the prevention of violation of human rights or abetment thereof by a public servant, it may recommend to the concerned Government or authority to make payment of compensation or damages as the Commission may consider necessary." Thus, the commission has jurisdiction to recommend compensation as the Commission may consider necessary. The power of the Commission under section 18 is not inhibited by any other provisions or any State Legislature or subordinate legislation. The power of the Commission under section 18 is in addition to any other provisions covering the subject matter and not in derogation of any other provisions of law. Entitlement of a person whose human rights have been violated in accordance with the relevant statutory provisions governing payment of compensation, does not in any manner create a fetter in the right of Commission to find out the magnitude of violation of human rights and award a compensation. Thus, the mere fact that under the orders issued by the U.P. Power Corporation, amount of Rs. 1,00000/- has been fixed in case of death or injury by the Corporation, does not fetter the rights of the Commission to award compensation over and above the amount of Rs. 1,00000/-. Thus, the order of the Commission awarding compensation more than Rs. 1,00000/- cannot be faulted on the above ground.

Now comes the second writ petition being writ petition No. 40513 of 2008, as observed above the U.P. Human Rights Commission found violation of the human rights of the wife of the respondent no. 2 and the findings recorded by the U.P. Human Rights Commission in so far as violation of human right of the wife of the respondent no. 2, deserves no interference by this Court.

In the facts and circumstances of the present case, we are satisfied that the order of the U.P. Human Rights Commission directing for payment of Rs. 4,0000/- be substituted with a direction to make payment of Rs. 2,50,000/-. The second writ petition is thus, partly allowed by substituting the direction for payment of Rs. 2,50,000/- as compensation within one month.

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

1. These two writ petitions challenging the orders passed by the National Human Rights Commission and other of U.P. Human Rights Commission respectively, raise similar question of law and have been heard together. Brief facts necessary to be noticed of these two writ petitions are; writ petition No. 13821 of 1010 has been filed by the U.P. Power Corporation Ltd. challenging the order dated 6.11.2009, recommending General Manager U.P. Power Corporation to pay a sum of Rs.3,00000/- as monetary relief to the next of kin of deceased Ramadhar Yadav. The deceased Ramadhar Yadav was electrocuted, while working on an electric pole of 11 KV Transmission Line. Ramadhar Yadav was an electric mechanic, who although was not regular or causal employee of the U.P. Power Corporation but the work was being taken from him by the employees of the U.P. Power Corporation and on a fateful day on 6.8.2008, it is the case of the petitioner that the deceased Ramadhar Yadav was called from his house by one Markandey Singh, skill coolie and Chandrapati Pandey, S.S.O for repairing of 11 K.V. Line. Ramadhar Yadav, while working on the pole suffered electric current and was taken to hospital by aforesaid two persons and thereafter to Varanasi, where he died on 8.8.2008. A complaint was filed by the respondent no. 2, the son of the deceased Ramadhar Yadav before the National Human Rights Commission, who after calling a report from the Corporation and Senior Superintendent of Police, Mau held an inquiry and thereafter passed the impugned order holding that the Commission has found in some other cases that outsiders are some times engaged in an unauthorised manner for repairs of transmission lines. This practice results in serious violation of human rights inasmuch as the hapless worker is not only exposed to insecurity of life but is also deprived of the benefits of labour laws. The National Human Rights Commission recommended for payment of a sum of Rs.3,00000/- as monetary relief to next of kin of the deceased Ramadhar Yadav.

2. In writ petition No. 41053 of 2008, the petitioner has challenged the order dated 27.3.2008, passed by one member of U.P. Human Rights Commission. The facts of the case are that one Smt. Chandrawati Devi, wife of Nand Lal Yadav, while going to her paddy field on 8.9.2007 at 8:00 a.m. in the morning came in touch with a live wire of 11000 volt which had broken from pole and was hanging near the earth. A complaint was submitted by the respondent no. 2, the husband of Smt. Chandrawati Devi in January, 2008, stating that wife of the

complainant came into contact of live wire of 11 KV on 8.9.2007, while going to her agricultural field and fell down, who was subsequently taken to hospital, she was being treated at Varanasi and an amount of Rs. 70,000/- had been spent towards treatment and an amount of Rs.1,00000/- has more to be spent on her treatment. The wire was broken on 6.9.2007 but no safety measures were taken by the Corporation. The Electricity Department or the State should be directed to pay an amount of Rs.5,00000/- . A report dated 24.3.2008 was submitted to the Commission by the Executive Engineer of the U.P. Power Corporation on 25.3.2008 and the Commission by order dated 27.3.2008 recommended that the Corporation should pay relief of Rs.4,00000/- within one month and further recommended for action against the guilty officials of the Electricity Department.

3. Sri Arvind Kumar, learned Counsel for the petitioner challenging the orders passed by the National Human Rights Commission dated 6.11.2009 and the order of the U.P. Human Rights Commission dated 27.3.2008, contended that U.P. Power Corporation has already framed its policy for payment of compensation to the persons suffering death or injury due to electric accident. It is submitted that by order dated 19.6.2008, U.P. Power Corporation has decided that amount of Rs.50,000/- should be increased to Rs.1,00000/- in case of death in the electricity accident, with regard to injury in cases of total disability an amount of Rs.1,00000/- and in the cases of partial disability a proportionate amount be paid on the basis of medical certificate up to the maximum of Rs.1,00000/-. Copy of the said order has been filed as Annexure-7 to the writ petition.

4. It has been further contended that the Corporation having already fixed the maximum limit of Rs.1,00000/- National Human Rights Commission or the U.P. Human Rights Commission could not have awarded any amount more than Rs.1,00000/-. He further submits that Human Rights Commission holds only a summary inquiry and the determination of the amount contrary to the Rules and Regulations framed by the U.P. Power Corporation, cannot be made. He submits that in any view of the matter, the amount paid is excessive. Learned Counsel for the petitioner further submits that there is no violation of the human rights in the accident which had occurred and complainants were free to approach the normal forum for compensation and the Human Rights commission ought not to have taken such decision.

5. Counter affidavit has been filed in second writ petition by the respondent no. 2 to which a rejoinder affidavit has also been filed. In the counter affidavit, it has been stated that U.P. Human Rights Commission has rightly awarded the amount on the complaint submitted by the respondent no. 2 but no action was taken by the Corporation. The Human Rights Commission has jurisdiction to pass order of compensation and there is no ground to interfere with the order of the U.P. Human Rights Commission awarding the compensation.

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

7. The orders impugned have been passed by the National Human Rights Commission and the U.P. Human Rights Commission in exercise of their jurisdiction under section 18 of the Protection of Human Rights Act, 1993. The Protection of Human Rights Act, 1993 has been enacted by Parliament to provide for the constitution of a National Human Rights Commission, State Human Rights Commissions for better protection of human rights and for matters connected therewith or incidental thereto. "Human rights" have been defined under section 2(d) which is as follows:

" "human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India."

8. The definition of word "human Rights" includes rights relating to life. Any violation of rights to life can be a violation of a human rights. Human rights are thus minimal rights which every individual must have against the State or other public authority by virtue of he/she being a human being. Article 21 of the Constitution of India guarantees life and personal liberty. Article 21 prohibits deprivation of life or personal liberty except due process of law. One of the submissions which has been pressed by learned counsel for the petitioners in both the cases is that there is no violation of human rights hence, National Human Rights Commission and U.P. Human Rights Commission committed error in initiating proceedings under the 1993 Act.

9. Coming to the facts of the first case, it is to be noted that in the said case, services of deceased Ramadhar Yadav was being taken by the employees of the U.P. Power Corporation exposing him threats of danger to his life. Ramadhar Yadav was not an employee of the Corporation nor he was protected by various safeguards which protect other regular/casual employees of the Corporation. The Commission has recorded a finding that Ramadhar Yadav was taken from his home by two employees of the Corporation Markandey Singh and Chandrapati Pandey for repairing of 11 K.V. transmission line. The finding has been recorded that at the instance of aforesaid two employees of the corporation Ramadhar Yadav climbed on the pole and while he was working on the pole, he was electrocuted. National Human Rights Commission made following observation in the order:

"The Commission has found in some other cases that outsiders are some times engaged in an unauthorised manner for repairs of transmission lines. This practice results in serious violation of human rights inasmuch as the hapless worker is not only exposed to insecurity of life but is also deprived of the benefits of labour laws."

10. The findings recorded by National Human Rights Commission fully prove that there was violation of human rights of deceased Ramadhar Yadav when his services were taken by the employees of the Corporation exposing him threats of danger to his life. Thus, the submission of the learned counsel for the petitioners that there was no violation of human rights, cannot be accepted.

11. In second writ petition, the findings have been recorded by the U.P.

Human Rights Commission that a live wire broke down and was hanging on the ground in whose contact the wife of respondent no. 2 Smt. Chandrawati Devi came on 8.9.2007 causing her injury. On the basis of report of the District Magistrate and S.D.O, it was found that on the pole insulator was of wood. The Wood being old broke out due to which a live wire hung four feet above the ground. It has also come on the record that information of the broken wire was given by one Lalji Yadav to the Sub Station on 6.9.2007, which was not repaired. It is statutory duty of the Power Corporation to maintain the transmission line in such a manner so as the peoples' lives are not exposed to dangers and threats from the transmission line. The officials of the Power Corporation being negligent, human rights of the citizens are violated. Hence, the second writ petition is also a case of violation of human rights and no error has been committed by the Commission in proceeding with the 1993 Act.

12. Sri Arvind Kumar, learned counsel for the petitioner submits that Corporation having already fixed the maximum amount of compensation in case of death as Rs.1,00000/-, in case of total disability Rs.1,00000/- and in the cases of partial disability proportionate amount on the basis of medical certificate up to the maximum of Rs.1,00000/-, the Commission was not entitled to award any compensation in excess of the aforesaid amount. For considering the aforesaid submissions, it is relevant to note the object as well as scheme of the Act as delineated from the various provisions of the Act. The preamble of the Act contains the key words "for better protection of human rights" thus, the object for enacting the Act was for constituting a National Human Rights Commission and State Human Rights Commissions for better protection of the human rights. The legislature felt that the laws in existence, regulating the function of the statutory and autonomous body including the power corporation are not sufficient to protect the human rights of the citizens hence, the 1993 Act was enacted. Section 18 of the Act contains the steps which are to be taken by the Commission during and after the inquiry. Section 18 of the Act which is relevant is quoted as below:

"18. Steps during and after inquiry.- *The Commission may take any of the following steps during or upon the completion of an inquiry held under this Act, namely:-*

(a) where the inquiry discloses the commission of violation of human rights or negligence in the prevention of violation of human rights or abetment thereof by a public servant, it may recommend to the concerned Government or authority-

(i) to make payment of compensation or damages to the complainant or to the victim or the members of his family as the Commission may consider necessary;

(ii) to initiate proceedings for prosecution or such other suitable action as the Commission may deem fit against the concerned person or persons;

(iii) to take such further action as it may think fit;

(b) approach the Supreme Court or the High Court concerned for such directions, orders or writs as that Court may deem necessary;

(c) recommend to the concerned Government or authority at any stage of the inquiry for the grant of such immediate interim relief to the victim or the members of his family as the Commission may consider necessary;

(d) subject to the provisions of clause (e), provide a copy of the inquiry report to the petitioner or his representative;

(e) the Commission shall send a copy of its inquiry report together with its recommendations to the concerned Government or authority and the concerned Government or authority shall, within a period of one month, or such further time as the Commission may allow, forward its comments on the report, including the action taken or proposed to be taken thereon, to the Commission;

(f) the Commission shall publish its inquiry report together with the comments of the concerned Government or authority, if any, and the action taken or proposed to be taken by the concerned Government or authority on the recommendations of the Commission."

13. According to section 18(a) where inquiry discloses the commission of violation of human rights or negligence in the prevention of violation of human rights or abetment thereof by a public servant, it may recommend to the concerned Government or authority to make payment of compensation or damages **as the Commission may consider necessary."** Thus, the commission has jurisdiction to recommend compensation as the Commission may consider necessary. The power of the Commission under section 18 is not inhibited by any other provisions or any State Legislature or subordinate legislation. The power of the Commission under section 18 is in addition to any other provisions covering the subject matter and not in derogation of any other provisions of law. Entitlement of a person whose human rights have been violated in accordance with the relevant statutory provisions governing payment of compensation, does not in any manner create a fetter in the right of Commission to find out the magnitude of violation of human rights and award a compensation. Thus, the mere fact that under the orders issued by the U.P. Power Corporation, amount of Rs.1,00000/- has been fixed in case of death or injury by the Corporation, does not fetter the rights of the Commission to award compensation over and above the amount of Rs. 1,00000/-. Thus, the order of the Commission awarding compensation more than Rs.1,00000/- cannot be faulted on the above ground.

14. Now reverting to the first writ petition, an amount of Rs.3,00000/- has been awarded as compensation to the next kin of deceased Ram Adhar Yadav. We are satisfied that no error has been committed by National Human Rights Commission in awarding a compensation of Rs.3,00000/- to the next of kin of the deceased Ramadhar Yadav. No grounds are made out to interfere with the order dated 6.11.2009. The first writ petition is dismissed.

15. Now comes the second writ petition being writ petition No. 40513 of 2008, as observed above the U.P. Human Rights Commission found violation of the human rights of the wife of the respondent no. 2 and the findings recorded by the U.P. Human Rights Commission in so far as violation of human right of the wife of the respondent no. 2, deserves no interference by this Court.

16. However, there is one aspect of the matter, which cannot be ignored. The wife of respondent no. 2 came into touch with the electric wire on 8.9.2007 and complaint appears to have been submitted in January, 2008, copy of which has been filed as Annexure-7. In the complaint, the respondent no. 2 after narrating the incident that his wife came into contact with 11 kv line and suffered injury whose treatment was going on in Meridian Nursing Home And Hospital Private Ltd. Saidpur, Ghazipur Road, Varanasi, it was stated in the complaint that an amount of Rs. 70,000/- has already been spent and it has been clarified that a further amount of Rs. 1,00000/- is likely to be spent on her treatment. After making the aforesaid claim, in last paragraph of the complaint, the respondent no. 2 claimed that State or Electricity Department be directed to pay Rs.5,00000/-. When in the compliant an amount of Rs.70,000+1,00000 has been disclosed towards the medical expenses including the amount likely to be spent on treatment, we see no basis for the U.P. Human Rights Commission to award an amount of Rs.4,00000/-. It has been noted in the order that one of the toe which was burnt has to be amputated. The Commission was considering the violation of human rights and compensation to be paid on the basis of such violation. When the complaint himself in January, 2008 in his complaint has stated total amount likely to be spent was Rs.70,000+1,00000 we do not see any reasonable basis for awarding compensation of Rs.400000/-. We however, do not propose to remit the matter to the U.P. Human Rights Commission for redetermination of the amount for payment of compensation to the complainant's wife. Since the violation of human rights is proved and any further delay in payment of compensation shall be denying the relief to the respondent no. 2.

17. In the facts and circumstances of the present case, we are satisfied that the order of the U.P. Human Rights Commission directing for payment of Rs. 4,0000/- be substituted with a direction to make payment of Rs.2,50,000/-. The second writ petition is thus, partly allowed by substituting the direction for payment of Rs.2,50,000/- as compensation within one month.

18. In the result first writ petition being writ petition No. 13821 is dismissed. The second writ petition being writ petition no. 40513 of 2008 is partly allowed by modifying the order of the U.P. Human Rights Commission dated 27.3.2008 to the extent that an amount of Rs.2,50,000/- be paid as compensation to the wife of respondent no. 2 within one month.

19. The parties shall however, bear their own costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.06.2010

BEFORE
THE HON'BLE AMAR SARAN, J.

Criminal Misc. Bail Application No.14090 of 2010

Saroj Jaiswal ...Applicant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri P.K. Singh

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

Code of Criminal Procedure-Section 439-Bail-Offence under section 272,273,304 IPC-Spot arrest with recovery of uria and chemicals alongwith spurious liquor-and powder of diazapam if urea added in normal alcohol-gets converted into methyl alcohol-a poisonous substance-fatal for human life-not entitled for bail.

Held: Para 9 & 10

It is observed in the order of the learned Sessions judge that if ureas is added in normal alcohol, it gets converted into Methyl alcohol, which is a poisonous substance and can prove fatal for human life.

Having given my thoughful consideration to the totality of the circumstances, I am not inclined to grant bail to the applicant.

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

1. Heard learned counsel for the applicant and learned Additional Government Advocate.

2. The applicant was apprehended at about 7.45 AM on 8.4.2010 in village Sirihari selling illicit liquor. One gallon containing 9 lts. of illicit country made liquor and one plastic bag containing 22 pouches of country made liquor were recovered from the applicant. In the said bag some chemical powder and 1/2 kg urea was also found from the possession of the applicant. The applicant confessed that she has purchased the said liquor from one Bhagwat Singh and Rajesh Singh and stated that in order to increase the intoxication, she used to add the powder of diazapam and urea. The case was registered against the applicant under sections 272/273 IPC, 60 Excise Act and 8/22 of NDPS Act at police station Kapsethi, district Varanasi.

3. It was argued by the learned counsel for the applicant that the police had implicated the applicant in a case under sections 272/273/304 IPC for which they had visited the village, but the applicant was bailed out in that main case. There is no chemical analyst report of the liquor recovered being spurious or adulterated. So far as the recovery of diazapam from the applicant was concerned, she was granted bail by the lower court.

4. It is further argued that no independent witnesses have supported the recovery and the prosecution version. The applicant was actually present in her Maika and that she was falsely implicated in the present case.

5. Learned AGA, however, argued that it is not material that the applicant was bailed out in the other case under sections 272/273/304 IPC, PS Kapsethi because on arrival at the village police were informed

that the applicant was selling liquor at that time and they arrested her committing the present crime red handed. The recovery of urea and chemical along with spurious liquor, which were kept with the purported objective of intensifying the effect of liquor compounded the case against the applicant because adding such adulterant could result in loss of life. In the applicant's village itself some persons appeared to have died as a result of drinking of spurious liquor for which the earlier FIR under sections 272/273/304 IPC at crime No. 24 of 2010 was lodged.

6. As the independent witnesses are usually unwilling to join in dispute to be witnesses of crime as they think the issue does not concern them, the non-examination of independent witnesses is not very material.

7. It is further submitted that as the applicant was arrested on the spot together with the liquor, urea, chemical and powder of diazapam etc. the plea that she was in her Maika at the time of incident, has no leg to stand.

8. The crime of dealing in spurious liquor has assumed grave proportions and many cases have been reported where the consumers have lost their lives because of the poor or spurious quality of the liquor, which is given to them. The offences under sections 272/273 IPC have been made punishable with imprisonment for life in the state of UP. Simply because no public analyst report was available at that stage, it could provide no ground for releasing the applicant on bail. The applicant also has a criminal history and was involved in other offences.

9. It is observed in the order of the learned Sessions judge that if ureas is added in normal alcohol, it gets converted into Methyl alcohol, which is a poisonous substance and can prove fatal for human life.

10. Having given my thoughful consideration to the totality of the circumstances, I am not inclined to grant bail to the applicant.

11. Accordingly, the bail application is rejected.

12. However, the trial is expedited. The trial court is directed to make an endeavour to decide the trial, if possible, within six months from the date of production of a certified copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.05.2010

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

Civil Misc. Writ Petition No.16930 of 2009

M/S Kishore Auto Sales & Others . ...Petitioners

Versus

Bharat Petroleum Corporation Ltd. and another. ...Respondents

Councel for the Petitioner
Sri Ravi Kant
Sri Imran Syed

Councel for the Respondent
Sri V.B. Upadhyay
Sri R.G. Padia
Sri Prakash Padia
S.C.

Constitution of India Art.226- Cancellation of dealership of B.P.C.-on basis of inspection of Petrol and Diesel Pumps strict.in accordance with G.O. Date 05.08.2008 under Para 12 of motor spirit and high speed Diesel (Regulation of Supply Distribution of Prevention of malpractices) order 2007-marker.test done in presence of petitioners-sufficient proof of alteration found-failing marker test no further chemical analyst required-objection regarding non compliance of prevention of clause 7 of G.O. 2005-held misconceived-petition dismissed.

Held: Para 11, 17 & 22

The Oil Company has framed Marketing Discipline Guidelines 2005. The State of U.P. has also issued a Government order dated 5.8.2008, providing for details with regard to inspection of the petrol and diesel pumps. Paragraph 12 of the Government order which is relevant provides that the Central Government by the Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order, 2007 has mixed marker in the motor spirit and high speed diesel for the purpose of checking the adulteration in the aforesaid petroleum products. Clause 12 further provides that if in the marker test pink result is received, it is sufficient proof of adulteration and in the event of failing of marker test, no further chemical analysis is required.

Thus, the submission of the petitioners that inspection dated 3.12.2008 being in breach of clause 7 deserves to be set aside on the ground of violation of Control Order, 2005 cannot be accepted.

The above report clearly supports the submission of the learned Counsel for the respondents that nothing wrong was found in the marker test which was effective till 31.12.2008. Marker test was statutorily introduced and was available on the date when the inspection was made. The submission of learned counsel for the petitioner that marker test is not foolproof test and cannot be relied, cannot be accepted.

Case law discussed:

W.P. No. 37175 of 1999, 2009 (1) EFR 87, W.P. no. 22959 of 2009, 1998 CriLJ3806

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

1. Heard Sri Ravi Kant, learned Senior Advocate, assisted by Sri Imran Sayeed for the petitioners and Sri V.B. Upadhyay, learned Senior Advocate, assisted by Sri Prakash Padia for the respondents.

2. This writ petition has been filed by the petitioner, a retail outlet dealer of Bharat Petroleum Corporation Ltd. challenging the order dated 14.3.2009 by which dealership of retail outlet has been terminated by the Bharat Petroleum Corporation.

3. Brief facts necessary for deciding the writ petition are; the petitioner was appointed as retail outlet dealer on 2.5.1977. The dealership between the petitioner and the respondent Corporation is being governed by the contract in writing. Last such a contract was entered into between the petitioner and the respondent Corporation on 4.4.2003. An inspection of the petitioner's retail outlet which is situated at Hanumanganj, district Allahabad was conducted by M/s SGS India Private Ltd. authorised by the Bharat Petroleum Corporation for such purpose on 3.12.2008. During inspection sample of motor spirit and high speed diesel oil was taken by the inspection team. A test known as marker test was conducted at the outlet of the petitioner in which sample of motor spirit failed, the traces of marker were found in the petrol

confirming adulteration. sample from the nozzle of dispensing pump including T.T. sample were taken. The samples collected were tested in the laboratory of the corporation at Mughalsarai in the presence of the petitioner and the transporter. Sample of motor spirit was found adulterated. The supply of petroleum products was suspended on 3.12.2008 itself. A show cause notice dated 9.1.2009 was issued to the petitioner to show cause as to why the dealership be not terminated. The petitioner submitted a reply to the show cause notice vide his letter dated 19.1.2009. The petitioner filed a writ petition in this Court being writ petition No. 3568 of 2009. A Division Bench of this Court vide order dated 28.1.2009 stayed the effect and operation of the order dated 3.12.2008, passed by the Bharat Petroleum Corporation and respondents were directed to resume supply of the petitioner forthwith. Against the order dated 28.1.2009, passed by the Division Bench S.L.P.(C) No. 4543 of 2009 was filed in which S.L.P. leave was granted and the order of the High Court dated 28.1.2009 was set aside and High Court was directed to reconsider the matter afresh after hearing the parties. On 14.3.2009, the Corporation terminated the petitioner's dealership hence, writ petition No. 3568 of 2009 was withdrawn with liberty to challenge the order terminating the dealership.

4. The present writ petition has been filed by the petitioner challenging the order dated 14.3.2009, terminating the petitioner's dealership. A counter affidavit has been filed by the Corporation to which rejoinder affidavit has also been filed.

5. Sri Ravikant, learned Senior Advocate, appearing for the petitioner challenging the impugned order submitted that the entire exercise of inspection, taking of sample and the report of laboratory have been done in flagrant breach of the Government orders and the Marketing Discipline Guidelines, 2005. It is contended that inspection, seizure and sampling of the petrol and diesel have to be carried out in accordance with the procedure prescribed in the Marketing Discipline Guidelines, 2005. It is submitted that under the Essential Commodities Act, 1955, the Central Government has issued a Control Order namely; Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution, and Prevention of Malpractices) Order, 2005. Clause 7 of which order provides that power of search and seizure can be exercised only by Gazetted Officers of the Central Government or State Government or any police officer not below the rank of Deputy Superintendent of Police or any officer of the oil company not below the rank of Sales Officer. It is submitted that inspection having not been conducted in accordance with clause 7 of the Control Order,2005, the entire exercise is vitiated and deserves to be set aside. It is further submitted that method of test and sample of motor spirit and high speed diesel are to be adopted as contemplated in Marketing Discipline Guidelines,2005 copy of which has been filed as Annexure- 4 to the writ petition, which provide that test has to be conducted according to BIS specification i.e. I.S. 1448. The inspection in question having not been conducted in accordance with the above Control Order, 2005 the termination of dealership is invalid. It has been further submitted that the marker test

which was conducted on 3.12.2008 and has been relied for termination of dealership has not been found to be foolproof test and Committee of Directors appointed by Government of India in December, 2008 itself found inefficiency of marker test system. Learned counsel for the petitioner has placed reliance on the judgement of Karnataka High Court dated 13.1.2010 in writ petition No. 37175 of 1999 **Sri G.V. Bhushan and others Vs. Union of India and others,** in which judgement the Marketing Guidelines of 2005 has been set aside including the consequent actions thereunder.

6. Sri V.B. Upadhyay, learned Senior Advocate, refuting the submissions of learned counsel for the petitioners contended that the petitioner's outlet was inspected in the presence of petitioner's representative, who has also signed the inspection report in which report, the petitioner's sample of motor spirit failed in the marker test. It is submitted that the sample collected from retail outlet was also tested at Mughalsarai Laboratory of the Corporation in the presence of the petitioner on 5.12.2008 which test also confirmed that motor spirit (petrol) was adulterated. It is submitted that adulteration having been proved in the petrol, the Corporation was within its right to cancel the dealership of the petitioners and the order impugned was passed after giving notice to the petitioners, which does not suffer from any infirmity. It is submitted that M/s SGS India Private Ltd. was authorised to inspect the retail outlet on behalf of the company and the said system continued till 31.12.2008. Hence, there is no error in the test conducted by the inspection team. It is submitted that marker test is a valid test which was relied by the Corporation at the relevant time and mere fact that subsequently, the matter was being reviewed for finding out another methodology of conducting inspection has no bearing in the present case. It is submitted that against the judgement of the Karnataka High relied by the petitioner in **Sri Sri G.V. Bhushan and others Vs. Union of India and others** (supra), a special appeal has been filed in which special appeal, the judgment of the Karnataka High Court has been stayed. Reliance has been placed on the Division Bench judgment of this Court in **Vindhya Services Station, Mirzapur and another Vs. Union of India and others** reported in 2009 (1) EFR 87 and judgment learned Single Judge in writ petition No. 22959 of 2009 **M/s Satyam Filling Station Vs. Appellate Authority& Anr**. decided on 1.2.2010.

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

8. The submissions raised by the learned counsel for the petitioners can be summarised as follows:

(i) The search and seizure of the retail outlet has to be made in accordance with Clause 7 of the Motor Spirit and High Speed Diesel (Regulation of Supply, distribution, and Prevention of Malpractices) Order, 2005. According to clause 7 of the aforesaid order only a Sales Officer of a company is authorised to conduct the search and inspection. Search and inspection having not been made in accordance with Clause 7 of the 2005 Order, the consequential action falls on the ground.

(ii) The Marketing Discipline Guidelines, 2005 provides for method and manner of testing the sample. The test has to conform to the specification No. 2796 and IS 1448 and no such test having been conducted, the impugned order terminating the agency is violative of Marketing and Discipline Guidelines, 2005. The samples having been taken by an agent appointed by the Oil Company and not by officers of the Corporation, the whole process is vitiated.

(iii) The marker test which was applied for inspection on 3.12.2008 lacks credence and is not foolproof test.

9. Before we proceed to examine the respective submissions of learned counsel for the parties, it is relevant to note certain important terms and conditions of the agreement entered into between the petitioner and the Oil Company on 4.4.1993, copy of which agreement has been filed as Annexure-1 to the writ petition. By the aforesaid agreement licence was granted to the petitioner for carrying on business at Hanumanganj, Allahabad in accordance with the terms and conditions of the agreement. Paragraph 10 of the agreement provides that the licensees hereby covenant and agree with the Company as follows:-

a).....
(b).....
(c).....
(d).....
(e).....
(f).....
(g).....
(h).....
(i).....
(j).....
(k).....
(l).....
(m).....
(n).....
(o) At all times and from time to time during the currency of this licence to give adequate facilities to the Company, its officers, agents and servants to inspect and test the accuracy and general working of the pumps and other equipment upon the said premises and to investigate the conduct and management by the Licensees of the said facilities, and afford to the Company its officers, agents and servants all proper and necessary assistance and facilities for conducting such inspection and investigating and for maintenance of the outfit.'

10. Clause 13(a) provides that notwithstanding anything to the contrary herein contained the Company shall be at liberty to terminate the agreement upon or at any time on the happening of any of the events as enumerated in the said clause. Clause 13(a) (vii) and (viii). It is relevant for the present case are quoted herein below:

13(a) (vii) If the Licensees shall be guilty of a breach of any of the covenants and stipulations on their part contained in this agreement;

(viii) If the Licensees shall commit or suffer to be committed any act which in the opinion of the Marketing Manager of the Company for the time being in Bombay or any other person nominated for this purpose by the Company is prejudicial to the interest or good name of the Company or its products. The decision of such officer or person shall be final and binding on the Licensees."

11. The Oil Company has framed Marketing Discipline Guidelines 2005. The State of U.P. has also issued a Government order dated 5.8.2008, providing for details with regard to inspection of the petrol and diesel pumps. Paragraph 12 of the Government order which is relevant provides that the Central Government by the Motor Spirit and High Speed Diesel (Regulation of Supply, Distribution and Prevention of Malpractices) Order, 2007 has mixed marker in the motor spirit and high speed diesel for the purpose of checking the adulteration in the aforesaid petroleum products. Clause 12 further provides that if in the marker test pink result is received, it is sufficient proof of adulteration and in the event of failing of marker test, no further chemical analysis is required.

12. In exercise of power under Essential Commodities Act, 1955 Central Government has made Order 2005 clause 7 of the order on which much reliance have been placed by the learned counsel for the petitioner is quoted as below:

"7. Power of search and seizure.-(1) *Any Gazetted Officer of the Central Government or a State Government or any police officer not below the rank of Deputy Superintendent of Police duly authorised by general or special order of the Central Government or a State Government, as the case may be, or any officer of the oil company, not below the rank of sales officer, may, with a view to securing compliance with the provisions of this order, or for the purpose of satisfying himself that this order of any order made thereunder has been complied with or there is reason to believe that all or any of the provisions of this order have been and are being or are about to be contravened."*

13. The principal submission of learned counsel for the petitioners is that under clause 7 only an officer of the Oil Company not below the rank of Sales officer is authorised to conduct search and the search which was conducted on 3.12.2008, no officer of the company was present hence, the search is in violation of clause 7 of the 2005 Order and the consequential action deserves to be set aside on this ground alone.

14. As noticed above, clause 10 (o) of the agreement between the petitioner and the Corporation obliges an outlet dealer to give adequate facilities to the Company, its officers, agents and servants to inspect and test the accuracy and general working of the pumps. Under clause 10 (o) the Company its officers, agents and servants are authorised to investigate and conduct inspection and investigation. It is thus, clear that under the agreement between the parties, agents of the company are also authorised to inspect to find out as to whether the terms and conditions of the agreement is being followed by the outlet dealer or not. Whereas under clause 7 of the 2005 Order, search can be conducted only by an officer not below the rank of the Sales Officer in the oil company apart from the gazetted officer of the Central Government and at least officer not below the rank of Deputy Superintendent of Police. The search which was conducted on 3.12.2008 was not an inspection of the officers of the Central Government and State Government rather it was inspection on behalf of the Company.

15. The power under clause 7 of the Control Order, 2005 has been given to the authorised officer for the purpose of satisfying himself that the order 2005 or any order made thereunder has been complied with or any of the provisions of the Order 2005 are being contravened. The contravention of orders issued under section 3 of the Essential Commodities Act are punishable under section 7 and other consequences have been laid down in the Essential Commodities Act, 1955 including the confiscation etc. The search and seizure thus under clause 7 of the Control Order 2005 relates to finding out as to whether any provision of the Control Order, 2005 has been contravened and any of the actions contemplated under Control Order, 2005 as well as Essential Commodities Act may result from such contravention. However, the inspection by the officers of the Company, its servants or agents may be for the purpose as provided for in the agreement between the parties dated 4.4.1993. Inspection by the agents of the company can thus, be for the purpose other than the search and seizure as provided in paragraph 7 of the Control Order 2005. The company which has given the dealership by contract entered between the parties has also right to determine as to whether the terms and conditions of the contract are being fully followed by the petitioners or not. Thus for inspection by the company for the purpose of finding out whether the covenants of the contract are being followed or not paragraph 7 of the Control Order may not be applicable. There is no conflict between the right of the Company to carry on inspection for the purpose of contract and the right to search and seizure given in paragraph 7 of the Control Order, 2005 both being not contrary to each other can survive together.

16. The Division Bench of this Court in **Vindhya Services Station Mirzapur Vs. Union of India** (supra) had occasion to consider the similar issues in the said case. The petrol pump agency was given to the petitioner under a written agreement. The officers of M/s SGS India Pvt. Ltd. inspected the outlet and conducted the marker test. The arguments was raised in the said case that under the Control Order, the inspection can be made only by an authorised officer and M/S S.G.S. India Pvt. Ltd. has no jurisdiction to take the sample. Repelling the said arguments following was laid down in paragraph 11:

"The second argument of the petitioners is that under the Control Order, which is issued under the Essential Commodities Act, it is only the authorised officer who can carry out the taking of samples. The argument is misconceived. There is a two fold check upon adulteration: one at the level of Oil Marketing Companies and the other by the State authorities under the Essential Commodities Control Orders. In respect of the agreement between the Oil Marketing Company and their dealers the terms are governed not by the Control Order but by the agreement and the Marketing Discipline Guidelines."

17. Thus, the submission of the petitioners that inspection dated 3.12.2008 being in breach of clause 7 deserves to be set aside on the ground of violation of Control Order, 2005 cannot be accepted.

18. The submission next pressed by learned counsel for the petitioner is that

test has to be conducted according to the specification as provided in the Marketing Discipline Guidelines 2005 and the test should conform to requirement of Bureau of Indian Standard Specification Nos. IS 2796 and IS 1460 for motor spirit and High speed diesel respectively. In the present case as noticed above, the marker test was conducted by inspecting team on 3.12.2008 at the outlet of the petitioners in which the sample collected from nozzle of the dispensing unit failed in so far as the petrol is concerned. Sample was collected on 3.12.2008 and was sent for laboratory test at Mughal Sarai laboratory of the Corporation. The petitioners were also called to appear in the laboratory test which was conducted on 5.12.2008. The sample collected on 3.12.2008 was also found adulterated in the laboratory test on 5.12.2008. The report of the test held on 5.12.2008 i.e. joint marker inspection has been given to the petitioner along with show cause notice dated 9.1.2009. The submission that marker test was not sufficient as per Marketing Discipline Guidelines and the Control Order has to be considered. It is to be noted that in the Control Order, 2005, amendments were made w.e.f. 12.1.2007 by which the definition of marker was added and the definition of adulteration was amended. Amendments were also made in clause 8 of the Control Order. Paragraphs 2 (a), (fi), (t) are quoted as below:

2(a) "adulteration" means presence of marker in motor spirit and high speed diesel and/or the introduction of any foreign substance into motor spirit or high speed diesel illegally or unauthorisedly with the result that the product does not conform to the requirements of the Bureau of Indian standards Specification Numbers IS 2796 and IS 1460 for motor spirit and high speed diesel respectively or any other requirement notified by the Central Government from time to time;"

(f)"malpractices" shall include the following acts of omission and commission in respect of motor spirit and high speed diesel-
(i) adulteration;
(ii) pilferage;
(iii) stock variation;
(iv) unauthorised exchange;
(v) unauthorised purchase;
(vi) unauthorised sale;
(vii) unauthorised possession;
(viii) overcharging;
(ix) sale of oil-specification product; and
(x) short delivery;

(fi) "marker" means a chemical substance approved by the Central Government from time to time for blending in kerosene and other petroleum products with the objective of preventing their diversion or adulteration of motor spirit or high speed diesel"

(t) "sale of off-specification product" means sale of motor spirit or high speed diesel by dealer of "having traces of marker and/or" quality not conforming to Bureau of Indian Standards Specification Numbers IS 2796 and IS 1460 for motor spirit or high speed diesel respectively"

19. Paragraph 8 of the Order deals with Sampling of Product and testing. A reading of paragraph 8 indicates that where the product does not contain marker, the sample is to be collected to check whether density and other parameters of the product conform to the requirement of Bureau of Indian Standard Specification Numbers IS 2796 and IS

1460 for motor spirit and high speed diesel respectively. Paragraph 8 is quoted herein below:

"8. Sampling of Product and testing.- (1-A) The authorized officer under clause 7 shall draw the sample from the tank, nozzle, vehicle or receptacle, as the case may be, in the test kit and test the product with the aid of test kit, to check whether the product contains any traces of marker. If such traces are found in the product, the authorised officer shall record the same in triplicate which shall be jointly signed by him and the dealer or transporter or concerned person or his representative, as the case may be, and given one copy of such recording to the dealer or transporter or concerned person or his representative and another copy to the oil company concerned, as the case may be."

(1) "Where the product does not contain marker under sub-clause (1-A), the authorised officer." Under Clause 7 shall draw the sample from the tank, nozzle, vehicle or receptacle as the case may be, in clean aluminium containers, to check whether density and other parameters of the product conform to the requirement of Bureau of India Standard Specification Numbers IS 2796 and IS 1460 for motor spirit and high speed diesel respectively. Where samples are drawn from retail outlet, the relevant tank-truck sample retained by the dealer as per Clause 3(b) would also be collected for laboratory analysis.

(2) The authorized officer shall take and seal six samples of 1 litre, each of the motor spirit or three samples of 1 litre each of the high speed diesel. Two samples of motor spirit or one of high speed di4sel would be given to the dealer or transporter or concerned person under acknowledgement with instruction to preserve the sample in his safe custody till the testing or investigations are completed. Two samples of motor spirit or one of the high speed diesel shall be kept by the concerned oil company or department and the remaining two samples of Motor Spirit or one of High Speed Diesel would be used for laboratory analysis;

(3) The sample label shall be jointly signed by the authorised officer who has drawn the sample, and the dealer or transporter or concerned person or his representative and the sample label shall contain information as regards the product, name of retail outlet, quantity of sample, date, name of the authorized officer, name of the dealer or transporter or concerned person or his representative;

(4) The authorised officer shall forward the sample of the product taken within ten days to any of the laboratories mentioned in Schedule III or to any other such laboratory when it may be notified by the Government in the official Gazette for this purpose, for analysing with a view to checking whether the density and other parameters of the product conform to the requirements of Bureau of Indian Standard Specification Numbers IS 2796 and IS 1460 for motor spirit and high speed diesel respectively.

(5) The laboratories mentioned in sub-clause (4) shall furnish the test report to the authorised officer within twenty days of receipt of sample at the laboratory.

(6) The authorised officer shall communicate the test result to the dealer or transporter or concerned person and the oil company, as the case may be, within five days of receipt of test results from the laboratory for appropriate action."

20. As noticed above paragraph 12 of the Government order relied by the petitioner and filed as Annexure-4 to the writ petition also indicates that if in the marker test the product fails there is no necessity of any further chemical analysis. In the present case, when the test was held on 3.12.2008, marker was found present hence, there was no further requirement of density analysis or any other analysis. The Control Order 2005 and the Government order clearly relies on the marker test for finding out adulteration, no error has been committed by the Corporation in cancelling the agreement relying on the marker test. Thus the submission that density and other specification was to be checked as per Indian Standard Specification Numbers is not applicable in the facts of the present case.

21. The third submission of the learned counsel for the petitioners that marker test is not foolproof test and the said marker system has been reviewed by the Government of India. Copy of the letter dated 22.12.2008 has been brought on record as Annexure-18 which is a report submitted by the Director Marketing and Oil Companies. It is relevant to extract some part of the report which is quoted as below:

"The Marker System was introduced by the PSU oil companies w.e.f. 1.10.2006 in the country. The Kerosene released from the supply locations is being doped with the Authentix Marker system since the introduction of the Marker programme.

The industry has been closely monitoring the effectiveness of the Marker programme and it has been our experience that the Marker system is found to be more effective than the traditional methods of inspections, BIS tests etc. to detect adulteration. The Marker legislation was enforced from 16.2.07 and during the period from 16.2.07 to 30.11.08 there was 558 cases of adulteration detected thorugh the Marker system involving Ros and Tank-trucks.

In order to identify more suppliers for Marker system, a Global Expression of Interest (GEOI) was floated by Interim order already granted shall continue. R&D on 26th July, 2008 on Industry basis. The details of the Mandatory Characteristics/Requirements of the Marker System included in GEOI are given as under:

- *After inducing into the potential adulterants, the Marker should not be removable/tampered with by physical or chemical means.*

- *The marker should be compatible with potential adulterants.*

- *The Marker should be stable with potential adulterants.*

- *The Marker should be detectable in Ethanol Gasoline blends.*

- *The Marker System should provide simple field level testing to determine adulteration (i.e. test positive or test negative).*

- *The Marker should be cost effective.*

- *The Marker System should enable exact quantitative estimation of adulternation.*

- *Marker as well as the test reagents should have adequate shelf life, should be storable under ambient conditions & be portable to facilitate the field force in implementation of the Marker system.*

The conclusions drawn by the technical Committee based on Laboratory evaluation of the 3 Marker systems is as under:

1. 1% marked Kerosence can be detected in MS & HSD except in Interim order already granted shall continue. branded HSD and BPC Branded MS.

2. Testing time required for one sample will be approximately 75 to 90 minutes as per recommended procedure i.e. 1&2 as most of the samples will have to be tested for both procedures. This also requires substantial number of IAS columns for procedure 2 which cannot be reused.

3. Marked Kerosene can be laundered by Conc. Nitric acid and Charcoal.

4. Marker could not be detected when marked kerosene was exposed to sunlight.

5. Un-dyed Kerosene when marked does not meet saybolt colour specification as per IS: 1459.

B) M/s Chematek:

1 1% marked kerosene can be detected in MS & HSD including Branded fuels.

2 Testing time required for one sample will be approximately 20 to 25 Minutes as per recommended procedure which is simple and requires common glassware.

3. Marked Kerosene cannot be laundered by 1% clay. However, marked kerosene can be laundered by 5% clay. Conc. Sulphuric acid, Conc. Nitric acid and Charcoal.

4 Marker can be detected when marked Kerosene was exposed to sunlight.

5 Undyed Kerosene when marked does not meet saybolt colour specification as per IS: 1459.

C) M/s GFI, Israel Marker System offered by M/s Nandan Petrochemicals, Mumbai

1 1% marked kerosene can be detected in MS &HSD including Branded fuels.

2 Testing time required for one sample will be approximately 5 minutes as per recommended procedure.

3 This testing involves use of XRF analyser which has to be mounted on

a vehicle and will require stabilized power supply or invertor. This analyser was brought pre calibrated by the party. The frequency of calibration and matrix effect of different fuels may have to be ascertained.

4. This Marker System in the Lab test was not found to be launderable with clay, acids, alkali. While 1% charcoal could not remove the Marker however about 20% lower concentration of Marker was observed with 5% charcoal treatment. The machine, however, was able to detect 1% adulteration of 5% charcoal treated marked kerosene in fuel.

5 The addition of this Marker to Kerosene does not affect the Physico-chemical properties of Kerosene including saybolt colour.

6 The Marker can be detected when marked kerosene was exposed to sunlight.

a) The basic requirement of the Marker as stated in the GEOI was that "it should not be removable/tampered with, by physical or chemical means" This condition is not met by M/s Authentix and M/s Chematek S.P.A. Italy in addition, the Authentix Marker could not be detected when exposed to sunlight and also in branded HSD of Interim order already granted shall continue. & branded MS of BPC. The Marker system of GFI offered by M/s Nandan Petro chemicals is found to be least launderable.

b) One of the mandatory requirements is also that the Marker System should provide simple field level testing to determine adulteration (i.e. test positive of test negative). The equipment of M/s GFI Marker system for detection of adulteration is bulky & heavy also requiring stabilised electrical power. The equipment is required to be calibrated at the frequency to be decided by the user and fitted in mobile vehicle for field testing of samples.

Review of Marker System by MOP &NG:

Secretary (P&NG) had taken a review meeting on Marker system on 10th December, 2008. In this meeting Interim order already granted shall continue. (R&D), on behalf of the Technical Committee had made a presentation on evaluation of the Global Expression of Interest (GEO). During the meeting the Industry advised MOP&NG that all the 3 evaluated Markers are not meeting 100% mandatory requirements of the GEOI.

In this regard a letter has already been addressed by the industry to MOP&NG vide RSHQ: Policy dated 28th November, 2008 intimating that re-tendering. In respect of Marker system will be required. Further, in the intervening period MOP&NG was requested to make suitable amendments to the Control Orders as the contract with the current suppliers expires on 31.12.2008.

However, Secretary P&NG advised that the Committee of Directors (Marketing) of the oil companies should examine all the aspects of the issue and submit their recommendations latest by 20th December, 2008.

The Committee of Directors (Marketing) after examining all the aspects of the issue recommends as follows:-

1. To re-tender for procurement of Marker system as none of the parties have fulfilled 100% of the mandatory requirements of the GEOI. A minimum time period of 6 months will be required to complete the process.

2. To amend the existing Kerosene Control Order which makes it mandatory to dope all Kerosene released from supply locations with Marker. The existing contract for procurement of Marker system expires on 31.12.08 and effective 1.1.2009 Kerosene will have to be sold without doping of marker.

3. To amend MS-HSD control order as Marker tests will not be carried out at retail outlets effective 1.1.2009."

22. The above report clearly supports the submission of the learned Counsel for the respondents that nothing wrong was found in the marker test which was effective till 31.12.2008. Marker test was statutorily introduced and was available on the date when the inspection was made. The submission of learned counsel for the petitioner that marker test is not foolproof test and cannot be relied, cannot be accepted.

23. Learned counsel for the petitioner has also placed reliance on the Division Bench judgment of **Krishna Kumar and Anr. Vs. Sr. Supdt. of Police and Ors.** 1998 CriLJ3806 for the submission that the product quality is to be tested in accordance with the bureau of Indian Standard Specification No. IS 1460. In the case of **Krishna Kumar** *(supra)* a first information report was lodged under section 3/7 of the Essential Commodities Act, 1955. The writ petition was filed challenging the said first information report. The challenge was made in the writ petition on the ground that sample taken from the petrol pump was said to be adulterated but the extent or exact quantity of the adulteration was not mentioned. All the writ petitions were dismissed. The Court considered and held that sample of the petrol and diesel was to be taken in accordance with clauses 7 and 8 . The said case was not a case of termination of dealership by oil company exercising its right under the agreement between the parties but was a case challenging the first information report hence, it is clearly distinguishable. The judgment of learned Single Judge in **M/s Satyam Filling Station** fully supports the submission of the learned Counsel for the respondents. On the marker system following observation was made by Hon'ble Single Judge.

"Learned counsel for the petitioner has also place reliance upon the affidavit filed on behalf of Bharat Petroleum Corporation in the Delhi High Court that marker test was not reliable. A perusal of the said affidavit which has been annexed as Annexure SA-6 to the Supplementary Affidavit shows that the petition that was filed in the Delhi High Court was for a direction for continuance of the "marker" system for which the contract had expired on 31st December, 2008 and bids for "marker" system pursuant to fresh notice inviting tenders on technical evaluation had failed to meet the product specifications. It is in this connection that it was stated in the affidavit that marker system that was introduced in February, 2007 has been discontinued by the order dated 31st December, 2008 issued by the Ministry of Petroleum and Natural Gas and the reasons for discontinuance was mentioned. Amongst the various reasons

mentioned it was stated that the complaints had been received that it was possible to launder/remove or clear such "marker" from kerosene. Thus, it was not that the test was defective but because it was found that initially it was quite effective in detecting adulteration in petrol and diesel but subsequently as human brain was very inventive, complaints had been received that it was possible to remove the existing marker from the kerosene.

The last contention of the learned counsel for the petitioner is that the dealership cannot be terminated on irrelevant or non-existent grounds. Learned counsel for the petitioner has placed reliance upon the decision of the Supreme Court in Harbans Lal Sahnia (supra). In this case the Supreme Court noticed that general allegations had been made by the Corporation against the dealer. In the present case, there are specific allegations against the petitioner. This decision, therefore, does not help the petitioner."

24. We have perused the impugned order dated 14.3.2009. The impugned order refers to relevant clauses of the agreement and has considered the reply submitted by the petitioners. All the points raised in the reply by the petitioners were considered and dealt with. We do not find any error in the impugned order which may warrant any interference by this Court in exercise of writ jurisdiction under Article 226 of the Constitution of India. The writ petition is dismissed.

Parties shall bear their own costs.

ORIGINAL JURISDICTIION
CIVIL SIDE
DATED: ALLAHABAD 27.04.2010

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

Civil Misc. Writ Petition No. 19793 of 2010

Pawan Kumar ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for Petitioner:
Sri Pankaj Kumar Tyagi
Smt. Archana Tyagi

Counsel for the Respondent:
C.S.C.

Motor Vehicle Act 1988-Section 207- Ceasure of Vehicle by A.R.T.O.-Release application pendency Since long-as per ACJM report vehicle not wanted in any offence-ARTO directed to take appropriate decision within 15 days.

Held: Para 6

Here in this case before us, since no complaint seems to have been filed by the Transport Authority before the Magistrate competent to try the case, therefore, it is incumbent upon the Transport Authority to take a decision either to release the motor vehicle subject to furnishing the security to his satisfaction by the petitioner or to take the decision as to whether any offence is committed and the offence is compoundable and the petitioner is ready to compound or to file a complaint before the Magistrate competent to try the case pertaining to the offence if found committed with regard to the vehicle concerned.

Case law discussed:
1994 AWC Pg. 1754

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

1. By way of this writ petition, the petitioner has sought a writ, order or direction in the nature of mandamus directing the respondent no. 2 (ARTO, Saharanpur) to decide the release application dated 27.02.2010 filed by the petitioner expeditiously as soon as possible.

2. Heard Smt. Archana Tyagi, learned counsel for the petitioner and learned standing counsel on behalf of the respondents.

3. The petitioner's Vehicle No. UP-12 T-1526 was seized by the ARTO, Saharanpur on 30.01.2010. The release application was filed by the petitioner on 27.02.2010 which is said to be still pending disposal before the ARTO, Saharanpur. It is submitted that the petitioner's vehicle has been detained as per provisions u/s 207(1) of the Motor Vehicle Act, 1988 and U.P. Motor Vehicle Tax Act, 1987 by the Transport Authority. The petitioner is ready to furnish security before the ARTO, Saharanpur, but even then, the ARTO, Saharanpur has not released the vehicle of the petitioner. An application for release of the vehicle was also filed by the petitioner before the ACJM, Saharanpur. The learned ACJM, Saharanpur had called for the report from the authority concnerned and found that no criminal case is filed in the aforesaid matter and therefore, he did not pass any order on the release application for the vehicle.

4. Learned standing counsel submitted that the vehicle is detained due to violation of the provisions of the Motor Vehicles Act, 1988 and unless the petitioner appears before the Transport Authority to deposit the compound fees as well as the additional tax imposed as per report dated 23.02.2010 by the ARTO, Saharanpur, the authoirty concerned is not under obligation to release the vehicle.

5. The Hon'ble Apex Court in the case of Jugal Kishore vs. State of U.P. and Another reported in 1994 AWC Pg. 1754 has laid down the law in this regard as follows:-

"The clear cut and unambiguous position under the law that emerges and admits of no contradiction is that on a vehicle being seized and detained by a police officer or other person authorized in this behalf by the State Government on his having reason to believe that one or other of the offences specified punishable under Section 192 of the Act has been or is being committed, he has to consider first for temporary release of vehicle subject to owners furnishing security to his satisfaction within reasonable period of time. If the vehicle is not released temporarily the police officer or person authorized has to decide the question as to whether the owner has committed any offence is to be compounded. This exercise has also to be completed within reasonable period of time. When the police officer or authorized person does not release the vehicle so seized on being satisfied that an offence has been committed or refuses to compound the offence, he is duty bound to complete the investigation/inquiry within a reasonable time. What is a reasonable time in a given case would depend on the peculiar facts and circumstances of that case and to file a complaint before the Magistrate competent to try the case and the Magistrate on the complaint being so laid before him would have the jurisdiction to

release the vehicle pending trial as provided under Section 451 CrPC and later on to pass an order as to the final disposal of the vehicle as provided under Section 452 CrPC at the conclusion of the trial. If the complaint is not laid before the Magistrate within a reasonable time, it is always open to the owner of the vehicle to approach the Court under Article 226 of the Constitution. The petitioners in all the writ petitions can have their remedy under the law in the light of our aforegoing observations. In the end, we direct the respondents to act in accordance with the observations made in this judgment."

6. Here in this case before us, since no complaint seems to have been filed by the Transport Authority before the Magistrate competent to try the case, therefore, it is incumbent upon the Transport Authority to take a decision either to release the motor vehicle subject to furnishing the security to his satisfaction by the petitioner or to take the decision as to whether any offence is committed and the offence is compoundable and the petitioner is ready to compound or to file a complaint before the Magistrate competent to try the case pertaining to the offence if found committed with regard to the vehicle concerned.

7. Hence, we find it expedient to direct the autohrity concerned/ARTO, Saharanpur to take a decision and to decide the representation alleged to have been filed by the petitioner before him within a period of 15 days of filing this order before him.

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

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.05.2010

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 21008 of 2010

Devendra Singh ...Petitioner
Versus
The State of U.P. and others ...Respondent

Counsel for the Petitioner:
Sri Anupam Kulshrestha

Counsel for the Respondent:
Sri Somil Srivastava
Sri Sahab Tiwari
C.S.C.

Indian Stamp Act-Section 33-Determination of stamp duty-loan advance for establishing cold storage-Document executed for purpose of loan-petitioner claimed exemption from stamp duty under notification dated 10.06.98-authorities below refused the defence of petitioner as cold storage in not within meaning of "agriculturist or Agricultural purpose"-remission as per notification above not permissible.

Held: Para 6

The instrument used for obtaining loan or financial assistance for establishing a cold storage is neither an instrument for acquisition of tractor or machinery relating to agricultural activity nor is an instrument executed by an agriculturist within the meaning of the aforesaid notification., According to Explanation I to the aforesaid notification the expression 'agriculturist' means a person engaged in any of the activities specified therein. The activities so specified does not cover the activities of running a cold storage.

Case Law discussed:
1989 RD489

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

1. Heard Sri Anupam Kulshrestha, learned counsel for the petitioner and the learned Standing counsel.

2. Petitioner no. 1 and respondent no. 5 jointly took financial assistant of Rs.10900000/- from the Central Bank of India for the purposes of establishing a cold storage. To secure the aforesaid loan petitioner executed a document. The aforesaid document was referred under Section 33 of the Indian Stamp Act for determination of the deficient stamp duty. The petitioner in the said proceedings claimed that the document is exempt from payment of stamp duty vide notification dated 10th June 1998 issued under Section 9 of the Indian Stamp Act which provides for remission of stamp duty exceeding Rs. 100/- on every instrument employed for obtaining loan or other financial assistance for agricultural activity. The Additional District Magistrate (Finance and Revenue) vide order dated 7.6.2005 refused to accept the contention of the petitioner and held that activity of a cold storage is not exempt under the aforesaid notification and thus determined the deficiency to the tune of Rs. 7,63,000/-. The said order was modified by the order dated 30.7.2005 and the liability to pay the said stamp duty was apportioned between petitioner no.1 and the respondent no. 5 is in the ratio of 50:50.

3. Aggrieved by the aforesaid, petitioner preferred a revision under Section 56 but the same has also been dismissed vide order dated 26.2.2010.

4. Learned counsel for the petitioner has submitted that the document in question is exempt from stamp duty in view of the aforesaid notification dated 10th June 1998.

5. The relevant portion of the aforesaid notification issued under Section 9 of the Act reads as under:-

"In exercise of the powers under clause (a) of Sub-Section (1) of Section 9 of the India Stamp Act, 1899 (Act No. II of 1899) as amended from time to time in its application to Uttar Pradesh, the Government is pleased to remit, with effect from the date of publication of this notification in the Official Gazette, the stamp duty exceeding Rs.100/- (Rupees one hundred) chargeable on every instrument employed for obtaining loan or other financial assistant (including a mortgage, charge, hypothecation or documents executed by sureties) for acquisition of tractor or machinery relating to agricultural activity where such instrument is executed by an agriculturist in favour of a Bank. "

6. The instrument used for obtaining loan or financial assistance for establishing a cold storage is neither an instrument for acquisition of tractor or machinery relating to agricultural activity nor is an instrument executed by an agriculturist within the meaning of the aforesaid notification., According to Explanation I to the aforesaid notification the expression 'agriculturist' means a person engaged in any of the activities specified therein. The activities so specified does not cover the activities of running a cold storage.

7. In **Atma Ram Misra Vs. Bank of India 1989 RD489**, this Court held that cold storages serve a useful purpose in

advancing interest of agriculturist while considering the expression 'agriculturist' and agricultural purpose' used in context with U.P. Agricultural Credit Act, 1973. However, the definition of 'agriculture and agricultural purpose' used therein can not be imported in context with the notification under this Act wherein word 'agriculturalist' has been used and has been defined differently in the explanation to the notification itself having a plain, simple and clear meaning which would not include activity of cold storage within those of an agriculturist.

8. In view of the above, the benefit of remission as per the above notification is not admissible to the petitioner. Therefore, the authorities have committed no error in refusing the relief as claimed by the petitioner.

9. The writ petition as such is devoid of merit and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.05.2010

BEFORE
THE HON'BLE SATYA POOT MEHROTRA, J.
THE HONBLE S.C.AGARWAL, J.

Civil Misc. Writ Petition No. 24789 of 2010

Smt. Raj Rani Singh and another ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri H.A.B. Sinha
Sri Archana Singh

Counsel for the Respondent:
Sri D. Vaish,
C.S.C.

Constitution of India Art 226 Writ Petition-alternative namely-order passed under section 13(4) of Securisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002-petitioner can approach before Debt Recovery tribunal for getting possession of secured property Petition not maintainable

Held Para 15, 16 and 17

Even though, the petitioners may not have remedy under Section 17 of the aforesaid Act against the order passed under Section 14 of the aforesaid Act but the petitioners may approach the Debts Recovery Tribunal against the measures taken by the respondent no.4-Bank under sub-section (4) of Section 13 of the aforesaid Act. Thus, the petitioners have got an alternative remedy under Section 17 of the aforesaid Act against the measure taken under sub-section (4) of Section 13 of the aforesaid Act for taking possession of the property given as security.

Reference in this regard may be made to a decision of this Court in Virendra Kumar Jaiswal V. Chief Metropolitan Magistrate and another, 2009 (10) ADJ 203 (DB)=2010 (1) AWC 832 (DB).

Having regard to the nature of controversy involved in the present Writ Petition, we are of the opinion that it would be appropriate that the petitioners be relegated to avail the alternative remedy of filing application/appeal under Section 17 of the aforesaid Act.

Case law discussed:
2009 (10) ADJ 203 (DB),2010 (1) AWC 832 (DB).

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

1. It appears that the petitioners took loan from the respondent no.4-Punjab National Bank.

2. The petitioners committed default in payment of the said loan. Consequently, proceedings under the Securisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 have been initiated against the petitioners.

3. Notice under Section 13(2) of the aforesaid Act was issued to the petitioner. The said notice was followed a notice dated 27.2.2008 issued under Section 13(4) of the aforesaid Act. An application under Section 14 of the aforesaid Act was filed by the respondent no.4 –Bank for taking possession of the property given by the petitioners as security for the aforesaid loan.

4. By the Order dated 26.10.2009 (Annexure 1 to the Writ Petition), the Additional District Magistrate (Finance and Revenue), Agra has issued directions for handing over the physical and actual possession of the property given as security by the petitioners to the respondent no.4-Bank,

5. The petitioners have filed the present Writ Petition, interalia, praying for quashing of the said Order dated 26.10.2009.

6. We have heard Smt. Archana Singh, learned counsel for the petitioners, the learned Standing Counsel appearing for the respondent nos. 1 to 3 and Sri D.Vaish, learned counsel for the respondent no.4 –Bank.

7. Sri D.Vaish, learned counsel for the respondent no.4 –Bank has raised preliminary objection that the petitioners have got an alternative remedy under Section 17 of the aforesaid Act, and the Writ Petition is liable to be dismissed on the said ground.

8. We have considered the submissions made by Sri D.Vaish, learned counsel for the respondent no.4 –Bank, and we are inclined to accept the same.

9. Sub-section (4) of Section 13 of the aforesaid Act, interalia, provides that in case the borrower fails to discharge his liability in full within the period specified in sub-section (2) of Section 13, the secured creditor may take recourse to one or more of the measures mentioned in sub-section (4) of Section 13 for recovery of his secured debt.

10. Clause (a) of sub-section (4) of Section 13 of the aforesaid Act contemplates as one of the measures, taking possession of the secured asset of the borrower including the right to transfer by way of lease , assignment or sale for uthorize the secured asset.

11. Sub-section (1) of Section 14 of the aforesaid Act, interalia, provides that where the possession of any secured asset is required to be taken by the secured creditor, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate to take possession thereof.

12. Thus, sub-section (1) of Section 14 of the aforesaid Act is for the purpose of execution of the measures which the secured creditor has decided to take under sub-section (4) of Section 13 of the aforesaid Act. Sub-section (1) of Section 14 of the aforesaid Act is thus, consequential provision in order to

execute the measures which the creditor has decided to take under sub-section (4) of Section 13 of the aforesaid Act.

Sub-section (1) of Section 17 of the aforesaid Act, interalia, provides that any person (including borrower), aggrieved by any of the measures referred to sub-section (4) of Section 13 taken by the secured creditor or his uthorized officer, may make an application to the Debts Recovery Tribunal within forty five days from the date on which such measures had been taken.

13. It will thus, be seen that the petitioners have got alternative remedy under Section 17 of the aforesaid Act.

14. It is true that Section 17 of the aforesaid Act does not provide remedy against the order passed under Section 14 of the aforesaid Act. It is also true that in view of sub-section (3) of Section 14 of the aforesaid Act, the action taken under Section 14 of the said Act attains finality. However, as noted above, Section 14 of the aforesaid Act is merely a consequential provision and is for the purpose of executing the measures taken under sub-section (4) of Section 13 of the aforesaid Act. The order under Section 14 of the aforesaid Act is merely a consequential order.

15. Even though, the petitioners may not have remedy under Section 17 of the aforesaid Act against the order passed under Section 14 of the aforesaid Act but the petitioners may approach the Debts Recovery Tribunal against the measures taken by the respondent no.4-Bank under sub-section (4) of Section 13 of the aforesaid Act. Thus, the petitioners have got an alternative remedy under Section 17 of the aforesaid Act against the measure taken under sub-section (4) of Section 13 of the aforesaid Act for taking possession of the property given as security.

16. Reference in this regard may be made to a decision of this Court in ***Virendra Kumar Jaiswal V. Chief Metropolitan Magistrate and another, 2009 (10) ADJ 203 (DB)=2010 (1) AWC 832 (DB).***

17. Having regard to the nature of controversy involved in the present Writ Petition, we are of the opinion that it would be appropriate that the petitioners be relegated to avail the alternative remedy of filing application/appeal under Section 17 of the aforesaid Act.

18. In view of the above, the Writ Petition is liable to be dismissed on the ground of alternative remedy available to the petitioners.

19. The Writ Petition is accordingly dismissed on the ground of availability of alternative remedy to the petitioners.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.05.2010

BEFORE
THE HONBLE AMITAVA LALA, A.C.J.
THE HON'BLE SHABIHUL HASNAIN, J.

Civil Misc. P.I.L. No. 29169 of 2010

U.P. Madhymic Shikshak Sangh and another ...Petitioner
Versus
Union of India and others ...Respondent

Counsel for the Petitioners:
Sri Alok Dwivedi
Sri R.K. Ojha

Counsel for the Respondents:
C.S.C.
A.S.G.I.
Sri S.K. Mishra

Constitution of India Art. 226-Petition seeking exumption from Training-indexing in census-on grand of main task of teacher to impart education and the interest of Student-objected when receiving Salary from public exchequer-considering balance of public importance as well as students-petition disposed of with direction to engage those teachers during vacation period considering individual strength of those institutions-necessary direction issued.

Held: Para 5

As against such view of the Supreme Court, we can not hold and say that Teachers cannot be taken for the purpose of rendering census work which is required for national importance, therefore, striking the balance between the two parts, we find that the first part is the training and the same can be made within summer vacation of the year and fixed for three days only, we do not find any difficulty for the Teachers in attending such training. So far as indexing and final work for the purpose of completion of census work are concerned, for the sake of equity, we direct the Central and State authorities to fix a pro gramme either preponing the dates or otherwise so that the duties can be discharged by such Teachers during vacational period which is forthcoming or in the periods when the institutions are closed inclusive of holidays unless they are compelled to accept their duty in any working day and if such work are taken in the working days then in that case the authorities will take into account the strength of the Teachers of the individual institutions so that there should not be any difficulty in imparting education to the students.

Case law discussed:

1995-AIR (SC)-0-1078, 1995-SCC-Supp2-13, 1995; 2008(1) ESC 1 (SC).

(Delivered by Hon'ble Amitava Lala, ACJ)

1. The grievance of the petitioners' association being the Teachers of the respective aided, non government recognized institutions in the name of Uttar Pradesh Madhyamic Shikshak Sangh and its Secretary, by way of this public interest litigation, is that in the recent census the teaching staffs of the various institutions were directed by the Central/State authorities to be deployed in the census work.

2. According to the respondents, the work is required to be done in three phases: April, 2010-Training, September, 2010-Indexing and from February, 2011 for about four months for the purpose of completion of appropriate census work. The main grievance of the petitioners is that the Teachers are engaged in imparting education, therefore, interest of the students are to be protected. It is further submitted before us that if the Teachers are not taken for the purpose of rendering actual work to be done in the census, they should not be called for training.

3. The respondents both for the Union of India and the State have appeared and contended before us that census is required to be done for national interest, therefore, nobody can avoid such type of work irrespective of their imparting education particularly, when they are receiving salary from the public exchequer. In the month of June the schools/colleges will be closed and only three days are required for the purpose of training during such period. No guardian or Teacher or institution have come forward objecting

the steps taken by the Union of India and State with regard to census work. They will get their appropriate emoluments for the purpose of doing the work. However, in support of the contentions of the petitioners they relied upon the judgement of the Supreme Court reported in ***1995-AIR (SC)-0-1078, 1995-SCC-Supp2-13, 1995 (Election Commission of India Versus State Bank of India Staff Association Local Head Office Unit Patnas: Northern Zone Insurance Employees Association) and 2008 (1) ESC 1 (SC) (Election Commission of India Versus St. Mary's School and others).*** However, even before the citation we wanted to strike a balance between two contingencies: one is imparting education and another is with regard to assistance in the census work by the Teachers. ***Election Commission of India (Supra)*** i.e. the second judgement of Supreme Court also said about Teachers in respect of holding duty for the election purpose that there is necessity to maintain the balance between the two.

4. Sri S. K. Misra, learned counsel appearing for the Union of India has voluntarily stated before this Court that only 5 to 10 percent Teachers of an institution as per record, has been taken for the purpose of rendering and discharging their work. If it is so, there would not be any difficulty to strike a balance and fulfill the direction by this Court.

5. As against such view of the Supreme Court, we can not hold and say that Teachers cannot be taken for the purpose of rendering census work which is required for national importance, therefore, striking the balance between the two parts, we find that the first part is the training and the same can be made within summer vacation of the year and fixed for three days only, we do not find any difficulty for the Teachers in attending such training. So far as indexing and final work for the purpose of completion of census work are concerned, for the sake of equity, we direct the Central and State authorities to fix a pro gramme either preponing the dates or otherwise so that the duties can be discharged by such Teachers during vacational period which is forthcoming or in the periods when the institutions are closed inclusive of holidays unless they are compelled to accept their duty in any working day and if such work are taken in the working days then in that case the authorities will take into account the strength of the Teachers of the individual institutions so that there should not be any difficulty in imparting education to the students.

6. To fulfill the desire of the Court the Central and State authorities can sit a meeting and give the proposals giving various alternative dates to the respective institutions through the association to complete the work effectively at the earliest for the cause and fulfillment of desire of the Court.

7. We dispose of this petition with above directions, however, without imposing any cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.06.2010

BEFORE
THE HON'BLE ARUN TANDON, J.
THE HON'BLE RAJESH CHANDRA, J.

Civil Misc. Writ Petition No. 35774 of 2010

Dr. Avanish Prakash Singh and another
...Petitioners
Versus
The State of U.P. and others
...Respondents

Counsel for the Petitioners:
Smt. Arti Raje
Sri Satyawan Srivastava

Counsel for the Respondents:
C.S.C.

Constitution of India Art. 226-Petitioner working as lecturer on Manday basis-having teaching experience-seeking preference in substantive appointment-in absence of statutory provision no such direction can be issued by writ court.

Held: Para 7 & 8

Selection for appointment as teacher on Mandeya under the Government Order dated 07.04.1998 does not provide for any such adjustment of teacher against such subsequent vacancies and nor any preference, on the strength of earlier working as teacher on Mandeya has been provided for.

So far as the order of the Division Bench of this court passed in writ petition no. 11124 of 2009 is concerned. Suffice to record that no legal proposition has been laid down by the judgement. Only a direction was issued to consider the request made as per the law. The law has been explained by this court. Therefore, no further consideration by the Regional Higher Education Officer is required.

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

1. Petitioner who are two in number claim to be appointed on Mandeya against the substantive vacancies which were available in Udai Pratap Autonomous College, Varanasi. The appointment was made in terms of the Government order dated 7th April, 1988 where under payment to such Mandeya Teachers was to be made on per lecture basis subject to the maximum provided. Their appointment was to commence in July end with the close of Academic Session. Clause 3 of the Government order further provided that continuance of such teachers appointed on Madeya for the next academic session would require fresh selection for the purpose. It is Stated that the petitioner along with other candidates filed writ petition no. 27167 of 2007 before this court seeking continuance as teacher on Mandeya against the available vacancy without under going the process of selection for the next academic session. The writ Court passed an interim order providing that the teachers working on Mandeya shall continue as such till regular appointment is made on the post in question.

2. Thus on the statement made by the counsel for the petitioner this court has no hesitation to record that the right of the petitioners to continue as teachers on Mandeya in the institution against the post was subject to the condition that such appointment would come to as automatic end when a regular teacher is apointed after due selection on the post.

3. From paragraph 17 of the present

writ petition it is established that Dr. Pushpraj Sonkar and Dr. Rakesh Kumar have been selected by U.P. Higher Education Service Commission under advertisement no. 41 for the post held by the petitioners earlier and they have also been appointed. In view of the aforesaid fact the interim order passed by the Court in writ petition no. 27167 of 2007 cannot be the basis for the continuance of the petitioner any further.

4. By means of the present writ petition the petitioners contend that two subsequent vacancies have fallen vacant in the institution due to retirement of one Sri Badri Nath Singh and second Dr. Parmatma Nand Singh and it is again these fresh vacancies, the management of the institution has made a proposal for continuance of the petitioner under letter dated 15th June, 2010. the petitioners seeks consideration of the papers so transmitted to the Regional Higher Education officer for continuance of the petitioner against the newly available vacancies because of their earlier appointment as Mandeya teachers. Reliance has also been placed upon the order of the Division Bench of this Court passed in writ petition no 11124 of 2009 Smt. Dr. Priyanka Srivastava Vs. State of U.P. and others for the purpose.

5. We have heard counsel for the petitioner and have examined the records. We are of the considered opinion that the earlier appointment of petitioners against the existing vacancies in the year 2007 was subject to the condition that it will come to an end on appointment of regular candidate on recommendation of the commission to similar effect is the order passed by Court in writ petition no. 27167 of 2007 as has been stated by the counsel for the petitioner. Therefore, the petitioner cannot claim any right to continue as Mandeya teacher against any subsequent vacancies which may have caused in the institution because of retirement of two teachers namely Sri Badri Nath Singh and Dr. Parmatma Nand Singh. Against these fresh vacancies appointment on Mandeya has to be made after advertisement and following the Government Order applicable on the subject dated 07.04.1998. The resolution of the committee of management directing adjustment of the petitioner against the subsequent vacancies is patently arbitrary and not in accordance with the Government Order dated 07.04.1998. It is needless to emphasize that large number of candidates must become eligible for the said post, for appointment on Mandeya between the period the petitioner was earlier appointed and till the fresh vacancy are caused in the institution is advertised. Any order to continue the petitioner against new vacancies would be voilative of Article 14 of the Constitution of India.

6. At this stage counsel for the petitioner submitted that since the petitioner have taught earlier for number of years, they have teaching experience and should be continued as teacher on Mandeya. The contention has only been stated to be rejected.

7. Selection for appointment as teacher on Mandeya under the Government Order dated 07.04.1998 does not provide for any such adjustment of teacher against such subsequent vacancies and nor any preference, on the strength of earlier working as teacher on Mandeya has been provided for.

8. So far as the order of the Division Bench of this court passed in writ petition

no. 11124 of 2009 is concerned. Suffice to record that no legal proposition has been laid down by the judgment. Only a direction was issued to consider the request made as per the law. The law has been explained by this court. Therefore, no further consideration by the Regional Higher Education Officer is required.

9. At this stage counsel for the petitioner submitted that the petitioner may be granted liberty to apply and they be considered. It is not necessary for this Court to issue any such direction that as the petitioner if eligible in terms of advertisement published can always apply and their application shall be taken care of by the authority concerned as per the conditions applicable.

The writ petition is dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.05.2010

BEFORE
THE HON'BLE UMA NATH SINGH, J.
THE HON'BLE ASHOK SRIVASTAVA, J.

Criminal Appeal No. 941 of 1981

Manna and others ...Petitioner
Versus
The State ...Respondent

Counsel for the Petitioner:
Sri K.K. Dixit
Sri Madhurima Bhargava
Sri Mamta Singh Yadav

Counsel for the Respondent:
G.A.

Criminal Appeal-Charges not properly framed by the Trial court from perusal of case diary offense Under Section 396, 302 and 412 made out but Trial Judge framed charge for offense Under Section 460/201 IPC only-held-Trial Judge committed great error by not framing charge regarding murder and disposing of dead body stealthily in order to disappearance of evidence-appeal allowed and remanded back to frame appropriate charges ofter hearing prosecution and accused person and to conclude Trial as the earliest possible considering long term of pendency of Trial.

Held: Para 21

On the basis of the above discussion, we are of the view that learned lower court has committed an error in framing the charges under Section 460/201 I.P.C. only. He should have framed charges regarding murder of the deceased and disposing of his dead body stealthily in order to cause disappearance of evidence and while framing such charges, he should have also considered the circumstances which are indicative of the offences relating to theft, robbery or dacoity and should have also framed charges regarding these offences.

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

1. The appellants Manna, Munai and Ram Prasad have been found guilty under Sections 460/201 I.P.C. by learned II Additional Sessions Judge, Hardoi in S.T. No. 223/80 vide judgment and order dated 11.12.1981. Each of the appellant has been sentenced to life imprisonment under Section 460 I.P.C. and 5 years R.I. for the offence under Section 201 I.P.C. They have also been sentenced to pay fine.

2. Brief facts of the case are that the deceased Ramghulam, was a resident of village Gogadeo where he lived in his

own house. The wife of Ramghulam had died during his life time and he had only one issue, a daughter, who was already married some 12 years ago from the date of incident. In these circumstances the deceased Ramghulam was living all alone in his residential house. The house of the appellant Manna was adjacent to the house of the deceased. The complainant of this case is one Chhotey Lal who is a cousin of the deceased and he was living in the same village and his residence was at a distance of some 40 paces from the house of deceased. The deceased carried on grain and money lending business. The appellants Manna and Munai are real brothers. Their mother and wife of deceased Ramghulam were cousin sisters. For that reason the deceased had once expressed his eagerness to give his property to the accused Manna. After a few years, when deceased found that the character of Manna was not good, he changed his idea of giving his property to him and further expressed a desire to give his entire properties to his daughter Smt. Sonkali. Since the house of the complainant Chhotey Lal was not far away from the house of the deceased and the deceased was living all alone in his house, the latter used to visit the residence of former very often. On 19.8.1979 at about 8.00 P.M. the complainant Chhotey Lal was informed by Ramesh, Nanhe Singh and Sheopal that the accused appellants Manna, Munai and Ram Prasad alongwith 3 other accused persons named in the F.I.R. were getting0.00" loaded gunny bags full of grains belonging to the deceased, on a truck. The grain bags were taken out from the residence of the deceased but neither he nor his daughter Son Kali was present there. Ramesh, Nanhe and Sheopal asked the accused as to why they were carrying the grain bags but they did not reply. They also did not answer the queries put to them regarding whereabouts of the deceased. Therefore, the trio got suspicious, went to the residence of the complainant and narrated to him everything they had seen. An alarmed complainant alongwith Ramesh, Nanhe Singh and Sheopal came to the residence of deceased where he found that the truck had already left that place and the main door of the house of the deceased was found locked from outside. Since the complainant failed to trace out the key, he managed to get a ladder and by scaling the wall of the house of the deceased, got inside. He found there that all the household articles were scattered and it was giving an appearance that a loot or theft had taken place in that house. The deceased Ramghulam was not found inside the house. The complainant went to the police station the next morning and lodged an F.I.R. On inquiry it was found that the deceased was not seen in his village since last 5 ? 6 days. Sonkali was informed of the incident who came to her father's house. She too had no information about the whereabouts of her father. During the course of investigation the I.O. arrested the accused Munai who, when interrogated, delivered the key of the main door of the house of the deceased. On further interrogation he admitted that he alongwith co-accused killed Ramghulam and thereafter stole utensils, ornaments, food grains and other articles from the house of the deceased. The appellant Munai further informed the police that bags of grains were taken away by rest of the appellants to Lucknow in order to sell the same. The I.O. rushed to Lucknow and on 20.3.1979 he arrested the appellants Manna and Ram Prasad who were trying to sell the bags containing grains. All the bags bore name

of the deceased. The I.O. recovered 56 bags Arahar and one bag full of mustered from the possession of these two appellants. The I.O. also succeeded in tracing the truck and its driver. The driver has been produced as a witness in this case. When the appellants Manna and Ram Prasad were interrogated they also admitted that they alongwith Munai had eliminated Ram Gulam and after killing him they had dumped his dead body in the nearby river after tying the same with two pitchers with a view that the dead body would settle down at the bottom of the river due to the weight of the pitchers and the water filled in it. On the pointing out of Manna on 21.3.1979 the dead body of the deceased was recovered from the river. It was identified by the daughter of the deceased. The post mortem was conducted and a report was prepared.

3. After concluding his investigation, the I.O. submitted a charge-sheet in the court of learned Magistrate against all 6 accused persons named in the F.I.R. including the appellants.

4. Charges under Section 460 and 201 I.P.C. were framed against all the 6 accused persons. The prosecution had examined as many as 10 witnesses.

5. PW-1 Shiv Pal Singh is a witness of fact who had informed Chhotey Lal that the accused persons named in the F.I.R. were getting loaded gunny bags full of grains on a truck at the residence of the deceased. PW-2 is the complainant Chhotey Lal. PW-3 Bhoora and PW-8 Kanshi Ram are the witnesses before whom the dead body of the deceased was recovered at the pointing out of the appellant Manna. PW-4 is Sonkali, daughter of the deceased. PW-5 Awadh Ram is the witness before whom bags containing Arahar and mustered were recovered from the possession of the appellants. PW-6 Babu Lal is the driver of the truck upon which the grain bags were carried from the residence of the deceased to a grain market at Lucknow. PW-7 Raj Bahadur Singh is the witness before whom the key of main door of the deceased and certain stolen utensiles were recovered from the residence of the appellant Munai. PW-9 Shiv Murti Singh, S.O., is the investigating officer of the cae and PW-10 Dr. J.K. Verma had conducted the post-mortem.

6. The trial of the case was concluded and the learned Addl. Sessions Judge vide his judgm0.00"ent and order impugned in this appeal acquitted Maiku, Ramdeen and Shrawan but he found the appellants Munai, Manna and Ram Prasad guilty of the offences charged and convicted them as has been mentioned earlier in this judgment. Feeling aggrieved by the judgment and order the present appeal has been filed.

7. We have heard learned counsel for the appellants and learned Government Counsel for the State.

Learned counsel for the appellants has assailed the charges framed by the learned trial court against the appellants. It has been submitted from the side of the appellants that there is no evidence on record which may justify the conviction of the appellants under Sections 460 I.P.C. and also 201 I.P.C. It has been further submitted that there is no evidence on record which may indicate that any one has seen the incident of theft or that of murder of the deceased. It has also been submitted that it is a case of

circumstantial evidence and many important links are missing in the matter. It has been further contended by learned counsel for the appellants that no charge has been framed against the appellants under Section 302 I.P.C. or 411 I.P.C. or under any section relating to theft. In these circumstances it has been submitted that it was not possible at this stage to analyze the evidence available on record so as to hold the appellants guilty of murder, theft or for the offence under Section 411 I.P.C.

8. At this stage the learned Government Counsel has said that on the basis of the statement of the witnesses as contained in the case diary and other material available on record, the learned lower court should have framed charges under Section 302, 457, 380 and 411 I.P.C. also. Since it has not been done so, it is a fit case in which the case should be remanded back to the court of learned Sessions Judge concerned to frame proper charges in the case and a fresh trial is needed in the interest of justice. It has been further contended from the side of the State that only by lapse of time no guilty should be allowed to go scot-free in the cases of heinous offences.

9. Replying to these contentions as advanced by learned State Counsel, learned counsel for the appellants has said that it is a very old case and if the case is remanded back, the appellants shall suffer unnecessarily and they will face hardship in the matter. He has further said that it is a case in which the learned trial court should have recorded an order of acquittal because there is no evidence in this case which may prove the offence under Section 460/201 I.P.C.

10. In our opinion, the argument advanced by learned counsel for the appellants is not acceptable. The date of incident is 20.8.1979 and the concerned sessions trial was decided on 11.12.1981. The appeal was filed in the year 1981. It means the matter reached the stage of appeal just in a short period of 2 years from the date of the alleged offence and due to heavy pendency in the High Court, the appeal could not be taken up for hearing prior to this date. Thus, there is no fault on the part of the State in the matter. There has been no delay on its part. Besides, it is the duty of the trial court to frame charges correctly and if an illegality or error has been committed by the trial court, it is the duty of the appellate court to set the matter right.

11. We have gone through the case diary.

12. In the instant case there has been extra judicial confessions of the appellants regarding their involvement in the murder of the deceased. On the pointing out of one of the appellants, the dead body of the deceased was recovered from the bed of the river. On the pointing out of the appellants and informations given by them, stolen utensils and food grains were recovered from their possession. The key of the main door of the house of the deceased was found in the possession of the appellant Munai.

13. After examining the material available on record and the case diary, we are of the firm view that the charges framed by the learned trial court are erroneous.

14. From perusal of the F.I.R., the statements of the witnesses recorded

under Section 161 Cr.P.C. and charges framed against the appellants by the learend lower court, prima facie an involvement of more than four persons appears to be there in the entire matter. In the instant case the learned lower court has framed charges under Section 460 and 201 I.P.C. only.

15. To recapitulate the facts and keeping them in a nutshell, at the cost of repeatation, we have to say that it appears that more than four persons may be involved in the entire episode of theft, killing of Ram Gulam and disposing of his dead body with a view to eliminate the evidence. In the instant case the allegations of theft, carrying away the stolen property, killing of Ram Gulam, disposal of stolen properties and disposal of dead body stealthily with illegal intentions are there on record.

16. A perusal of **Section 460 I.P.C**. reveals that if at the time of the committing of lurking house-tresspass by night or house breaking by night, any person guilty of such offence if voluntarily causes or attempts to cause death or grievous hurt to any person, every person involved in committing such lurking house-tresspass by night or house-breaking by night, shall be punished under this section.

17. The language of this section clearly indicates that the ingredients of this section are confined to commission of lurking house-tresspass by night or house-breaking by night only. This section does not speak anything about commission of theft or causing injury or grievous injury or death of a person while committing theft.

18. According to **Section 390 of Indian Penal Code,** theft becomes robbery if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

19. In the case before us it is evident that fact wise allegations are there that a theft was committed by all the accused peresons in the residential house of Ram Gulam. The over all perusal of the case diary and the statements of the witnesses of facts under Section 161 Cr.P.C. also indicate that allegations are also there that murder of Ram Gulam was committed during the course of theft either by all the accused persons named in the F.I.R. or with the active help and connivance of all of them. Therefore, in the instant case the offence of theft is converted into an offence of robbery. Since there is an involvement of more than four persons, robbery has become dacoity. A murder has been allegedly committed in the case therefore, offence becomes an offence which is punishable under Section 396 I.P.C. Thus, prima facie in the instant case an offence of dacoity with murder also appears to have taken place.

20. The law relating to framing of charges is clear. If allegations are there, the charges should be framed in graver sections so that in a case if it is found that an offence having lesser gravity has been committed, a conviction can be recorded under appropriate section of the relevant Act but reverse is not possible. Charges should also be framed in the alternative.

As mentioned above, an offence punishable under Section 460 I.P.C. does not relate to an offence relating to theft or robbery. To punish an accused under Section 460 I.P.C., it is sufficient if it is proved against him that he committed murder of a person while he was committing lurking house-tresspass by night. There may be an incident where a murder is committed by some persons while committing lurking house tresspass by night or breaking-house by night but no theft or robbery could be committed, and there may be an incident where another murder may be committed while committing theft or while taking away the articles received by theft. In the latter case, a charge cannot be allowed to be confined to one under Section 460 I.P.C. only. Another charge under Section 394 readwith Section 302 I.P.C. or in appropriate cases a charge under Section 396 I.P.C. or Section 412 I.P.C. must also be framed. Charges are framed on the basis of the allegations available in the case diary. It is something different whether prosecution succeeds in proving those charges or not.

21. On the basis of the above discussion, we are of the view that learned lower court has committed an error in framing the charges under Section 460/201 I.P.C. only. He should have framed charges regarding murder of the deceased and disposing of his dead body stealthily in order to cause disappearance of evidence and while framing such charges, he should have also considered the circumstances which are indicative of the offences relating to theft, robbery or dacoity and should have also framed charges regarding these offences.

22. On the basis of the above discussion, we are of the view that the appeal should be allowed.

23. The appeal is allowed. The judgment and order dated 11.12.1981 passed by learned II Additional Sessions Judge, Hardoi in S.T. No. 223/80 impugned in this appeal is set aside. The case is remanded back to the learned Sessions Judge, Hardoi. We direct the learned lower court to study the entire case diary attentively. It is left to the discretion of the lower court to frame charges afresh against the accused persons in appropriate sections after hearing the prosecution and accused persons of the case. After framing of the charges, the trial shall be concluded as the earliest possible as the case is very old.

24. The learned Sessions Judge may either decide the case himself or may transfer it to a court competent to decide it.

The appellants are on bail. They are required to file fresh bail bonds to the satisfaction of learned Sessions Judge. The appellants are directed to appear on 5.7.2010 before the learned Sessions Judge, Hardoi and file fresh bail bonds so that their presence before the trial court during the course of trial is ensured.

Office is directed to send back the lower court record forthwith the learned District & Sessions Judge, Hardoi.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.06.2010

BEFORE
THE HON'BLE DHARAM VEER SHARMA, J.
THE HON'BLE DR. SATISH CHANDRA, J.

Writ Petition No. 1093 of 2006

Ajai Kumar Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Constitution of India-Art.226-Public Interest Litigation-by a Practicing Advocate-Locus-Standi-Nothing on record causing loss to public exchequer-can helping the builders-misconceived petition by an Advocate-inspite of time granted No rejoinder affidavit field-held-conduct of petitioner itself makes dis-entitled to maintain the petition-as matter referred to Bar Council for appropriate action against petitioner-No monitory penality required.

Held: Para 41 & 42

Thus having regard to the contents of paragraphs 7 to 11 referred to above it transpires that there is not even an iota of evidence to prove that respondents caused any loss to the public exchequer or they acted in a fashion to help bidders. Curiously enough no bidder has come forward to challenge the entire transaction and the petitioner who is not aggrieved person has assailed the auction of the respondents without any locus on an economic matter which is not in violation of any rule.

Thus this petition has not been filed with clean hands. The conduct of the petitioner dis-entitles him to maintain the petition. However, we find that the petitioner who is an Advocate should not have filed this writ petition. The matter is referred to the Bar Council of U.P. for appropriate decision in the matter. Accordingly, no monetary penalty is required to be imposed against the petitioner for filing this petition.

Case law discussed:
(2002) 2 SCC 333, (2009) 7 SCC 561, (2004) 3 SCC 349, 2005 (1) SCC 590, 2010 AIR SCW 1029, 1981 Supp SCC 87, (1982) 2 SCC, (1992) 4 SCC 494, (1992) 4 SCC 494, 1980, 1 SCC 81, 1979, 4 SCC 167, (2003) 6 SCC 230,(2002) 2 SCC 333, (1987) 2 SCC,295 this Court held:(SCC pp 334-35,para 61), (1992) 4 SCC 305 this Court opined: (SCC p. 348, para 109), (2000) 10 SCC 664 it was held: (SCC pp.762-63, paras 229 & 232), (1998) 8 SCC 143 it has been held: (SCC pp. 152-53, para 28), (1992) 4 SCC 305, (1993) 1 SCC 561, (1992) 4 SCC 305: 1993 SCC (Cri) 36, (2009) 7 SCC 561, AIR 2001 SCC 1739, AIR 2005 SC 540, (2002)2 SCC 333, AIR 2003 SC 1344

(Delivered by Hon'ble Dharam Veer Sharma, J.)

1. The instant writ petition designed and styled as Public Interest Litigation has been filed by the petitioner Ajai Kumar Singh, a Practicing Advocate. It is directed against the auction of certain commercial plots situate at Vibhuti Khand, Gomti Nagar Scheme of Lucknow Development Authority. The petitioner has prayed for quashing of the allotment as held in pursuance of the auction notices. It is further prayed that a writ in the nature of mandamus be issued commanding the respondents to stop constructions on the allotted lands and a direction may be issued to the C.B.I. to inquire into the matter and submit its report to this Court.

2. The petitioner has come with a case that as a practising Advocate he has opportunity of interacting with people belonging to different walk of life and incidentally he met some prospective bidders of the land in question who have filtered out certain informations which reveals deliberate activities of the respondents with an ulterior motive to

fill up there wallets resulting in heavy losses to the public exchequer. The authorities are functioning in utter violation of the provisions and spirit of the Constitution. Authorities had been charged with corruption.

It is alleged that two tender notices were published on 14.06.2005 and 16.06.2005, annexures 1 and 2 in a daily Hindi Newspaper for auction of commercial plots in Vibhuti Khand of the Gomti Nagar Scheme for Group Housing and Shops. On a bare reading of the tender notices it transpired that the rate of land per sq.mt. is nearly 3 times lesser than the rate of fixed for the land in the vicinity. The reserved rate of land is fixed for Rs.6000 per sq.mt. whereas the rate in the open market is more than Rs.15,000 per sq.mt. The same was done to benefit certain builders. It is alleged that in the vicinity within one kilometer distance at Viraj Khand the property was auctioned on the quoted price of Rs.17,000/- per sq.mt and in the same way in Vastu Khand some commercial plots were auctioned at the rate of Rs.16000 to 30,000 per sq.mt. Respondents created an opportunity to extract heavy illegal gratification by not providing in the auction notices Floor Area Ratio and ground coverage. It is always provided in every auction notice in terms of the byelaws of the Development Authority.

3. After the auction of the land in question to benefit their favorite builders respondents have managed to influence the Government to reduce the stamp duty payable on the registration of the land for personal gains.

4. Lucknow Mahayojna 2021 framed by the Government provides that the land in question may be used for commercial category but in the instant case in utter disregard to the specific provision the land has been auctioned to the builders for group housing.

The respondents/the officers of Lucknow Development Authority are indulging in corruption in furtherance of the same a scheme of Gomti Nagar Phase II was advertised. The advertisement was not made in major newspapers of circulation. The dates for submission of tender were fixed for 12.1.2006 to 17.1.2006 while 14.1.2006 and 15.1.2006 were holidays. It is further averred that in thecreation of Lohia Park, Gomti Nagar a sum of Rs.50 crores have already been spent by the Lucknow Development Authority and the same has been counter signed by the Secretary of the Lucknow Development Authority but the then Secretary refused to sign the same.

It is further urged that the petitioner incidentally met some prospective bidders of the land in question who have filtered out information of unwarranted conditions provided in the auction notice. Accordingly the instant petition has been filed to bring these facts to the notice of the court. Thus the petitioner's case is that the reserve price of the plots in question was kept 1/3rd of market rate of the land with a view to extend benefit to certain bidders and further LDA fixed certain arbitrary conditions like quantum of solvency and earnest money for different sizes of the plots. The Floor Area Ratio has been given to the builders much more than the prescribed Floor Area Ratio. The allotment of plot to the builders of the choice is violative of Article 14 of the Constitution. The

auction was not fair, accordingly petitioner has filed the Public Interest Litigation alleging himself to be the public spirited person.

Respondent nos. 2 to 6 have contested the petition. They have filed joint counter affidavit and denied allegations made in the petition in toto. The case of respondents on factual aspect is as under;

5. The land in question is a land earmarked for commercial activity as per lay out plan for Vibhuti Khand, Gomti Nagar Scheme, Lucknow. A tender notice dated 07.11.2004 was published in the daily newspapers The Times of India and Dainik Jagran for the land in question as commercial land with reserve price of Rs.6000 of which the tender submission date was 19.1.2004. No tender were received till the time and date of the submission of the tender. However, later on two offers without earnest money were received with conditions and the same were not in the interest of the Lucknow Development Authority resulting which the same were not accepted by the competent authority. For the land in question again tender notice were published in the daily newspaper Dainik Jagran, Amar Ujala, Hindustan Times and Times of India with date of submission of tender as 07.02.2005 and date of auction as 08.02.2005 as commercial land. No tenders were received till the last date of submission. For the land in question against tender notice dated 16.02.2005 was published in the daily newspapers Times of India, Dainik Jagran and Hindustan Times with last date of tender submission as 28.02.2005 and tender auction as 01.03.2005 as commercial land but no tenders were received till the last date. Thus, at last the proposal was placed before the Board of the Lucknow Development Authority on 09.05.2005 to the effect that on the commercial land in question, only commercial activity may be permitted on ground floor and for the remaining floors commercial activity and Group Housing may be permitted if need be on the same Floor Area Ratio, coverage and set back which is for commercial land.

6. The Board of Lucknow Development Authority accepted the proposal with the conditions that the price of the land in question would remain which is for commercial land. The decision of the Board of Lucknow Development Authority was sent to the State Government for needful. For compliance of the Board of Lucknow Development Authority decision dated 09.05.2005, a committee was constituted to lay down the detailed terms and conditions for advertising the tender notice and auction. The committee submitted the report and the same was approved by the competent authority. Accordingly the tender notice dated 29.05.2005, amended tender dated 14.6.2005 which relates to 11 plots in Vibhuti Khand, Gomti Nagar, Lucknow was published in daily newspapers for submission of tenders on 21.06.2005 and auction to be held on 22.06.2005. On 21.06.2005 tenders were submitted in response to the tender notice dated 29.05.2005, amended tender notice dated 14.06.2005 and tender notice dated 16.06.2005 which relates to 11 plots in Vibhuti Khand, Gomti Nagar, Lucknow. Of 35 tenders, technical bids were open on 21.06.2005 and after scrutiny by a Committee comprising of Finance

Controller, Lucknow Development Authority; Chief Town Planner, Lucknow Development Authority, Joint Secretary, Lucknow Development Authority, Executive System, Lucknow Development Authority and Executive Engineer, Lucknow Development Authority, 02 tenders of M/s Shaurya Towers Pvt Limited and M/s Brindavan Gulmohan Enterprises were recommended to be rejected and the remaining 33 tenders were recommended to be accepted.

7. The aforesaid recommendations was accepted by the Vice Chairman, Lucknow Development Authority. The remaining 33 tenders whose technical bid was in order were invited for open auction on 22.06.2005. No protest or representation against the tender notice dated 29.05.2005, amended tender notice dated 14.06.2005 and tender notice dated 16.06.2005 was received by the answering respondents upto 22.06.2005 and even with regard to the scrutiny of the technical bid no protest or representation was received by Lucknow Development Authority from M/s Shaurya Towers Pvt Limited and M/s Brindavan Gulmohan Enterprises. An open auction was held on 22.06.2005 amongst the qualified contestants with respect to each plot keeping in view the reserved price of Rs.6000 per sq.mt.indicated in the tender notice.

8. The highest bidder with respect to each plot was recommended for acceptance by the aforesaid committee and at last accepted by the Vice Chairman, Lucknow Development Authority. The building plan for 09 plots out of 11 plots also been approved and the construction is in progress.

The reserve price has to be fixed according to the actual status of the land in question in accordance with the Govenrment Order dated 03.06.2005 wherein the rate fixed for commercial land is held to be twice of the residential rate. The reserve price for residential land in Gomti Nagar Scheme Phase I including Vibhuti Khand upto 30.11.2003 was Rs.2500 per sq.mt. and the same was revised to Rs.3000 per sq.mt. with effect from 01.12.2003 through order dated 29.11.2003.

9. Thus the rate for commercial land with effect from 01.12.2003 was Rs.6000.00 per sq.mt. i.e. double the reserve price for residential land. The reserve price of Gomti Nagar Phase-I including Vibhuti Khand was further revised to Rs.4000/- per sq.mt. with effect from 01.04.2006 through order dated 29.03.2006. The reserve price was further revised to Rs.4400/- per sq.mt. for Gomti Nagar Phase I including Vibhuti Khand with effect from 01.09.2007 through order dated 03.09.2007. Thus the reserve price of the Lucknow Development Authority for Gomti Nagar Scheme Phase I including Vibhuti Khand even on the date is Rs.4400 per sq.mt for residential land and double the same for commercial land i.e. Rs.8800 per sq.mt. The price of Rs.15000/- per sq.mt indicated by the petitioner in the paragraph under reply for Vibhuti Khand, Gomti Nagar, Scheme, Lucknow is imaginary resulting which the consequential calculation made by the petitioner in the paragraph under reply is also imaginary. The qualification for bidders was fixed in the tender notice dated 29.05.2005, amended tender notice dated 14.6.2005 and tender notice dated 16.6.2005 on the basis of the

recommendation of the committee which was accepted by the Vice Chairman,Lucknow Development Authority. The Committee made the recommendation after studying/analyzing the similar conditions imposed by Greater NOIDA Industrial Development Authority.

10. The condition of solvency and turnover is fixed with regard to commercial plots for construction of commercial and residential and not for those plots for which construction of only commercial or only Group Housing is permitted. If no restriction of solvency, turnover and earnest money would have been placed in the tender notice dated 29.05.2005, amended tender notice dated 14.06.2005 and tender notice dated 16.06.2005, then the object of making development through developers upon the land in question could have never been achieved if the persons having low solvency and turnover would have been permitted to take part in the bid and simultaneously the money in phased manner could not have been realized by the Lucknow Development Authority as well as the interest of the public, who are prospective buyers, would have been adversely affected.

11. Commercial plot of Viraj Khand, Gomti Nagar Scheme, Lucknow and Vastu Khand, Gomti Nagar Scheme, Lucknow referred in the paragraph under reply can not be compared with the commercial plots in Vibhuti Khand, Gomti Nagar Scheme, Lucknow on account of the location size of plots and activities permitted. The condition of solvency and turnover is fixed with regard to commercial plots for construction of commercial and residential and not for those plots for which construction of only commercial or only Group Housing is permitted. In Viraj Khand Gomti Nagar scheme, Lucknow and Vastu Khand, Gomti Nagar scheme, Lucknow, several commercial plots were auctioned during the relevant time of which the petitioner is citing example and the highest bid for the most of the said commercial plots was almost at par with the highest bid of Vibhuti Khand, Gomti Nagar Scheme, Lucknow.

12. All the terms and conditions are not published in the tender notice. The details terms and conditions are indicated in the tender form which can be purchased from the office of the Lucknow Development Authority. The Floor Area Ratio and Ground Coverage is 2.0 and 30% respectively in the case of commercial plots in commercial area as per Lucknow Development Authority Building Byelaws, 2000. The tender notice of Jaipur Development Authority can not be compared with the tender notice of the Lucknow Development Authority.

The petitioner with regard to floor area ratio has referred to Chapter 3 Part-3 of the Lucknow Development Authority building byelaws, 2000 meant for commercial area.

No reduction in stamp duty has been granted by the State Government where as on the contrary 10% of the stamp duty has been paid by the allottees while executing the registered agreement. Thus no relaxation has been given to the allottees.

13. As per Model Zoning Regulations issued by State Government, the provisions of Group Housing in commercial area on conditions is permitted and accordingly the Board of the Lucknow Development Authority took a decision in its meeting dated 09.05.2005 and the said decision was sent to the State Government for doing the needful.

There is no loss of public exchequer of the Lucknow Development Authority and the amount indicated in the paragraph under reply is imaginary. There was no reduction relaxation of payment of stamp duty in the case of 11 plots in question. The Floor Area Ratio is strictly in accordance with the Lucknow Development Authority Building Byelaws, 2000 meant for commercial land in commercial area and not otherwise. The cost of the 11 plots in question is more than the reserve price fixed in terms of the decision.

14. Petitioner has filed the present writ petition before this Court as a proxy petition on behalf of the prospective bidders who had met the petitioner and had given baseless information. The prospective bidders can not be said to be belonging to unrepresented group as they could have very well preferred the representation or complaint if any to the Respondents in the Writ Petition and later on could have filed a Writ Petition if necessary before Court. The present writ petition is not liable to be entertained as Public Interest Litigation and the same is liable to be dismissed with cost payable to the answering respondents.

15. The petitioner sought time for filing rejoinder affidavit. Several opportunities were given to the petitioner to file the same. But he has failed to file any rejoinder affidavit. Thus the version of respondents no. 2 to 6 in the counter affidavit has not been contradicted by the petitioner.

The parties were also given opportunity to file written submissions, accordingly written submissions on behalf of Lucknow Development Authority have been made. After going through the submissions, it transpires that on issue involved in the writ petition, the learned counsel for the L.D.A. has contended that the instant petition is not maintainable. He has made submissions to the extent that the instant writ petition does not fall within the parameters of bonafide public interest litigation and the petitioner cannot be treated as an aggrieved person. Contentions raised are as under:-

A. Whether the petitioner Sri Ajai Kumar Singh has locus to file the instant Public Interest Litigation?

B. The writ petition involving the question of settlement of Commercial Plots can not be termed to be a Public Interest Litigation and when it is not a Public Interest Litigation then the petitioner can not be said to be aggrieved person.

C. The Tenor of the writ petition goes to show that it is a proxy petition filed with malicious and capricious intention.

D. The writ petition is liable to be dismissed on the ground of non-joinder of necessary party.

E. The conduct of the petitioner during the proceedings of the instant writ petition, as is evident from the order sheet, has made him liable to pay exemplary cost by filing a malicious petitions and for abusing the process of the Court.

F. On merits the petitioner has failed to substantiate the allegations levelled by him. The Lucknow Development Authority submits that the petitioner is busy body and has tried to ventilate the cause of certain prospective bidders. Paragraph 19 of the writ petition is relevant, which is as follows:-

"That the petitioner is a practicing advocate and as such he has opportunities of interacting with people belonging to different walks of life and incidentally he has met some prospective bidders of the land in question who have been filtered out by imposing certain unwarranted conditions provided in the auction notice who through due diligence provided to the petitioner all the facts and figures given herein above."

It is further urged that the writ petition filed by the petitioner in the nature of Public Interest litigation is tainted with improper motives and is intended to thwart the Lucknow Development Authority from undertaking various developmental activities for planned development of the city of the Lucknow in accordance with the provisions of Master Plan-2021 and U.P. Urban Planning and Development Act, 1973. Petitioner has abused the process of this Hon'ble Court for oblique considerations. Neither any violation of statutory provision nor violation of any fundamental rights has been prima facie shown by the writ petitioner. Hon'ble Supreme Court in the case of BALCO employees' Union (Regd.) Vs. Union of India, (2002) 2 SCC 333, at page 382 was pleased to hold as under:-

"92. In a democracy it is the prerogative of each elected Government to follow it's own policy. Often a change in Government may result in the shift in focus or change in economic policies. Any such change may result in adversely affecting some vested interests. Unless any illegality is committed in the execution of the policy or the same is contrary to law or mala fide, a decision bringing about change cannot per se be interfered with by the Court.

97. Judicial interference by way of PIL is available if there is injury to public because of dereliction of Constitutional or statutory obligations on the part of the government. Here it is not so and in the sphere of economic policy or reform the Court is not the appropriate forum. Every matter of public interest or curiosity cannot be the subject matter of PIL. Courts are not intended to and nor should they conduct the administration of the country. Courts will interfere only if there is a clear violation of Constitutional or statutory provisions or non-compliance by the State with it's Constitutional or statutory duties. None of these contingencies arise in this present case."

Further in the case of Villianur Iyarkkai Padukappu Maiyam Vs. Union of India, (2009) 7 SCC 561, Hon'ble

Supreme Court was pleased to observe as under:-

"168. In a democracy, it is the prerogative of each elected Government to follow its own policy. Often a change in Government may result in the shift in focus or change in economic policies. Any such change may result in adversely affecting some vested interests. Unless any illegality is committed in the execution of the policy or the same is contrary to law or malafide, a decision bringing about change cannot per se be interfered with by the court.

169. It is neither within the domain of the courts nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are the courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical. Wisdom and advisability of economic policy are ordinarily not amenable to judicial review. In matters relating to economic issues the Government has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within the limits of the authority. For testing the correctness of a policy, the appropriate forum is Parliament and not the courts.

170. Normally, there is always a presumption that the Governmental action is reasonable and in public interest and it is for the party challenging its validity to show that it is wanting in reasonableness or is not informed with public interest. This burden is a heavy one and it has to be discharged to the satisfaction of the court by proper and adequate material. The court cannot lightly assume that the action taken by the Government is unreasonable or against public interest because there are large number of considerations, which necessarily weigh with the Government in taking an action.

The petitioner has pretended to act in the name of pro bono publico, though he had no interest of the public or even of his own to protect. Allegations made in the Writ Petition are baseless and unfounded. They are motivated for oblique considerations. Hon'ble Supreme Court in the case of Ashok Kumar Pandey Vs. State of W.B., (2004) 3 SCC 349, was pleased to hold as under:-

"14. The Court has to be satisfied about (a) the credentials of the applicant; (b) the prima facie correctness or nature of information given by him; (c) the information being not vague and indefinite. The information should show gravity and seriousness involved. Court has to strike balance between two conflicting interests; (i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and (ii) avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive actions. In such case, however, the Court cannot afford to be liberal. It has to be extremely careful to see that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to the Executive and the Legislature. The Court has to act ruthlessly while dealing with imposters and busy bodies or meddlesome interlopers impersonating as

public-spirited holy men. They masquerade as crusaders of justice. They pretend to act in the name of Pro Bono Publico, though they have no interest of the public or even of their own to protect.

34. Unless an aggrieved party is under some disability recognized by law, it would be unsafe and hazardous to allow any third party be a member of the Bar to question the decision against third parties."

Further in the case of Dattaraj Nathuji Thaware Vs. State of Maharashtra, 2005(1) SCC 590 at para 12, Hon'ble Supreme Court was pleased to observe as under:-

"12. .....The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fide and not for personal gain or private motive or political motivation or other oblique considerations. The Court must not allow its process to be abused for oblique considerations by masked phantoms who monitor at times from behind. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives, and try to bargain for a good deal as well to enrich themselves. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs."

It is further contended that Hon'ble Supreme Court vide its judgment and Order dated 18.01.2010 in Civil Appeal No. 1134-1135 of 2002, State of Uttaranchal Vs. Balwant Singh Chaufal & ors reported in 2010 AIR SCW 1029 considered the evolution of the Public Interest Litigation in India and expressed its concern regarding the abuse of the process of Courts through PIL. Being concerned with the abuse the Hon'ble Supreme Court issued directions to preserve the purity and sanctity of PIL as under:-

"198. In order to preserve the purity and sanctity of the PIL, it has become imperative to issue the following directions:

(1) The courts must encourage genuine and bona fide PIL and effectively discourage and curb the PIL filed for extraneous considerations.

(2) Instead of every individual judge devising his own procedure for dealing with the public interest litigation, it would be appropriate for each High Court to properly formulate rules for encouraging the genuine PIL and discouraging the PIL filed with oblique motives. Consequently, we request that the High Courts who have not yet framed the rules, should frame the rules within three months. The Registrar General of each High Court is directed to ensure that a copy of the Rules prepared by the High Court is sent to the Secretary General of this Court immediately thereafter.

(3) The courts should prima facie verify the credentials of the petitioner before entertaining a P.I.L.

(4) The court should be prima facie satisfied regarding the correctness of the contents of the petition before entertaining a PIL.

(5) The court should be fully satisfied that substantial public interest is involved before entertaining the petition.

(6) The court should ensure that the petition which involves larger public interest, gravity and urgency must be given priority over other petitions.

(7) The courts before entertaining the PIL should ensure that the PIL is aimed at redressal of genuine public harm or public injury. The court should also ensure that there is no personal gain, private motive or oblique motive behind filing the public interest litigation.

(8) The court should also ensure that the petitions filed by busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs or by adopting similar novel methods to curb frivolous petitions and the petitions filed for extraneous considerations.

199. Copies of this judgment be sent to the Registrar Generals of all the High Courts within one week."

B- The writ petition involving the question of settlement of Commercial Plots can not be termed to be a Public Interest Litigation and when it is not a Public Interest Litigation than the petitioner can not be said to be aggrieved person.

Thus, in this writ petition according to L.D.A. the issue involved in the present case hinges around the settlement of the Commercial Plots. The commercial plots had been sold through open auction. As is evident from paragraph 19 of the writ petition, no cause of action has accrued to the petitioner as certain bidders, who could not be successful in the tender have shifted their grievance on the petitioner. Thus, it is a proxy petition. Further more it is submitted that Courts of law can not examine the wisdom of the authorities so far as prescribing certain conditions in the settlement of the Commercial Plots. The conditions are put to ensure the achievement of the object and therefore, the solvency criteria and prescription of earnest money were put in the tender notice so that the capable bidders may participate in the auction. This was done with a view to ensure hundred percent achievement of the development work for which the plots in question were sold. By leveling bald allegations without substantiating the same, the petitioner has abused the process of the Court. There was no occasion to him to file a Public Interest Litigation. He is not an aggrieved person, therefore, the writ petition is not maintainable.

D- The writ petition is liable to be dismissed on the ground of non-joinder of necessary party.

In respect of this issue the submission is that after finalization of the tender process third party rights have been created and thus whosoever has been alloted the plots in question has become necessary and proper party but the petitioner has not impleaded as any of

the successful party in this writ petition. On this score alone writ petition deserves to be dismissed.

E- The conduct of the petitioner during the proceedings of the instant writ petition, as is evident from the order sheet, has made him liable to pay exemplary cost by filing a malicious petitions and for abusing the process of the Court.

The order sheet itself throws sufficient light on the conduct of the petitioner after filing of the writ petition on one pretext or the other, the petitioner or his counsel sought repeated adjournment. Such conduct needs to be deprecated by this Hon'ble Court as firstly the petitioner though claims himself to be a public spirited person fighting for the public cause has sought repeated adjournments and secondly he being a practicing lawyer has committed misconduct by using the instant writ petition to be a tool to abuse the process of the Court. This act of the petitioner has made him liable to pay heavy cost.

F- On merits the petitioner has failed to substantiate the allegations levelled by him.

The submission of the Lucknow Development Authority is that the commercial plots have been settled in a just and fair manner and as per the prescribed norms and the petition lacks merits and is liable to be dismissed.

16. We agree with the contention of the Lucknow Development Authority, yet another aspects have also to be seen.

17. We find that the instant petition as "Public Interest Litigation' is not maintainable as per norms and parameters set for maintaining a "Public Interest Litigation' by the Hon'ble Supreme Court.

18. The petitioner does not have locus to file the same even as a Public Interest Litigation for the following reasons:-

1.While making exception to the general law of locus standi in a Public Interest Litigation, the Hon'ble Supreme Court has laid down certain norms when such a petition can be entertained without the petitioner being personally affected and to what limit can requirement of locus be expanded and has also mandated that when it should not be maintainable.

2. Public Interest Litigation can only be filed for espousing the cause of others when and only when the persons aggrieved are unable to approach the Court directly by reasons of object poverty or lack of means or being socially disadvantaged and backward. Thus those who are unable to knock the door of the Court themselves for lack of sources and means can file Public Interest Litigation, but in this case the aggrieved person i.e. the rival candidates and their respective political parties as well as the electors of Raebareli, do not fall within the above ambit.

In view of the decision of the Hon'ble Apex Court in Gauruvayoor Devaswom Managing Committee and another Vs. C.K. Rajan and others, (2003) 7 SCC, 546, the petition as Public Interest Litigation is not maintainable. The relevant paragraphs 41,46,50,61 and 67 are quoted as below:-

41. The courts exercising their power of judicial review found to their dismay that poorest of the poor, the depraved (sic), the illiterate, the urban and rural unorganized labour sector, women, children, those handicapped by "ignorance, indigence and illiteracy" and other downtrodden persons have either no access to justice or had been denied justice. A new branch of proceedings known as "social action litigation" or "public interest litigation" was evolved with a view to render complete justice to the aforementioned classes of persons. It expanded its wings in course of time. The courts in pro bono publico granted relief to inmates of prisons, provided legal aid, directed speedy trials, maintenance of human dignity and covered several other areas. Representative actions, pro bono publico and test litigations were entertained in keeping with the current accent on justice to the common man and a necessary disincentive to those who wish to bypass real issues on merits by suspect reliance on peripheral procedural shortcomings. (see Mumbai Kamgar Sabha V. Abdulbhai Faizullabhai, (1976) 3 SCC 832.)

46. But with the passage of time, things started taking different shapes. The process was sometimes abused. Proceedings were initiated in the name of public interest litigation for ventilating private disputes. Some petitions were publicity-oriented.

50. The principles evolved by this Court in this behalf may be suitably summarized as under:

(i) The Court in exercise of powers under Article 32 and Article 226 of the Constitution of India can entertain a petition filed by any interested person in the welfare of the people who is in a disadvantaged position and, thus, not in a position to knock the doors of the Court. The Court is constitutionally bound to protect the fundamental rights of such disadvantaged people so as to direct the State to fulfil its constitutional promises. (See S.P.Gupta V. Union of India, 1981 Supp SCC 87, People's Union for Democratic Rights V. Union of India, (1982) 2 SCC 494, Bandhua Mukti Morcha V. Union of India and Janata Dal V. H.S.Chowdhary, (1992) 4 SCC 305.)

(ii) Issues of public importance, enforcement of fundamental rights of a large number of the public vis-à-vis the constitutional duties and functions of the State, if raised, the Court treats a letter or a telegram as a public interest litigation upon relaxing procedural laws as also the law relating to pleadings. (See Charles Sobraj V. Supdt., Central Jail, 1978, 4 SCC 104 and Hussainara Khatoon (I) V. Home Secy., State of Bihar, 1980, 1 SCC 81.)

(iii) Whenever injustice is meted out to a large number of people, the Court will not hesitate in stepping in. Articles 14 and 21 of the Constitution of India as well as the International Conventions on Human Rights provide for reasonable and fair trial.

In Maneka Sanjay Gandhi V. Rani Jethmalani, 1979, 4 SCC 167 it was held: (SCC p.169, para 2)

"2. Assurance of a fair trial is the first imperative of the dispensation of

justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperiling, from the point of view of public justice and its attendant environment, is necessitous if the court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. We have to test the petitioner's grounds on this touchstone bearing in mind the rule that normally the complainant has the right to choose any court having jurisdiction and the accused cannot dictate where the case against him should be tried. Even so, the process of justice should not harass the parties and from that angle the court may weigh the circumstances."
(See also Dwarka Prasad Agarwal V. AB.D.Agarwal, (2003) 6 SCC 230)

(iv) The common rule of locus standi is relaxed so as to enable the Court to look into the grievances complained on behalf of the poor, the depraved (sic), the illiterate and the disabled who cannot vindicate the legal wrong or legal injury caused to them for any violation of any constitutional or legal right. [see Fertilizer Corpn. Kamgar Union (Regd.) V. Union of India, 198, 1 SCC 568, S.P. Gupta, People's Union for Democratic Rights, D.C.Wadhwa(Dr) V. State of Bihar, 1987, 1 SCC 378 and BALCO Employees' Union (Regd.) V. Union of India, (2002) 2 SCC 333].

(v) When the Court is prima facie satisfied aqbout variation of any constitutional right of a group of people belonging to the disadvantaged category, it may not allow the State or the Government from raising the question as to the maintainability of the petition. (See Bandhua Mukti Morcha).

(vi) Although procedural laws apply to PIL cases but the question as to whether the principles of res judicata or principles analogous thereto would apply depends on the nature of the petition as also facts and circumstances of the case. [See Rural Litigation and Entitlement Kendra V. State of U.P, 1989 Supp (1) SCC 504 and Forward Construction Co. V. Prabhat Mandal (Regd.), (1986) 1 SCC 100].

(vii) The dispute between two warring groups purely in the realm of private law would not be allowed to be agitated as a public interest litigation. (See Ramsharan Autyanuprasi V. Union of India, 1989 Supp (1) SCC 251.

(viii) However, in an appropriate case, although the petitioner might have moved a court in his private interest and for redressal of personal grievances, the Court in furtherance of the public interest may treat it necessary to enquire into the state of affairs of the subject of litigation in the interest of justice. (see Shivajirao Nilangekar Patil V. Dr. Mahesh Madhav Gosavi, (1987) 1 SCC 227.

(ix) The Court in special situations may appoint a Commission, or other bodies for the purpose of investigating into the allegations and finding out facts. It may also direct management of a public institution taken over by such Committee. (See Bandhua Mukti Morcha, Rakesh Chandra Narayan V.

State of Bihar, 1989 Supp(1) SCC 644 and A.P. Pollution Control Board V. Prof. M.V.Nayudu, (1999) 2 SCC 718.)

In Sachidanand Pandey V. state of W.B., (1987) 2 SCC, 295 this Court held: (SCC pp.334-35, para 61)

"61. It is only when courts are apprised of gross violation of fundamental rights by a group or a class action on when basic human rights are invaded or when there are complaints of such acts as shock the judicial conscience that the courts, especially this Court, should leave aside procedural shackles and hear such petitions and extend its jurisdiction under all available provisions for remedying the hardships and miseries of the needy, the underdog and the neglected. I will be second to one in extending help when such help is required. But this does not mean that the doors of this Court are always open for anyone to walk in. It is necessary to have some self-imposed restraint on public interest litigants."

In Janata Dal V. H.S.Chowdhary, (1992) 4 SCC 305 this Court opined: (SCC p.348, para 109)

"109. It is thus clear that only a person acting bona fide and having sufficient interest in the proceeding of PIL will alone have a locus standi and can approach the court to wipe out the tears of poor and needy, suffering from violation of their fundamental rights, but not a person for personal gain or private profit or political motive or any oblique consideration. Similarly, a vexatious petition under the colour of PIL brought before the court for vindicating any personal grievance, deserves rejection at the threshold."

The Court will not ordinarily transgress into a policy. It shall also take utmost care not to transgress its jurisdiction while purporting to protect the rights of the people from being violated.

In Narmada Bachao Andolan V. Union of India, (2000) 10 SCC 664 it was held: (SCC pp.762-63, paras 229 & 232)

"229. It is now well settled that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy-making process and the courts are ill-equipped to adjudicate on a policy decision so undertaken. The court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution. Even then any challenge to such a policy decision must be before the execution of the project is undertaken. Any delay in the execution of the project means overrun in costs and the decision to undertake a project, if challenged after its execution has commenced, should be thrown out at the very threshold on the ground of laches if the petitioner had the knowledge of such a decision and could have approached the court at that time. Just because a petition is termed as a PIL does not mean that ordinary principles applicable to litigation will not apply. Laches is one of them.

232. While protecting the rights of the people from being violated in any manner utmost care has to be taken that the court does not transgress its jurisdiction. There is, in our constitutional framework a fairly clear demarcation of powers. The court has come down heavily whenever the executive has sought to impinge upon the court's jurisdiction."

(x) The Court would ordinarily not step out of the known areas of judicial review. The High Courts although may pass an order for doing complete justice to the parties, they do not have a power akin to Article 142 of the Constitution of India.

(ix) Ordinarily, the High Court should not entertain a writ petition by way of public interest litigation questioning the constitutionality or validity of a statute or a statutory rule.

52. This Court in BALCO Employees' Union (Regd.) succinctly opined: (SCC pp. 3767-77, paras 77-80).

"77. Public interest litigation, or PIL as it is more commonly known, entered the Indian judicial process in 1970. It will not be incorrect to say that it is primarily the judges who have innovated this type of litigation as there was dire need for it. At that stage, it was intended to vindicate public interest where fundamental and other rights of the people who were poor, ignorant or in socially or economically disadvantageous position and were unable to seek legal redress were required to be espoused. PIL was not meant to be adversarial in nature and was to be cooperative and collaborative effort of the parties and the court so as to secure justice for the poor and the weaker sections of the community who were not in a position to protect their own interests. Public interest litigation was intended to mean nothing more than what words themselves said viz. "litigation in the interest of the public'.

78. While PIL initially was invoked mostly in cases connected with the relief to the people and the weaker sections of the society and in areas where there was violation of human rights under Article 21, but with the passage of time, petitions have been entertained in other spheres. Prof. S.B. Sathe has summarized the extent of the jurisdiction which has now been exercised in the following words:

"PIL may, therefore, be described as satisfying one or more of the following parameters. These are not exclusive but merely descriptive:

____ Where the concerns underlying petition are not individualist but are shared widely by a large number of people (bonded labour, undertrial prisoners, prison inmates).

____Where the affected person belong to the disadvantaged section of society (women, children, bonded labour, unorganized labour etc.)

_____Where judicial law -making is necessary to avoid exploitation (inter-country adoption, the education of the children of the prostitutes).

_____Where judicial intervention is necessary for the protection of the

sanctity of democratic institutions (independence of the judiciary, existence of grievance redressal forums).

____Where administrative decisions related to development are harmful to the environment and jeopardize people's right to natural resources such as air or water.'

79. There is, in recent years, a feeling which is not without any foundation that public interest litigation is now tending to become publicity interest litigation or private interest litigation and has a tendency to be counterproductive.

80. PIL is not a pill or a panacea for all wrongs. It was essentially meant to protect basic human rights of the weak and the disadvantaged and was a procedure which was innovated where a public-spirited person files a petition in effect on behalf of such persons who on account of poverty, helplessness or economic and social disabilities could not approach the court for relief. There have been, in recent times, increasingly instances of abuse of PIL. Therefore, there is a need to reemphasize the parameters within which PIL can be resorted to by a petitioner and entertained by the court. This aspect has come up for consideration before this Court and all we need to do is to recapitulate and re-emphasize the same."

58. We have also not come across any case so far where the functions required to be performed by statutory functionaries had been rendered redundant by a court by issuing directions upon usurpation of statutory power. The right of a person belonging to a particular religious denomination may sometimes fall foul of Articles 25 and 26 of the Constitution of India. Only whence the fundamental right of a person is infringed by the State an action in relation thereto may be justified. Any right other than the fundamental rights contained in Articles 25 and 26 of the Constitution of India may either flow from a statute or from the customary laws. Indisputably, a devotee will have a cause of action to initiate an action before the High Court when his right under statutory law is violated. He may also have a cause of action by reason of action or inaction on the part of the State or a statutory authority; an appropriate order is required to be passed or a direction is required to be issued by the High Court. In some cases, a person may feel aggrieved in his individual capacity, but the public at large may not.

61. In State of W.B. V. Nuruddin Mallick, (1998) 8 SCC 143 it has been held: (SCC pp. 152-53, para 28)

"28. it is not in dispute in this case that after the management sent its letter dated 6-8-1992 for the approval of its 31 staff viz. both teaching and non-teaching staff, both the District Inspector of Schools and the Secretary of the Board sought for certain information through their letters dated 21-9-1992. Instead of sending any reply, the management filed the writ petition in the High Court, leading to passing of the impugned orders. Thus, till this date the appellant authorities have not yet exercised their discretion. Submission for the respondents was that this court itself should examine and decide the question in issue based on the material on record to set at rest the long-standing issue. We

have no hesitation to decline such a suggestion. The courts can either direct the statutory authorities, where it is not exercising its discretion, by mandamus to exercise its discretion, or when exercised, to see whether it has been validly exercised. It would be inappropriate for the Court to substitute itself for the statutory authorities to decide the matter."

67. Mr. Subbao Rao referred to N.M.Thomas for the proposition that court is also a "State" within the meaning of Article 12 but that would not mean that in a given case the court shall assume the role of the executive government of the State. Statutory functions are assigned to the State by the legislature and not by the court. The court while exercising its jurisdiction ordinarily must remind itself about the doctrine of separation of powers which, however, although does not mean that the court shall not step in any circumstance whatsoever but the court while exercising its power must also remind itself about the rule of self-restraint. The court, as indicated hereinbefore, ordinarily is reluctant to assume the functions of the statutory functionaries. It allows them to perform their duties at the first instance.

19. The Hon'ble Apex Court in Janata Dal Vs. H.S.Chowdhary and others (1992) 4 SCC 305 has laid down the criteria for entertaining PIL, which reads as under:-

109."It is thus clear that only a person acting bona fide and having sufficient interest in the proceeding of PIL will alone have a locus standi and can approach the court to wipe out the tears of the poor and needy, suffering from violation of their fundamental rights, but not a person for personal gain or private profit or political motive or any oblique consideration. Similarly, a vexatious petition under the colour of PIL brought before the court for vindicating any personal grievance, deserves rejection at the threshold."

20. The tenor of the petition leaves no room for doubt that the instant writ petition has been preferred by the petitioner with extraneous motivation or for glare of publicity break the queue muffing his face by wearing the mask of Public Interest Litigation. In Dattaraj Nathuji Thaware, Appellant V. State of Maharashtra and others, AIR 2005 Supreme Court 540 the Hon'ble Supreme Court has laid emphasis that PIL should be used for delivering social justice to the citizens. In other words, it should be exercised for redressal of genuine public wrong or public injury but at the same it should not be allowed to abused for oblique considerations or improper motives. It would be expedient to reproduce paragraphs 8,9,11 and 12 of the above referred case:-

8. It is depressing to note that on account of such trumpery proceedings initiated before the Courts, innumerable days are wasted, which time otherwise could have been spent for the disposal of cases of the genuine litigants. Though we spare no efforts in fostering and developing the laudable concept of PIL and extending our long arm of sympathy to the poor, the ignorant, the oppressed and the needy whose fundamental rights are infringed and violated and whose grievances go unnoticed, unrepresented and unheard; yet we cannot avoid but

express our opinion that while genuine litigants with legitimate grievances relating to civil matters involving properties worth hundreds of millions of rupees and criminal cases in which persons sentenced to death facing gallows under untold agony and persons sentenced to life imprisonment and kept in incarceration for long years, persons suffering from undue delay in service matters- Government or private, persons awaiting the disposal of cases wherein huge amounts of public revenue or unauthorised collection of tax amounts are locked up, detenue expecting their release from the detention orders etc, etc. are all standing in a long serpentine queue for years with the fond hope of getting into the Courts and having their grievances redressed, the busy bodies, meddlesome interlopers, wayfarers or officious interveners having absolutely no public interest except for personal gain or private profit either of themselves or as a proxy of others or for any other extraneous motivation or for glare of publicity break the queue muffing their faces by wearing the mask of public interest litigation and get into the Courts by filling vexatious and frivolous petitions and thus criminally waste the valuable time of the Courts and as a result of which the queue standing outside the doors of the Courts never moves, which piquant situation creates frustration in the minds of the genuine litigants and resultantly they lose faith in the administration of our judicial system.

21. 9. Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and /or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, court must be careful to see that a body of persons or member of public, who approaches the Court is acting bona fide and not for personal gain or private motive or political motivation or other oblique considerations. The Court must not allow its process to be abused for oblique considerations by masked phantoms who monitor at times from behind. Some persons with vested interest indulge in the pastime of meddling with judical process either by force of habit or from improper motives, and try to bargain for a good deal as well to enrich themselves. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.

11. The Court has to be satisfied about (a) the credentials of the applicant; (b) the prima facie correctness or nature of information given by him; (c) the information being not vague and indefinite. The information should show gravity and seriousness involved. Court has to strike balance between two conflicting interests; (i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and (ii) avoidance of public mischief and to avoid mischievous

petitions seeking to assail, for oblique motives, justifiable executive actions.

22. In such case, however, the Court cannot afford to be liberal. It has to be extremely careful to see that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to the Executive and the Legislature. The Court has to act ruthlessly while dealing with imposters and busybodies or meddlesome interlopers impersonating as public-spirited holy men. They masquerade as crusaders of justice. They pretend to act in the name of Pro Bono Publico, though they have no interest of the public or even of their own to protect.

12.Courts must do justice by promotion of good faith, and prevent law from crafty invasions. Courts must maintain the social balance by interfering where necessary for the sake of justice and refuse to interfere where it is against the social interest and public good. (See State of Maharashtra V. Prabhu (1994 (2) SCC 481), and Andra Pradesh State Financial Corporation V. M/s. GAR Re-Rolling Mills and Anr., (AIR 1994 Screening Committee 2151). No litigant has a right to unlimited draught on the court time and public money in order to get his affairs settled in the manner as he wishes. Easy access to justice should not be misused as a licence to file misconceived and frivolous petitions. (See Dr. B.K.Subbarao V. Mr. K.Parasaran, 1996 (7) JT 265). Today people rush to Courts to file cases in profusion under this attractive name of public interest. They must inspire confidence in Courts and among the public.

23. The Hon'ble Apex Court in Sampat Singh and others Vs. State of Haryana and others, (1993) 1 SCC 561 held at paras 5 and 6 as under:-

5. These petitioners were not at all parties to the earlier proceedings at any stage. Hence, notwithstanding the above submission, we unreservedly hold that these petitioners have no locus standi to approach this Court for the reliefs sought for in this petition. In this connection, reference may be made to the decisions of this Court in Janata Dal V. H.S.Chowdhary, (1992) 4 SCC 305 and Simaranjit Singh Mann V. Union of India, (1992) 4 SCC 653. The copies of the affidavit of Dharam Pal and the order of the Magistrate, discharging the accused have been produced before us. We also sent for the file, containing the said affidavit and discharge orders and perused the same.

6. Though it is true that Dharam Pal who appeared before this Court supporting the case of the State of Haryana in Civil Appeal N0.5412 of 1990 with full vigour, appears to have suddenly reversed back from his earlier stand and given an affidavit withdrawing his allegations. The question whether the offering of the post of Chairman of Khadi Board of Haryana as a quid pro quo for tendering the affidavit or not, does not fall within our province in the present proceeding. Further we do not like to express any opinion on his conduct except observing that the Court should not be indirectly used as an instrumentality by anyone to attain or obtain any beneficial achievement which one could not get through normal legal process and that if anyone approaches

the Court with ulterior motive, designed to wrench some personal benefit by putting another within the clutches of law and using the Court as a devise only for that end but not to get any legal remedy, then in such a situation the Court should heavily come upon such a person and see that the authority of the Court is not misused. Neither the State nor the complainant, Dharam Pal has challenged the order of the Magistrate discharging the accused, presumably for the reasons that the police has closed the investigation and sent its cancellation report and that Dharam Pal has expressed his desire in his affidavit not to probe into the allegations. We have gone through the entire file as well as the order of the Magistrate. Except observing that the complainant who initiated the law into motion alleging serious allegations against Ch. Bhajan Lal who was then holding a Cabinet rank in the Central Government, may become liable for criminal and civil liability in case the allegations are not proved. Whatever might have been the motive of Dharam pal for withdrawal of his complaint, he, after having fought the case up to this Court in quashing proceedings cannot have any justification in requesting the investigating officer not to probe into the allegations and staging 'walk out' of the Court. On the other hand, he ought to have submitted to the discipline of the Court, especially when he has initiated the proceedings as a public interest litigant.

24. This petition styled as Public Interest Litigation is nothing but a camouflage to foster personal disputes. It is necessary to take note of the meaning of the expression "public interest litigation". In Stroud's Judicial Dictionary, Vol. 4, 4th Edn., "Public interest" is defined thus:

"Public interest.-(1) A matter of public or general interest does not mean that which is interesting as gratifying curiosity or a love of information or amusement; but that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected."

In Black's Law Dictionary, 6th Edn., "public interest" is defined as follows:

"Public interest.- Something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, or as the interests of the particular localities, which may be affected by the matters in question. Interest shared by citizens generally in affairs of local, State or national Government.

In Janata Dal Case (1992) 4 SCC 305: 1993 SCC (Cri) 36 the Apex Court considered the scope of public interest litigation. Following paragraphs are relevant:

"53. The expression "litigation' means a legal action including all proceedings therein, initiated in a court of law with the purpose of enforcing a right or seeking a remedy. Therefore, lexically the expression "PIL' means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or a class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected."

"62 Be that as it may, it is needless to emphasise that the requirement of locus standi of a party to a litigation is mandatory, because the legal capacity of the party to any litigation whether in private or public action in relation to any specific remedy sought for has to be primarily ascertained at the threshold."

"98. While this Court has laid down a chain of notable decisions with all emphasis at their command about the importance and significance of this newly developed doctrine of PIL, it has also hastened to sound a red alert and a note of severe warning that courts should not allow its process to be abused by a mere busybody or a meddlesome interloper or wayfarer or officious intervener without any interest or concern except for personal gain or private profit or other oblique consideration."

"109. It is thus clear that only a person acting bona fide and having sufficient interest in the proceeding of PIL will alone have a locus standi and can approach the court to wipe out the tears of the poor and needy, suffering from violation of their fundamental rights, but not a person for personal gain or private profit or political motive or any oblique consideration. Similarly, a vexatious petition under the colour of PIL brought before the court for vindicating any personal grievance, deserves rejection at the threshold."

Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity-seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity-oriented or founded on personal vendetta. As indicated above, court must be careful to see that a body of persons or a member of the public, who approaches the court is acting bona fide and not for personal gain or private motive or political motivation or other oblique consideration. The court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busybodies deserve to be thrown out by rejection at the threshold, and in appropriate cases, with exemplary costs.

25. Lexically the expression PIL means a legal action initiated in a Court of law for enforcement of public interest or general interest or in which the public or a class of the community have pecuniary interest or some interest by which their legal rights or liabilities are effected. Thus, the concept of PIL which has been and is being fostered by judicial activism has become an increasingly important one setting up valuable and respectable records specially in the Arena of Constitutional and legal treatment for the un-representated and under represented."

26. PIL needs a self imposed judicial restriction, especially when the grievance exposed does not adversely affect the large number of citizens who on account of innumerable reasons, like poverty, etc., cannot approach the Court to ventilate their grievances. Before the public interest jurisdiction is invoked, the Court is ordinarily expected to be satisfied that there is some element of public interest, that the transaction impugned involves malafides, and that there is a need for balancing the consequences of the public good with the act of the State. Public interest litigation should not ordinarily be permitted as an adventurous freak in Court. The Courts should shun the temptation of litigant to achieve political goals or personal gains.

27. Before we grapple with the issue involved in the present case, we feel it necessary to consider the issue regarding public interest aspect. Public Interest Litigation which has now come to occupy an important field in the administration of law should not be "publicity interest litigation" or "politics interest litigation" or for moving the courts with oblique motive for personal gains. It should be properly regulated and should be averted. It should not be allowed to become a tool in unscrupulous hands to release vendetta and wreak vengeance as well. A person acting bona fide and having sufficient interest in the proceeding of public interest litigation will alone have a locus standi and can approach the court to wipe out violation of fundamental rights and genuine infraction of statutory provisions, but not for personal gain or private profit or political motive or any oblique consideration. The petitioner has failed to satisfy that he was genuinely concerned in the public interest.

28. In this context, we find that the Hon'ble Apex Court had deprecated such Public Interest Litigation commenced by a third party. In S.P.Gupta Vs. Union of India, 1981 Suppl SCC 87, Hon'ble Apex Court held as under:-

"But we must be careful to see that the member of the public, who approaches the Court in cases of this kind, is acting bona fide and not for personal gain or private profit or political motivation or other oblique consideration. The Court must not allow its process to be abused by politicians and others."

29. It is not the case of the petitioner that the aggrieved party is a minor, an insane person or is suffering from any other disability which the law recognizes as sufficient to permit another person, eg. next friend, to move the Court on his behalf. It is also not the case of the petitioner that any of the aggrieved party, who is under some disability recognized by law has asked him to set the law in motion. We feel that it would be unsafe and hazardous that at the behest of the third party the matter regarding auction, which has already been concluded between the parties, should be reopened.

30. Keeping in view the law laid down by the Hon'ble Apex Court in Karamjeet Singh Vs. Union of India AIR 1993 SCC 284 and Ashok Kumar Pandey Vs. State of Bengal AIR 2004 SCC 280, the petition is devoid of any merit. The petition cannot be treated as Public Interest Litigation and the petitioner

being the third party and stranger cannot be permitted to maintain the petition.

Contents of para 19 of the writ petition leave no room for doubt that the instant petition has not been preferred alleging any violation of Article 21 or Human Right or the litigation has been initiated for the benefit of the poor and the under privileged. It is also clear that petitioner who is an Advocate is a stranger and is not an aggrieved person. Accordingly, in view of the decision of the Hon'ble Apex Court in the case of Villianur Iyarkkai Padukappu Maiyam Vs. Union of India and Others, 2009 (7) SCC 561, he has no locus standi to file the instant petition relevant paras 114 and 115 are reproduced as under:-

"114. The question of locus standi in the matter of awarding the contract has been considered by this Court in BALCO Employees' Union (Regd.) v. Union of India and others, (2009) 7 SCC 561 . This Court, after review of law on the point, has made following observations in paragraph 88 of the judgment:

88. It will be seen that whenever the Court has interfered and given directions while entertaining PIL it has mainly been where there has been an element of violation of Article 21 or of human rights or where the litigation has been initiated for the benefit of the poor and the underprivileged who are unable to come to court due to some disadvantage. In those cases also it is the legal rights which are secured by the courts. We may, however, add that public interest litigation was not meant to be a weapon to challenge the financial or economic decisions which are taken by the Government in exercise of their administrative power. No doubt a person personally aggrieved by any such decision, which he regards as illegal, can impugn the same in a court of law, but, a public interest litigation at the behest of a stranger ought not to be entertained. Such a litigation cannot per se be on behalf of the poor and the downtrodden, unless the court is satisfied that there has been violation of Article 21 and the persons adversely affected are unable to approach the court.

31. 115. On the facts and in the circumstances of the case, this Court is of the view that the only ground on which the appellants could have maintained a PIL before the High Court was to seek protection of the interest of the people of Pondicherry by safeguarding the environment. This issue was raised by the appellants before the High Court and the High Court has issued directions regarding the same, which are to be found in paragraph 24 of the impugned judgment. After the High Court's directions the element of public interest of the appellants' case no longer survives. The appellants cannot, therefore, proceed to challenge the Award of the Contract in favour of the respondent No. 11 on other grounds as this would amount to challenging the policy decision of the Government of Pondicherry through a PIL, which is not permissible. Thus on the ground of locus standi also the appeals should fail."

32. In view of the law laid down by the Apex Court the petition can not be treated to be a Public Interest Litigation and a third party or stranger cannot be permitted to maintain the petition and thus on this count the petition is liable to be dismissed.

Yet there is another aspect in this matter. The Hon'ble Apex Court repeated from time to time the essential requirement to file the writ petition is firstly to establish that the petitioner is a bona fide person having sufficient interest in the proceedings in the nature of PIL. He has alone the locus standi to approach the Court and not a person who comes for personal gain of private profit, or political motive or any oblique consideration. Similarly a vexatious or proxy writ petition under the colour of Public Interest Litigation brought before this Court for vindicating personal grievances deserves rejection at the threshold keeping in mind the ratio of law laid down in the cases e.g. Janta Dal Vs. S.S.Chaudhary, D.N.Thaware Vs. State of Maharashtra and Villianur Iyarkkai Padukappu Maiyam Vs. Union of India and Others (supra). This Court is of the view that the writ petition is not presented by the writ petitioner bonafidely and is not likely to serve any public interest, the same cannot be entertained as it does not aim redressal of genuineness of public law or public injury.

33. It is pertinent to refer that the petitioner is a professional Advocate. Advocate has no locus standi to file the writ petition in his own name when the petition is not in public interest and nothing prevented affected person from filing writ petition. The matter was considered by the Hoh'ble Apex Court in Vinoy Kumar Vs. State of U.P., AIR 2001 SCC 1739, para 3 of which reads as under:

"In the instant case the petitioner had not filed the petition in public interest and did not disclose the circumstances which prevented the affected persons from approaching the Court. In the discharge of his professional obligations, the petitioner Advocate is not obliged to file the writ petition on his clients. No circumstance was mentioned in the petition which allegedly incapacitated the affected persons from filing the writ petition. Section 30 of the Advocates Act, only entitles an Advocate to practice the profession of law and not to substitute himself for his client. The filing of the writ petition in his own name, being not a part of the professional obligation of the Advocate, the High Court was justified in dismissing the writ petition holding that the petitioner-Advocate had no locus standi."

34. Similarly in Dattaraj Nathuji Thaware Versus State of Maharashtra and others, AIR 2005 SC 540, the apex court affirmed the High Court's monetary penalty against the member of Bar for filing a frivolous and vexatious Public Interest Litigation to foster personal dispute. It has been observed that no-one should be permitted to disgrace the noble profession. Paras 1 and 17 of the judgment of the above case read as under:-

"Para-1: This case is a sad reflection on members of the legal profession and is almost a black spot on the noble profession. The petitioner who belongs to this profession filed a petition styled as "Public Interest Litigation" before the Nagpur Bench of the Bombay High Court. By the impugned judgment, the High Court dismissed it holding that there was no public interest involved and in fact the petitioner had resorted to blackmailing respondent nos.6 & 7 and was caught red handed accepting 'black-mailing' money. The High Court also noticed that the allegations of unauthorised constructions made in the petition were also not true.

Para-17: It is disturbing feature which needs immediate remedial measure by the Bar Councils and the Bar Association to see that the process of law is not abused and polluted by its member. It is high time that the Bar Councils and the Bar Associations ensure that no member of the Bar becomes party as petitioner or in aiding and/or abetting files frivolous petitions carrying the attractive brand name of "Public Interest Limitation". That will be keeping in line with the high traditions of the Bar. No one should be permitted to bring disgrace to the noble profession. We would have imposed exemplary cost in this regard but taking note of the fact that the High Court had already imposed costs of Rs.25,000/-, we do not propose to impose any further cost."

35. Thus the direction of the Hon'ble Apex Court impels the Bar Council and Bar Association to take appropriate action against erring members found guilty of filing frivolous and vexatious PIL petitions. Thus on this count also the petition is misconceived and not maintainable.

Yet there is another aspect of the matter. Lucknow Development Authority has come forward with a case that the economic decision was taken in public interest in accordance with norms which cannot be agitated.

36. However, the Hon. Apex Court in the matters of economic decisions decided not to examine relative merits on different economic policies and refused to strike down a policy decision on the grounds of its desirability.

In the case of Balco Employes Union Versus Union of India and others,(2002)2 SCC 333, in para-47 the Hon'ble Apex Court held as under;

"47. Process of disinvestments is a policy decision involving complex economic factors. The Courts have consistently refrained from interfering with economic decisions as it has been recognised that economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the Courts would decline to interfere. In matters relating to economic issues, the Government has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within limits of authority. There is no case made out by the petitioner that the decision to disinvest in BALCO is in any way capricious, arbitrary, illegal or uninformed. Even though the workers may have interest in the manner in which the Company is conducting its business, inasmuch as its policy decision may have an impact on the workers rights, nevertheless it is an incidence of service for an employee to accept a decision of the employer which has been honestly taken and which is not contrary to law."

In Federation of Railway Officers Association and others Versus Union of India, AIR 2003 SC 1344 the Hon'ble Apex Court at para 12 held as under;

"Para-12: In examining a question of this nature where a policy is evolved by the Government judicial review thereof is limited. When policy according to which or the purpose for which discretion is to be exercised is clearly expressed in the statute, it cannot be an unrestricted

discretion. On matters affecting policy and requiring technical expertise Court would leave the matter for decision of those who are qualified to address the issues. Unless the policy or action is inconsistent with the Constitution and the laws or arbitrary or irrational or abuse of the power, the Court will not interfere with such matters."

37. Further the Hon'ble Apex Court in Balco Employees case (supra) held at para-87 that PIL was not meant to be a weapon to challenge the financial or economic decision which are taken by the Government in exercise of their administrative power. No doubt a person personally aggrieved by any such decision which he records as illegal can impugn the same in the court of law but a PIL at the behest of a stranger ought not to be entertained. Relevant para-87 of the above ruling is reproduced as under;

"Para-87: It will seen that whenever the Court has interfered and given directions while entertaining PIL it has mainly been where there has been an element of violations of Article 21 of human rights or where the litigation has been initiated for the benefit of poor and the under privileged who are unable to come to Court due to some disadvantage. In those cases also it is the legal rights which are secured by the Courts. We may, however, add that Public Interest Litigation was not meant to be a weapon to challenge the financial or economic decisions which are taken by the Government in exercise of their administrative power. No doubt a person personally aggrieved by any such decision, which he regards as illegal, can impugn the same in a Court of law, but, a Public Interest Litigation at the behest of a stranger ought not to be entertained. Such a litigation cannot per se be on behalf of the poor and the downtrodden, unless the Court is satisfied that there has been violation of Article 21 and the persons adversely affected and unable to approach the Court."

38. Thus in this context even on merits we find that the Government decision is not liable to be challenged.

39. We have perused the record. Despite several opportunity given to the petitioner no rejoinder affidavit was filed to contradict the version of the respondents 2 to 6. There is nothing on record to establish that the Government was ever pleased to give exemption in the stamp duty or the market price of the land is three times higher than the price fixed for auction. Also there is nothing on record to prove that the auction caused loss to State Exchequer and bidders were helped. No allegation or malafide is proved against the Board constituting many persons which approved the entire proposal. Thus the contents of the writ petition are misconceived and are not proved.

In this regard paragraphs 7 to 11 of the counter affidavit are reproduced as below;

"Para-7- That the contents of paragraph-7 of the writ petition are denied. It is stated that the reserve price has to be fixed according to the actual status of the land in question in accordance with the Government Order dated 03.06.2005 wherein the rate fixed for commercial land is held to be twice of the residential rate. The reserve price for residential land in Gomti Nagar Scheme Phase I including Vibhuti Khand upto 30.11.2003 was Rs.2500 per sq.mt. and the same was revised to Rs.3000 per sq.mt. with effect from 01.12.2003 through order dated

29.11.2003. A copy of the order dated 03.06.2005 and the order dated 29.11.2003 are being annexed as Annexure No.C-3 & C-4 to this counter affidavit. Thus the rate for commercial land with effect from 01.12.2003 was Rs.6000 per sq.mt. i.e. double the reserve price for residential land. The reserve price of Gomti Nagar Phase-I including Vibhuti Khand was further revised to Rs.4000 per sq.mt. with effect from 01.04.2006 through order dated 29.03.2006. A copy of the order dated 29.03.2006 is being annexed as Annexure No.C-5 to this counter affidavit. The reserve price was further revised to Rs.4400 per sq.mt. for Gomti Nagar Phase-I including Vibhuti Khand with effect from 01.09.2007 through order dated 03.09.2007. A copy of the order dated 03.09.2007 is being annexed as Annexure No.6 to this Counter Affidavit. Thus the reserve price of the Lucknow Development Authority for Gomti Nagar Scheme Phase I including Vibhuti Khand even on date is Rs.4400 per sq.mt.for residential land and double the same for commercial land i.e. Rs.8800 per sq.mt. The price of Rs.15000 per sq.mt.indicated by the petitioner in the paragraph under reply for Vibhuti Khand, Gomti Nagar Scheme, Lucknow is imaginary resulting which the consequential calculation made by the petitioner in the paragraph under reply is also imaginary. The qualification for bidders was fixed in the tender notice dated 29.05.2005, amended tender notice dated 14.06.2005 and tender notice dated 16.06.2005 on the basis of the recommendation of the committee which was accepted by the Vice Chairman, Lucknow Development Authority. The committee made the recommendation after studying/analyzing the similar conditions imposed by Greater NOIDA Industrial Development Authority. The condition of solvency and turnover is fixed with regard to commercial plots for construction of commercial and residential and not for those plots for which construction of only commercial or only Group Housing is permitted. If no restriction of solvency, turnover and earnest money would have been placed in the tender notice dated 29.05.2005, amended tender notice dated 14.06.2005 and tender notice dated 16.06.2005 then the object of making development through developers upon the land in question could have never been achieved if the persons having low solvency and turnover would have been permitted to take part in the bid and simultaneously the money in phased manner could not have been realized by the Lucknow Development Authority as well as the interest of the public who are prospective buyers would have been adversely affected.

40. Para-8- That the contents of paragraph 8 of the writ petition are denied. It is stated that commercial plot of Viraj Khand, Gomti Nagar Scheme, Lucknow and Vastu Khand, Gomti Nagar Scheme, Lucknow referred in the paragraph under reply can not be compared with the commercial plots in Vibhuti Khand, Gomti Nagar Scheme, Lucknow on account of the location, size of plots and activities permitted. The condition of solvency and turnover is fixed with regard to commerical plots for construction of commercial land residential and not for those plots for which construction of only commercial or only Group Housing is permitted. In Viraj Khand, Gomti Nagar, Lucknow and Vastu Khand Gomti Nagar Lucknow several commercial plots were auctioned during the relevant time of which the petitioner is citing example and the highest bid for the most of the said commercial plots was almost at par with the highest bid of Vibhuti Khand, Gomti Nagar Scheme, Lucknow.

Para-9- That the contents of paragraph 9 of the writ petition are denied. It is stated that all the terms and conditions are not published in the tender notice. The detailed terms and conditions are indicated in the tender form which can be purchased from the office of the Lucknow Development Authority. A blank copy of the tender form along with detailed terms and conditions is being annexed as Annexure No.C-7 to this Counter Affidavit. The Floor Area Ratio and Ground Coverage is 2.0 and 30% respectively in the case of commercial plots in commercial area as per Lucknow Development Authority Building Byelaws, 2000. The tender notice of Jaipur Development Authority can not be compared with the tender notice of the Lucknow Development Authority.

Para-10- That the contents of paragraph 10 of the writ petition are denied. It is stated that the petitioner with regard to Floor Area Ratio is referring to Chapter 3 - Part 3 of the Lucknow Development Authority Building Byelaws, 2000 which is for Group Housing and is not applicable in respect of commercial plots as the same is dealt with Chapter -3-Part-5 of Lucknow Development Authority Building Byelaws, 2000. A copy of the Chapter 3-Part 5 of Lucknow Development Authority Building Byelaws, 2000 is being annexed as Annexure No.C-8 to this Counter Affidavit. The FAR, ground coverage and purchasable FAR has been fixed strictly in accordance with the Lucknow Development Authority Building Byelaws, 2000 meant for commercial area.

Para-11- That the contents of paragraphs 11 & 12 of the writ petition are denied. It is stated that no reduction in stamp duty has been granted by the State Government whereas on the contrary 10% of the stamp duty has been paid by the allottees while executing the registered agreement which will be evident from the chart annexed as Annexure No.C-2 to this Counter affidavit. Thus, no relaxation has been given to the allottees."

41. Thus having regard to the contents of paragraphs 7 to 11 referred to above it transpires that there is not even an iota of evidence to prove that respondents caused any loss to the public exchequer or they acted in a fashion to help bidders. Curiously enough no bidder has come forward to challenge the entire transaction and the petitioner who is not aggrieved person has assailed the auction of the respondents without any locus on an economic matter which is not in violation of any rule.

42. Thus this petition has not been filed with clean hands. The conduct of the petitioner dis-entitles him to maintain the petition. However, we find that the petitioner who is an Advocate should not have filed this writ petition. The matter is referred to the Bar Council of U.P. for appropriate decision in the matter. Accordingly, no monetary penalty is required to be imposed against the petitioner for filing this petition.

43. Considering the facts in its entirety and proposition of law we are not inclined to interfere in the petition under Article 226 of the Constitution as the writ petition being not maintainable lacks merit also.

44. The writ petition is dismissed.
