APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.03.2010

BEFORE
THE HON'BLE VIJAY MANOHAR SAHAI, J.
THE HON'BLE RITU RAJ AWASTHI, J.

Special Appeal No. 342 of 2010

The Director General, C.R.P.F., C.G.O. Complex, Lodhi Road, New Delhi and others ...Appellants

Versus

Constable No. 850774845, Lalji Pandey ...Respondents

Counsel for the Petitioner:
Sri Bhoopendra Nath Singh
Sri Udit Chandra
Sri Subodh Kumar

Counsel for the Respondents:
Sri S.K. Shukla
Sri Surendra Prasad
Sri Ashok Mishra
Sri A.K. Pandey
Sri N.K. Tripathi

(A) High Court Rule-1951-Chapter VIII, Rule-5-Special Appeal-against the judgment passed by Single Judge-arises out from dismissal order-appellate and Revisional Order against-order judgment by Single Judge-whether affirmed by Special Appeal competent?-held-'yes' reasons discussed.

Held: Para 14 & 15

In view of above, the present special appeal is maintainable and the preliminary objection raised by the respondent having no legal force is hereby rejected.

Learned counsel for the appellant has vehemently urged that impugned judgment and order of the learned Single Judge is not sustainable in the eyes of law as the same has been passed without territorial jurisdiction. It is submitted that the respondent while posted to 113 Battalion C.R.P.F. Hyderabad had absented himself without leave and, therefore, departmental proceedings were conducted against him for misconduct under section 11(1) of C.R.P.F. Act. After completion of disciplinary proceedings the punishment order dated 17.04.1994 was passed by which respondent was dismissed from service. The respondent had availed the opportunity of filing appeal and revision before the higher authorities which were rejected by orders dated 16.06.1996 and 26.10.1997.

(B) Constitution of India, Art. 226-Tribunal jurisdiction-petitioner/Respondent-member of C.R.P.F.-all the orders dismissal-appellate and revisional order passed by the authorities outside of territorial limit of State of U.P.-merely communication at the residence of petitioner (Bhadohi) Varanasi-shall not confer any jurisdiction to High Court Allahabad-impugned judgment not suitable.

Held: Para 23

Mere communication of these orders at the residential address of the respondent at district Bhadohi would not confer territorial jurisdiction to this Court. It has been held by the Full Bench of this Court in the case of Rajendra Kumar Mishra (supra) that mere residence of the petitioner within the territorial jurisdiction of this Court would not confer the jurisdiction to this Court to entertain the writ petition in which the order under challenge has been passed out side the State of U.P. The writ petition would be maintainable in the territorial jurisdiction of the High Court in which the impugned order was passed.

Case law discussed:
2010(1) ADJ-1 (FB), AIR 1981 Supreme Court 806, 2005(5) AWC 4542 (FB), 2008-UPLBEC-1-39.

(Delivered by Hon'ble Ritu Raj Awasthi, J.)

1. Heard Sri Udit Chandra holding brief of Sri Subhodh Kumar for the appellant and Sri S. K. Shukla appearing for the respondent.

2. This intra court appeal has been filed challenging the judgment and order dated 12.12.2002 passed in civil misc. writ petition no. 42351 of 1997 (Constable No. 850774845, Lalji Pandey vs. Director General, C.R.P.F. and others) whereby the impugned punishment order dated 17.03.1994 of dismissal from service, on the charge of unauthorized absence of duty was set aside and the matter was remanded to the punishing authority with a direction that the respondent (petitioner) shall be awarded lesser punishment having regard to the nature and circumstances of the case and in the light of the observations made in the judgment expeditiously preferably within one year from the date of the order. The writ petition was filed by the delinquent employee after exhausting the departmental remedy of appeal as well as the revision before the competent authorities which were rejected.

3. A preliminary objection has been raised by the counsel for the respondent submitting that the present special appeal is not maintainable in view of the law laid down by the full bench of this Court in the case of ***Sheet Gupta vs. State of U.P. and others, 2010(1) ADJ-1 (FB)***, as the writ petition was filed challenging the punishment order dated 17.03.1994 of dismissal from service, appellate order dated 16.06.1996 rejecting the appeal filed against the punishment order of dismissal and the revisional order dated 26.10.1997 rejecting the said appeal by the department.

4. It is contended that in the Full Bench decision of this Court in the case of Sheet Gupta (supra), it has been held that special appeal will not lie against the order passed by the Single Judge in exercise of jurisdiction conferred by Article 226 or 227 of the Constitution of India in respect to any order made in exercise of appellate or revisional jurisdiction under any such Act i.e. under any Uttar Pradesh Act or Central Act.

5. The learned counsel for the appellant has strongly disputed the preliminary objection and has submitted that special appeal is fully maintainable in view of the fact that the respondent was employed in the central reserve police force established under the Central Reserve Police Force Act, 1949 and the service conditions of the respondent were covered under the rules and regulations framed therein.

6. The submission of the learned counsel for the appellant is that this Force falls within the category of "any other armed force raised or maintained by the dominion" as mentioned in Paragraph I of List I of the 7th Schedule to the Government of India Act, 1935 or/and as mentioned in Entry-2, List-I of the 7th Schedule to the Constitution of India and as per section 3(1) of the C.R.P.F. Act central reserve police force is part of the armed forces of the Union, therefore, the special appeal filed against the order of learned Single Judge in respect to any order passed or purported to be passed in exercise of appellate or a revisional jurisdiction under any central Act with respect to any of the matters enumerated

in the Union list in 7th Schedule of the Constitution of India shall be fully maintainable under Chapter VIII Rule-5 of the Allahabad High Court Rules.

7. In order to consider the preliminary objection we first consider the provision of special appeal as provided under Chapter VIII Rule-5 of the Allahabad High Court Rules, which is quoted as under:

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

8. Meaning thereby an appeal shall lie to the Court from a judgment not being a judgment passed in the exercise of Appellate Jurisdiction in respect of a decree or order made by a Court subject to the Superintendence of the Court and not being as order made in the exercise of revisional jurisdiction or in the exercise of its power of Superintendence or in the exercise of criminal jurisdiction or in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution in respect of any judgment, order or award

(a) of a tribunal, Court or statutory arbitrator made or purported to be made in the exercise or purported exercise of jurisdiction
(b) of the Government or any Officer or authority, made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction.

9. Under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution.

10. In the case of *Sheet Gupta vs. State of U.P. and others (Supra)* the Full Bench of this Court had the occasion to consider the following question made by a reference:

"Whether a special appeal under the provisions of Rule 5 of Chapter VIII of the Rules of the Court lies in a case where the judgment has been given by a learned Single Judge in a writ petition directed against an order passed in an appeal under paragraph 28 of the U.P. Scheduled Commodities Distribution Order, 2004?"

11. The Full Bench had come to the conclusion that such special appeal will not lie in certain circumstances. The relevant paragraph is quoted below:

"Having given our anxious consideration to the various plea raised by the learned counsel for the parties, we find that from the perusal of Chapter VIII Rule 5 of the Rules a special appeal shall lie before this Court from the judgment passed by one Judge of the Court. However, such special appeal will not lie in the following circumstances:

1. the judgment passed by one Judge in the exercise of appellate jurisdiction, in respect of a decree or order made by a Court subject to the Superintendence of the Court;
2. the order made by one Judge in the exercise of revisional jurisdiction;
3. the order made by one judge in the exercise of the power of Superintendence of the High Court;
4. the order made by one Judge in the exercise of criminal jurisdiction;
5. the order made by one Judge in the exercise of jurisdiction conferred by Article 226 or Article 227 of the Constitution of India in respect of any judgment, order or award by
(i) the tribunal,
(ii) Court or
(iii) statutory arbitrator

made or purported to be made in the exercise or purported exercise of jurisdiction under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution of India;
6. the order made by one judge in exercise of jurisdiction conferred by Article 226 and 227 of the Constitution of India in respect of any judgment, order or award of
(i) the Government or
(ii) any officer or
(iii) authority,

made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act, i.e. under any Uttar Pradesh Act or under any Central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the the Seventh Schedule to the Constitution of India."

12. From bare perusal of the above decision it is very much clear that no special appeal shall lie against the order made by Single Judge in exercise of jurisdiction conferred by Article 226 or 227 of the Constitution of India in respect of any judgment, order or award of the government or any officer or any authority made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Act i.e. under any Uttar Pradesh Act or under any central Act, with respect to any of the matters enumerated in the State List or the Concurrent List in the 7th Schedule to the Constitution of India. Meaning thereby that in case the order under challenge in writ jurisdiction before the learned Single Judge was the order passed by the Government or any officer or any authority made or purported to be made in the exercise or purported exercise of appellate or revisional jurisdiction under any such Central Act with respect to any of the matters enumerated in the Union List then the special appeal would be maintainable.

13. It is relevant to notice here that the Central Reserve Police Force Act, 1949 has been enacted in exercise of powers conferred to the Central Government under Paragraph 1 of List-I

of 7th Schedule to the Government of India Act, 1935, which is presently Entry-2, List-I of the 7th Schedule of the Constitution of India.

Entry 2 of List-I (Union List) of 7th Schedule provides as under:

"Naval, military and air force; any other armed forces of the Union".

In the case of ***Akhilesh Prasad vs. Union Territory of Mizoram, AIR 1981 Supreme Court 806,*** it has been held that any other armed force of the Union includes the Central Reserve Police Force. Therefore, it can easily be concluded that the Central Reserve Police Force is covered under "any other armed forces of the Union as provided in Entry 2, List-I (Union List) of the 7th Schedule of the Constitution of India.

14. In view of above, the present special appeal is maintainable and the preliminary objection raised by the respondent having no legal force is hereby rejected.

15. Learned counsel for the appellant has vehemently urged that impugned judgment and order of the learned Single Judge is not sustainable in the eyes of law as the same has been passed without territorial jurisdiction. It is submitted that the respondent while posted to 113 Battalion C.R.P.F. Hyderabad had absented himself without leave and, therefore, departmental proceedings were conducted against him for misconduct under section 11(1) of C.R.P.F. Act. After completion of disciplinary proceedings the punishment order dated 17.04.1994 was passed by which respondent was dismissed from service. The respondent had availed the opportunity of filing appeal and revision before the higher authorities which were rejected by orders dated 16.06.1996 and 26.10.1997.

16. The learned counsel for the appellant has urged that the entire departmental proceedings as well as the punishment order dated 17.04.1994, the appellate order dated 16.06.1996 and the revisional order dated 26.10.1997 were passed out side the territorial jurisdiction of this Court and, therefore, no part of cause of action accrued to the respondent-petitioner in the State of U.P. in order to avail the extra ordinary jurisdiction under Article 226 of the Constitution of India of this Court. In support of his submission the learned counsel for the appellant has relied on full Bench Decision of this Court in the case of ***Rajendra Kumar Mishra vs. Union of India and others, 2005(5) AWC 4542 (FB)*** and submits that mere being permanent resident in the State of U.P. the respondent does not get any right to file the writ petition before this Court as no part of cause of action has accrued within the territorial jurisdiction of this Court.

17. Learned counsel for the respondent in reply to the aforesaid submission submitted that writ petition filed by the respondent was fully maintainable in this Court in view of the fact that the impugned orders were communicated to him at Bhadohi (Varanasi) at his residential address. Moreover, the respondent is permanent resident of district Bhadohi and, therefore, this Court has the territorial jurisdiction to decide the writ petition filed by the respondent. In this regard he has pointed out to the Court the order dated

16.06.1996 by which the appeal preferred by the respondent against the punishment order was rejected by the Inspector General, in which an endorsement has been made that the copy of the rejection order of the appeal is forwarded to G.C., C.R.P.F. Allahabad. Learned counsel for the respondent on the basis of the said documents submits that the impugned order was sent to the office of the C.R.P.F. at Allahabad for further action and communication to the respondent-petitioner and, therefore, the part of cause of action has accrued within the territorial jurisdiction of this Court.

18. The learned counsel for the respondent in support of his submission has relied on the decision of this Court in the case of ***Phool Singh Chauhan vs. Chief of the Army Staff, 2008-UPLBEC-1-39***.

19. We have considered the various submissions made by the learned counsel for the parties.

20. The Full Bench of this Court in the case of Rajendra Kumar Mishra (supra) has held that the writ petition is liable to be dismissed on the short ground that Allahabad High Court does not have jurisdiction in the case and only the Calcutta High Court or Dehli High Court had jurisdiction in this Case. In fact the petitioner Rajendra Kumar Mishra while serving in the army was posted at Kancharapara at Calcutta was charge-sheeted and Court Martial proceedings were held by the Commanding Officer, Light Regiment at Calcutta in which he was found guilty of the charges and awarded certain punishments. The petitioner being the permanent resident of U.P. had filed the writ petition before the Allahabad High Court challenging the punishments. It was held that merely because the petitioner is resident of district Ballia (U.P.) the writ petition challenging Court Martial proceeding and sentence was not maintainable as no cause of action had accrued within the territorial jurisdiction of the Allahabad High Court.

21. In the case of *Phool Singh Chauhan (supra)* this Court has held that since the petitioner had sent an application to the Chief of the Army Staff from district Kanpur for taking him back in service which was rejected and communicated to the petitioner by letter dated 20.05.1986 at Kanpur (U.P.) the petitioner had cause of action to challenge the said decision of not taking him back in service before this Court. Thus so far as the prayer of the petitioner to quash the order dated 20.05.1986 refusing reinstatement of the petitioner in service it can be held that this Court has territorial jurisdiction since the representation was sent from Kanpur and refusing of the same was also communicated at Kanpur. The relevant paragraph is quoted below:

"12. In above view of the matter, it cannot be held that any part of cause of action arose within the territorial jurisdiction of this Court to challenge the punishment awarded by summary Court material dated 15th March, 1980. However, the submission much pressed by Counsel for the petitioner is that since the petitioner has sent an application to the Chief of the Army Staff from District Kanpur for taking him back in service, which was rejected and communicated to the petitioner vide letter dated 20th May, 1986 at Kanpur (U.P.), the petitioner had cause of action to challenge the said decision of not taking him back in

service before this Court. In the counter affidavit filed by the respondents the allegations made in paragraphs 9 and 10 of the writ petition, i.e., representation of the petitioner to the Chief of the Army Staff for his reinstatement on 7th October, 1985, rejection of the said request and communication at Kanpur vide letter dated 20th May, 1986 has not been denied. Thus in so far as the prayer of the petitioner to quash the order dated 20th May, 1986 refusing reinstatement of the petitioner in service, it can be held that this Court has territorial jurisdiction since the representation was sent from Kanpur and the refusal of the same was also communicated at Kanpur. In support of the petitioner's prayer to quash the order dated 20th May, 1986 same submission is pressed by the petitioner, i.e., the punishment of dismissal as well as imprisonment of six months was not permissible within the meaning of Army Act, 1950 and the said punishment being without jurisdiction, the petitioner was entitled to be reinstated."

22. We are of the considered opinion that the decision of this Court in the case of Phool Singh Chauhan vs. Chief of the Army Staff (supra) is not much of assistance to the respondent as the said case has no application in the facts of the present case because Respondent/petitioner has only challenged the punishment order of dismissal and the orders rejecting his appeal and revision, which have been admittedly passed out side the territorial jurisdiction of this Court.

23. Mere communication of these orders at the residential address of the respondent at district Bhadohi would not confer territorial jurisdiction to this Court. It has been held by the Full Bench of this Court in the case of Rajendra Kumar Mishra (supra) that mere residence of the petitioner within the territorial jurisdiction of this Court would not confer the jurisdiction to this Court to entertain the writ petition in which the order under challenge has been passed out side the State of U.P. The writ petition would be maintainable in the territorial jurisdiction of the High Court in which the impugned order was passed.

24. In view of the above, we are of the considered opinion that order under challenge passed by the learned Single Judge in writ petition no. 42351 of 1997 was passed without territorial jurisdiction and hence it is liable to be set aside.

25. We have also given our thoughtful consideration to the merit of the case and gone through the records. There is no finding of the learned Single Judge that the entire proceedings conducted by the appellants were in any manner illegal or violative of principle of natural justice or in violation of any rule or regulations made in this behalf. The respondent belong to a disciplined force and he had absented himself from duty for considerable period of long time without permission and due intimation to the department and without sending any medical certificate and proper application within time. He had not admitted himself in any of the C.R.P.F. Hospitals and, therefore, his plea that he had fallen ill due to which he could not join his duty raises doubts about his conduct. The departmental authorities had considered the various pleas raised by the respondent in appeal and revision which were filed against the punishment order and rejected.

26. In view of above, we are of the considered opinion that impugned order dated 12.12.2003 passed in writ petition no. 42351 of 1997 is liable to be set aside and it is hereby set aside. In the result the appeal is allowed. No order as to costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.03.2010

BEFORE
THE HON'BLE AMAR SARAN, J.
THE HON'BLE SHYAM SHANKAR TIWARI, J.

Criminal Appeal No. 636 of 2010

Satendra Kumar ...Appellant (in Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Ram Singh
Sri A.C. Tiwari

Counsel for the Opposite Party:
G.A.

Criminal Appeal-Conviction under Section 302-life imprisonment in addition of fine Rs.1000/-and further sentenced one year R.1 with fine of Rs.1000/-death caused firstly by strangulation than set on fire by the appellant-incident took place in side the house-presence of appellant not denied-eye witness turn hostile-even then entire evidence can not be ignored-considering gravity of case as well as circumstantial evidence-not entitled for bail-rejected.

Held: Para 11 & 13

In the present case P.W.1 has supported the prosecution case in his examination in chief. His cross-examination was deferred on the request of accused and after about 40 days when he again appeared in the witness box he turned hostile by disowning his earlier stand. Apparently it shows that either the witness has been terrorized or he has been won over by the accused under some temptation. In the light of the observations of the Apex Court the entire evidence of P.W.1 cannot be rejected. Rather it has to be scrutinized and accepted to the extent it supports the prosecution case and the medical report also supports it.

It is true that there is no direct eye account of the death of the deceased and only the circumstances put forward by the prosecution have to be scrutinized to reach any conclusion. From the circumstances of the case and the evidence (oral and documentary) on record it appears that the cause of death of the deceased is especially within the knowledge of the appellant and as per the provisions contained u/s 106 of the Indian Evidence Act the burden of proving that fact is on the appellant.

Case law discussed:
(2009) 1 SCC(Crl) 272, (1976 1 SCC page 389, (2001) 2 SCC page 205, 2006 Crl.L.J. Page 1121, (1999) 8 SCC page 679, (2006) 10 SCC page 681.

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

1. Heard Sri Ram Singh learned counsel for the appellant and learned AGA for the State.

2. This criminal appeal has been filed on behalf of appellant Satendra Kumar against the judgment and order passed by learned Addl. Sessions Judge/Special Judge (SC/ST(PA) Act) in Sessions Trial No. 1262 of 2007 in which appellant has been convicted u/s 302 and 201 IPC and sentenced to undergo rigorous imprisonment for life u/s 302 IPC, in addition to fine of Rs.1000/- and in case of default of payment of fine further to undergo three months imprisonment. He has further been

sentenced u/s 201 IPC with imprisonment of one year and a fine of Rs.1000/- and in default of payment of fine further to undergo three months imprisonment.

3. Prayer for bail has been made by the appellant in the above criminal appeal.

4. The prosecution case in brief is that the deceased Deorani was married with the appellant Satendra Kumar about three years prior to this incident. The appellant along with his other family members being not satisfied with the dowry given in the marriage used to torture her. Ultimately the death of Deorani was caused by the appellant and his family members and her body was set on fire. An FIR was lodged regarding the above incident at P.S.Chhatari District Bulandshahr u/s 304B and 498A IPC and u/s ¾ D.P. Act against the appellant and other accused. The case was investigated by the Investigating Officer and charge sheet was submitted against the appellant and others under the aforesaid sections.

5. After committal of the case, charges u/s 498A IPC,304B IPC and Section 3/4 Dowry Prohibition Act were framed against the accused. The learned trial court framed charges u/s 302/201 IPC also against the appellant and others in the alternative. Relying upon the evidence adduced on record the learned trial court recorded the finding of conviction against appellant Satendra Kumar as stated above and other co-accused persons were acquitted.

6. It is contended by learned counsel for the appellant that FIR of this case is a tainted document as it was not registered on the information or dictation of the informant rather it was prepared by some other person with the connivance of the police of the police station concerned. It is also contended that the deceased committed suicide. There is no evidence against the appellant as all the witnesses of fact produced by the prosecution have turned hostile and have not supported the prosecution story. It is also contended that the trial court itself did not believe the prosecution story against the accused-appellant and other accused persons regarding allegations of dowry demand and torture and consequential death of the deceased. It has also been contended that the appellant is a disabled person. He was not present at his residence at the time of alleged incident as he runs a Cheap Ration Shop allotted to him for selling kerosene and ration.

7. Learned AGA has rebutted the above argument and submitted that the evidence of P.W.1, the informant is on record who has supported the prosecution case in his examination in chief but subsequently after a deferred cross-examination he turned hostile. His entire evidence cannot be brushed aside. It can be believed to the extent it supports the prosecution case. It is also contended that an unnatural death of the deceased took place inside the house of the appellant. He was present at his residence at the time of the incident. The death of the deceased was caused first and then her body was set on fire only to give it a colour of suicide. The post mortem report fully supports the prosecution case. No carbon particles were found in the trachea of the deceased. There was no redness in the skin of the deceased. The story put forward by appellant and supported by DW 1 explaining the fracture injury in the hyoid bone of the deceased is false and an after thought. The appellant has given a false

explanation by giving an incorrect information to the villagers regarding the death of the deceased since he has not disclosed the true facts regarding her death, a presumption should be shown against his innocence. There is no evidence on record that due to his alleged disability he is unable to do any kind of work.

8. The Apex Court has time and again laid down certain principles in the form of guide lines to be followed by Courts while evaluating the circumstantial evidence. But no universal yard-stick can be laid down in this regard as the facts and circumstances differ from case to case. In the case of **Ujjagar Singh Vs. State of Punjab (2009) 1 SCC(Crl) 272** it has been observed by Apex Court as follows:

"It must more the less be emphasized that whether a chain is complete or not would depend on the facts of each case emanating from the evidence and no universal yard-stick should even be attempted."

9. A perusal of the statement of P.W.1 Kalyan Singh on record reveals that in his examination in chief he has fully supported the prosecution case. He has also proved the written report submitted by him at the police station as Ext. Ka-1 but his cross-examination was got deferred on that date and after about 40 days he was again produced in the court for further cross-examination and then he turned hostile and did not support the prosecution case. On the strength of these facts it is averred by the prosecution that deliberately P.W.1 has turned hostile later on as he has been won over by the appellant but evidence adduced by him in the beginning of his statement in the Court cannot be brushed aside.

10. The Apex Court reiterated its observation on the evidenciary value of hostile witness in the case of **Bhagwan Singh Vs. State of Haryana (1976 1 SCC page 389** and again observed in the case of **Gura Singh Vs. State of Rajsthan (2001) 2 SCC page 205** that it is a misconceived notion that merely because a witness is declared hostile his entire evidence should be excluded or rendered unworthy of consideration. The evidence remains admissible in the trial and there is no legal bar to base the conviction upon the testimony of such witness. The same view has been taken by the Apex Court in the case of Radha Mohan Singh alias **Lal Saheb and others Vs. State of U.P. 2006 Crl.L.J. Page 1121** wherein it has been observed that the evidence of a hostile witness cannot be rejected in toto merely because the prosecution chooses to treat him as hostile and cross-examines him. It can be accepted to the extent his version is found to be dependable on a careful scrutiny thereof.

11. In the present case P.W.1 has supported the prosecution case in his examination in chief. His cross-examination was deferred on the request of accused and after about 40 days when he again appeared in the witness box he turned hostile by disowning his earlier stand. Apparently it shows that either the witness has been terrorized or he has been won over by the accused under some temptation. In the light of the observations of the Apex Court the entire evidence of P.W.1 cannot be rejected. Rather it has to be scrutinized and accepted to the extent it supports the

prosecution case and the medical report also supports it.

12. Admittedly, the deceased Deorani died inside the house of her husband. As per the defence case she committed suicide but the medical report does not support the defence theory inasmuch as the post mortem report reveals that there was a ligature mark on the front side of the neck in the middle part in the size of 10cm x 3 cm. and Echymosis was present under neath and hyoid bone was also found fractured. It further reveals that post mortem burn injuries were found all over the body except the neck, back, chest and abdomen. No line of redness was found present nor carbon particles were found in her trachea and in the opinion of the doctor death was due to asphyxia as a result of ante mortem injuries of strangulation. Thus the medical report belies the theory of suicide by the deceased put forward by the defence. The evidence of D.W.1 that the deceased while in a burning condition crying for help ran out of her house and collided with a rope tied with the wall meant for drying clothes is only an after thought because only by colliding with a rope such as ante-mortem injury and a fracture of the hyoid bone is not possible. Moreover, after strangulation her dead body was set on fire as the dead body had post mortem burn which also shows that it was not a case of suicide.

13. It is true that there is no direct eye account of the death of the deceased and only the circumstances put forward by the prosecution have to be scrutinized to reach any conclusion. From the circumstances of the case and the evidence (oral and documentary) on record it appears that the cause of death of the deceased is especially within the knowledge of the appellant and as per the provisions contained u/s 106 of the Indian Evidence Act the burden of proving that fact is on the appellant.

14. The Apex Court in the case of **State of Tamil Nadu Vs. Rajendra (1999) 8 SCC page 679** has observed that in cases of circumstantial evidence where the accused omits to offer an explanation or offers a false explanation in response to a question regarding an incriminating circumstance, is an additional link in the chain of circumstances to make them complete and the conduct of accused in such circumstances becomes relevant.

15. In **Trimukh Maroti Kirkan v. State of Maharashtra (2006) 10 SCC page 681.** The Apex Court has held:

"The demand for dowry or money from the parents of the bride has shown a phenomenal increase in the last few years. Cases are frequently coming before the courts, where the husband or in-laws have gone to the extent of killing the bride if the demand is not met. These crimes are generally committed in complete secrecy inside the house and it becomes very difficult for the prosecution to lead evidence. No member of the family, even if he is a witness of the crime, would come forward to depose against another family member. The neighbours, whose evidence may be of some assistance, are generally reluctant to depose in court as they want to keep aloof and do not want to antagonize a neighborhood family. The parents or other family members of the bride being away from the scene of commission of crime are not in a position to give direct evidence which may

inculpate the real accused except regarding the demand of money or dowry and harassment caused to the bride. But, it does not mean that a crime committed in secrecy or inside the house should go unpunished.

If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. (See Stirland v. Director of Public Prosecutions- quoted with approval by Arijit Pasayat,J. In State of Punjab v. Karnail Singh. (2003) 11 SCC 271) The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep; in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

15. In view of the above discussions considering the evidence of informant on record coupled with the FIR, post mortem report and false explanation put forward by the appellant and the provision contained u/s 106 of the Indian Evidence Act we are of the considered view that death of the deceased has been caused by the appellant by strangulation and thereafter her body was set on fire. Considering the gravity of the offence and nature of evidence and attending circumstances and the finding of guilt of the appellant recorded by the trial court, the appellant does not deserve bail and accordingly his prayer for bail is hereby rejected.

16. Office is directed to prepare paper book within three months and hearing of the appeal is expedited and it be listed thereafter.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.03.2010

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

First Appeal From Order No. 861 of 2010

Oriental Insurance Co. Ltd. ...Appellant
Versus
Smt. Sukhviri and others ...Respondents

Counsel for the Appellant:
Sri Amaresh Sinha
Sri S.K. Mehrotra

Counsel for the Respondents:
Sri Anurag Sharma

Motor Vehicle Act, 1988-Section 173-accident claim Tribunal-award given with direction to the insurance company to-deposit entire amount of award of compensation-recover the same from the vehicle owner if there is breech of policy-appeal by insurance company-held-warrant no interference-keeping it open to initiate fresh recovery proceeding against vehicle owner.

Held: Para 42

In view of the above discussion, we are of the opinion that the Tribunal did not commit any illegality in directing the Appellant-Insurance Company to make deposit of the amount of compensation, and recover the same from the insured person i.e. the owner of the vehicle in question-respondent no. 5 herein.

Case law discussed:

2004(2) TAC 12 (SC), 2005(1) TAC 4 (SC), AIR 1998 SC 588, 2004 (3) SCC 297: 2004 (1) T.A.C.321:AIR 2004 SC 1531, (2007) 3 S.C.C700: 2007(2) TAC 398 (SC), 2008(1) T.A.C.803 (SC), AIR 1998 SC 588, 2004(3) SCC 297: 2004 (1) T.A.C. 321: AIR 2004 SC 1531, 2007 (2) T.A.C. 398 (S.C.), 2008(1) T.A.C. 803 (S.C.), (2007) 5 S.C.C. 428: 2007 (2) T.A.C. 417, 2004(2) T.A.C.12 (SC), 2005 (1) T.A.C. 4 (SC), 2007 (1) T.A.C. 20 (All.), 2009 (1) A.W.C. 355, (2004) 3 SCC 297.

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

1. The present appeal has been filed by the Appellant-Insurance Company against the judgment and order/award dated 30.5.2009 passed by the Motor Accidents Claims Tribunal, Meerut in Motor Accident Claim Petition No. 281 of 2008, filed by the claimant-respondent nos. 1 to 4 on account of the death of Soraj Singh in an accident which took place on 10.2.2008 at about 6.30 P.M..

2. It was, interalia, stated in the Claim Petition that on 10.2.2008 at about 6.30 P.M., the deceased Soraj Singh was travelling alongwith Sahansar Pal and others in Maruti Van bearing Registration No. HR-26L-9129 from Muzaffar Nagar to Sarur Pur Khurd; and that the driver of the said Maruti Van was driving the same at a moderate speed on his correct side on Meerut Muzaffar Nagar Road; and that when the said persons reached near Kanta in jungle of village Bhaisi under Police Station Khatauli, District-Muzaffar Nagar, a Truck bearing Registration No. HR-38J-8752 (hereinafter also referred to as "the vehicle in question"), which was being driven by its driver in a rash, negligent and careless manner and at high and excessive speed, came on wrong side from the opposite direction and hit the said Maruti Van, as a result of which, the deceased Soraj Singh sustained multiple grievous injuries, and he died on the spot.

3. It was, interalia, further stated in the Claim Petition that at the time of the accident, the said Soraj Singh was aged about 52 years, and he was self-employed in Milk Dairy, and his monthly income was Rs. 5000/- per month.

4. It was, interalia, further stated in the Claim Petition that at the time of the accident, the vehicle in question was insured with the Appellant-Insurance Company, and the owner of the vehicle was Suresh Kumar, respondent no.5 in the present Appeal.

5. The claimant-respondent nos. 1 to 4 claimed Rs.15,20,000/- as compensation with interest @ 18% per annum from the date of the Claim Petition till the date of actual payment of compensation to the claimant-respondent nos. 1 to 4.

6. The Claim Petition was contested by the Appellant-Insurance Company, i.e., the insurer of the vehicle in question.

7. In its Written Statement, the Appellant-Insurance Company did not admit the averments made in the Claim Petition. It was, interalia, further stated by the Appellant-Insurance Company that without admitting the factum of accident, involvement of the vehicle in question in

the accident and any liability as insurer, the accident (if any) had occurred due to negligent act and driving of the driver of the aforementioned Maruti Van, and no such accident had occurred due to negligent act or driving of the driver of the vehicle in question.

8. It was, interalia, further stated by the Appellant-Insurance Company that the owner of the vehicle in question entrusted the said vehicle to a person to drive the same illegally, who had no valid and effective driving licence, and thus, the owner of the vehicle in question knowingly and intentionally committed breach of terms and conditions of the Insurance Policy, and the Appellant-Insurance Company was not liable to pay compensation, if any.

9. The case proceeded ex-parte against the owner of the vehicle in question, i.e., the respondent no.5 herein.

The Tribunal framed six Issues in the case.

Issue no. 1 was regarding the factum of the accident having taken place on 10.2.2008 at about 6.30 P.M. on account of rash and negligent driving by the Driver of the vehicle in question thereby hitting the said Soraj Singh as a result of which the said Soraj Singh travelling in the Maruti Van sustained injuries and consequently died.

Issue no.2 was as to whether there was composite negligence on the part of the driver of the Maruti Van bearing Registration No. HR-26L-9129.

Issue no.3 was as to whether the vehicle in question, i.e., Truck No. HR 38J-8752 was insured with the Appellant-Insurance Company at the time of the accident.

Issue no.4 was as to whether the driver of the vehicle in question was not having valid driving licence at the time of the accident.

Issue no.5 was as to whether the vehicle in question was being driven not in accordance with the terms of the Insurance Policy at the time of the accident.

Issue No.6 was as to whether the claimant-respondent nos. 1 to 4 were entitled to get any compensation, and if yes, quantum of such compensation and against which opposite party in the Claim Petition.

10. The claimant-respondent nos. 1 to 4 examined two witnesses on their behalf.

11. Further, the claimant-respondent nos. 1 to 4 filed documentary evidence.

12. No oral evidence was led on behalf of behalf of the opposite parties in the Claim Petition. The Appellant-Insurance Company filed photostat copy of the Insurance Policy (Paper No. 38 Ga).

13. Issue Nos. 1 and 2 were decided by the Tribunal together. The Tribunal decided Issue No.1 in the affirmative holding that the accident took place on account of rash and negligent driving of the vehicle in question as a result of which, the said Soraj Singh travelling in the aforementioned Maruti Van sustained grievous injuries, and consequently died.

14. Issue No.2 was decided by the Tribunal in the negative holding that there was no composite negligence on the part of the driver of the aforesaid Maruti Van.

15. Issue No.3 was decided by the Tribunal in the affirmative holding that the vehicle in question was insured with the Appellant-Insurance Company at the time of the accident.

16. As regards Issue Nos.4 and 5, the Tribunal noted that the case had proceeded ex-parte against the owner of the vehicle in question, i.e., the respondent no. 5 herein. The Tribunal further noted that the driving licence of the driver of the vehicle in question (Khalid) was also not produced. In order to absolve itself of the liability to pay compensation, it was necessary for the Appellant-Insurance company to prove that the driver of the vehicle in question was not having valid driving licence at the time of the accident, and that the vehicle in question was not having valid permit at the time of the accident i.e., the vehicle in question was being driven not in accordance with the terms of the Insurance Policy. In the circumstances, it was not established that the driver of the vehicle in question (Khalid) was not having valid driving licence at the time of the accident, and the vehicle in question was being driven not in accordance with the terms of the Insurance Policy. Hence, the liability to pay compensation was on the Appellant-Insurance Company subject to the condition that in case the Appellant-Insurance Company was convinced that the driver of the vehicle in question was not having valid driving licence and the vehicle in question was being driven not in accordance with the terms of the Insurance Policy, then it would be open to the Appellant-Insurance Company to recover the amount of compensation paid by it from the owner of the vehicle in question, i.e., the respondent no.5 herein. Issue Nos. 4 and 5 were decided accordingly.

17. As regards Issue No.6, the Tribunal assessed the income of the deceased Soraj Singh as Rs.4000/- per month, and applied multiple of 11 applicable in respect of the age group of 50 to 55 years as per the second schedule to the Motor Vehicles Act, 1988. Accordingly, the Tribunal assessed the amount of compensation as Rs.3,61,500/- with simple interest @7% per annum from the date of the filing of the Claim Petition till the date of payment. The Tribunal further held that the initial liability to pay compensation was on the Appellant-Insurance Company subject to the condition that if the Appellant-Insurance Company was convinced that at the time of the accident the driver of the vehicle in question was not having valid driving licence, and the vehicle in question was not having permit, and was being driven not in accordance with the terms of the Insurance Policy, then it would be open to the Appellant-Insurance Company to recover the amount of compensation paid by it from the owner of the vehicle in question, i.e., the respondent no. 5 herein.

18. We have heard Shri Amresh Sinha, learned counsel for the Appellant-Insurance Company, and perused the record filed with the appeal.

19. Sri Amresh Sinha, learned counsel for the Appellant-Insurance Company submits that having held that the aforesaid Truck in question was being

run against the terms and conditions of the Insurance Policy, the Tribunal erred in directing the Appellant-Insurance Company to pay the amount of compensation and thereafter recover the same from the owner of the Truck in question, i.e., respondent no. 5 herein.

20. Sri Amresh Sinha submits that in any case, the interest of the Appellant-Insurance Company as against the owner of the Truck in question (respondent no. 5 herein) should have been properly secured so that after making the payment of compensation under the impugned award, the Appellant-Insurance Company would be able to recover the same from the owner of the aforesaid Truck in question. Sri Amresh Sinha has relied upon the following decisions in this regard:--

1. **Oriental Insurance Company Ltd. Vs. Sri Nanjappan & Others, 2004(2) TAC 12 (SC)**
2. **National Insurance Company Vs. Challa Bharathamma, 2005(1) TAC 4 (SC)**

21. We have considered the submissions made by Sri Amresh Sinha, learned counsel for the Appellant-Insurance Company.

22. As regards the submission made by Sri Amresh Sinha that the Tribunal erred in directing the Insurance company to make the payment of compensation and thereafter recover the same from the owner of the Truck in question, it is pertinent to refer to the relevant provisions of the Motor Vehicles Act, 1988.

Sub-section (5) of Section 147 of the Motor Vehicles Act, 1988 lays down as under:-

"147. Requirements of policies and limits of liability-- (1) to (4).....
(5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons."

23. The above-quoted provision thus provides that an insurer issuing a policy of insurance under Section 147 of the said Act, shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons.

24. Sub-section (1) of Section 149 of the Motor Vehicles Act, 1988 provides as follows:-

"***149. Duty of insurers to satisfy judgements and awards against persons insured in respect of third party risks--*** *(1) If, after a certificate of insurance has been issued under sub-section (3) of Section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of Section 147 (being a liability covered by the terms of the policy) [or under the provisions of Section 163-A] is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have*

avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment-debtor, in respect of the liability, together with any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.
(2) to (7). . . . . ."

25. The above-quoted provision thus provides that in case any judgment or award is obtained against any person insured by the policy, then the insurer shall pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment debtor, in respect of the liability, together with any amount payable in respect of costs and interest. This will be so even though the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy.

26. In view of the above provisions, we are of the opinion that the directions given by the Tribunal requiring the Appellant-Insurance Company to make the deposit of compensation awarded under the impugned award and thereafter recover the same from the owner of the aforesaid Truck in question, is in accordance with law, and the same does not suffer from any infirmity.

27. The above conclusion is supported by various decisions of the Apex Court:

1. Oriental Insurance Co.Ltd. Vs. Inderjit Kaur and others, AIR 1998 SC 588.
2. National Insurance Company Ltd. Vs. Swaran Singh , 2004 (3) SCC 297: 2004 (1) T.A.C.321:AIR 2004 SC 1531.
3. National Insurance Co. Ltd. Vs. Laxmi Narain Dhut, (2007) 3 S.C.C700: 2007(2) TAC 398 (SC).
4. Prem Kumari & Others Vs. Prahlad Dev & Others, 2008(1) T.A.C.803 (SC).

28. In ***Oriental Insurance Co. Ltd. v. Indrajit Kaur and others, AIR 1998 SC 588***, their Lordships of the Supreme Court opined as under (paragraph 7 of the said AIR):

"7. We have, therefore, this position. Despite the bar created by S.64-VB of the Insurance Act, the appellant, an authorised insurer, issued a policy of insurance to cover the bus without receiving the premium therefore. By reason of the provisions of Ss.147(5) and 149(1) of the Motor Vehicles Act, the appellant became liable to indemnify third parties in respect of the liability which that policy covered and to satisfy awards of compensation in respect thereof notwithstanding its entitlement (upon which we do not express any opinion) to avoid or cancel the policy for the reason that the cheque issued in payment of the premium thereon had not been honoured."

(Emphasis supplied)

29. This decision thus supports the conclusion mentioned above on the basis of Sections 147(5) and 149(1) of the Motor Vehicles Act, 1988.

30. In ***National Insurance Co.Ltd. v. Swaran Singh, 2004(3) SCC 297: 2004 (1) T.A.C. 321: AIR 2004 SC 1531***, their Lordships of the Supreme Court held as follows (paragraph 105 of the said AIR):

"105. The summary of our findings to the various issues as raised in these petitions is as follows:

(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third-party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) An insurer is entitled to raise a defence in a claim petition filed under Section 163-A or Section 166 of the Motor Vehicles Act, 1988, interalia, in terms of Section 149(2) (a) (ii) of the said Act.

(iii) The breach of policy condition e.g., disqualification of the driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) Insurance Companies, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicles;the burden of proof wherefor would be on them.

(v) The Court cannot lay down any criteria as to how the said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards the insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply " the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insurer under Section 149(2) of the Act.

(vii) The question, as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver,(a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance Companies would be liable to satisfy the decree.

(ix) The claims tribunal constituted under Section 165 read with Section 168

is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between the insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of Sections 149 (2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the tribunal to the Collector in the same manner under Section 174 of the Act as arrears as land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the tribunal.

(xi) The provisions contained in sub-section (4) with the proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover amount paid under the contract of insurance on behalf of the insured can be taken recourse to by the Tribunal and be extended to claims and defences of the insurer against the insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims."

(Emphasis supplied)

31. Proposition nos.(vi) and (x), reproduced above support the conclusion that the direction given by the Tribunal in the award impugned in the present case is in accordance with law.

In ***National Insurance Co.Ltd. v. Laxmi Narain Dhut, 2007 (2) T.A.C. 398 (S.C.),*** their Lordships of the Supreme Court considered the decision in ***National Insurance Co.Ltd. v. Swaran Singh*** (supra) and held as under (paragraph 35 of the said TAC):

"35. As noted above, the conceptual difference between third party right and own damage cases has to be kept in view. Initially, the burden is on the insurer to prove that the license was a fake one. Once it is established the natural consequences have to flow.

In view of the above analysis the following situations emerge:
(1) The decision in Swaran Singh's case (supra) has no application to cases other than third party risks.
(2) Where originally the license was fake one, renewal cannot cure the inherent fatality.
(3) In case of third party risks the insurer has to indemnify the amount and if so advised to recover the same from the insured.
(4) The concept of purposive interpretation has no application to cases relatable to Section 149 of the Act.

The High Courts/Commissions shall now consider the matter afresh in the light of the position in law as delineated above.

The appeals are allowed as aforesaid with no order as to costs."

(Emphasis supplied)

32. In view of the above decision, it is evident that in case of third party risks, the decision in ***National Insurance Co. Ltd. v. Swaran Singh and others*** (supra) would apply, and the insurer has to indemnify the amount to the third party and thereafter may recover the same from the insured.

33. In ***Prem Kumari & others vs. Prahlad Dev and others, 2008(1) T.A.C. 803 (S.C.),*** their Lordships of the Supreme Court have reiterated the view expressed in ***National Insurance Company Limited. Vs. Laxmi Narain Dhut's case*** (supra) explaining the decision in ***National Insurance Company Limited Vs. Swaran Singh and others*** (supra), and held as under (paragraphs 8 and 9 of the said TAC):

"8. The effect and implication of the principles laid down in Swaran Singh's case (supra) has been considered and explained by one of us ***(Dr.Justice Arijit Pasayat) in National Insurance Co.Ltd. v. Laxmi Narain Dhut, (2007) 3 S.C.C. 700: 2007 (2) T.A.C. 398****. The following conclusion in para 38 are relevant:*

"38. In view of the above analysis the following situations emerge:

(1) The decision in Swaran Singh's case (supra) has no application to cases other than third party risks.
(2) Where originally the license was a fake one, renewal cannot cure the inherent fatality.
(3) In case of third-party risks the insurer has to indemnify the amount, and if so advised, to recover the same from the insured.
(4) The concept of purposive interpretation has no application to cases relatable to Section 149 of the Act.
9. In the subsequent decision ***Oriental Insurance Co.Ltd v. Meena Variyal & others, (2007) 5 S.C.C. 428: 2007 (2) T.A.C. 417****, which is also a two Judge Bench while considering the ratio laid down in Swaran Singh's case (supra) concluded that in a case where a person is not a third party within the meaning of the Act, the Insurance Company cannot be made automatically liable merely by resorting to* ***Swaran Singh's*** *case (supra). While arriving at such a conclusion the Court extracted the analysis as mentioned in para 38 of* ***Laxmi Narain Dhut*** *(supra) and agreed with the same. In view of consistency, we reiterate the very same principle enunciated in* ***Laxmi Narain Dhut*** *(supra) with regard to interpretation and applicability of Swaran Singh's case (supra)."*

(Emphasis supplied)

34. In view of the above decisions, it is evident that the directions given by the Tribunal requiring the Appellant-Insurance Company to deposit the amount awarded under the impugned award in the first instance, and thereafter, recover the same from the owner of the Truck in question, are valid and legal.

35. As regards the submission made by Sri Amresh Sinha that the interest of the Appellant-Insurance Company should be protected as against the owner of the Truck in question (respondent no. 5 herein) so that in case the Appellant-Insurance Company deposits the amount of compensation, it may be able to recover the same from the owner of the aforesaid Truck in question, it is pertinent to refer to the decisions relied upon by Shri Amresh Sinha.

36. In ***Oriental Insurance Company Ltd. Vs. Sri Nanjappan and others, 2004(2) T.A.C.12 (SC)*** (supra), their Lordships of the Supreme Court opined as under (Paragraph 7 of the said T.A.C.):

"7. Therefore, while setting aside the judgment of the High Court we direct in terms of what has been stated in Baljit Kaur's case 2004(1) T.A.C.366(SC)(supra) that the insurer shall pay the quantum of compensation fixed by Tribunal, about which there was no dispute raised to the respondents-claimants within three months from today. For the purpose of recovering the same from the insured, the insurer shall not be required to file a suit. It may initiate a proceeding before the concerned Executing Court as if the dispute between the insurer and the owner was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount to the insured, owner of the vehicle shall be issued a notice and he shall be required to furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the Executing Court shall take assistance of the concerned Regional Transport Authority. The Executing Court shall pass appropriate orders in accordance with law as to the manner in which the insured, owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the Executing Court to direct realisation by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle, the insured. The appeal is disposed of in the aforesaid terms, with no order as to costs."

(Emphasis supplied)

37. In ***National Insurance Company v. Challa Bharathamma, 2005 (1) T.A.C. 4 (SC)*** (supra), it was laid down as follows (Paragraph 13 of the said T.A.C):-

"The residual question is what would be the appropriate direction. Considering the beneficial object of the Act, it would be proper for the insurer to satisfy the award, though in law it has no liability. In some cases the insurer has been given the option and liberty to recover the amount from the insured. For the purpose of recovering the amount paid from the owner, the insurer shall not be required to file a suit. It may initiate a proceeding before the concerned Executing Court as if the dispute between the insurer and the owner was the subject- matter of determination before the Tribunal and the

issue is decided against the owner and in favour of the insurer. Before release of the amount to the claimants, owner of the offending vehicle shall furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the Executing Court shall take assistance of the concerned Regional Transport Authority. The Executing Court shall pass appropriate orders in accordance with law as to the manner in which the owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the Executing Court to direct realisation by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle i.e. the insured. In the instant case considering the Quantum involved we leave it to the discretion of the insurer to decide whether it would take steps for recovery of the amount from the insured."

(Emphasis supplied)

38. In our opinion, the directions contemplated in the above decisions may be sought by the Appellant-Insurance Company before the Executing Court when the Appellant-Insurance Company, after depositing the amount awarded under the impugned award, moves appropriate application before the Executing Court to recover the said amount from the insured person, i.e. the owner of the vehicle in question (respondent no. 5 herein), while the claimants file an application for the execution of the award or for the release of the amount deposited by the Appellant-Insurance Company. We are refraining from expressing any opinion in this regard.

39. We may, however, refer to two decisions of this Court wherein the above decisions of the Supreme Court have been considered.

40. In ***Smt. Bhuri and others Vs. Smt. Shobha Rani and others, 2007 (1) T.A.C. 20 (All.)***, a learned Single Judge of this Court held as under (paragraph 5 of the said T.A.C.):-

"5. From the aforesaid case law, as referred to by the learned Counsel for the parties, it would be evident that in spite of the fact that the insurer is not made liable to compensate the claimants under the policy under Section 149 of the Motor Vehicles Act, still the liability of payment, under the law as developed by the Apex Court in this context, has been assigned to the Insurance Company. At the same time, the Insurance Company has also been given liberty to recover the said amount from the insured within the provisions of the Motor Vehicles Act itself and without taking the burden of filing a suit for that purpose. This principle of law was initially propounded in Baljit Kaur's case (supra) and it has been followed in the aforesaid cases referred to by the parties concerned. But in the subsequent cases more especially in Nanjappan's case (supra) it has also been observed that before releasing the amount under deposit before the Court the insured/owner of the vehicle shall be issued a notice and he shall be required to furnish security for the entire amount which the Insurance Company will pay to the claimants. After that notice the Court may direct the attachment of the offending vehicle as part of the security and could also pass appropriate orders in accordance with law. In case of default it shall be open to the Court to direct realisation of the

amount from the insured/owner by disposal of security or from any other property or properties of the owner of the vehicle. Therefore, all these modes have been provided by the Apex Court for the insurer to make recovery from the insured. But from all these directions as given by the Apex Court, the purport is that the Court shall not undermine the interest of the claimants for whose welfare the Supreme Court has been developing this law through all these cases even by interpreting otherwise the liability of the insurer with Section 149 of the Motor Vehicles Act. Thus, what is the crux of the matter in the present case is that the revisionists-claimants cannot be made to suffer even if the insured/owner of the vehicle does not furnish security or does not appear before the Court in pursuance to the notice issued to him. The burden of recovering the amount within the provisions of the Act itself has been placed upon the insurer in the aforesaid judgments of the Apex Court. The claimants who have obtained the award in their favour have not been made to suffer through any observation made by the Supreme Court in these cases. Thus, in the aforesaid view of the matter, what I feel is that it would be just and proper if the Court below is directed to first take resort to the issuance of notice to the insured/owner of the vehicle and thereafter only the money under deposit before the Court should be released in favour of the claimants."

(Emphasis supplied)

41. In ***National Insurance Company Limited Vs. Smt. Khursheeda Bano and others, 2009 (1) A.W.C. 355,*** a Division Bench of this Court laid down as follows (paragraph 4 of the said A.W.C.):

*"4. Learned counsel has cited the judgment of the Supreme Court in **National Insurance Company Ltd. v. Challa Bharathamma and others, (2004) 8 SCC 517**, to establish that the claim of the insurance company should be secured by the owner. We have no quarrel with such proposition. What we want to say is that unless and until an appropriate application in the selfsame proceeding is made by the insurance company for the purpose of recovery, the question of furnishing security by the owner cannot arise. Such situation is yet to ripe. At this stage, we are only concerned with the payment of compensation to the claimants which cannot be stalled and has got nothing to do with the dispute regarding liability between the owner and the insurance company. The sufferer is a third party. Moreover, in such judgment, the Division Bench of the Supreme Court has categorically held "considering the beneficial object of the Act, it would be proper for the insurer to satisfy the award, though in law it has no liability." In effect it is a stop-gap arrangement to satisfy the award as soon as it is passed. The judgment of 3 Judges' Bench of the Supreme Court in **National Insurance Co. Ltd v. Swaran Singh and others, (2004) 3 SCC 297,** also speaks in para 110 that the Tribunal can direct that the insurer is liable to be reimbursement by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the Tribunal. Therefore, the intention of the Legislature as well as the interpretation by the Supreme Court and different High Courts is well settled to the extent that under no circumstances payment of compensation to the claimants will be stalled. Even at the cost of the repetition we say, it has nothing to do*

with the dispute with regard to liability of owner or insurer, which can be considered in the separate application in the selfsame cause or in an execution application in connection thereto to be initiated by the insurance company."

(Emphasis supplied)

42. In view of the above discussion, we are of the opinion that the Tribunal did not commit any illegality in directing the Appellant-Insurance Company to make deposit of the amount of compensation, and recover the same from the insured person i.e. the owner of the vehicle in question-respondent no. 5 herein.

43. After making deposit of the amount awarded under the impugned award, it will be open to the Appellant-Insurance Company to initiate appropriate proceedings for recovery of the amount from the owner of the aforesaid Truck in question (respondent no. 5 herein), and seek appropriate directions in such proceedings.

44. It is made clear that in case any appeal is filed by the claimant-respondent nos. 1 to 4 or by the owner of the aforesaid Truck in question (respondent no.5 herein), it will be open to the Appellant-Insurance Company to contest the same on the grounds legally open to the Appellant-Insurance Company.

45. The amount of Rs.25,000/- deposited by the Appellant-Insurance Company while filing the present appeal, will be remitted to the Tribunal for being adjusted towards the amount to be deposited by the Appellant-Insurance Company, as per the directions given in the impugned award.

46. Subject to the above observations, the appeal filed by the Appellant-Insurance Company is dismissed. However, on the facts and in the circumstances of the case, there will be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.03.2010

BEFORE
THE HON'BLE VIJAY MANOHAR SAHAI, J.
THE HON'BLE RITU RAJ AWASTHI, J.

Special Appeal No. 988 of 2003

Suresh Tiwari ...Appellant
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Amit Saxena
Sri Abhinav Shukla

Counsel for the Respondents:
C.S.C.

Intermediate Education Act-Regulation 2 (2)-Class III post in recognized Inter College fall vacant-50% reservation to class 4th employees from promotion quota-whether available even on Single vacancy-held-'yes' otherwise it would amount to deny the promotion quota against statutory provision.

Held: Para 7

There is another aspect of the matter that in case of one post of clerk is to be filled up by direct recruitment and not by promotion then it would amount to denying any avenue of promotion to the Class-IV employees as the post in question would be filled up by direct recruitment and the Class-IV employees would be denied of opportunity of promotion on Class-III post of clerk, which would lead to stagnation,

adversely affecting the Class-IV employees.

Case law discussed:

1999(3) UPLBEC 2315, (2006) 3 UPLBEC 2391.

(Delivered by Hon'ble Ritu Raj Awasthi, J.)

1. Heard Sri Abhinav Shukla holding brief of Sri Amit Saxena for the appellant and Standing Counsel appearing for the respondents.

2. Under challenge is the judgment and order dated 25.08.2003 passed in civil misc. writ petition no. 35867 of 2003 (Suresh Tiwari vs. State of U.P. and others). The learned Single Judge relying on the decision of this Court in the case of ***Palak Dhari Yadav vs. Regional Inspectress of Girls Schools and others, 1999(3) UPLBEC 2315*** has dismissed the writ petition holding that the Single post of clerk cannot be filled up by way of promotion.

3. The factual matrix as borne out from the record appears that the appellant-petitioner was working on a Class-IV post at Siddheshwar Uchchtar Madhyamik Vidyalaya, Gopalpur, Fatehpur. There was one sanctioned post of clerk in the said Vidyalaya which fell vacant on 31.10.2000. The committee of management passed a resolution permitting the appellant-petitioner to work on the post of clerk under 50 percent promotional quota. The proposal was approved by the D.I.O.S. Fatehpur and thereafter the appellant-petitioner had joined on the post of clerk on 03.01.2002.

4. However, when the D.I.O.S. came to know that a single post of clerk, which ought to be filled up by way of direct recruitment and not by way of promotion in view of the decision in the case of *Palak Dhari Yadav (supra)*, he issued a show cause on 07.05.2003 calling upon the committee of management to show cause as to why the approval granted be not cancelled. The committee of management did not submit any explanation. Thereupon the D.I.O.S. taking into consideration the principle laid down by this Court in the case of *Palak Dhari Yadav (supra)* cancelled the earlier approval.

5. The learned counsel for the appellant has submitted that in the case of Jai Bhagwan Singh vs. D.I.O.S. Gautambudhnagar (writ petition no. 6836 of 2005) by order dated 28.10.2005 the learned Single Judge had referred the following question for consideration by a larger Bench:

"Whether a single post of Class III available in an Intermediate College governed by the 1921 Act can be filled by way of promotion and whether the case of Palak Dhari Yadav, reported in (1999) 3 UPLBEC 2315, has been correctly decided keeping in view the opinion expressed by another Single Judge in Writ Petition No. 4165 of 2004 as also the pronouncement of the Apex Court in the case of B. Badami vs. State of Maysore and All India Federation vs. Union of India."

6. The Division Bench while considering the above reference has come to the conclusion, as reported in (2006) 3 UPLBEC 2391, **Jai Bhagwan Singh vs. D.I.O.S., Gautambudh Nagar** as under:

"13. Thus a bare reading of note of Regulation 2(2) of the Regulations makes it clear that if there is only one sanctioned

post, the same is to be filled up through the channel of promotion since 50% of one shall be half and half or more than half is to be deemed as one, as per the legal fiction contemplated in the Note.

14. The learned Single Judge in Palak Dhari Yadav (supra) has placed reliance upon the judgment of the Apex Court in the case of Post Graduate Institution of Medical Education and Research, Chandigarh (supra). The Apex Court in Post Graduate Institution of Medical Education and Research, Chandigarh (supra) was considering the question of applicability of reservation for the Scheduled Castes, Scheduled Tribes and Other Backward Classes categories for filling the posts. The concept of reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes referable to Article 16(4) of the Constitution is a different concept as compared to the right of promotion, which is a right given to existing employees. The reservation, as contemplated under Article 16(4), is a different concept with entire different object. The judgment relied upon by the learned Single Judge in Palak Dhari Yadav (supra) was not a case dealings with the promotion or right of serving employees.

15. The Apex Court in State of Punjab and others (supra) had occasion to consider almost similar controversy. The Punjab Medical College Education Service (Class-I) Rules, 1978 provided for method of appointment, 75% by promotion and 25% by direct recruitment. The question arose in that context. The submission raised before the Apex Court that in view of the observations made in R.K. Sabharwal v. State of Punjab, reported at (1995) 2 SCC 745, the determination as to whether the vacancy will go to the promote or direct recruitment will be decided. The submission was made before the Apex Court that the judgment of R. K. Sabharwal's case (supra), which was dealing with the reservation to the Scheduled Castes, Scheduled Tribes, and Other Backward Classes under Article 16(4), has nothing to do, while interpreting the Rules pertaining to the quota fixed for only by promotion or direct recruitment, this submission was accepted by the Apex Court. In the aforesaid judgment, the Apex Court had also occasion to consider the Post Graduate Institution of Medical Education and Research, Chandigarh (supra) and held that the judgment of Post Graduate Institution of Medical Education and Research, Chandigarh (supra) has no applicability, while considering the quota for promotion and direct recruitment. Following was observed by the Apex Court in paragraph 12:

"Before parting with the discussion, we may mention one submission placed for our consideration by learned counsel for the respondent. Placing reliance on a latter Constitution Bench judgment in Postgraduate Institute of Medical Education and Research v. Faculty Assn., it was contended that this Court in the light of R. K. Sabharwal case held that where there was only one post in a cadre, there could not be any reservation under Article 16(4) for for SCs. STs and BCs. Similarly, if there is one post of Professor, Rule 19 may not apply. In this connection, paras 34 and 35 of the Report at p. 23 were pressed into service, Ray J., speaking for the Constitution Bench, stated in the said paragraphs as under: (SCC p.23, Paras 34-35):

"In a single post cadre, reservation at any point of time on account of rotation of roster is bound to bring about a situation where such a single post in the cadre will be kept reserved exclusively for the members of the Backward Classes and in total exclusion of the general members of the public. Such total exclusion of general members of the public and cent per cent reservation for the Backward Classes is not permissible within the constitutional framework. The decisions of this Court to this effect over the decades have been consistent.

35. Hence until there is plurality of posts in a cadre, the question of reservation will not arise because any attempt of reservation by whatever means and even with the device of rotation of roster in a single post cadre is bound to create 100% reservation of such post whenever such reservation is to be implemented. The device of rotation of roster in respect of single post cadre will only mean that on some occasions there will be complete reservation and the appointment to such post is kept out of bounds to the members of a large segment of the community who do not belong to any reserved class, but on some other occasions the post will be available for open competition when in fact on all such occasions, a single post cadre should have been filled only by open competition amongst all segments of the society.

It is difficult to appreciate how this decision can be of any assistance to learned Counsel for the respondent. It is obvious that in the aforesaid case, the Constitution Bench was concerned with a similar scheme of reservation for S.C., S.T. and BC candidates and, therefore, Article 16 (4) squarely arose for consideration. To that extent, the said decision falls in line with the legal position examined by the earlier Constitution Bench in R. K. Sabharwal case. As we have already opined earlier, the factual and legal situation in the present case is entirely different. We are not concerned with any scheme of reservation under Article 16(4). Therefore R.K. Sabharwal case cannot be pressed into service, as seen earlier. If that is so, on the same lines the ratio of the decision of this Court in the Postgraduate Institute of Medical Education & Research case would also not apply. While deciding the question of working out the Recruitment Rule for appointment from two sources of promotees and direct recruits wherein only Article 16(1) would hold the field, uninhibited by the exceptional category carved out from the said sub-article (1) by sub-article (4) thereof. The first point for determination is, therefore, answered in favour of the appellants and against the respondent."

16. The above judgment of the Apex Court clearly laid down that while interpreting the Rules regarding promotion concept, the reservation has no application.

17. Thus, we are of the view that in the judgment of Palak Dhari Yadav's case, reliance on the Post Graduate Institution of Medical Education and Research, Chandigarh (supra) was not a correct reliance and the said reliance is clearly misplaced. In Palak Dhari Yadav's case, the learned Single Judge has incorrectly taken the view that the rule making authority while enacting Regulation 2(2) read with Note did not visualise reservation of only one post for promotion."

The reference was answered in the following words:

"(i) A single post of Class-III available in an Intermediate College governed by the 1921 Act can be filled by way of promotion; and the case of Palak Dhari Yadav (supra) has not been correctly decided."

That since the impugned judgment and order has been passed relying on the judgment of this Court in the case of Palak Dhari Yadav (supra) which has been subsequently declared as not laying the correct law, therefore, we are of the considered opinion that the impugned judgment and order challenged in the present special appeal is not sustainable in the eye of law and liable to be set aside.

7. There is another aspect of the matter that in case of one post of clerk is to be filled up by direct recruitment and not by promotion then it would amount to denying any avenue of promotion to the Class-IV employees as the post in question would be filled up by direct recruitment and the Class-IV employees would be denied of opportunity of promotion on Class-III post of clerk, which would lead to stagnation, adversely affecting the Class-IV employees.

8. In view of the above, the impugned judgment and order dated 29.08.2003 is hereby set aside. The order dated 23.05.2003 of the D.I.O.S. Fatehpur cancelling the approval of promotion of the appellant-petitioner on the post of clerk is quashed. The consequences shall follow. The appeal is hereby allowed. No order as to costs.

APPELLATE JURSDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.03.2010

BEFORE
THE HON'BLE VIJAY KUMAR VERMA, J.

Criminal Appeal No. 1905 of 1981

Briskshbhan @ Birkhey and others ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri G.S. Chaturvedi
Sri Apul Mishra
Sri Rahul Mishra

Counsel for the Opposite Party:
Sri Bhanu Pratap Singh
Sri Dharam Pal Singh
A.G.A.

Criminal Appeal-Appeal against conviction order dated.25.08.81- offense under section 147, 353,149, 307 IPC-Appeal admitted-record summoned-session judge Jhansi in 2001 reported that the Original record weeded out in the year 1992 itself-except certified copy judgement nothing there-even reconstructed of record after 29 years not possible-held-appeal can not be decided on merit-except acquittal of appellant following the ratio of judgment of Apex Court in Abhay Raj Case.

Held: Para 7

From the report made by the Sessions Judge, Jhansi, this fact is borne out that the record of Session Trial No. 9 of 1980 was weeded out in the year 1992 and original judgement only is available in the file. From the report dated 15.09.2007 of the Sessions Judge, Jhansi, this fact is also borne out that reconstruction of the record is not possible. I agree with the submission of the learned counsel for the appellant

that no useful purpose would be served after a gap of about twenty nine years to direct retrial of the accused persons, as no paper of the case is available. Therefore, having regard to the observations made by the Hon'ble Apex Court in the case of *State of U.P. Vs. Abhay Raj Singh* (supra) there is no alternative except to acquit the appellants, as hearing of the appeal in accordance with the arrangement made in section 386 Cr.P.C.can not be made and retrial also is not possible.

Case law discussed:

(2004 (50) ACC 591), 2(010 (1) ADJ 53).

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

1. Heard Sri Rahul Mishra, Advocate holding brief of Sri Apul Mishra, counsel of the appellants and AGA for the State.

2. This appeal has been preferred by the appellants Briskshbhan @ Birkhey, Ram Prasad, Meharban, Lalta, Jagdish, Pratap, Rajendra Singh, Ram Swaroop, Siyaram @ Siya, Girwar Sahai, Jamuna and Har Prasad against the judgement and order dated 25.08.1981 passed by the 2nd Addl. Sessions Judge, Jhansi in S.T. No. 9 of 1980 (State Vs. Brishshbhan and others), whereby the appellants have been convicted and sentenced to undergo rigorous imprisonment for two years under section 147 IPC, two years rigorous imprisonment under section 353 read with section 149 IPC, five years rigorous imprisonment under section 307 read with section 149 IPC and three years rigorous imprisonment under section 225 IPC. The appellant Harprasad has been further convicted and sentenced to undergo rigorous imprisonment for two years under section 324 IPC.

3. After admission of the appeal, the record of session trial no. 9 of 1980 was summoned from the Sessions Judge, Jhansi. In response to the letter issued by the office for sending the lower court record, it was reported by the District Judge, Jhansi vide his letter no. 332/XV dated 27.12.2001 that record of session trial has been weeded out on 06.11.1992 and original judgement only is available in the record. Thereafter, direction was issued to the Sessions Judge, Jhansi to reconstruct the record. In response to the letter issued in this regard, the Sessions Judge, Jhansi vide letter no. 1758/XV dated 15.09.2007 has reported that reconstruction of the record is not possible. Since the papers of Session trial are not available, hence after a gap of about 29 years, retrial of the accused persons is also not possible.

4. Placing reliance on ***State of U.P. Vs. Abhay Raj Singh and another (2004 (50) ACC 591)***, it is submitted by learned counsel for the appellants that for want of lower court record, the appeal can not be heard on merit and hence, the appellants are liable to be acquitted. It is also submitted by learned counsel that after a gap of about twenty nine years, retrial of the accused persons is also not possible, because no vital paper of the case is available and hence, no useful purpose would be served to direct retrial of the appellants.

5. On the other hand the learned AGA drawing my attention towards ***Raj Narain Pandey Vs. State 2(010 (1) ADJ 53)***, has submitted that this court can decide the appeal on merit on the basis of the certified copy of the judgement, as has been done by another Bench of this Court in aforesaid case.

6. I have given my thoughtful consideration to the rival submissions made by the parties counsel. It is true that another Bench of this Court in the case of ***Raj Narain Pandey*** (Supra) has decided the appeal on merit in the absence of lower court record on the basis of the impugned judgement only, but in my considered opinion, the appeal can not be decided on merit in the absence of lower court record. Unless the evidence is available for perusal, in my opinion, the appeal can not be decided on merit merely on the basis of the lower court judgement, as evidence is essentially required to consider the merit of the impugned judgement and merely on the basis of the said judgement, no order on merit can be passed in the appeal.

7. From the report made by the Sessions Judge, Jhansi, this fact is borne out that the record of Session Trial No. 9 of 1980 was weeded out in the year 1992 and original judgement only is available in the file. From the report dated 15.09.2007 of the Sessions Judge, Jhansi, this fact is also borne out that reconstruction of the record is not possible. I agree with the submission of the learned counsel for the appellant that no useful purpose would be served after a gap of about twenty nine years to direct retrial of the accused persons, as no paper of the case is available. Therefore, having regard to the observations made by the Hon'ble Apex Court in the case of ***State of U.P. Vs. Abhay Raj Singh*** (supra) there is no alternative except to acquit the appellants, as hearing of the appeal in accordance with the arrangement made in section 386 Cr.P.C.can not be made and retrial also is not possible.

8. Consequently, the appeal is allowed. The impugned judgement and order are set aside and the surviving appellants-accused are hereby acquitted of the offences with which they have been charged for want of trial court record and there being no possibility of retrial.

9. The appellants-accused are on bail. They need not to surrender. Their personal and bail bonds are cancelled and the sureties are discharged.

10. Office is directed to send a copy of this judgement to the trial court concerned for information.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.03.2010

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

Civil Misc. Writ Petition No. 3960 of 2010

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

Counsel for the Petitioner:
Sri Sunil Kumar Singh

Counsel for the Respondents:
C.S.C.

<u>Constitution of India, Art. 226</u>- Cancellation of appointment-petitioner was appointed as Collection Amin in the year 1976-confirmed on the said post in 1977-after 33 years-complaint made about lack of qualification-petitioner from very beginning disclosed his qualification as High School-admittedly passed Intermediate subsequently certainly could not be appointed initially due to lack of requisite qualification-but considering long period of working-

omission on post of authorities-can not beousted dismissal order quashed-consequential direction given.

Held: Para 13

It is also to be noticed that there was a distinction made in the case of Mohd. Sartaj (supra) wherein paragraph 19 recites that the order of cancellation therein was passed within a very short span of time. The aforesaid aspect, therefore, weighed heavily with the Supreme Court while deciding the case of Mohd. Sartaj. In the instant case, the order has been passed after more than 33 years of service and, therefore, the question of proximity of time has also to be taken notice of which has weighed with me while allowing this petition. Apart from this, there is no fraud or misrepresentation on the part of the petitioner and he had categorically disclosed his qualification only as High School and not as Intermediate. The impression given by the complainant that the petitioner had obtained employment through a forged mark-sheet was not found to be correct. It appears that then authority proceeded to make the appointment on the basis of a bona fide belief of the existence of the Rules before its amendment which contained the qualification of High School.

Case law discussed:

1993 Supp. (2) SCC 611, AIR 1978 SC 1536, (1993) 3 SCC 591, (1998) 8 SCC 59.

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

1. The petitioner is a Collection Amin, whose services have been terminated under the impugned order dated 10.12.2009 on the ground that when he was appointed 33 years ago, he did not possess the minimum qualification of Intermediate which was required for the said post and, therefore, his appointment being invalid, the services are liable to be terminated.

2. The petitioner was admittedly appointed on 1.1.1977 as a Collection Amin and it is undisputed that he was made regular w.e.f. 1.7.1978 and was confirmed in his services on 10.1.1983. The petitioner passed his Intermediate Examination in the year 1989.

3. The nephew of the petitioner, who has been arrayed as Respondent No.4, made a complaint that the petitioner had gained appointment on the basis of a forged Certificate upon which the petitioner was issued a Notice on 30.1.2006 by the Addl. District Magistrate, Azamgarh, calling upon him to give a reply to the said allegation made in the complaint. The petitioner submitted a reply that his certificate was not forged and he had been given appointment under the then prevalent qualification which was High School, and which certificate was possessed by him. The District Magistrate issued another direction to the Sub-Divisional Magistrate that he has received the said reply and the Addl. District Magistrate has gone into this question and, therefore, appropriate action should be taken. On the strength of such direction, a show cause notice was issued to the petitioner on 11.12.2007 to explain about his want of qualification on the initial date of appointment. The petitioner submitted a reply on 25.1.2008 indicating that at the time of his appointment, he was in possession of a High School Certificate and on the strength thereof, he was appointed in 1977. He also submitted that the Rule, having been changed with regard to qualification, was not in force nor was it known to the Sub-Divisional Magistrate who was the then appointing

authority and, therefore, there is no occasion to consider his appointment to be invalid that too even after 32 years of service. A second show cause notice was issued to the petitioner on 29.8.2008 by the Sub-Divisional Magistrate calling upon the petitioner to show cause as to why his services be not terminated.

4. This second show cause notice was challenged by the petitioner in Writ Petition No.15525 of 2008 in which a counter-affidavit was filed but no orders were passed. The Sub-Divisional Magistrate, thereafter, proceeded to consider the reply of the petitioner and passed the impugned order holding that the petitioner did not possess the minimum qualification of having passed the Intermediate Examination on the date of his appointment and his services were terminated.

5. This writ petition has been filed challenging the said order dated 10.12.2009 on the ground that the petitioner has already put in more than 32 years of service and that in view of the law laid down in the case of Surendra Kumar Singh Vs. U.P. Financial Corporation and others, decided on 11.8.2004, which is a Division Bench judgement, this Court should exercise its writ of certiorari to quash the impugned order. Other decisions have also been cited at the Bar which shall be discussed hereinafter.

6. The facts in relation to the appointment of the petitioner on 1.1.1977, and the fact that the petitioner was only High School and not Intermediate, has not been disputed by the petitioner. Learned Standing Counsel, therefore, contends that there is no occasion to file any counter-affidavit and the matter can be decided on the legal issues raised. He submits that the petitioner did not possess the minimum qualification on the date of his initial appointment and, therefore, in view of the decision of the Apex Court in the case of State of M.P. and others Vs. Shyam Pardhi and others, (1996) 7 SCC 118, the initial qualification which was lacking at the time of appointment, cannot allow the petitioner to continue in service and, therefore, the impugned order is not vitiated. He has further cited the decision of the Apex Court in the case of Mohd. Sartaj and another Vs. State of U.P. and others, (2006) 2 SCC 315 (paragraph nos. 11 and 16), to contend that this was not a mere irregularity in appointment and it was a lack of initial qualification which cannot be cured and hence the appointment has to be set side. Learned Standing Counsel, therefore, contends that the impugned order does not call for any interference and the Division Bench judgment relied upon by the learned counsel for the petitioner, which is Annexure-11 to the writ petition, does not come to his aid.

7. In view of the undisputed fact that the petitioner did not have the initial qualification of Intermediate at the time of his appointment in 1977 and was only a High School, the fact remains that the petitioner was appointed on the basis of a wrong qualification. The petitioner subsequently passed his Intermediate Examination in the year 1989 after he had been confirmed in service. The qualification of Intermediate had been introduced by way of an amendment in the Rules on 11.3.1976. The appointment of the petitioner was undisputedly after the said amendment. This is not a case where the petitioner was at fault but it is a

case where he has been appointed on the basis of a qualification which has been altered by way of an appropriate amendment. The question is, therefore, should his appointment should be cancelled and the second issue is as to whether it should be done after 33 years of service of the petitioner.

8. The Apex Court in the case of **Ashok Kumar Sharma and another Vs. Chandra Shekhar and another, 1993 Supp. (2) SCC 611**, came to the conclusion that the results of the examination of the qualification that was required to be possessed on the date of interview had not been declared for no fault of the applicants, but were announced immediately before the date of interview. This did not dis-entitle the applicants as being disqualified and the Supreme Court upheld their selection and appointment in spite of that infirmity. The minority view of the third Hon'ble Judge even though agreed with the conclusion but held the applicants to be ineligible on the date when the application was to be filed. The minority view held that such practice should be discouraged as a person not qualified on the date of the application, cannot be subsequently given any benefit. However, since the conclusion was in favour of the applicants, their appointments were upheld.

9. There is another 3 Judges decision in the case of **Ram Sarup Vs. State of Haryana and others, AIR 1978 SC 1536**, relied upon by the learned counsel for the petitioner where one of the three requisite qualifications of experience was not possessed by the candidate yet the Supreme Court held that the same stood cured in the following words:-

"We are of the view that the appointment of the appellant was irregular since he did not possess one of the three requisite qualifications but as soon as he acquired the necessary qualification of five years' experience of the working of labour laws in any one of the three capacities mentioned in Cl. (1) of R.4 or in any higher capacity, his appointment must be regarded as having been regularised."

10. The Supreme Court in another case **M.S. Mudhol Vs. S.D. Halegkar, (1993) 3 SCC 591**, considered the case relating to the appointment to the post of a Principal where the allegation was that the candidate did not fulfil the essential qualification. The Supreme Court in para 4 held that the candidate did not have the requisite educational qualification to be selected for the post of Principal as he did not possess the post graduate Degree in the division concerned, yet the subsequent acquisition of the qualification and his experience was taken into account and it was found that it would be inequitable to dislodge the petitioner after 9 years of service. Even though it was held that the academic qualification was not possessed, yet the illegality was committed by the Selection Committee and, therefore, the candidate was allowed to continue in service.

11. The Supreme Court in the case of **Roshni Devi Vs. State of Haryana and others, (1998) 8 SCC 59,** again came across such a case where it passed an order in exercise of powers under Article 142 of the Constitution of India and upheld the appointment.

12. The aforesaid decisions found favour with the Division Bench as relied upon by the learned counsel for the

petitioner and, as such, in view of the fact that the petitioner had continued for more than 33 years of service, I see no justification in passing of the order when it is admitted that the petitioner has passed his Intermediate Examination subsequently.

13. It is also to be noticed that there was a distinction made in the case **of Mohd. Sartaj** (supra) wherein paragraph 19 recites that the order of cancellation therein was passed within a very short span of time. The aforesaid aspect, therefore, weighed heavily with the Supreme Court while deciding the case of Mohd. Sartaj. In the instant case, the order has been passed after more than 33 years of service and, therefore, the question of proximity of time has also to be taken notice of which has weighed with me while allowing this petition. Apart from this, there is no fraud or misrepresentation on the part of the petitioner and he had categorically disclosed his qualification only as High School and not as Intermediate. The impression given by the complainant that the petitioner had obtained employment through a forged mark-sheet was not found to be correct. It appears that then authority proceeded to make the appointment on the basis of a bona fide belief of the existence of the Rules before its amendment which contained the qualification of High School.

14. I, accordingly, set aside the order dated 10.12.2009 and allow the writ petition.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.03.2010

BEFORE
THE HON'BLE B.K. NARAYANA, J.

Civil Misc. Writ Petition No. 4351 of 1994

Adhyaksh Prabandh Samiti, Dugdh Utpadak Sahkari Samiti Ltd. ...Petitioner
Versus
Presiding Officer, Labour Court, Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri G.D. Mishra

Counsel for the Respondents:
Sri Rajesh Tiwari
C.S.C.

U.P. Industrial Dispute Act-1947-Award in favour of workman-of Cooperative Societies-challenged on question of jurisdiction-held-considering ratio of Zila Sahkari Bank Case-provision of Industrial dispute Act not applicable-to those employees governed by Societies Act.

Held: Para 7

For the aforesaid reason, I have no hesitation in holding that the ratio of the case of Ghaziabad Zila Sahkari Bank Ltd (Supra) applies to the facts and circumstances of this case with full force, and I have no hesitation in holding that the provisions of U.P. Industrial Disputes Act are not applicable to the employees of Co-operative Societies Act who are governed by the provisions of U.P. Co-operative Societies Act, 1965. The impugned award dated 14.4.1993 is therefore, totally without jurisdiction and is liable to be set aside.

Case law discussed:
JT 2007 (2) SC 566.

(Delivered by Hon'ble B.K. Narayana, J.)

1. List has been revised. Heard learned counsel for the petitioner and learned Standing Counsel for respondent No. 1. None appeared for respondent Nos. 2 to 4.

2. The petitioner, Adyaksh, Prabandh Samiti Dugdh Utpadak Sahkari Samiti Limited, District Fatehpur which is a village level primary mill Co-operative Society registered under the U.P. Co-operative Societies Registration Act, 1965 has filed this writ petition before this Court assailing the award dated 14.4.1993 published on 15.10.1993 by which the respondent No. 1 allowed the adjudication case No. 47 of 1990 setting aside the termination of service of respondent No. 4 and reinstating him in service with full back wages.

3. Learned counsel for the petitioner has raised only one submission before this Court that the award passed by the respondent No. 1 is totally without jurisdiction in view of the fact that provisions of Industrial Disputes Act are not applicable to the employees of Co-operative Societies registered under Co-operative Societies Registration Act, 1965. In support of his contention, learned counsel for the petitioner has relied upon the case of **JT 2007 (2) SC 566 (Ghaziabad Zila Sahkari Bank Ltd. vs. Additional Labour Commissioner and others)**.

4. Learned Standing Counsel appearing for respondent No. 1 submitted that the impugned award is based on relevant consideration and supported by cogent reasons and does not call for any interference by this Court. He however, failed to show whether respondent No. 1 had jurisdiction to entertain the dispute and to adjudicate upon the same on merits by passing the impugned award.

5. I have heard learned counsel for the parties and perused the record. The Apex Court after considering the provisions of U.P. Co-operative Societies Act and the U.P. Industrial Disputes Act in paras 61 and 64 of its judgment in the case of **Ghaziabad Zila Sahkari Bank Ltd (Supra)** has held as under:

61. *"The general legal principle in interpretation of statutes is that 'the general Act should lead to the special Act.' Upon this general principle of law, the intention of the U.P. legislature is clear, that the special enactment UP Co-operative Societies Act, 1965 alone should apply in the matter of employment of Co-operative Societies to the exclusion of all other Labour Laws. It is a complete code in itself as regards employment in co-operative societies and its machinery and provisions. The general Act the UPID Act, 1947 as a whole has and can have no applicability and stands excluded after the enforcement of the UPCS Act. This is also clear from necessary implication that the legislature could not have intended 'head-on-conflict and collision' between authorities under different Acts. In this regard reference can be made to decisions of this Court in the case of* ***The co-operative Central Bank Ltd. & ors v. The Additional Industrial Tribunal, Andhra Pradesh & ors (supra)*** *where this Court observed that:*

"Applying these tests, we have no doubt at all that the dispute covered by the first issue referred to the Industrial Tribunal in the present cases could not

possibly be referred for decision to the Registrar under Section 61 of the Act. The dispute related to alteration of a number of conditions of service of the workmen which relief could only be granted by an Industrial Tribunal dealing with an industrial dispute. The Registrar, it is clear from the provisions of the Act, could not possibly have granted the reliefs claimed under this issue because of the limitations placed on his powers in the Act itself. It is true that Section 61 by itself does not contain any clear indication that the Registrar cannot entertain a dispute relating to alteration of conditions of service of the employees of a registered society, but the meaning given to the expression "touching the business of the society", in our opinion, makes it very doubtful whether a dispute in respect of alteration of conditions of service can be held to be covered by this expression. Since the word "business" is equated with the actual trading or commercial or other similar business activity of the society, and since it has been held that it would be difficult to subscribe to the proposition that whatever the society does or is necessarily required to do for the purpose of carrying out its objects, such as laying down the conditions of service of its employees, can be said to be a part of its business, it would appear that a dispute relating to conditions of service of the workmen employed by the society cannot be held to be a dispute touching the business of the society. Further, the position is clarified by the provisions of sub-section (4) of Section 62 of the Act which limit the power to be exercised by the Registrar, when dealing with a dispute refereed to him under section 61, by a mandate that he shall decide the dispute in accordance with the provisions of the Act and the Rules and bye-laws. On the face of it, the provisions of the Act, the rules and the bye-laws could not possibly permit the Registrar to change conditions of service of the workmen employed by the society. For the purpose of brining facts to our notice in the present appeals, the Rules framed by the Andhra Pradesh Government under the Act and the bye-laws of one of the appellant Banks have been placed on the paper books of the appeals before us. It appears from them that the conditions of service of the employees of the Bank have all been laid down by framing special bye-laws. Most of the conditions of service, which the workmen want to be altered to their benefit, have thus been laid down by the bye-laws, so that any alteration in those conditions of service will necessarily require a change in the bye-laws. Such a change could not possibly be directed by the Registrar when, under Section 62(4) of the Act, he is specifically required to decide the dispute referred to him in accordance with the provisions of the bye-laws . It may also be noticed that a dispute referred to the Registrar under Section 61 of the Act can even be transferred for disposal to a person who may have been invested by the Government with powers in that behalf, or may be referred for disposal to an arbitrator, when deciding the dispute will also be governed by the mandate in Section 62(4) of the Act, so that he will also be bound to reject the claim of the workmen which is nothing else than a request for alteration of conditions of service contained in the bye-laws. It is thus clear that in respect of the dispute relating to alteration of various conditions of service, the Registrar or other person dealing with it under Section 62 of the Act is not competent to grant the

relief claimed by the workmen at all. On the principle laid down by this Court in the case of the Deccan Merchants co-operative Bank Ltd., therefore, it must be held that this dispute is not a dispute covered by the provisions of Section 61 of the Act. Such a dispute is not contemplated to be dealt with under Section 62 of the Act and must, therefore, be held to be outside the scope of Section 61.

Further this Court observed in **R.C. Tiwari v. M.P. State Co-operative Marketing Federation Ltd. & others (supra)**, that:-

"He also places reliance on Section 93 of the Societies Act which states that nothing contained in the Madhya Pradesh Shops and Establishments Act, 1958, the M.P. Industrial Workmen (Standing Orders) Act, 1950 shall apply to a Society registered under this Act. By necessary implication, application of the Act has not been excluded and that therefore, the labour court has jurisdiction to decide the matter. We find no force in the contention. Section 55 of the Societies Act gives power to the Registrar to deal with disciplinary matters relating to the employees in the Society or a class of Societies including the terms and conditions of employment of the employees. Where a dispute relates to the terms of employment, working conditions, disciplinary action taken by a society, or arises between a Society and its employees, the Registrar or any officer appointed by him, not below the rank of Assistant Registrar, shall decide the dispute and his decision shall be binding on the society and its employees. As regards, power under Section 64, the language is very wide, viz., "Notwithstanding anything contained in any other law for the time being in force any dispute touching the constitution, a management or business of s Society or a liquidation of a Society shall be referred o the Registry by any of the parties to the dispute. "therefore, the dispute relating to the management or business of the Society is very comprehensive as repeatedly held by this Court. As a consequence, special procedure has been provided under this Act. Necessarily, reference under Section 10 of the Societies Act stands excluded. The judgment of this Court arising under Andhra Pradesh Act has no application to the facts for the reason that under that Act the dispute did not cover the dismissal of the servants of the Society which the Act therein was amended."

6. Similar view was taken by this Court in the case of **Belsund Sugar Co. Ltd. vs. State of Bihar & ors** (supra), **Allahabad Bank v Canara Bank & Anr** (supra), State of **Punjab v. Labour Court, Jullunder and others** (Supra) and **U.P. State Electricity Board v. Shiv Mohan Singh & anr** (supra).

62.....
63......
64. *"We, are therefore, of the view that the Assistant Labour Commissioner's jurisdiction was wrongly invoked and his order dated 15.3.2003 under Section 6H, U.P> Industrial Disputes Act, 1947 is without jurisdiction and hence null and void and it can be observed that, in view of the said general legal principle, it is immaterial whether or not the Government has enforced Section 135 (UPCS Act) because, in any case the said provision (Section 135) had been included in the Act only by way of clarification and abundant caution.*

7. For the aforesaid reason, I have no hesitation in holding that the ratio of the case of **Ghaziabad Zila Sahkari Bank Ltd** (Supra) applies to the facts and circumstances of this case with full force, and I have no hesitation in holding that the provisions of U.P. Industrial Disputes Act are not applicable to the employees of Co-operative Societies Act who are governed by the provisions of U.P. Co-operative Societies Act, 1965. The impugned award dated 14.4.1993 is therefore, totally without jurisdiction and is liable to be set aside.

8. The writ petition is allowed. The award dated 14.4.1993 passed by respondent No. 1, Presiding Officer, Labour Court, Allahabad (Annexure 2 to the writ petition) is set aside.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.03.2010

BEFORE
THE HON'BLE VINEET SARAN, J.
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No. 5004 of 2004

Smt. Rajni Chauhan ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Shashi Nandan
Sri Pooja Agrawal

Counsel for the Respondents:
C.S.C.

Constitution of India Art. 226-Principle of Natural Justice-petitioner 'A' level government Contractor-licence cancelled without issuing show cause notice-without disclosing any material defect-held-cancellation will not effect only present but debar the petitioner for ever being registered as 'A' level Government Contractor forever entails civil consequences can not be black listed without attending opportunity- order can not be black listed without foreign affording opportunity- order quashed.

Held: Para 10

Here in the present case, undisputedly no opportunity of hearing was given to the petitioner before cancelling his registration as class 'A' contractor and passing of an order of blacklisting. We are therefore of the considered opinion that before passing the impugned order the opportunity of hearing must have been afforded to the petitioner as the impugned order leads to civil consequences as this will not only affect the petitioner's registration with respondent no.2 but will affect his future working with various other government departments, which of course is the means of livelihood of the petitioner. Hence the impugned order cannot be sustained in the eye of law.

Case law discussed:
A.I.R. 1975 Supreme Court 266, A.I.R. Suprme Court 620, AIR 1994 Supreme Court 1277, .I.R. 2001 Supreme Court 3707.

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

1. The petitioner is a registered contractor of category 'A' with the respondent no.2. She is aggrieved by order dated 23.1.2004 passed by Regional Food Controller Agra Division, Agra (the respondent no.2) by which the petitioner's registration as Class 'A' contractor has been cancelled and the petitioner has been black listed. The impugned order has been assailed on the ground that the same has been passed without affording any opportunity of hearing to the petitioner.

2. A counter affidavit has been filed by the respondents. In paragraph 5 of the counter affidavit it is stated that the petitioner had got herself registered under category 'A' after concealing material facts, therefore, it was not necessary to afford an opportunity before passing the order dated 23.1.2004.

3. Learned counsel appearing for the petitioner has submitted that had there been any illegality or misrepresentation/fraud committed by the petitioner while obtaining the registration, it should have been informed to the petitioner in the form of show cause notice so that she could rebut the same but without notice the order should not have been passed as the cancellation of registration will affect not only the present Registration with the respondent but it will debar the petitioner from being registered in other government departments, which will affect the livelihood of the petitioner.

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

5. From the perusal of the impugned order, it is apparent that no opportunity of hearing has been afforded to the petitioner before cancelling his registration and passing an order of black listing. This has also been admitted in the counter affidavit filed by the State respondents. It is settled position of law that when an order leads to civil consequences and the same has been passed without affording an opportunity of hearing that can not be sustained in the eye of law.

6. The Apex Court in the case of **Union of India and other v. A.K. Mithiborwala and others A.I.R. 1975 Supreme Court 266** held that:

"12..... The Government cannot choose to exclude persons by discrimination. The order of black-listing has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of black-listing. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality.

15.The blacklisting order does not pertain to any particular contract. The blacklisting order involves civil consequences. It caste a slur. It creates a barrier between the persons blacklisted and the Government in the matter of transactions. The blacklists are "instruments of coercion".

7. In the case of **Raghunath Thakur v. State of Bihar and others A.I.R. Suprme Court 620** the Apex Court has taken the view that even if rules do not provide to offer an opportunity of hearing before passing an order of Blacklisting then also opportunity of hearing is necessary before passing the order which leads to civil consequences. In paragraph 4 of the judgement it has been held that:

4. Indisputably, no notice had been given to the appellant of the proposal of blacklisting the appellant. It was contended on behalf of the State Government that there was no requirement in the rule of giving any

prior notice before blacklisting any person. In so far as the contention that there is no requirement specifically of giving any notice is concerned, the respondent is right. But it is an implied principle of the rule of law that any order having civil consequence should be passed only after following the principles of natural justice. It has to be realised that blacklisting any person in respect of business ventures has civil consequence for the future business of the person concerned in any event. Even if the rules do not express so, it is an elementary principle of natural justice that parties affected by any order should have right of being heard and making representations against the order. In that view of the matter, the last portion of the order in so far as it directs blacklisting of the appellant in respect of future contracts, cannot be sustained in law. In the premises, that portion of the order directing that the appellant be placed in the blacklist in respect of future contracts under the Collector is set aside.

8. In the case of **M/s Southern Painters v. Fertilizers & Chemicals Travancore Ltd., and another AIR 1994 Supreme Court 1277** the Apex court has observed as under:

9. The deletion of the appellant's name from the list of approved contractors on the ground that there were some vigilance report against it, could only be done consistent with and after the compliance of the principles of natural justice. That not having been done, it requires to be held that withholding of the tender form from the appellant was not justified. In our opinion, the High Court was not justified in dismissing the writ petition.

9. The same view has been reiterated by the Apex Court in the case of **Gronsons Pharmaceuticals (P) Ltd., and another v. State of Uttar Pradesh and others A.I.R. 2001 Supreme Court 3707**.

10. Here in the present case, undisputedly no opportunity of hearing was given to the petitioner before cancelling his registration as class 'A' contractor and passing of an order of blacklisting. We are therefore of the considered opinion that before passing the impugned order the opportunity of hearing must have been afforded to the petitioner as the impugned order leads to civil consequences as this will not only affect the petitioner's registration with respondent no.2 but will affect his future working with various other government departments, which of course is the means of livelihood of the petitioner. Hence the impugned order cannot be sustained in the eye of law.

11. In the result, the writ petition succeeds and is allowed. The impugned order dated 23.1.2004 passed by respondent no.2 as annexure -5 to the writ petition is hereby quashed. The respondents are at liberty to proceed in accordance with law.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 16.03.2010

BEFORE
THE HON'BLE VIJAY KUMAR VERMA, J.

Criminal Misc. Application No.5023 of 2010

Vimlesh ...Applicant
Versus
State of U.P. & another ...Opposite Party

Counsel for the Applicant:
Sri Dileep Kumar Mishra

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

Code of Criminal Procedure-Section 190 (1)-against final report-protest Application with affidavit filed-without following procedure prescribed in chapter XV-summoning order based upon extraneous affidavit-not sustainable.

Held: Para 12

In view of the observations made herein-above, the impugned summoning order cannot be sustained, as cognizance has been taken by the learned magistrate merely on the basis of the affidavits filed by the complainant in support of the protest petition against final report. Therefore, it would be in the interest of justice to send the case back to the court below for passing fresh order on the protest petition filed by the complainant against the final report.

Case law discussed:
2001 (43) ACC 1096, 2008 (1) ACR 68, (2001(43) ACC 1096).

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

1. *"Whether after rejection of Final Report cognizance can be taken on the basis of the affidavits and other extraneous material filed by the complainant in support of protest petition without following the procedure laid down under sections 200 and 202 of the Code of Criminal Procedure (in short, 'the Cr.P.C.')"* is the main point that falls for consideration in this application under section 482 Cr.P.C., by means of which the applicant Vimlesh has invoked inherent jurisdiction of this Court for setting-aside the order dated 15.06.2009 passed by the Judicial Magistrate, Court No. 1, Kanpur Dehat in Criminal Misc. Application No. 278 of 2008 (Indra Vs. State) arising out of case crime no. 215 of 2008 under section 436 IPC, P.S. Rasoolabad, District Kanpur Dehat.

2. By the impugned order, the applicant named above has been summoned to face the trial under section 436 IPC after rejecting final report.

3. Shorn of unnecessary details, the facts emerging from the record leading to the filing of this application, in brief, are that an FIR was lodged on 02.06.2008 by the complainant Inder s/o Sri Sardar Beria (opposite party No. 2 herein) at P.S. Rasoolabad, District Kanpur Dehat, where a case under section 436 IPC was registered at crime no. 215 of 2008 against Vimlesh (applicant herein). After investigation, final report was submitted by the investigating officer. On getting notice of the final report, the complainant Inder filed protest petition, in support whereof, certain affidavits were also filed. The learned Magistrate vide impugned order summoned the applicant to face the trial after rejecting the final report. Hence, the applicant has invoked the inherent jurisdiction of this court to quash the impugned summoning order.

4. I have heard Shri Dilip Kumar Mishra, Advocate appearing for the applicant and AGA for the State.

5. The only submission made by learned counsel for the applicant was that the impugned summoning order is wholly illegal, as the applicant has been summoned by the learned magistrate on the basis of the affidavits, which have been filed by the complainant in support of the protest petition against final report.

The contention of the learned counsel was that cognizance under section 190 (1) (b) Cr.P.C. on the final report can be taken only, if there is material in the case diary to proceed against the accused persons and for this purpose extraneous material like affidavits filed by the complainant with the protest petition cannot be considered. It was also submitted by learned counsel that if material in the case diary is not sufficient to take cognizance against the accused persons and if any protest petition has been filed by the complainant against final report, then in that case, the procedure laid down under Chapter XV Cr.P.C. has to be followed by the magistrate after treating the protest petition as complaint. For these submissions, reliance has been placed on the observations made by Division Bench of this Court in the case of ***Pakhando & others vs. State of U.P. & another 2001 (43) ACC 1096***.

6. The learned AGA, on the other hand, submitted that the impugned order does not suffer from any illegality, as on filing of the protest petition against the final report with affidavits, cognizance can be taken by the magistrate under section 190 (1) (b) Cr.P.C., if the magistrate is satisfied that there is sufficient ground to proceed and since in the present case on the basis of the affidavits filed by the complainant in support of his protest petition against final report, prima facie case is made out against the applicant, hence the learned magistrate was fully justified in taking cognizance against the applicant.

7. Having given my thoughtful consideration to the rival submissions made by the learned counsel for the parties, I find force in the submission of the learned counsel for the applicant that cognizance under section 190(1)(b) Cr.P.C. cannot be taken on the basis of the extraneous material like affidavits filed in support of the protest petition against final report and if the material in the case diary is not sufficient for summoning the accused person, then the procedure laid down in Chapter XV Cr. P.C. has to be followed by the magistrate after treating the protest petition as complaint, as held by the Division Bench of this Court in ***Pakhando*** case (supra).

8. In the present case, the record shows that certain affidavits were filed by the complainant with his protest petition which he has filed against final report. The learned Magistrate on the basis of that protest petition and affidavits summoned the applicant to face the trial under section 436 IPC, which in my opinion is not permissible in law, as cognizance under section 190(1)(b) Cr.P.C. after rejecting the final report can not be taken on the basis of the extraneous material like affidavits, which are filed in support of the protest petition against final report and if the material in the case diary is not sufficient to take cognizance and summon the accused to face the trial, then in such case the protest petition should be registered as complaint, taking cognizance under section 190(1)(a) Cr.P.C. and after following the procedure laid down in Chapter XV Cr.P.C., order under section 203 or 204 Cr.P.C. should be passed.

9. This court has held in the case of ***Mohammad Yusuf & others vs. State of U.P. and another 2008 (1) ACR 68*** that the magistrate cannot take cognizance under section 190 (1) (b) Cr.P.C. on the basis of the protest petition and affidavits

filed in support thereof without following the procedure laid down under Chapter XV Cr.P.C. the following observations made in para 11 are worth mentioning:-

"Where the magistrate decides to take cognizance under section 190 (1) (b) ignoring the conclusions reached at by the investigating officer and applying his mind independently, he can act only upon the statements of the witnesses recorded by the police in the case-diary and material collected during investigation. It is not permissible at that stage to consider any material other than that collected by the investigating officer. In the instant case the cognizance was taken on the basis of the protest petition and accompanying affidavits. The Magistrate should have adopted the procedure of complaint case under Chapter XV of the Code of Criminal Procedure and recorded the statements of the complainant and the witnesses who had filed affidavits under Section 200 and 202 Cr.P.C. The Magistrate could not take cognizance under section 190 (1) (b) Cr.P.C. on the basis of protest petition and affidavits filed in support thereof. The Magistrate having taking into account extraneous material i.e. Protest petition and affidavits while taking cognizance under section 190 (1) (b) Cr.P.C. the impugned order is vitiated."

10. The Division Bench of this Court in the case of ***Pakhando and others Vs. State of U.P. and another (2001(43) ACC 1096)*** had the occasion to consider the matter regarding the procedure to be adopted by the Magistrate/Court on submission of the final report by the police. Having taken various authorities into consideration, the following observations have been made by the Division Bench in para 15 of the judgement at page 1100 of the report:-

"From the aforesaid decisions, it is thus clear that where the Magistrate receives final report, the following four courses are open to him and he may adopt any one of them as the facts and circumstances of the case may require:-

(I). He may agreeing with the conclusions arrived at by the police, accept the report and drop the proceedings. But before so doing, he shall give an opportunity of hearing to the complainant' or
(II) He may take cognizance under Section 190(1)(b) and issue process straightway to the accused without being bound by the conclusions of the investigating agency, where he is satisfied that upon the facts discovered or unearthed by the police, there is sufficient ground to proceed; or
(III) he may order further investigation, if he is satisfied that the investigation was made in a perfunctory manner; or
(IV) he may, without issuing process or dropping the proceedings decide to take cognizance under Section 190(1)(a) upon the original complaint or protest petition treating the same as complaint and proceed to act under Sections 200 and 202 Cr.P.C. and thereafter decide whether complaint should be dismissed or process should be issued."

11. As would appear from the observations made by this Court in ***Mohammad Yusuf case (supra)***, cognizance under section 190 (1) (b) Cr.P.C. cannot be taken on the basis of the affidavits filed in support of the protest petition against final report and if material in the case diary is not sufficient

to take cognizance, then the procedure laid down under Chapter XV Cr.P.C. should be followed by the magistrate after treating the protest petition as complaint, as held by Division Bench of this Court in ***Pakhando*** case (supra). Therefore, in present case also, if the material in the case diary was not sufficient for summoning the accused to face the trial, then after taking cognizance under section 190(1)(a) Cr.P.C., the protest petition filed by the complainant against the final report ought to have been registered as complaint and following the procedure laid down under section 200 and 202 Cr.P.C., the learned magistrate should have decided whether the complaint should be dismissed or process should be issued. If after taking evidence under section 200 and 202 Cr.P.C., the magistrate decides to take cognizance against the accused persons, final report has to be rejected, but in any case, cognizance cannot be taken merely on the basis of affidavits or other material filed by the complainant in support of the protest petition against final report, without following the procedure laid down under Chapter XV Cr.P.C., if the material in the case diary is not sufficient to take cognizance.

12. In view of the observations made herein-above, the impugned summoning order cannot be sustained, as cognizance has been taken by the learned magistrate merely on the basis of the affidavits filed by the complainant in support of the protest petition against final report. Therefore, it would be in the interest of justice to send the case back to the court below for passing fresh order on the protest petition filed by the complainant against the final report.

13. Consequently, the application under section 482 Cr.P.C. is allowed. Setting aside the impugned summoning order dated 15.06.2009 and quashing further proceedings of Criminal Misc. Application No. 278 of 2008 (Inder Vs. State), pending in the court of Judicial Magistrate, Court No. 1, Kanpur Dehat, the learned magistrate is directed to pass fresh order on the protest petition filed by the complainant against final report, in case crime No. 215 of 2008 of P.S. Rasoolabad, District Kanpur Dehat, treating the same as complaint and following the procedure laid down under section 200 and 202 Cr.P.C.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.03.2010

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

Civil Misc. Writ Petition No. 5676 of 2002

Naseem Ahmad ...Petitioner
Versus
Union of India Thru' Secy. Ministry of Home Affairs and others ...Respondents

Counsel for the Petitioner:
Sri R.P. Tripathi
Sri Ashutosh Tripathi

Counsel for the Respondents:
Sri S.N. Srivastava/SSC,
Sri U.N. Sharma
Sri Devi Shanker Shukla
C.S.C.

Constitution of India, Art. 226-Practice & Procedure-against the dismissal order-statutory appeal allowed-matter send back before disciplinary authority to proceed further-on failure of joining on the date fixed by authority-appellate authority cancelled its earlier order-held-

without jurisdiction once order passed under statutory provisions-can not be cancelled by an administrative order.

Held: Para 9

The appellate authority had become functus-officio and it had no jurisdiction to set aside an order passed in a statutory appeal by an administrative order. If an order has been passed in exercising of a statutory power, the same cannot be reviewed in exercise of administrative powers. In the instant case, the same D.I.G., who had allowed the appeal of the petitioner, had no authority to cancel the same. The entire exercise is, therefore, without jurisdiction.

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

1. Heard Shri Ashutosh Tripathi, learned counsel for the petitioner and Shri Upendra Nath Sharma, learned counsel for the respondents.

2. The petitioner-Naseem Ahmad underwent disciplinary proceedings on account of overstay after having taken leave. The petitioner was subjected to an inquiry but the disciplinary authority disagreeing with the Enquiry Officer's report proceeded to impose the punishment of dismissal on the petitioner vide order dated 7th July, 1999. The petitioner preferred an appeal against the same and the same was allowed on 24th November, 1999 by the following order:

"..... Therefore, I find that the departmental enquiry conducted against the appellant is not just and fair. In view of the above procedural irregularities, which are against instructions on the subject as well as principle of the natural justice, the departmental enquiry conducted against No. 851190409 Ex CT Nasim Ahmed of 130 Bn by the Commandant 130 Bn CRPF vide his office order No. P. VIII-11/98-130-EC-II dated 31.10.98 is hereby quashed and a denovo enquiry is ordered for his OSL for 76 days from 19.7.98 to 2.10.98. Said No. 851190409 Ex. CT Nasim Ahmed of 130 Bn is hereby re-instated into service with the direction to report in the unit within thirty (30) days from the date of issue of this order. Intervening period from the date of dismissal from service till the date of reporting in the unit be treated as DIES-NON."

3. It is, therefore, clear that the appeal was allowed and the petitioner was to be tried again in the inquiry proceedings de-novo. The petitioner was served with a notice on 6th January, 2000 that he may report or else he was not to be given any further opportunity. The respondents have come out with a case that the petitioner failed to report for duty and, therefore, the impugned order was passed on 14th Feburary, 2000 cancelling the earlier order of the appellate authority dated 24.11.1999.

4. This writ petition has been filed questioning the correctness of the order dated 14.02.2000 and the jurisdiction of the Deputy Inspector General of Police to cancel his earlier order passed in a statutory appeal.

5. Learned counsel for the petitioner submits that even if the petitioner did not report for duty in spite of passing of the order by the Appellate Authority, the Authority had to proceed to hold the inquiry de-novo and, thereafter, any order could have been passed against the petitioner. There was no occasion for the

D.I.G. to cancel the earlier appellate order dated 24.11.1999.

6. Shri Sharma, learned counsel for the respondents contends that this order was under a compulsory situation, inasmuch as, if the petitioner failed to comply with the direction of the order of the Appellate Authority, there was no option but to cancel the appellate order which has been done by the D.I.G.

7. I have heard learned counsel for the parties and perused the affidavits available on records. The appeal, which was allowed in favour of the petitioner, was a statutory appeal. The consequences of the order in appeal was that the order of dismissal had been set aside and the petitioner will therefore be deemed to be a member of the force. In such a situation, even if it is presumed that he did not join for duty, the option to the authority was to proceed ex-parte against the petitioner in an inquiry under the rules and then to pass an order.

8. The Rules do not provide for cancellation of the appellate order and the order passed in appeal could not be reviewed by the appellate authority. It could have been set aside by a competent authority or a court of law. The D.I.G. was not possessed with any jurisdiction to cancel an order merely on the ground that the petitioner had not reported for duty after passing of the order in appeal.

9. The appellate authority had become functus-officio and it had no jurisdiction to set aside an order passed in a statutory appeal by an administrative order. If an order has been passed in exercising of a statutory power, the same cannot be reviewed in exercise of administrative powers. In the instant case, the same D.I.G., who had allowed the appeal of the petitioner, had no authority to cancel the same. The entire exercise is, therefore, without jurisdiction.

10. In my opinion, the order dated 14.02.2000 is not in conformity with law and is patently illegal. The same is hereby set aside.

11. It shall be open to the respondents to proceed de-novo against the petitioner as directed by the Appellate Authority in the order dated 24.11.1999.

12. With the aforesaid observations, the writ petition stands allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.03.2010

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

Civil Misc. Writ Petition No. 8314 of 2002

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

Counsel for the Petitioner:
Sri A. Upadhyay
Sri Indra Raj Singh
Sri Mritunjay
Sri Namit Srivastava
Sri Ranjit Saxena
Sri Anil Kumar Sharma
Sri Narendra Mohan

Counsel for the Respondents:
C.S.C.

U.P. Government Servant Regulation of Drivers Rule 1993-Regulation-petitioner working as Drivers on daily wages basic

since 1996-Regular post created on 5.3.1997-oral termination since 01.02.2002-working on in pursuance of stay order-No right for regularisation-but the Board of Revenue regularized 26 person on 27.02.2002-considering further development regarding process of regularization-necessary direction given-petitioner is still working-no question of disclosing to him.

Held: Para 12 & 13

It has also brought to the notice of the Court through a supplementary affidavit in W.P.No.8004 of 2002 Ram Sajeewan Vs. State of U.P. and others that an order has been passed by the Secretary, Board of Revenue on 27.2.2002 whereby 26 persons have been extended the benefit of regularisation who were working on daily wage basis. This was after publishing a notice on 19.2.2002. These two documents give an indication that some process of regularisation of daily wage was under taken by the Board of Revenue.

13. The petitioner shall bring the aforesaid facts to the notice of the State Govt through the Secretary, Board of Revenue who shall forward his comments to the State Govt. for an appropriate decision in the matter.

Case law discussed:

1996(7) SCC 562.

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

1. Heard Sri Narendra Mohan learned counsel for the petitioner and the learned standing counsel.

The petitioner contends that he is entitled for being regularised on the post of Driver and that the oral order of termination passed by the authority not to discharge duty w.e.f. 1.2.2002 is illegal. The writ petition was entertained and an interim order was passed on 24.5.2002 calling upon the respondents to either permit the petitioner to continue to work in the same capacity as he has been engaged earlier or to show cause.

2. A counter affidavit has been filed and it has been admitted that the petitioner had been prevented from discharging his duties w.e.f. 1.2.2002. However, in view of the interim order passed by this Court the Member Secretary, Board of Revenue passed an order dated 9.7.2002 for re-engaging the petitioner as he was continuing earlier and he has been paid allowances on daily wage basis.

3. Sri Narendra Mohan learned counsel for the petitioner contends that the petitioner was engaged in the year 1996 and regular posts in the Department were created subsequently vide order dated 5.3.1997. Sri Mohan contends that in view of the Regularisation Rules, 2001 the petitioner's claim should have been considered for regular appointment inasmuch as he was entitled to the post if he fulfills the eligibility conditions as prescribed therein.

4. The counter affidavit recites that the status of the petitioner was that of a daily wager and not of an adhoc employee, therefore he was not entitled for any regularization. Nonetheless through a communication dated 13.8.2000 the Registrar, Board of Revenue, Allahabad has been informed by the Secretary, Board of Revenue that so far as the regularization of daily wagers is concerned, a proposal has been sent to the State Govt for considering their regularization separately. As and when such a proposal is approved the matter shall be considered accordingly.

5. The counter affidavit relying on the said letter recites that if any substantive vacancy comes into existence and if the proposal as mentioned above is accepted by the State Govt. the claim of the daily wages employees shall be considered in accordance with law.

6. The claim of the petitioner in the writ petition was to protect him only against the oral order and the same was granted by an interim order and the respondents themselves proceeded to engage the petitioner and are taking work from him.

7. So far as the second prayer with regard to regularization is concerned, it is admitted position that the petitioner was not appointed on adhoc basis but was engaged on a muster roll as is evident from Annexure 1 to the writ petition. In this view of the matter the status of the petitioner is clearly defined as a daily wage employee and the status of a daily wage employee has been considered and has been explained by the Apex Court in the case of **State of H.P. Versus Suresh Kumar Verma and another reported in 1996(7) SCC 562**.

8. In view of the law laid down by the Apex Court and the stand taken in the counter affidavit the claim of the petitioner for regularisation as a daily wage employee in my opinion cannot be considered under the 2001 Regularisation Rules as claimed by the petitioner. At the best if the State Govt. has any set of rules for the regularisation of daily wagers the same can be considered in case the petitioner fulfills the criteria of eligibility for such regulariation under any such rules for the time being inforce.

9. From a counter affidavit it appears that the proposal was made to the State Govt. but there is nothing on record to indicate any approval.

10. Apart from this there is a rule known as U.P. Govt. Department Drivers Service Rules, 1993. The said rules were enforced after having been formulated under Article 309 of the Constitution of India much prior to the engagement of the petitioner. The appointment to the post of Driver after promulgation of the said rules is therefore to be in accordance with the rules which were already in existence. The petitioner's engagement was made in 1996 and the post was created in 1997. It is therefore clear that the appointment on a clear vacancy could have been made only in accordance with the said 1993 Rules and not otherwise. The said rules do not make any room for any such engagement as claimed by the petitioner.

11. However as already indicated above since the department had made a proposal for regularisation of daily wage employees, the said question is yet to be examined by the State Govt.. For this purpose the petitioner may approach the State Govt for the redressal of his grievances.

12. It has also brought to the notice of the Court through a supplementary affidavit in W.P.No.8004 of 2002 Ram Sajeewan Vs. State of U.P. and others that an order has been passed by the Secretary, Board of Revenue on 27.2.2002 whereby 26 persons have been extended the benefit of regularisation who were working on daily wage basis. This was after publishing a notice on 19.2.2002. These two documents give an indication that some process of regularisation of daily

wage was under taken by the Board of Revenue.

13. The petitioner shall bring the aforesaid facts to the notice of the State Govt through the Secretary, Board of Revenue who shall forward his comments to the State Govt. for an appropriate decision in the matter.

14. In case the petitioner is still in service on daily wage basis and the work of the petitioner is still requires it will not be necessary for the respondents to disengage the petitioner.

15. With the aforesaid observations, the writ petition is disposed of.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.03.2010

BEFORE
THE HON'BLE VIJAY KUMAR VERMA, J.

Criminal Misc. Application No. 8618 of 2010

Saurabh Dewana ...Applicant
Versus
The State of U.P. ...Respondent

Counsel for the Applicant:
Sri Tarun Kumar Malviya

Counsel for the Respondent:
A.G.A.

Code of Criminal Procedure-Code Section 482-cognigence taken by Magistrate-in printed proforma-without application of judicial mind-held- very unfortunate-judicial order-by filling up blanks on printed proforma-not sustainable.

Held: Para 4

Certified copy of the impugned order of taking cognizance is paper No. 45, which shows that the said order has been passed on the printed proforma by filing up the blanks. The blanks on the printed proforma appear to have been filled by court employee and the learned magistrate thereafter put his initial, which shows non-application of judicial mind in passing the said order. It is very unfortunate that judicial order of taking cognizance has been passed by the learned magistrate by filling up blanks on printed proforma. This type of order has been held illegal by this Court in Ankit case (supra). Hence the impugned order is liable to be quashed on this ground alone.

Case law discussed:
2009 (3) U.P. Crl. Rulings 427.

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

1. Heard learned counsel for the applicant and AGA for the State.

2. By means of this application under section 482 of the Code of Criminal Procedure, (in short 'the Cr.P.C.')' order dated 02.12.2009 (annexure-5) passed by the ACJM court No. 3 Ghaziabad in Criminal Case No. 3860 of 2009 has been sought to be quashed. By the impugned order cognizance has been taken on the charge sheet in case crime No. 1144 of 2009 of P.S. Singhani Gate, Ghaziabad.

3. It is submitted by learned counsel for the applicant that the learned magistrate did not apply his judicial mind at the time of taking cognizance on the charge-sheet and impugned order of taking cognizance has been passed on printed proforma, which is not permissible in law. For this submission attention of the Court has been drawn towards the case of ***Ankit vs. State of***

U.P. and another, 2009 (3) U.P. Crl. Rulings 427.

4. Certified copy of the impugned order of taking cognizance is paper No. 45, which shows that the said order has been passed on the printed proforma by filing up the blanks. The blanks on the printed proforma appear to have been filled by court employee and the learned magistrate thereafter put his initial, which shows non-application of judicial mind in passing the said order. It is very unfortunate that judicial order of taking cognizance has been passed by the learned magistrate by filling up blanks on printed proforma. This type of order has been held illegal by this Court in Ankit case (supra). Hence the impugned order is liable to be quashed on this ground alone.

5. The learned AGA has submitted that in view of the law laid down in ***Ankit case*** (supra), after setting aside the impugned order, direction be issued to the magistrate concerned to pass fresh order on the charge sheet. I find force in this submission.

6. Consequently, the application under section 482 Cr.P. C. is allowed. The order dated 02.12.2009 passed by ACJM, Court No. 3, Ghaziabad, in Case No. 3860 of 2009 (State vs. Saurabh Dewana), arising out of Case Crime No. 1144 of 2009, under sections 420, 467, 468, 471 IPC, P.S. Singhani Gate, District Ghaziabad, is hereby quashed.

7. The learned magistrate is directed to pass fresh order on the charge-sheet in aforesaid case after applying its judicial mind.

8. Let a copy of this order be sent to the lower court concerned for compliance.

9. The Registrar General is directed to send a copy of this order to the District Judge Ghaziabad, who may issue administrative instruction to all the presiding officers restraining them from using printed proforma in passing judicial order. The blank printed proforma available in the offices of all courts in Ghaziabad judgeship be got destroyed by the District Judge.

10. If approved by the Hon'ble Administrative Committee, let a circular letter be issued by the Registrar General restraining the judicial officers in Uttar Pradesh from using printed/ cyclostyled proforma for passing any type of judicial order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.03.2010

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 12789 of 1992

Digvijai Singh and another ...Petitioners
Versus
Director of Education (Secondary), Allahabad and others ...Respondents

Counsel for the Petitioners:
Sri A.K. Misra
Sri A.K. Srivastava
Sri Tarun Verma
Sri Yogendra Kumar Srivastava

Counsel for the Respondents:
Sri A.B. Singh
Sri Swaraj Prakash
S.C.

U.P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers & other Employees Act, 1971-Section-9-Payment of Salary-petitioner imparting education to High School students-post of L.T. Grade Science Teacher never created-held-not entitled for salary from public exchequer-petitioner can put claim against Management.

Held: Para 6

A teacher is entitled for payment of salary from the State Exchequer only if he has been appointed against a duly sanctioned post with reference to the provisions of Section 9 of the Act of 1971. No teacher can be appointed in absence of a duly created post. After the post is created it has to be filled in accordance with the statutory provisions applicable then. No earlier appointee can be adjusted against such a post. Therefore, the relief prayed for by the petitioners for payment of salary after conversion of the post has necessarily to be rejected.

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

1. This writ petition has been filed for the following relief:

"issue a writ, order or direction in the nature of mandamus directing the respondents to pay salary to the petitioners and to create and sanction two posts in Science, one in Biology and the other in Maths from the date of opening of Science Classes in the institution."

2. According to the petitioners the institution in question was granted recognition as an High School in Science subject and students were also admitted in the said subject. Having regard to the need of teacher for imparting education in the Science subjects at High School level, the petitioners were offered appointment by the Management of the institution. Copy of the letters offering appointment to the petitioners have been enclosed as Annexures-3 and 4 to the writ petition.

3. Admittedly no post of Science teacher at High School level was created in the institution with reference to Section 9 of **Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971** (hereinafter referred to as Act, 1971), the question of payment of salary to the petitioners from the State Exchequer did not arrive.

A supplementary affidavit has been filed today on behalf of the petitioner. It has been stated that the Committee of Management had also filed a writ petition in for the relief of creation of new post of Science teachers at High School level being Civil Misc. Writ Petition No. 15557 of 2003. The writ petition was disposed of on 10.04.2003 requiring the Director of Education to consider the claim of the institution for creation of new post of Science teacher within the time specified. In compliance to the order of the Court referred to above, the Director of Education by means of letter dated 29.08.2007 has refused to create any new post in the institution. This order is not under challenge before this Court. The order records that there are 11 sanctioned posts of teachers in the institution in Arts subject including that of Head Master. Having regard to the strength of students admitted in various subjects of Arts, only 07 teachers are required and, therefore, it has been observed that two posts of Arts teachers lying vacant in the institution may be converted into that of Science

subject's post for which on an application being made, appropriate orders shall be passed.

4. Counsel for the petitioner with reference to the said order submits that since the Director of Education himself has recorded that the petitioners are teaching in the institution, the Director should have directed payment of salary to the petitioners after permitting the conversion of the existing two posts..

5. Having heard learned counsel for the parties and having gone through the records of the present writ petition, I am of the considered opinion that the contention raised on behalf of the writ petitioners is totally misplaced.

6. A teacher is entitled for payment of salary from the State Exchequer only if he has been appointed against a duly sanctioned post with reference to the provisions of Section 9 of the Act of 1971. No teacher can be appointed in absence of a duly created post. After the post is created it has to be filled in accordance with the statutory provisions applicable then. No earlier appointee can be adjusted against such a post. Therefore, the relief prayed for by the petitioners for payment of salary after conversion of the post has necessarily to be rejected.

7. It goes without saying that if the Management of the institution makes an application for conversion of the post of L.T. Grade Teacher (Arts) to that of L.T. Grade Teacher (Science), the matter shall be considered by the competent authority. Fresh recruitment shall thereafter be made in accordance with the provision of Intermediate Education Act/U.P. Secondary Education Services Selection Board Act, 1982 and the petitioners will be at liberty to apply.

8. For the period during which the petitioners may have worked in the institution in absence of a duly sanctioned post of Science Teacher, the responsibility of making payment of salary is upon the Management of the institution alone. If the petitioners are so advised, they may initiate such suit proceedings against the Management as they may be advised.

9. Writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.03.2010

BEFORE
THE HON'BLE SABHAJEET YADAV, J.

Civil Misc. Writ Petition No. 11825 of 2010

Uma Shanker Rai and others...Petitioners
Versus
Deputy Dirctor, Consolidation, Azamgarh and others ...Respondents

Counsel for the Petitioners:
Sri Sankatha Rai
Sri J.P. Singh

Counsel for the Respondents:
Sri Mahesh Narain Singh
Sri Priya Ranjan Rai
C.S.C.

U.P. Consolidation of Holding Act Section 48 (3)-Power of Dy. Director of Consolidation-against present consolidation scheme on serious complaint regarding allotment of Gaon Sabha land to Private chak holders-the D.D.C. deputed settlement officer of consolidation-who visited in village in question recorded statement of the chairman and the member of

consolidation committed-reported great bungling done by the consolidation officer, consolidator and the lekhpal conclusion of entire consolidation scheme with direction to prepare fresh scheme after hearing all concern-may not be strictly within the provision of Section 48, but any interference by writ court court amounts to allow the said irregularities to continue-even otherwise full opportunity has been proposed to be given to all concerned petitioner can not be aggrieved person-No locustandi-petition dismissed.

Held: Para 18, 22 & 27

Applying the aforesaid principle of law laid down by Hon'ble Apex Court in given facts and circumstances of the case, I am of the considered opinion that since vide impugned order passed by Deputy Director of Consolidation while cancelling the provisional consolidation scheme of the village in question, a fresh provisional consolidation scheme is intended to be prepared by another Assistant Consolidation Officer, thereafter aggrieved person would be entitled to file objection against said fresh provisional consolidation scheme of the village, under section 20(2) of the Act, therefore, at this stage the right and interest of petitioners cannot be held to be prejudiced or impaired and further it can not be held that they have any genuine grievance against impugned action accordingly it can not be held that the petitioners are 'aggrieved persons', entitled to file instant writ petition at this stage.

Thus from a joint reading of aforesaid sub-sections of section 48 of the Act it is clear that any subordinate authority to the Director may after allowing the parties concerned an opportunity of being heard refer the record of any case or proceedings to the Director of Consolidation for action under Sub-section (1) thereupon Director of Consolidation would be entitled to exercise his power under Section 48 (1) of the Act. The power conferred upon Director/Deputy Director of Consolidation under Sub-Section (1) of Section 48 is of wide amplitude wherein he can examine the record of any case decided or proceedings taken by any subordinate authority for the purposes of the satisfying himself as to the regularity of proceedings, or as to the correctness, legality or propriety of any order (other than interlocutory order) passed by such authority in the case or proceedings. Therefore, in my opinion, the revisional power, can be exercised by the Director/ Deputy Director of Consolidation to examine the regularity of any proceeding taken by the subordinate authorities and to examine, the correctness, legality or propriety of any order (other than interlocutory order) passed by such authority in the case decided by him. The exercise of said power cannot be confined to examine correctness legality or propriety of any order passed by such authority in the case decided by him alone . The expressions "regularity of the proceedings" used under Sub-section (1) of Section 48 of the Act is also of the wide import, which may embrace in it, the preparation of provisional consolidation scheme of unit or the village by Assistant Consolidation Officer under Section 19-A of the Act, as one of the such proceedings, therefore, while exercising the revisional power, which can also be exercised by Deputy Director of Consolidation on a reference, he was fully competent to cancel the provisional consolidation scheme prepared by the Assistant Consolidation Officer which was found by him irregular, and could not be otherwise corrected except by cancellation in its entirety. Thus the impugned action taken by Deputy Director of Consolidation was well within the ambit of his authority under law and can not be held to be beyond the scope of authority under law.

The view taken by Hon'ble Apex Court in aforesaid case, in my considered opinion, supports the view taken by me hereinbefore, therefore, in any view of

the matter assuming that the impugned order passed by Deputy Director of Consolidation may not be strictly in conformity of the provisions of section 48 (3) of the Act, or otherwise found to be contrary to law even then, I am not inclined to exercise extra-ordinary discretionary jurisdiction under Article 226 of the Constitution in favour of the petitioner for the simple reason that on quashing of the impugned order, the provisional consolidation scheme prepared by Assistant Consolidation Officer Sri Dal Singar Tiwari would be restored resulting which all pervasive illegalities crept in provisional consolidation scheme of the village, which has been cancelled by Deputy Director of Consolidation, would be restored and would be perpetuated. Thus it is fit case where this Court should refuse to exercise discretionary writ jurisdiction in favour of the petitioner.

Case law discussed:

(1975) 2 SCC 702, A.I.R. 1976 SC 578, (2002) 1 SCC 33, AIR 1999 SC 2583, , AIR 1988 SC 94, AIR 1966 SC 828.

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

1. By this petition, the petitioners have challenged the judgment and order dated 08.01.2010 passed by Deputy Director of Consolidation, Azamgarh in Misc. Case No. 62 (Dayanand Rai and others Versus State of U.P. and others) under Section 48(3) of U.P.C.H. Act, hereinafter referred to as the Act, whereby the provisional consolidation scheme of Village Bibipur, Pargana and Tehsil Nizamabad, District Azamgarh prepared by Assistant Consolidation Officer namely Sri Dal Singar Tiwari has been cancelled and another Assistant Consolidation Officer has been directed to make fresh provisional consolidation scheme of the unit in question and complete the same by 30.6.2010 and Settlement Officer of Consolidation, Azamgarh has also been directed to to take disciplinary action against Sri Dal Singar Tiwari the Assistant Consolidation Officer, Consolidator and Lekhpal concerned. The aforesaid order has been passed by Deputy Director of Consolidation, Azamgarh purporting to be under Section 48(3) of U.P.C.H. Act on the complaints of some chak holders of the village thereupon after making spot inspection and taking statements of villagers and aggrieved persons Settlement Officer Consolidation had recommended for cancellation of provisional consolidation scheme of the unit prepared by Assistant Consolidation Officer.

2. Heard Sri R.N. Singh, learned Senior counsel and Sri Sankatha Rai assisted by Sri J.P. Singh for the petitioners and Sri Kripa Shanker Singh for the respondent no. 9.

3. Sri R.N. Singh, learned senior counsel for the petitioners has contended that the impugned order has been passed by Deputy Director of Consolidation under the garb of the provision of Section 48(3) of U.P.C.H. Act, cancelling the provisional consolidation scheme of the village prepared by the Assistant Consolidation Officer under the provisions of Section 19-A of the Act, whereas proper course of the action for aggrieved chak holders against provisional consolidation scheme was to file objection before Consolidation Officer under Section 20(2) of the Act and aggrieved chak holders have further opportunity to file appeal against the decision of Consolidation Officer before the Settlement Officer of Consolidation, under Section 21(2) of the Act, and further remedy of revision before Deputy

Director of Consolidation under Section 48(1) of the Act is available to the aggrieved chak holders of the village. In such circumstances it was not open to the Deputy Director of Consolidation to pass impugned order under Section 48(3) of the Act, merely on complaints of some chak holders of the village, by making an enquiry thereon.

4. Learned counsel for the petitioners further submitted that the Deputy Director of Consolidation under the provisions of Act is statutory functionary as such he can exercise only those powers and perform those functions which are specifically conferred upon him under the provisions and scheme of the Act. He has no plenary power under the scheme of the Act whereby the other provisions of the said Act can be made unworkable and scheme of the Act can be defeated. From the tenor of the impugned order, it appears that Deputy Director of Consolidation has passed impugned order as if he was exercising any supervisory administrative powers, upon the sub-ordinate consolidation authorities whereas under the scheme of the Act no such administrative power is conferred upon him, as such impugned action taken by him is ultravires the aforesaid provisions of the Act.

5. It was further contended by Sri R.N. Singh that it is no doubt true that power conferred upon Deputy Director of Consolidation under Section 48 of the Act is somewhat supervisory in nature and such power can be exercised by him as revisional court and/or authority against the decisions of sub-ordinate consolidation authorities, and similar power can also be exercised by him but only on a proper reference made by the sub-ordinate authority wherein record of any case or proceedings is referred to him under sub-section (3) of Section 48 for his decision/action under sub-section (1) of Section 48 of the Act, but the impugned order passed by Deputy Director of Consolidation is neither covered nor referable to the provisions of Section 48(3) of the Act, thus it is beyond the scope of authority under law as such arbitrary and is without jurisdiction, therefore cannot be sustained.

6. Contrary to it, Sri Kripa Shanker Singh, learned counsel appearing on behalf of respondent no. 9 in support of the impugned order has submitted that the same has been passed by Deputy Director of Consolidation on complaints of several persons of the village who are chak holders in proposed consolidation scheme, after holding an enquiry thereon and after affording an opportunity of hearing to the several chak holders of the village and those chak holders who have supported the existing provisional consolidation scheme of the village prepared by Assistant Consolidation Officer namely Sri Dal Singar Tiwari.

7. While elaborating and substantiating his arguments Sri Kripa Shanker Singh has submitted that on receipt of various complaints the Deputy Director of Consolidation had directed the Settlement Officer of Consolidation to hold an enquiry and examine the matter who in pursuant thereto had examined several chak holdersof the village and made local spot inspection, thereafter, recommended for cancellation of provisional consolidation scheme prepared by Assistant Consolidation Officer namely Sri Dal Singar Tiwari. In the said report, he had pointed out that the

provisional consolidation scheme prepared by Assistant Consolidation Officer was out come of malpractices, manipulations and was full of illegalities of such a nature which could not possibly be cured otherwise except by the cancellation of provisional consolidation scheme prepared by Assistant Consolidation Officer and since the aforesaid recommendation was made by Settlement Officer of Consolidation after making spot inspection of the village and hearing the villagers who were chak holders of the village as such aforesaid recommendation could be treated to be a reference within the meaning of Section 48(3) of the Act. Therefore while cancelling the said provisional consolidation scheme it can not be said that the impugned order passed by the Deputy Director of Consolidation is arbitrary and beyond the scope of its authority under law. As such the order passed by Deputy Director of Consolidation can not be faulted with on that score.

8. He has further contended that at any view of the matter since while cancelling the provisional consolidation scheme preprepared by Assistant Consolidation Officer namely Sri Dal Singar Tiwari, the Deputy Director of Consolidation has directed another Assistant Consolidation Officer to prepare fresh provisional consolidation scheme of the village in question, therefore, no person can claim that they have any right to be heard before cancellation of said provisional consolidation scheme as no vested right of any person can be said to be impaired by impugned order passed by the Deputy Director of Consolidation. He further submitted that after preparation of fresh provisional consolidation scheme of the village in question in pursuance of the impugned order passed by Deputy Direction of Consolidation, the aggrieved chak holders would have right to file objection under Section 20(2), appeal under Section 21(2) and Revision under Section 48(1) of the Act, as such the impugned order passed by Deputy Director of Consolidation can not be legitimately questioned by the petitioners at this stage, as it can not be said that any vested right of the petitioners are impaired by now and that they are aggrieved persons and entitled to challenge the same before this Court.

9. He has further contended that not only this, but while cancelling the aforesaid provisional consolidation scheme the Deputy Director of Consolidation has directed another Assistant Consolidation Officer to prepare the fresh provisional consolidation scheme of the village and complete the exercise by 30 June, 2010. As such, assuming that the impugned order passed by Deputy Director of Consolidation is of administrative in nature even then since it has removed/cured all pervasive gross illegalities crept in the existing provisional consolidation scheme of the village in question, restoration of which would perpetuate the said illegalities, and would ultimately defeat the aims and object of the consolidation scheme, therefore, this court should refuse to exercise its discretionary jurisdiction under Article 226 of the Constitution of India.

10. In order to appreciate rival contentions of the parties it would be useful to extract the impugned order dated 8.1.2010 passed by Deputy Director of Consolidation, Agamgarh as under:-

"विगत 9-11-2009 ई० को ग्राम बीबीपुर तप्पा कोठा के निवासी दयानन्द राय आदि अनेक ग्राम वासियों द्वारा इस अदालत के समक्ष इस आशय की शिकायत प्रस्तुत की गयी थी कि क्षेत्रीय सहायक चकबन्दी अधिकारी श्री दल सिंगार तिवारी कभी भी गांव मे नहीं गये और चकबन्दी कार्य पूरा हो गया। ग्राम सभा की लगभग दस बीघा भूमि भी लोगों के चकों मे प्रस्तावित कर दी गयी है। सड़क के भूखण्डों के साथ भी भारी छेड़ छाड़ किया गया है। अतः अनियमितता की जांच करके प्रभावी कार्यवाही की जाय। कालान्तर मे पतिराम यादव, सभा नारायन राय व शैलेश कुमार राय सहित ग्राम प्रधान एवं चकबन्दी समिति की अध्यक्षा श्रीमती अन्तराजी ने भी ए०सी०ओ० श्री तिवारी के चक निर्माण को निरस्त करने की याचना प्रस्तुत की। शिकायत की गम्भीरता को देखते हुए अधोहस्ताक्षरी द्वारा पूरे प्रकरण की जॉच करने हेतु पत्रांक 24/रीडर/दिनांक 12-11-2009 ई के जरिये बन्दोबस्त अधिकारी चकबन्दी आजमगढ़ को निर्देश भेजा गया, जिससे उ०प्र० सरकार के राजकीय अभिकरण का पक्ष तथ्यों सहित स्पष्ट हो सके।

बन्दोबस्त अधिकारी चकबन्दी, आजमगढ़ ने उक्त ग्राम में दो दिन जाकर स्थल निरीक्षण करके सभी पक्षों की बातों को सुनते हुए अपनी विस्तृत जांच आख्या दिनांक 7-12-2009 ई को इस अदालत के समक्ष प्रस्तुत किया है। उक्त आख्या प्राप्त होने पर इस अदालत से चकबन्दी समिति के सभी पदाधिकारियों को अपना पक्ष प्रस्तुत करने हेतु सूचना प्रेषित की गयी। विगत 22-12-2009 ई० को चकबन्दी समिति के कुल पांच पदाधिकारियों में से तीन पदाधिकारीगण क्रमशः ग्राम प्रधान श्रीमती अन्तराजी, सदस्या श्रीमती प्रमिला देवी एवं श्री अंगद राम ने उपस्थित होकर अपने बयान अंकित कराये। एक अन्तिम अवसर देने पर एक अन्य सदस्य श्री बृजपाल शर्मा ने भी दिनांक 30-12-2009 को उपस्थित होकर अपना बयान दर्ज कराया, जबकि एक मात्र पदाधिकारी श्री संकठा राय सूचना पाने के बावजूद बयान देने हेतु हाजिर नही हुए। प्रताप नरायन राय पुत्र श्री निवास ने इस आशय का दावा 29-12-2009 को पेश किया था कि श्री अंगद राय ने उक्त ग्राम के वार्ड नं० 8 से अपने ग्राम पंचायत सदस्यता से विगत 15-5-2008 ई० को त्याग पत्र दे दिया था, जो 19-7-2008 ई० को स्वीकृत हो चुका है। अतः वह अब चकबन्दी समिति के भी पदाधिकारी नहीं रहे, अतः उनका बयान अधिकार क्षेत्र से एवं विधि विरूद्ध होने से अग्राहय है। दूसरी ओर सर्व श्री प्रताप नारायन, युधिष्ठिर राय, केशरी नरायन, अरविन्द कुमार राय, उमा शंकर राय व दीन पाल राय आदि ने दयानन्द राय आदि द्वारा उठाई गयी शिकायतों को निराधार बताते हुए अपना लिखित कथन 12-11-2009 ई० को प्रातः 10 बजे से 12 बजे के मध्य आयोजित "जनता दर्शन" के दौरान अधोहस्ताक्षरी के समक्ष प्रस्तुत किया था, इसे भी एस०ओ०सी० को जांच हेतु भेजा गया था।

बन्दोबस्त अधिकारी चकबन्दी, आजमगढ़ अपनी जांच आख्या मे लिखते है कि ग्राम बीबीपुर वर्ष 1981 ई० से चकबन्दी प्रकिया में चल रहा है। प्रथम आर इस ग्राम का चक निर्माण दिनांक 14-6-1990 को सम्पन्न हुआ था। चक आपत्तियों के निस्तारण के बाद एस०ओ०सी० स्तर से ग्राम की चक अपीलों की सुनवाई के दौरान दिनांक 30-5-2005 ई० को अनियमितताएं पाये जाने के कारण ग्राम पुनः मालियत स्तर पर प्रत्यावर्तित कर दिया गया। ए०सी०ओ० द्वारा दिनांक 5-6-2009 ई० से चक निर्माण का कार्य प्रारम्भ किया गया। धारा 20 का प्रकाशन दिनांक 6-11-2009 ई० को दर्शाया गया है। कुल 467 चकदारों वाले इस ग्राम में उक्त चकबन्दी के अन्दर व 90 चक चकबन्दी पृथक रखे गये । एक चक की संख्या 300, दो चकों की संख्या 57 , तीन चकों की संख्या 9 व चार चकों की संख्या एक है तथा कुल 87 उडान चक बना दिये गये है। 25 प्रतिशत से प्रतिशत अधिक क्षेत्रफल की कमी वाले चकदारों की संख्या 36 और वृद्धि वाले चकदारों की संख्या 17 है। उक्त चक गठन का स्थलीय निरीक्षण करते हुए मौके पर काश्तकारों की संमस्याओं को सुनकर आगे लिख रहे है कि भूखण्ड संख्या 206 में मौके पर सुरेश राय की मड़ई व पेड़ है, जिसे दूसरे चकदार के चक मे प्रविष्ट कर दिया गया है। भूखण्ड संख्या 207 में मौके पर बॉस की खूटी व पुराना बाग है, इसकी 100 पैसे कीमत लगा दी गयी है । भूखण्ड संख्या 203 श्रीप्रकाश व दिनेश आदि का है, इसमें 10विश्वा की मालियत लगाकर उमाशंकर व सूर्यमुखी आदि का उडान चक बैठा दिया गया है। भूखण्ड संख्या 116 रकबा 1.005 कड़ी बाग का नम्बर है, इसमें चार पक्षकारों का 1/4, 1/4 अंश है , किन्तु इस पूरे नम्बर पर युधिष्ठिर राय व बाबूराय का चक बना दिया गया है। इसी प्रकार भूखण्ड संख्या 117 में भी अन्य हिस्सेदारों को न देकर केवल युधिष्ठिर राय को चक दे दिया गया है। भूखण्ड संख्या 215 अभिलेखों में 0.365 कडी दर्ज है , जबकि मौके पर सिर्फ 0.050 कडी है तथा शेष क्षेत्रफल सड़क में चला गया है। इसके बावजूद इसे दुरूस्त न करते हुये पूरा 0.365 कडी रकबा चकदार शम्भूनाथ पुत्र मंगल को 70पैसे के रेट से किनारे की भूमि पर एलाट कर दिया गया हैं। इसी प्रकार चकदार 143 के चक उडान बना दिये गये है और 100 पैसे की मालियत 70पैसे में नदी के किनारे में दे दी गयी है। चकदार संख्या 213 को मकान के किनारे मूल गाटे पर चक पूरा नही दिया गया है व एक चक उडान बना दिया गया है। भूखण्ड संख्या 201 मौके पर बाग के स्वरूप में है किन्तु इस पर चक बन गया है ,जबकि यह पॉच खाते दारों के नाम सी०एच०-18(चकबाहर) होना चाहिए था। भूखण्ड सं०123 में मौके पर सुरेन्द्र नाथ राय का नलकूप पाया गया, जो हरिशंकर आदि के चक में चला गया हैं। इसके अलावा भूखण्ड सं० 121 के दक्षिणी मेड से

नाली व रास्ता दिया जाना चाहिए था, जो नही दिया गया हैं । भूखण्ड सं० 88 श्रीमती देवी व युधिष्ठिर आदि का है। युधिष्ठिर अपना चक अन्यत्र बनवा लिये है। श्रीमती देवी की ओर से भूखण्ड सं० 82 के भूस्वामी की सहमति से चक मॉगा गया था, जिसे ए०सी०ओ० श्री तिवारी द्वारा नही दिया गया । भूखण्ड सं० 50 व 51 दिनेश पुत्र राम नरायन का तनहा नम्बर है, जो सडक के किनारे स्थित है, किन्तु इस पर लगभग 0.500 कडी का चक अशोक आदि चकदारो का गलत रूप से बना दिया गया है। अनुसूचित जाति की बस्ती में जाने के लिए उन्हें कोई रास्ता नही दिया गया है। भूखण्ड सं० 53 सडक के किनारे का है, जो शमसेर आदि का है , किन्तु इन्हे यहॉ से हटाकर युधिष्ठिर राय का चक 0.560 कड़ी का बना दिया गया है। भूखण्ड सं० 13 की 20 पैसे की मालियत 12 नं० पर 60 पैसे की दर से प्रदिष्ट कर दी गई है। भूखण्ड सं० 6 श्रीमती देवी का है , इनका चक इस भूखण्ड पर बना तो है, किन्तु दक्षिण ओर रवीन्द्र व अखिलेश आदि को गलत रूप से सडक से लगाकर चक दे दिया गया है । भूखण्ड सं० 45 रकबा 0.239 कडी सड़क के किनारे है, जहॉ से मूल खतेदार को हटाकर दूसरे चकदार को बैठा दिया गया है। उपरिवर्णित विषय के आधार पर एस०ओ०सी० अपने निष्कर्ष में लिखते है कि उक्त तथ्यों से स्पष्ट है कि सहायक चकबन्दी अधिकारी (ए०सी०ओ०) श्री दलसिंगार तिवारी द्वारा अविवेकपूर्ण तरीके से चक निर्माण किया गया है, जिससे कृषको में असन्तोष व्याप्त हो गया है। कुछ व्यक्तियों द्वारा अन्य चकदारों के हानि की कीमत पर चकबन्दी प्रकिया के लाभों का प्रयोग गलत रीति से अपने पक्ष में किया गया है। ग्राम में गुटबन्दी भी है, कृषकों का एक वर्ग चकबन्दी प्रकिया को इसके आगे बढाने के पक्ष में है, वहीं दूसरा वर्ग उपरिवर्णित अनियमितताओं को देखते हुए चक निर्माण निरस्त करके नये सिरे से चक निर्माण की माँग कर रहा है। एस०ओ०सी० का कथन है कि गुटबन्दी के परिवेश में ए०सी०ओ० श्री तिवारी को और भी अधिक सावधानी एवं संवेदनशीलता से कार्य करना चाहिए था, जो उनके द्वारा नहीं किया गया। चकनिर्माण के दौरान सहायक चकबन्दी अधिकारी श्री दल सिंगार तिवारी द्वारा गुणवत्ता कायम नहीं रखी जा सकी।

प्रताप नरायण राय व युधिष्ठिर राय आदि अनेक ग्रामीणों ने आवेदन दिनॉक 12.11.2009 ई० में अधोहस्ताक्षरी में समक्ष हाजिर होकर सारी शिकायतों को निराधार बताते हुए दावा किया था कि ए०सी०ओ स्तर से चक निर्माण की काग्रवाही सुचारू ढंग से सम्पन्न हुई है व चक उद्धरण वितरित किया गया है, उसके बाद अवैध माँग रखने वाले कतिपय गिने चुने व्यक्तियों का निजी स्वार्थ न हल हो सकने के कारण गलत व निराधार आरोप लगाते हुए शिकायती प्रार्थना पत्र दिये गये हैं। उनका उद्देश्य केवल चकबन्दी प्रकिया को बाधित करना है। अतः शिकायतों को निरस्त करके प्रक्रिया को चकबन्दी अधिकारी स्तर पर आगे बढ़ाते हुए चक आपत्तियों पर सुनवाई करके उनका नियमानुसार निस्तारण का निर्देश दिया जाय। ग्राम प्रधान श्रीमती अन्तराजी ने इस आवेदन पर भी अपनी सहमति प्रकट करते हुए अपने मुहर के साथ हस्ताक्षर अंकित किये हैं। दिनांक 16.12.2009 ई० को ग्राम प्रधान श्रीमती अन्तराजी व चकबन्दी समिति के सदस्त सर्वश्री बृजपाल शर्मा, प्रमिला देवी एवं संकठा राय ने नोटरी शपथ पत्र तैयार कराया था, जिसे अधोहस्ताक्षरी के समक्ष दिनाँक 21.12.2009 ई० को पेश किया था, य पि इनमें से संकठा राय को छोडकर अन्य तीनों पदाधिकारियों ने अगले ही दिन दिनाँक 22.12.2009 ई० को पुनः अधोहस्ताक्षरी के समक्ष हाजिर होकर इस आशय का बयान अंकित कराये हैं कि उनका 16.12.2009 ई० का कथित शपथ पत्र गलत व फर्जी माना जाय। इससे स्पष्ट हो रहा है कि इस ग्राम के कुल पाँच पदाधिकारियों में से चार लोगों किसी एक दृढ़ मत के नही है, शिकायतकर्ता पक्ष के साथ आने पर वे उन्ही की भाषा बोलते हुए उनके मन्तब्य पर अपनी सहमति प्रकट कर देते है, वही शिकायत का खण्डन करने वाले पक्ष के साथ आने पर वे पूरी शिकायत को गलत बताते हुए चकबन्दी प्रक्रिया को आगे बढ़ाने की बात करने लगते हैं, इस विरोधाभासी मनोभाव के प्रकटीकरण से ज्ञात हो रहा है कि वे स्थानीय स्तर पर दोनों पक्षों के किसी भी विरोध से खुद को बचाये रखना चाह रहे हैं। चूँकि ग्राम स्तर पर चकबन्दी समिति पूरे चकबन्दी प्रक्रिया के दौरान एक बेसिक इकाई के रूप में कार्य करती हैं, अतः इस पूरे प्रकरण पर चकबन्दी समिति के पदाधिकारियों का मन्तव्य प्राप्त करने हेतु उन्हें अधोहस्ताक्षरी द्वारा ब्यान हेतु बुलाया गया था।

बन्दोबस्त अधिकारी चकबन्दी आजमगढ द्वारा अपनी जॉच आख्या दिनॉक 7.12.2009 ई० में अनियमितता का जो विस्तृत विवरण प्रस्तुत किया गया है, उसे स्पष्ट हो गया है कि चक निर्माण करने वाले सहायक चकबन्दी अधिकारी श्री दल सिंगार तिवारी ने चक निर्माण करते समय स्थल पर जाकर भूखण्डो की भौतिक स्थिति का अवलोकन और आगणन विधि विधान पूर्वक कभी नहीं किया, अन्यथा किसी के आवासीय भवन, मडई, बाग, बॉस खूँटी , निजी नलकूप किसी अन्य चकदार के चक में प्रविष्ट न हो जाते । चार पक्षकारों के पूरे अंश युधिष्ठिर राय के चक के रूप में परिणत न होते, भूखण्ड सं० 215 के 0.050 कडी रकबे को छोडकर सडक में समाहित हो चुके 0-315 कडी रकबे को भी शमिल करके पूरे 0-365 कडी क्षेत्रफल को शम्भू नाथ के चक से एलाट कर दिया जाता, पूरा ग्राम केवल 467 चकों का है, जो बहुत बडा नही माना जा सकता, इसके बावजूद यहॉ 87 उडान चक बना दिये गये जिनका औचित्य प्रमाणित कर पाना अत्यन्त कठिन है, इसी प्रकार 25ः से अधिक क्षेत्रफल की कमी वाले 36 चकदार एवं वृद्धि वाले 17 चकदारो के होने का भी कोई तर्क समक्ष से परे हैं स्थल पर बाग हाने के बावजूद गा० नं० 201 का सी०एच० 18 न किया जाना दोषपूर्ण है, इसी प्रकार गा०नं०

82 के भूमिधर की सहमति का संज्ञान लेकर चक न बनाना, अपेक्षाओं के अनुरूप स्थल पर नाली मार्ग न छोडा जाना, अनुसूचित जाति की बस्ती को रास्ते से वंचित कर देना, सडक के किनारे के मूल नम्बर से चकदारों को हटाकर कतिपय लोगों को अनुचित लाभ देते हुए वहॉ चक आवंटित कर देना न केवल चकबन्दी प्रक्रिया के प्रयोजन एवं उद्देश्यों को विफल दे रहा है अपितु सडक/मुख्य मार्ग के किनारे के मूल नम्बरों को उनके ही मूल खातेदारों के चक में प्रदिष्ट कर देने अथवा चक बाहर रखने विषयक 1981 ई० के शासनादेश/मा० चकबन्दी आयुक्त के निर्देशों की भी खुली अवहेलना है। इस प्रकार बिना स्थलीय अवलोकन एवं विश्लेषण किये ए०सी०ओ० श्री तिवारी द्वारा इस ग्राम में चक निर्माण कर देने से चक निर्माण की पूरी प्रक्रिया दूषित हो गई है, श्री तिवारी द्वारा पूरी सत्यनिष्ठा से अपने दायित्वों को निर्वहन नही किया गया है, उनके द्वारा चक निर्माण में बरती गई उक्त व्यापक स्तरकी अनियमितताएं कदाचित इस सीमा तक नही है कि उन पर प्राप्त होनेवाली चक आपत्तियों का निस्तारण कर देने मात्र से पूरी चक निर्माण प्रक्रिया दोषमुक्त एवं निर्मल हो जाएगी, बल्कि उक्त व्यापक अनियमितताओं को देखते हुए ए०सी०ओ० श्री दल सिंगार तिवारी द्वारा किये गये चक निर्माण को पूर्ण रूप से निरस्त करके किसी अन्य ए०सी०ओ० से नये सिरे से समयबद्ध रीति से चक निर्माण की प्रक्रिया को पूर्ण कराया जाना न्यायोचित प्रतीत हो रहा हैं

आदेश

ग्राम बीबीपुर परगना व तहसील निजामाबाद जनपद आजमगढ में सहायक चकबन्दी अधिकारी श्री दल सिंगार तिवारी द्वारा किये गये सम्पूर्ण चक निर्माण को निरस्त किया जाता है और सहायक चकबन्दी अधिकारी श्री सूरन प्रसाद को इस ग्राम का नये सिरे से चकनिर्माण करने हेतु अधिकृत करते हुए निर्देश दिया जाता है कि वह ए०सी०ओ० स्तर का सम्पूर्ण चक निर्माण का कार्य विलम्बतम 30-6-2000 ई० तक हर दशा में पूर्ण करें। बन्दोबस्त अधिकारी चकबन्दी आजमगढ को निर्देश दिया जाता है कि दोषी सहायक चकबन्दी अधिकारी के विरूद्ध कठोर दण्डात्मक कार्यवाही हेतु आरोप विरचित करते हुए एक सप्ताह के अन्दर विभागीय कार्यवाही की पत्रावली पेश करें, इसके अलावा दोष पूर्ण एक निर्माण की इस पूरी प्रक्रिया में संलिप्त रहे दोष चकबन्दीकर्ता एवं लेखपाल के विरूद्ध भी कठोर अनुशासनात्मक कार्यवाही सुनिश्चित की जाय। ए०सी०ओ० श्री सूरन प्रसाद को उक्त कार्य समय से पूर्ण करने एवं कार्यो की शत प्रतिशत गुणवत्ता बनाये रखने हेतु स्वच्छ छवि के कर्मठ चकबन्दीकर्ता एवं लेखपाल उपलब्ध कराये जाय। समय समय पर उनके कार्यों का नियमित रूप से अनुश्रवण भी किया जाय। अनुपालनार्थ आदेश की प्रति बन्दोबस्त अधिकारी चकबन्दी आजमगढ़ व सहायक चकबन्दी अधिकारी श्री सूरन प्रसाद को तत्काल प्रेषित की जाय। आदेश की एक एक प्रति डी०डी०सी०, एस०ओ०सी०, सी०ओ० व ए०सी०ओ० कोर्ट मे अनुरक्षित रक्षक पज्जिकाओं पर भी रखते हुए चकबन्दी समिति के अध्यक्ष/ ग्राम प्रधान को भी इस आशय से सुलभ करा दी जाय कि वह इस आदेश की मुनादी विधिवत पूरे ग्राम में करा दे। आवश्यक कार्यवाही के उपरान्त पत्रावली सच्चित की जाय।

दिनांक 8-1-2010 ई०"

11. From a careful reading of the impugned order dated 8.1.2010 passed by Deputy Director of Consolidation it is clear that it was passed by him on the basis of report of Settlement Officer of Consolidation dated 7.12.2009 and after hearing the members of consolidation committee, complainants and other persons of the village who have come forward in support of provisional consolidation scheme prepared by Assistant Consolidation Officer namely Sri Dal Singar Tiwari. In the impugned order, Deputy Director of Consolidation has narrated the contents of the report of Settlement Officer of Consolidation, who had submitted it after making spot inspection of the village and after affording opportunity of hearing to the chak holders and persons, who had made complaints in respect of various illegalities committed by the Assistant Consolidation Officer while preparing provisional consolidation scheme. The Deputy Director of Consolidation has found that in the said report, Settlement Officer of Consolidation had narrated various irregularities and illegalities committed by Assistant Consolidation Officer while preparing provisional consolidation scheme of the village which could not be rectified and cured in individual objections, which may be filed against said provisional consolidation scheme and he has further found that the illegalities and irregularities were of such a nature which could not be cured otherwise except by cancellation of entire

provisional consolidation scheme of the village prepared by Dal Singar Tiwari, therefore in order to remove and cure the aforesaid illegalities and irregularities, the Deputy Director of Consolidation has cancelled the entire provisional consolidation scheme of the village while directing another Assistant Consolidation Officer for preparation of fresh provisional consolidation scheme of the village which is intended to be completed by 30.6.2010.

12. Now first question arises for consideration is that as to whether the writ petition filed by petitioners at this stage is maintainable? and/or as to whether the petitioners are aggrieved persons entitled to challenge the impugned order passed by Deputy Director of Consolidation at this stage?

13. In this connection, it is to be noted that by impugned order dated 8.1.2010 passed by Deputy Director of Consolidation he has cancelled the entire provisional consolidation scheme of the village in question prepared by Assistant Consolidation Officer under Section 19-A of the Act with a further direction to another Assistant Consolidation Officer to prepare a fresh provisional consolidation scheme of the unit. It is further significant to be noted that against the provisional consolidation scheme the aggrieved chak holders of the village have right to file objection before consolidation officer under Section 20(2) of the Act and thereafter any person aggrieved by the order/decision of Consolidation Officer is entitled to file appeal under Section 21(2) of the Act before Settlement Officer of Consolidation and thereafter has right to prefer revision before Deputy Director of Consolidation under Section 48 of the Act. But in instant case, since the provisional consolidation scheme of the unit prepared by Assistant Consolidation Officer namely Sri Dal Singar Tiwari has been cancelled by Deputy Director of Consolidation with a further direction to another Assistant Consolidation Officer to prepare fresh provisional consolidation scheme of the village under Section 19-A of the Act, therefore, no question arises for filing objection before Consolidation Officer under Section 20(2) against said cancellation for simple reason that preparation of fresh provisional consolidation scheme of the village is still under contemplation and after preparation of fresh provisional consolidation scheme the aggrieved chak holders would be entitled to file an objection under Section 20 (2), appeal under Section 21 (2) and revision under Section 48 of the Act thus the rights and interest of petitioners have yet not been impaired by impugned action of Deputy Director of Consolidation causing any genuine grievance so as to entitle them to approach this Court under Article 226 of the Constitution seeking writ of certiorari.

14. In this connection, it would also be useful to refer some decisions of Hon'ble Apex Court herein after, wherein the Hon'ble Apex Court has considered the content and import of words "person aggrieved" entitled to file appeal, revision and a writ petition under Article 226 of the Constitution of India.

15. "In ***Bar Council of Maharashtra Vs. M.V. Dabholkar***, (1975) 2 SCC 702, while dealing with the content and scope of expressions "aggrieved person" to maintain an appeal under Section 38 of Advocate Act, a Seven Judges Constitution Bench of

Hon'ble Apex Court held that where a right of appeal to courts against an administrative or judicial decision is created by statute, the right is invariably confined to a "person aggrieved" or a person who claims to be aggrieved. The meaning of words "an aggrieved person" may vary according to the context of statute. One of the meaning is that a person will be held to be aggrieved by a decision if that decision is materially adverse to him. Normally one is required to establish that one has been denied or deprived of something to which one is legally entitled in order to make one "an aggrieved persons". Again a person is aggrieved if a legal burden is imposed upon him. The meaning of words "a person aggrieved" is sometimes given restricted meaning in certain statute which provide remedies for the protection of private legal rights. The restricted meaning requires denial or deprivation of legal rights. A more liberal approach is required in the background of statutes which do not deal with property rights but deal with professional conduct and morality. The role of the Bar Council under the Advocates' Act is comparable to the role of a guardian in professional ethics. The words "person aggrieved" in Section 37 and 38 of the Act are of wide import and should not be subjected to a restricted interpretation of possession or denial of legal rights or burdens or financial interests. The test is whether the words "person aggrieved" include "a person who has a genuine grievance because an order has been made which prejudicially affects his interests.

16. In ***Jasbhai Motibhai Desai Vs. Roshan Kumar, Haji Bashir Ahmed and others A.I.R. 1976 SC 578*** in para 34 of the decision the Hon'ble Apex Court has held as under:-

"34. This Court has laid down in a number of decisions that in order to have the locus standi to invoke the extraordinary jurisdiction under Article 226, an applicant should ordinarily be one who has a personal or individual right in the subject-matter of the application, though in the case of some of the writs like habeas corpus or quo warranto this rules is relaxed or modified. In other words, as a general rule, infringement of some legal right or prejudice to some legal interest inhering in the petitioner is necessary to give him a locus standi in the matter. (see State of Orissa V. Madan Gopal Rungta AIR 1952 SC 12; Calcutta Gax Co. V. State of W.B. AIR 1962 SC 1044; Ram Umeshwari Suthoo V. Member, Board of Revenue, Orissa (1967) 1 SCA 413; Gadde Venkateswara Rao V. Rajasaheb Chandanmall; Dr. Satyanarayana Sinha V. M/s. S. Lal & Co. (1073) 2 SCC 696.

17. In ***Ghulam Qadir Vs Special Tribunal and others (2002) 1 SCC 33*** the Hon'ble Apex Court has again reiterated the earlier view taken by Apex Court and held that "there is no dispute regarding the legal proposition that right under Article 226 of the Constitution of India can be enforced only by an aggrieved person except in the cases where writ prayed for is for habeas corpus or quo warranto. Another exception in the general rule is the filing of writ petition in public interest."

18. Applying the aforesaid principle of law laid down by Hon'ble Apex Court in given facts and circumstances of the case, I am of the considered opinion that

since vide impugned order passed by Deputy Director of Consolidation while cancelling the provisional consolidation scheme of the village in question, a fresh provisional consolidation scheme is intended to be prepared by another Assistant Consolidation Officer, thereafter aggrieved person would be entitled to file objection against said fresh provisional consolidation scheme of the village, under section 20(2) of the Act, therefore, at this stage the right and interest of petitioners cannot be held to be prejudiced or impaired and further it can not be held that they have any genuine grievance against impugned action accordingly it can not be held that the petitioners are 'aggrieved persons', entitled to file instant writ petition at this stage.

19. Now next question arises for consideration is that as to whether the impugned order passed by Deputy Director of Consolidation is covered by the provisions of Section 48(3) of Act or as to whether the impugned action taken by him is ultravires, the aforesaid provisions of Act being beyond the scope of authority under law and without jurisdiction?

20. In this connection it would be appropriate to examine the provisions of Section 48 of the Act which is being reproduced in extenso as under:-

*"[48. **Revision and reference**.-(1) The Director of Consolidation may call for and examine the record of any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings, or as to the correctness, legality or propriety of any order [other than an interlocutory order] passed by such authority in the case or proceedings, and may, after allowing the parties concerned an opportunity of being heard, make such order in the case or proceedings as he thinks fit.*
(2) Power under sub-section (1) may be exercised by the Director of Consolidation also on a reference under sub-section(3).
(3) Any authority subordinate to the Director of Consolidation may, after allowing the parties concerned an opportunity of being heard, refer the record of any case or proceedings to the Director of Consolidation for action under sub-section(1).]
*[**Explanation (1)]-** For the purposes of this section, Settlement Officers, Consolidation, Consolidation Officers, Assistant Consolidation Officers, Consolidator and Consolidation Lekhpals shall be subordinate to the Director of Consolidation.]*
*[**Explanation (2)]-** For the purposes of this section the expression 'interlocutory order' in relation to a case or proceedings, means such order deciding any matter arising in such case or proceeding or collateral thereto as does not have the effect of finally disposing of such case or proceeding.]"*

21. From a careful reading of the aforesaid provisions of Act it is clear that under Sub-Section (1) of Section 48 of the Act, the Director of Consolidation is empowered to call for and examine the record of any case decided or proceedings taken by any subordinate authority for the purposes of satisfying himself as to the regularity of proceedings; or as to the correctness, legality or propriety of any order (other than interlocutory order) passed by such authority in the case or proceedings and after allowing the parties

concerned an opportunity of being heard, he can make such order in the case or proceeding as he thinks fit. Sub-section (2) further provides that the power conferred upon the Director of Consolidation may be exercised by him also on a reference under Sub-section (3) and Sub-section (3) provides that any authority subordinate to the Director of Consolidation may, after allowing the parties concerned an opportunity of being heard, refer the record of any case or proceedings to the Director of Consolidation for action under Sub-section(1).

22. Thus from a joint reading of aforesaid sub-sections of section 48 of the Act it is clear that any subordinate authority to the Director may after allowing the parties concerned an opportunity of being heard refer the record of any case or proceedings to the Director of Consolidation for action under Sub-section (1) thereupon Director of Consolidation would be entitled to exercise his power under Section 48 (1) of the Act. The power conferred upon Director/Deputy Director of Consolidation under Sub-Section (1) of Section 48 is of wide amplitude wherein he can examine the record of any case decided or proceedings taken by any subordinate authority for the purposes of the satisfying himself as to the regularity of proceedings, or as to the correctness, legality or propriety of any order (other than interlocutory order) passed by such authority in the case or proceedings. Therefore, in my opinion, the revisional power, can be exercised by the Director/ Deputy Director of Consolidation to examine the regularity of any proceeding taken by the subordinate authorities and to examine, the correctness, legality or propriety of any order (other than interlocutory order) passed by such authority in the case decided by him. The exercise of said power cannot be confined to examine correctness legality or propriety of any order passed by such authority in the case decided by him alone. The expressions "regularity of the proceedings" used under Sub-section (1) of Section 48 of the Act is also of the wide import, which may embrace in it, the preparation of provisional consolidation scheme of unit or the village by Assistant Consolidation Officer under Section 19-A of the Act, as one of the such proceedings, therefore, while exercising the revisional power, which can also be exercised by Deputy Director of Consolidation on a reference, he was fully competent to cancel the provisional consolidation scheme prepared by the Assistant Consolidation Officer which was found by him irregular, and could not be otherwise corrected except by cancellation in its entirety. Thus the impugned action taken by Deputy Director of Consolidation was well within the ambit of his authority under law and can not be held to be beyond the scope of authority under law.

23. Now next question arises for consideration is that as to whether the impugned order was passed by Deputy Director of Consolidation on a proper reference made to him if not what would be legal consequence of it? And even if the impugned order is not in conformity of the provisions of Section 48(3) of the Act, as to whether this Court can still refuse to exercise its extraordinary writ jurisdiction under Article 226 of the Constitution? In this connection it is to be noted that from the perusal of the impugned order passed by Deputy

Director of Consolidation it is clear that same was passed on a report of Settlement Officer of Consolidation dated 7.12.2009 which was based upon the complaints made to Deputy Director of Consolidation pointing out various irregularities and illegalities committed by the Assistant Consolidation Officer while preparing provisional consolidation scheme of the village in question. The aforesaid report was submitted by Settlement Officer of Consolidation after making local spot inspection of the village and hearing of the complainants, members of the consolidation committee and those persons who had supported the provisional consolidation scheme prepared by Assistant Consolidation Officer. Thus the aforesaid report of Settlement Officer of Consolidation dated 7.12.2009 was in respect of the illegalities committed by Assistant Consolidation Officer while preparing provisional consolidation scheme of the village which was a proceeding before him under Section 19-A of the Act, as such in my considered opinion the said report of Settlement Officer of Consolidation is nothing but only a reference to Deputy Director of Consolidation under Section 48(3) to take action thereon under Section 48(1) of the Act in respect of regularity of the said proceeding.

24. Further from the perusal of impugned order passed by Deputy Director of Consolidation it is clear that on receipt of said report of Settlement Officer of Consolidation which is to be termed as reference, the Deputy Director of Consolidation has passed impugned order after hearing the complainants, member of consolidation committee and other persons including some petitioners. therefore while passing the impugned order, in my considered opinion, substantial compliance of the provision of Section 48(3) of the Act has been done by the Deputy Director of Consolidation, accordingly the same can not be held to faulty on account of any technical infirmity in the said order. As already indicated herein before that in pursuant to the impugned order since preparation of a fresh provisional consolidation scheme of the village is under contemplation against which aggrieved chak holders of the unit would have opportunity of filing objection, appeals and revisions at appropriate forums, therefore, any failure of hearing to all chak holders of the village under existing provisional scheme before its cancellation in my considered opinion can not be faulted with.

25. There is yet another reason which has impelled me for taking the aforesaid view in the matter. From the record it transpires that vide impugned order the Deputy Director of Consolidation has cancelled the provisional consolidation scheme prepared by Assistant Consolidation Officer on the ground that the illegalities and irregularities in the said provisional consolidation scheme were all pervasive and were of such a nature which could not be corrected or rectified by superior consolidation authorities in individual objections, appeals and revisions which could be preferred against the said provisional consolidation scheme, except cancellation of entire provisional consolidation scheme prepared by said Assistant Consolidation Officer. Therefore, if the impugned order passed by the Deputy Director of Consolidation is quashed or set aside, the earlier position of all pervasive illegalities and irregularities crept in the existing

provisional consolidation scheme would be restored, and aforesaid illegalities would be perpetuated, resulting which the provisions of consolidation scheme would be defeated. In this view of the matter, also I am inclined to interfere in the impugned order passed by Deputy Director of Consolidation.

26. In this connection, it would be useful to refer a decision of Hon'ble Apex Court rendered in ***M.C. Mehta Vs. Union of India AIR 1999 SC 2583***, wherein the Hon'ble Apex Court after referring its earlier decisions rendered in ***Mohammad Swalleh and others Vs IIIrd Addl. District Judge, Meerut and another AIR 1988 SC 94*** and ***Gadde Venkateswara Rao Vs Govt. of A.P. and others AIR 1966 SC 828*** in para 18 and para 19 of the said decision observed as under:-

"18. We shall initially refer to two cases where discretion was exercised not to grant relief and the first one was a case where relief was refused even though there was breach of natural justice. The first one is Gadde Venkateswara Rao v. Govt. of Andh. Pra. (1966) 2 SCR 172 : (AIR 1966 SC 828). There the Panchayat Samithi, in exercise of its statutory powers passed a resolution on 25-8-1960 to locate a primary health centre at Dharmajigudem. Later, it passed another resolution on 29-5-1961 to locate it at Lingapalem. On a representation by villagers of Dharmajigudem, Government passed orders on 7-3-1962 setting aside the second resolution dated 29-5-1961 and thereby restoring the earlier resolution dated 25-8-1960. The result was that the health centre would continue at Dharmajigudem. Before passing the orders dated 7-3-62, no notice was given to the Panchayat Samithi. This Court traced the said order of the Government dated 7-3-1962 to Section 62 of the Act and if that were so, notice to the Samithi under Section 62(1) was mandatory. Later, upon a review petition being filed, Government passed another order on 18-4-1963 cancelling its order dated 7-3-62 and accepting the shifting of the primary centre to Lingapalem. This was passed without notice to the villagers of Dharmajigudem. This order of the Government was challenged unsuccessfully by the villagers of Dharmaji-gudem in the High Court. On appeal by the said villagers to this Court, it was held that the latter order of the Government dated 18-4-1963 suffered from two defects, it was issued by Government without prior show cause notice to the villagers of Dharmaji-gudem and Government had no power of review in respect of Government orders passed under Section 62(1). But that there were other facts which disentitled the quashing of the order dated 18-4-63 even though it was passed in breach of principles of natural justice. This Court noticed that the setting aside of the latter order dated 18-4-63 would restore the earlier order of Government dated 7-3-62 which was also passed without notice to the affected party, namely, the Panchayat Samithi. It would also result in the setting aside of a valid resolution dated 29-5-61 passed by the Panchayat Samithi. This Court refused relief and agreed that the High Court was right in not interfering under Article 226 even if there was violation of natural justice. Subba Rao, J. (as he then was) observed (p. 189) (of SCR) : (at pp. 837 of AIR) as follows :

"Both the orders of the Government, namely, the order dated March 7, 1962 and that dated April 18, 1963, were not legally passed : the former, because it

was made without giving notice to the Panchayat Samithi, and the latter, because the Government had no power under Section 72 of the Act to review an order made under Section 62 of the Act and also because it did not give notice to the representatives of Dharmaji-gudem village.

His Lordship concluded as follows:

"In those circumstances, was it a case for the High Court to interfere in its discretion and quash the order of the Government dated April 18, 1963? If the High Court had quashed the said order, it would have restored an illegal order - it would have given the Health Centre to a village contrary to the valid resolutions passed by the Panchayat Samithi. The High Court, therefore, in our view, rightly refused to exercise its extraordinary discretionary power in the circumstances of the case."

The above case is clear authority for the proposition that it is not always necessary for the Court to strike down an order merely because the order has been passed against the petitioner in breach of natural justice. The Court can under Article 32 or Article 226 refuse to exercise its discretion of striking down the order if such striking down will result in restoration of another order passed earlier in favour of the petitioner and against the opposite party, in violation of principles of natural justice or is otherwise not in accordance with law."

"19. We would next refer to another case where, though there was no breach of principles of natural justice this Court held that interference would be the restoration of another order which was not legal. In Mohammad Swalleh v. Third Addl. District Judge, Meerut, (1988) 1 SCC 40,: (AIR 1988 SC 94), which arose under the U.P. Urban Buildings (Regulation of Letting Rent and Eviction)Act, 1972, the prescribed authority dismissed an application filed by the landlord and this was held clearly to be contrary to the very purpose of Section 43 (2) (rr) of the Act. The District Court, entertained an appeal by the landlord and allowed the landlord's appeal without noticing that such an appeal was not maintainable. The tenant filed a writ petition in the High Court contending that the appeal of the land lord before the District Court was not maintainable. This was a correct plea. But the High Court refused to interfere. On further appeal by the tenant, this Court accepted that though no appeal lay to the District Court, the refusal of the High Court to set aside the order of the District Judge was correct as that would have restored the order of the prescribed authority, which was illegal.

27. The view taken by Hon'ble Apex Court in aforesaid case, in my considered opinion, supports the view taken by me hereinbefore, therefore, in any view of the matter assuming that the impugned order passed by Deputy Director of Consolidation may not be strictly in conformity of the provisions of section 48 (3) of the Act, or otherwise found to be contrary to law even then, I am not inclined to exercise extra-ordinary discretionary jurisdiction under Article 226 of the Constitution in favour of the petitioner for the simple reason that on quashing of the impugned order, the provisional consolidation scheme prepared by Assistant Consolidation Officer Sri Dal Singar Tiwari would be restored resulting which all pervasive illegalities crept in provisional consolidation scheme of the village, which has been cancelled by Deputy

Director of Consolidation, would be restored and would be perpetuated. Thus it is fit case where this Court should refuse to exercise discretionary writ jurisdiction in favour of the petitioner.

28. In view of the aforesaid discussion, writ petition is devoid of merits, according same is hereby dismissed.

29. However, dismissal of writ petition shall not preclude the Assistant Consolidation Officer from preparing fresh provisional consolidation scheme of the village by 30.06.2010 as directed by Deputy Director of Consolidation.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.03.2010

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 16156 of 2010

Mukesh Chaturvedi ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ashwani Kumar Yadav

Counsel for the Respondents:
C.S.C.

Constitution of India, Art. 226- Practice & Procedure-Admission to Special B.T.C. course/selection process/ held-in the year 2001, the candidates selected and completed 2 years training-by G.O. dated 20.10.2005 State government canceled the examination held in 2001, but given chance to participate in the examination held in 2005-whether they were passed or fail-only protection from the exemption of training granted to these who had undergon completed said training-the validity of G.O. 2005 upheld upto the stage of Apex Court-by another G.O. basic secretory basic education again decided the sent for training ignoring the G.O. as well judgment-held-illegal total non application of mind-amounts to contempt secretory to explain to its stand about liability of contempt.

Held: Para 9

I am of the prima facie opinion that the order of the Secretary is based on complete non application of mind to the terms and conditions of the Government Order dated 20.10.2005, which has been confirmed by the Hon'ble Single Judge as well as by the Division Bench of this Court.

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

1. Connect with Writ Petition No. 68624 of 2009.

2. The controversy with regard to the admission to Special B.T.C. Course-2001 could not be resolved even after 09 years because the State Government has decided to issue Government Orders after Government Orders for confusing the issues in garb of clarifying the position and by altering its stand from time to time.

3. Entrance Test for Special B.T.C. Course-2001 took place in April, 2002. The results were declared on 03rd July, 2003. It is admitted to the State respondents that the results were fabricated and that the admission granted were based on other considerations than merit. Therefore, the State Government ultimately on 20.10.2005 cancelled the entire entrance test.

The State Government in the same Government Order came out with an exception clause. The exception clauses i. e. para 4 and 5 of the Government Order provided that irrespective of the fact as to whether the candidate was admitted illegally or by superseding the other meritorious candidates, if he has completed two years of training because of such illegal admission, he shall be permitted to appear in the fresh entrance test to be conducted along with entrance test of B.T.C. Course-2005 and if in such entrance test the illegally admitted candidate comes within the zone of being admitted to B.T.C. Course, then he will not be required to undergo the B.T.C. Training again and such candidate with the permission of the NCTE would be offered appointment in Parishadiya Vidhyalayas.

4. Clause (5) recorded that permission to hold Special B.T.C. 2001 entrance examination along with B.T.C. Entrance Examination-2005 be undertaken with the approval of the State Government and a proposal in that regard be submitted to the State Government.

What follows from the Government Order dated 20.10.2005 is as follows:

(a) There shall be a separate entrance test for Special B.T.C.-2001 candidates along with B.T.C. Entrance Test of 2005 from amongst the students who participated in the earlier entrance test only.
(b) Candidates, who have already undergone training of two years under the admission granted after declaration of result in July, 2003, shall not be required to undergo the training of two years again.
(c) They would be offered appointment after obtaining permission from the NCTE.
(d) A proposal be submitted to the State Government for holding a common entrance test for Special B.T.C. Course-2001 along with B.T.C. Entrance Test of 2005 from amongst candidates who had undertaken the training of two years.

5. This Court may record that the Government Order permitted participation of all earlier candidates in the second entrance test for B.T.C.-2001 irrespective of the fact whether they had been admitted to B.T.C. Course and completed training or not. According to the Court, the only benefit granted to the candidates, who had completed the B.T.C. Training of two years, irrespective of the cancellation of the entire entrance test held earlier, was that if they are successful in the entrance test of Special B.T.C. Course 2001 to be held under Government Order dated 20.10.2005, then they will not be required to undergo the training of two years again. This benefit was not provided to other candidates who may be admitted after the entrance test to be held under Government Order dated 20.10.2005.

6. This Government Order was subjected to challenge by means of large number of writ petitions, which were decided on 24.04.2006. The order of the Hon'ble Single Judge provided that examination for B.T.C. 2001 shall be conducted only from amongst the candidates who have undertaken examination on the last occasion. Meaning there by that the zone of consideration for Special B.T.C. Entrance Test 2001 under Government Order dated 20.10.2005 was confined to the students

who had undergone the said entrance test held in April, 2002.

7. Certain private candidates not being satisfied with the order of the Hon'ble Single Judge filed Special Appeal No. 553 of 2006, which was decided on 31.08.2007 and the Court specifically held that the decision taken by the State Government under Government Order dated 20.10.2005 was a correct decision. For protecting the interest of genuine persons, who had undergone the training, it was observed that if they are successful in the entrance test to be held under Government Order dated 20.10.2005, then there would be no reason for them to undertake the training of two years afresh. For ready reference the order of the Division Bench, relevant for our purposes, is quoted herein below:

"Now coming to the last aspect of the matter whether equity and justice require that the candidates having completed two years of training ought not to have visited penal consequences and, therefore, the State Government's decision should have been set aside. We find that it is true that due to ongoing enquiry and time taken therein, in the meantime the candidates who were selected and admitted have devoted their two years valuable time for the purpose of undergoing the BTC training and we also feel that it would be hard on the part of such candidate who are ultimately excluded having spent their two years valuable time undergoing such training but in the facts and circumstances of the particular case, we find that the State Government has taken a correct decision and also has taken care of training undergone by the genuine persons by providing in the order impugned in the writ petition that ofter having fresh entrance test, the candidates who are ultimately found successful, if had already undergone training, would not be required to undergo such training afresh but the earlier training shall be treated to be a valid training and shall entitle those candidates for appointment in accordance with the rules on the basis of the said training. This taken care of the genuine candidates who have already undergone BTC training but those who failed to get selection cannot claim any benefit since the beneficiaries of wrongful means or wrongful selection are liable to loose the benefit acquired on the basis of such tainted selection and no equity would lie in their favour."

The State of U.P. is said to have made a modification application before the Hon'ble Single Judge in the writ petition, referred to above, which was rejected after observing that the order has merged in the orders of the Division Bench.

8. Instead of carrying out the directions contained in the order of the writ Court as well as of the Division Bench, which had specifically affirmed the Government Order dated 20.10.2005, the State Government became wiser and came out with a fresh Government Order on 29.12.2008 to the effect that the candidates, who had completed two years training in pursuance to the admission for B.T.C. Course-2001 held in April, 2002, they would be required to appear in an examination wherein, if they achieve 33% marks, they would be offered appointment as assistant teacher in Parishadiya Vidhyalayas. This Government Order has been made a sheet anchor for rejecting the representation of the petitioner, who had appeared in the entrance test held in the year 2002 and claims to be a victim of

unfair practice adopted by the State. The Secretary, Basic Education, under the impugned order has recorded that the Government Order dated 29.12.2008 confines the test for the candidates who had completed two years training in pursuance of the selection held in the year 2002, which has been cancelled by the State Government itself in 2005. It has been recorded that since the petitioner had not undergone the training of two years in pursuance to the earlier admissions/selections, they cannot be permitted to appear in the test now held under the Government Order dated 29.12.2008. The order of the Secretary is under challenge in this petition.

9. I am of the prima facie opinion that the order of the Secretary is based on complete non application of mind to the terms and conditions of the Government Order dated 20.10.2005, which has been confirmed by the Hon'ble Single Judge as well as by the Division Bench of this Court.

10. As already noticed above, a fresh entrance test from amongst all the candidates who had undertaken the earlier examination held in April, 2002 was necessary. Only relaxation from training was granted to such candidates who succeed in the entrance examination to be held under Government Order dated 20.10.2005 and who had completed two years training. The Division Bench has specifically held that if such candidates are successful in subsequent examination to be held under Government Order dated 20.10.2005, it will be too harsh to ask such candidates to undergo the training again for the same period of two years. The Government Order dated 29.12.2008 has been made a tool by the State Government to deny consideration for admission to B.T.C. Course 2001 to the candidates like the petitioner, who are victim of illegalities earlier committed by the State itself. The Government Order dated 29.12.2008 over reaches the judgment of the Division Bench referred to above and is an attempt to perpetuate illegalities committed by the State while granting admissions on the basis of entrance test held in the year 2002.

11. Let Secretary, Secondary Education, file is personal affidavit by the next date fixed for explaining the situation and to show cause why this Court may not proceed to impose exceptional cost for unnecessary litigation being generated. He may also explain that once the Government Order dated 20.10.2005 was affirmed by this Court in the year 2005 and directions were issued to act in accordance there to, how could the Government Order dated 29.12.2008 be issued for diluting the directions issued by the Writ Court and as to why proceedings for contempt of the Court may not be initiated against him.

List on 12th April, 2010.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.03.2010

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.

Civil Misc. Writ Petition No. 21446 of 2007

Mohd. Naim ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:

Sri V.P. Shukla

Counsel for the Respondents:
Sri Pramod Bhardwaj
the disciplinary authority bound to give show cause notice-in case of differ the opinion from enquiring report-order-held-not sustainable-quashed-with liberty to pass fresh order after show cause notice.

Held: Para 3

A perusal of the order does not indicate that the petitioner was given any show cause or opportunity prior to the passing of the order dated 16.1.2007. It is also not evident from the impugned order as to what was the reason for disagreeing with the earlier inquiry report. In view of the aforesaid clear position and no counter affidavit having been filed the impugned order dated 16.1.2007 is unsustainable.
Case law discussed:
1998 (8) SCC, Page 1.

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

1. Heard learned counsel for the petitioner.

2. The petitioner has challenged the order dated 16th January, 2007 passed by the District Basic Education Officer, Saharanpur whereby punishment has been imposed on the petitioner by stopping one increment on permanent basis with a further warning to the petitioner on account of the charges levelled against him.

The writ petition was preferred and entertained on 1st May, 2007 and the respondents had accepted notice and were granted time to file counter affidavit. None of the respondents including the Basic Education Shiksha Parishad has

C.S.C.

Constitution of India Art. 226-stoppage of one increment with permanent effect-

filed any counter affidavit till date. A notice in writing has been served on learned counsel for the Basic Shiksha Parishad about this case being taken up today.

In spite of the notice none appears on behalf of the Parishad.

I have heard learned Standing Counsel for the respondents who contends that the order has been passed after a full scale inquiry.

I have perused the impugned order as also the averments contained in the writ petition which have not been controverted by filing any counter affidavit. The petitioner contends that the inquiry had earlier been instituted and satisfied with the reply of the petitioner a recommendation was made for dropping the inquiry. A copy of the same dated 15th April, 2005 is Annexure-3 to the writ petition. It appears that the disciplinary authority did not agree with the said inquiry report and ordered a fresh inquiry which was conducted. On such fresh recommendation by the second Inquiry Officer, the impugned order dated 16th January, 2007 has been passed.

3. A perusal of the order does not indicate that the petitioner was given any show cause or opportunity prior to the passing of the order dated 16.1.2007. It is also not evident from the impugned order as to what was the reason for disagreeing with the earlier inquiry report. In view of the aforesaid clear position and no counter

affidavit having been filed the impugned order dated 16.1.2007 is unsustainable.

Learned Standing Counsel contends that the petitioner has filed a representation and he had a right to file an appeal before the Secretary Basic Shiksha Parishad. It is correct that an alternative remedy is always available in such a matter but in view of the law laid down in the case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai & others, reported in 1998 (8) SCC, Page 1, the aforesaid argument does not hold water inasmuch as the impugned order is absolutely vitiated as pointed out herein above. In view of this, the order dated 16.1.2007 is quashed. The Basic Education Officer shall give a show cause to the petitioner and, thereafter proceed to pass an appropriate order in accordance with law within three months from the date of production of a certified copy of this order before him.

The writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.03.2010

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 16995 of 1992

Ram Singh Katiyar ...Petitioner
Versus
Director of Education, U.P., Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri J.N. Singh
Sri A.K. Saxena

Counsel for the Respondents:
C.S.C.

U.P. High School and Intermediate Colleges (Teachers and other Employees) Payment of Salary Act 1971-Petitioner offered appointment on Post of L.T. grade teacher on 8.9.1991-while substantive vacancy caused due to retirement of earlier substantive appointee on 30.06.1989 and commission failed to recommend suitable candidate-appointment during an imposed by State Government dated 29.06.1991-upheld by Hon'ble High Court-held-even sort term vacancy can not be filed up without publication in two newspaper in view of Radha Raijada Case-not entitled for salary.

Held: Para 6

Learned counsel for the petitioner referred to an interim order of the Division Bench of this Court in Special Appeal No.1237 of 2009 and claims that in similar circumstance an interim order has been granted and therefore, the services of the petitioner may not be interfered with. On examination of the interim order of this Court it is found that none of the issues referred above have been considered, even otherwise it may be recorded that the judgment of this Court in the case of Ashika Prasad Shukla Vs. District Inspector of Schools, Allahabad and another (1998) 3 U.P.L.B.E.C 1722 deals with adhoc appointment against short term vacancy and not against substantive vacancies. It may be clarified that so far as short term vacancies are concerned, appointment was regulated by the Second Removal Order of 1981 which did not require any publication of advertisement. Therefore, the Full Bench in the case of "Radha Raizada & Ors. Vs. Committee of Management & Ors" reported in (1994) 3 UPLBEC 1551 laid down that even in respect of short term vacancies, advertisement in two news papers is must. However, with regards to substantive vacancies the same were to be filled as per Ist Removal of Difficulties

Order, 1981 and it specifically required that on ad-hoc can be made only after the vacancies were advertised in newspaper.

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

1. Petitioner before this Court seeks a writ of mandamus commanding the respondent nos.3 and 4 to pay salary to the petitioner w.e.f. 11.8.1991 and further to declare the ban imposed by respondent no.1 on appointments as illegal.

2. The facts in brief are as follows:-

A substantive vacancy on the post of L.T. Grade Teacher became available in the B.N. Inter College, Bhagwant Nagar, Hardoi due to retirement of the earlier incumbent on 30.6.1989. The provisions of the Intermediate Education Act, 1921, U.P. Secondary Education Services Selection Board Act, 1982 and U.P. High School and Intermediate Colleges (Teachers and other Employees0 (Payment of Salary) Act, 1971 are fully applicable to the teachers of the institution. This vacancy according to the petitioner was requisitioned to the U.P. Secondary Education Services Selection Board and since the Selection Board failed to recommend a suitable candidate, the Committee of Management decided to make ad-hoc appointment on the said post. It is stated that a resolution was passed on 8.9.1991 offering appointment to the petitioner against the said vacancy on adhoc basis. This order according to the petitioner is referable to the powers vested in the Committee of Management under Section 18 of the Act No.5 of 1982. With reference to the aforesaid appointment the petitioner has set up his plea for salary. Reference has been made to the telegram issued by the State

Case law discussed:

1995 (3) U.P.L.B.E.C 1387, 1992(1) U.P.L.B.E.C 582, (1998) 3 U.P.L.B.E.C 1722, (1994) 3 UPLBEC 1551.

Government dated 29.6.1991, wherein ban on appointments has been imposed.

3. I have heard learned counsel for the parties and have gone through the records of the writ petition.

4. Admittedly the appointment of the petitioner was made when ban had been imposed and was in-force. This Court in the case of "**Durgesh Kumari Vs. State of U.P. And others" reported in 1995 (3) U.P.L.B.E.C 1387** has specifically upheld the ban imposed on appointments against the substantive vacancies was legal and valid. The judgment of the Hon'ble Single Judge to the contrary holding that the ban will not apply to appointments under Section 18 in the case of "**Kumar Prabhabati Dikshit Vs. U.P. Madhyamic Siksha Sewa Ayog, Allahabad" reported in 1992(1) U.P.L.B.E.C 582** has specifically been over-ruled.

5. In view of the aforesaid judgments of the Division Bench the prayer for payment of salary or for quashing of the ban must fail. The writ petition is held to be devoid of merits and it is accordingly dismissed.

6. Learned counsel for the petitioner referred to an interim order of the Division Bench of this Court in Special Appeal No.1237 of 2009 and claims that in similar circumstance an interim order has been granted and therefore, the services of the petitioner may not be interfered with. On examination of the interim order of this Court it is found that none of the issues referred above have

been considered, even otherwise it may be recorded that the judgment of this Court in the case of **Ashika Prasad Shukla Vs. District Inspector of Schools, Allahabad and another (1998) 3 U.P.L.B.E.C 1722** deals with adhoc appointment against short term vacancy and not against substantive vacancies. It may be clarified that so far as short term vacancies are concerned, appointment was regulated by the Second Removal Order of 1981 which did not require any publication of advertisement. Therefore, the Full Bench in the case of **"Radha Raizada & Ors. Vs. Committee of Management & Ors" reported in (1994) 3 UPLBEC 1551** laid down that even in respect of short term vacancies, advertisement in two news papers is must. However, with regards to substantive vacancies the same were to be filled as per Ist Removal of Difficulties Order, 1981 and it specifically required that on ad-hoc can be made only after the vacancies were advertised in newspaper.

7. Even otherwise, interim orders do not have any precedential value.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.03.2010

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

Civil Misc. Writ Petition No. 34494 of 1994

Vijay Kumar Upadhayay ...Petitioner
Versus
Regional Dy. Director of Education, Agra and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Bhushan
Ms. Rashmi Tripathi

Counsel for the Respondents:
C.S.C.

Uttar Pradesh Education Department Administration (Delegation of Power) First Amendment Rules 1973- appointment of Class 4th employee in government Girls Inter College-Rule 73 authorise the District Inspectoress of School to appoint class 4th employees- where there is no post of District Inspectress of School-said power exercisable by the D.I.O.S.-petitioner was appointed as Class IVth employee by D.I.O.S.-Regional Deputy Director refused approval on pretext the Principal is the appointing authority-except education code No any statutory provision shown by standing counsel-held-instructions can not override the statutory provisions-order impugned not sustainable quashed.

Held: Para 10

Apart from this, once Rules have been framed under Article 309 of the Constitution then in the hierarchy of the legislation, the said Rule will prevail. The Education Code, which has been compiled as an executive instruction, does not have statutory force where the field is already occupied under the Rules. The Full Bench decision of this Court in the case of Magan Ram Yadava Vs. Deputy Director of Education and others, (1980) UPLBEC 6 (FB) clearly supports the aforesaid conclusion drawn. Learned Standing Counsel has been unable to point out any other Rule which may substantiate the plea taken in the counter-affidavit that the Principal was the appointing authority and not the District Inspector of Schools. In this view of the matter on all counts the order dated 28.9.1994 cannot be sustained.

Case law discussed:
(1980) UPLBEC 6 (FB).

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

1. Heard Ms. Rashmi Tripathi, learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. The petitioner has come up for quashing of the order dated 28.9.1994 passed by Regional Deputy Director of Education - Respondent No.1, whereby a direction was issued to the District Inspector of Schools to cancel the appointment of the petitioner as a class-IV employee in Government High Secondary School, Jasrana, District - Firozabad.

3. The facts shorn of details are that Principal of the institution, which is a government institution, intimated the vacancy to the District Inspector of Schools. The institution was under the control of the District Inspector of Schools and, accordingly, the District Inspector of Schools vide order dated 26.9.1994 appointed the petitioner in the institution as class-IV employee. The said order is Annexure-2 to the writ petition. A copy of the same was also sent to the Respondent No.1, who in turn, intimated the District Inspector of Schools that the appointing authority is not the District Inspector of Schools and, therefore, the order should be cancelled. It was further narrated in the impugned order that the appointing authority is the Regional Deputy Director of Education i.e. the respondent No.1.

4. The petitioner, therefore, has challenged the same on the ground that the Rules which have been framed under Article 309 of the Constitution namely The Uttar Pradesh Education Department Administration (Delegation of Powers) First Amendment Rules 1973, have been notified on 23.10.1973 and the said Rules authorise the District Inspectress of Girls Schools to make such appointment. It has further been submitted that since there is no such Officer posted in the district, therefore, powers are to be exercised by the District Inspector of Schools, who is duly authorized to do so.

5. The respondents have filed a counter-affidavit and have brought on record the provisions of the Education Code. The Education Code is a bunch of executive instructions which have been compiled for the purpose of internal instructions of the education department.

6. Learned Standing Counsel contends that the said Education Code authorizes the Regional Deputy Director of Education and not the District Inspector of Schools. Learned Standing Counsel further submits that the Education Code which applies in such matters, the appointing authority is the Principal of the institution and, therefore, even otherwise the District Inspector of Schools could not have made the appointment.

7. On this, new case is being taken up in the counter-affidavit, a rejoinder-affidavit was filed clearly stating therein that the Education Code does not have statutory force and it does not override the statutory Rules framed under Article 309 of the Constitution. On a direction of this Court, a supplementary- counter-affidavit was filed bringing on record the provisions of the Education Code to which a supplementary-rejoinder-affidavit has been filed in the same terms denying the applicability thereof.

8. The question that arises for consideration in the present writ petition is as to whether the District Inspector of

Schools was authorized to make the appointment under the aforesaid Rules which have been framed under Article 309 of the Constitution or it is the Principal of the institution, who was authorized to make the appointment under the provisions of the Education Code.

9. The respondent - State has been unable to point out any other Rule apart from the provisions of the Education Code which may empower the Regional Deputy Director of Education to make appointment on the post of class-IV employee in the office subordinate to the same. The impugned order, which recites that the Regional Deputy Director of Education is the authority competent, therefore, has no legs to stand on the own showing of the respondents, who state that it is the Principal of the institution, who is the appointing authority. Accordingly, the impugned order dated 28.9.1994 deserves to be set aside on this ground alone.

10. Apart from this, once Rules have been framed under Article 309 of the Constitution then in the hierarchy of the legislation, the said Rule will prevail. The Education Code, which has been compiled as an executive instruction, does not have statutory force where the field is already occupied under the Rules. The Full Bench decision of this Court in the case of Magan Ram Yadava Vs. Deputy Director of Education and others, (1980) UPLBEC 6 (FB) clearly supports the aforesaid conclusion drawn. Learned Standing Counsel has been unable to point out any other Rule which may substantiate the plea taken in the counter-affidavit that the Principal was the appointing authority and not the District Inspector of Schools. In this view of the matter on all counts the order dated 28.9.1994 cannot be sustained.

11. Accordingly, the writ petition is allowed and the order dated 28.9.1994 is quashed. The petitioner shall be entitled to all consequential benefits forthwith. The respondents shall carry out the direction herein above within four weeks from today.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.03.2010

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 36379 of 2003
With
Civil Misc. Writ Petition No. 13104 of 2003

Phool Chand Tiwari ...Petitioner
Versus
Joint Director of Education and others ...Respondents

Counsel for the Petitioner:
Sri R.G. Padia
Sri Prakash Padia

Counsel for the Respondents:
Sri V. Singh
Sri Yashwant Singh 'Subasha'
Sri Kaushal Kumar Singh
Sri Pradeep Verma
C.S.C.

U.P. Intermediate Education Act 1921-Chapter III, Regulation-2-promotion on class III post under 50% promotion quota-only 3 post available under promotion quota-petitioner being senior most class 4th employee was proposed to be promoted under General category-claim about promotion under SC/ST reservation quota-not available if the vacancy is less than 5 post in view of law

laid down by Division Bench decision of Vishwajeet Singh case.
Since the vacancy is within 50% quota for promotion and there is a candidate available for such promotion in the category of Class-IV employee, namely Sri Phool Chand Tiwari, this Court holds that the promotion granted in his favour, as approved by the District Inspector of Schools under order dated 06th June, 2002, is strictly in accordance with law.
Case law discussed:
2006 (4) ALJ 438, 2009(3) ESC 1652, AIR 1995 SC 1371, (2009) 4 UPLBEC 3066.

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

1. These two writ petitions pertain to the same post of clerk in Mathura Inter College Naharpur, Azamgarh. Facts in short giving rise to the present writ petition are as follows:

2. Mathura Inter College Naharpur, Azamgarh is an institution aided and recognized under the provisions of the Intermediate Education Act. There are three sanctioned post of Class-III in the institution. At the relevant point of time three persons were working against the sanctioned posts, namely Mohd. Iqbal, Balbir Singh Yadav and Ramdev Bind. First two candidates were appointed by direct recruitment, while Sri Ramdev Bind was appointed by way of promotion. Sri Balbir Singh Yadav retired on 30.09.2000. The vacancy so caused fell within the 50% quota reserved for promotion in view of Regulation 2 of Chapter-III of the Regulations framed under the Intermediate Education Act read with note appended thereto. There was no candidate belonging to scheduled caste working on Class-III post.

3. Ram Dhani (petitioner in Writ Petition No. 13104 of 2003), who claims to be a member of scheduled caste, therefore, made an application requesting the management of the institution to fill the vacancy from a scheduled caste candidate and since no person belonging to scheduled caste was working in the institution on Class-IV post eligible for such promotion, it was further prayed that the post be filled by direct recruitment. Since this application of the Ram Dhani was not being considered and the committee was not advertising the vacancy for direct recruitment within the reserved category, Sri Ram Dhani filed Writ Petition No. 11629 of 2001. The writ petition was decided under the judgment dated 29th March, 2001 and the District Inspector of Schools was directed to consider the grievance of Sri Ram Dhani.

Held: Para 14

4. In the meantime it appears that the Committee of Management passed a resolution on 16th October, 2001 recommending the promotion of Sri Phool Chand Tiwari (petitioner in Writ Petition No. 36379 of 2003) who was working as a Class-IV employee in the institution and was possessed of all the essential qualifications for such promotion. The District Inspector of Schools by means of the order dated 08th May, 2002 approved the promotion of Sri Phool Chand Tiwari.

5. This, according to Ram Dhani, was illegal for two reasons (a) because of non-consideration of his grievance as per the direction of this Court dated 29th March, 2001, referred to above and (b) because of non-consideration of issue that the vacancy fell within the quota reserved for scheduled caste. Sri Ram Dhani therefore approached the Joint Director of Education. The Joint Director of

Education by means of order dated 29.07.2003 directed the District Inspector of Schools to cancel the approval granted to the promotion of Sri Phool Chand Tiwari, in the background that the vacancy was within the quota for scheduled caste and that a public complaint has been made by Sri Ram Dhani. This order of the Joint Director of Education dated 29th July, 2003 has been challenged by Sri Phool Chand Tiwari by means of Writ Petition No. 36379 of 2003.

6. The District Inspector of Schools forwarded a letter dated 01st July, 2003 to the Joint Director of Education informing him that there are only three Class-III post sanctioned in the institution and therefore no quota of scheduled caste is to be provided for having regard to 21% reservation provided for the purpose. This letter of the District Inspector of Schools has been challenged by Sri Ram Dhani by means of Writ Petition No. 13104 of 2003.

7. I have heard learned counsel for the parties and have gone through the records of the writ petition.

8. Two issues arise for consideration in these writ petitions (a) whether the vacancy caused due to retirement of Balbir Singh Yadav on 30.09.2000 falls within 50% quota for promotion and (b) whether the vacancy has to be reserved for scheduled caste category candidate and if so its effect.

9. So far as the first issued is concerned, this Court may only refer to the provisions of Regulation 2 of Chapter-III of the Regulations framed under the Intermediate Education Act read along with the note appended thereto. The note specifically provides that while calculating 50% of quota for promotion, half and more than half shall be treated to be one. Since in the facts of the case there are three sanctioned post and the promotion quota provided is 50% of the cadre post, it would logically follows that one and half posts would be the promotion quota. Since half is to be read as one, it would therefore result in two post being within the promotion quota.

10. The issue in that regard has been settled under the Division Bench judgment of this Court in the case of ***Jai Bahgwan Singh vs. District Inspector of Schools and others; 2006 (4) ALJ 438***. The issue no. 1 is therefore answered accordingly.

11. So far as the issue no. 2 is concerned, it is an admitted position that there are only three sanctioned post of Clerk in the institution. The reservation provided for scheduled caste category, as admitted to the parties, is 21%.

12. A Division Bench of this Court in the case of ***Dr. Vishwajeet Singh and others vs. State of U.P. and others; 2009(3) ESC 1652***, in paragraph 87 and 88 it has held that for reservation being applied in favour of scheduled caste category candidate there should be at least 5 post in a cadre. The Division Bench has placed reliance upon the Constitution Bench judgment of the Hon'ble Supreme Court in the case of ***R.K. Sabharwal and others v. State of Punjab and others; AIR 1995 SC 1371***.

13. In view of the said Division Bench judgment of this Court in the case of Vishwajeet Singh (to which I was

party), there is no other option but to hold that since there are only three post in category candidate. Consequently, Sri Ram Dhani can have no claim in respect of said post on account of reservation.

14. Since the vacancy is within 50% quota for promotion and there is a candidate available for such promotion in the category of Class-IV employee, namely Sri Phool Chand Tiwari, this Court holds that the promotion granted in his favour, as approved by the District Inspector of Schools under order dated 06th June, 2002, is strictly in accordance with law.

15. Counsel for the petitioner-Ram Dhani, however, brought to the notice of this Court another Division Bench judgment of this Court in the case of ***Mahendra Kumar Gaur vs. District Inspector of Schools (2009) 4 UPLBEC 3066***, wherein it has been held that in the institution if there are only three post and no person of scheduled caste has been appointed, the vacancy caused shall stand reserved for scheduled caste as per the roster and shall be filled by such reserve category of the candidate only.

16. The Division Bench in its judgment in the case of *Mahendra Kumar Gaur* (supra) has not noticed the earlier Division Bench judgment of this Court in the case of Dr. Vishwajeet Singh (supra) and therefore there is absolutely no conflicting opinion qua the law viz-a-viz the applicability of reservation to the cadre which does not have minimum 5 post. This Court finds that the judgment in the case of *Mahendra Kumar Gau*r (supra) is clearly distinguishable.

Class-III cadre in the institution, no post can be reserved for scheduled caste

17. The writ petition filed by Sri Phool Chand Tiwari (i. e. Writ Petition No. 36379 of 2003) is allowed and it is held that his promotion is strictly in accordance with law. The authorities shall take appropriate action accordingly. Order dated 29.07.2003 is hereby quashed. The writ petition filed by Sri Ram Dhani (i. e. wpon 13104 of 2003) is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.03.2010

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 41816 of 2005
Connected with
Civil Misc. Writ Petition No. 43168 of 2005

Pankaj Kumar ...Petitioner
Versus
Hon'ble High Court of Judicature at Allahabad Thru Registrar General and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare
Sri K. Shahi,

Counsel for the Respondents:
Sri Amit Sthalekar
Sri K.R. Sirohi
Sri Rajeev Gupta
C.S.C.,

Constitution of India, Art. 226- Cancellation of appointment-petitioner were selected on the post of stenographer-3 poser advertised-against that 7 appointment made-noticing irregularity-four excess appointments cancelled-on direction of administrative judge to accommodate join vacancy in fast Track Court-working as such-

demand of salary-Registrar General filed its reply with contention of salary be paid from fast track courts fund-without considering the validity of excess appointment-held-public exchequer can not be burdened with liability of salary for omission of authorities-the moment on which all three post full filled-District judge ought to have cancel the list of selection-let Registrar General give salary from its own pocket.

Held: Para 15 & 16

Any appointment made beyond the number of vacancies advertised, is without jurisdiction, therefore, a nullity, in-executable and un-enforceable in law.

In my opinion, the stand of the Registrar General is patently a negation of rule of law, which applies to the employees of the Courts under the superintendence of the High Court like to any other citizens of the Country. Public money cannot be permitted to be used for payment of salary to such void appointees.

Case law discussed:

2005 (2) ESC 1509, AIR 1996 SC 976, AIR 2001 SC 2900.

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

1. Supplementary counter affidavit filed today on behalf of respondent nos. 1 to 3 be taken on record.

2. Heard Sri K. Shahi, learned counsel for the petitioners, Sri Rajiv Gupta, learned counsel for High Court and District Court at Saharanpur and learned Standing Counsel for the State-respondent.

3. These two writ petitions have been filed by four petitioners in all. The facts of both the writ petitions with regard to appointment of all the petitioners are identical. Therefore, a common order is being passed. The facts on record of Civil Misc. Writ Petition No. 41816 of 2005 are being treated to be the leading case.

4. Petitioner before this Court seek quashing of the order dated 28th February, 2010 passed by the District & Sessions Judge, Saharanpur, where-under he has relieved the petitioner from the post of Stenographer on the ground that such appointment was made in excess of the sanctioned posts available in the Judgeship, Shaharanpur. Petitioner further prays for quashing of the order dated 16th May, 2005 where-under respondent no.4 was attached to the Fast Track Court No. 1 as stenographer on deputation.

5. The facts in short leading to the present writ petition are as follows:

6. There were three vacant posts of Stenographers available in the judgeship of District Saharanpur. The said three posts were advertised for appointment. The then District Judge actually appointed seven persons as against three advertised and actual vacancies available. Thus, four persons were appointed as Stenographers against non non-advertised and non-existing posts.

7. The subsequent District Judge on being made aware of the aforesaid situation passed an order 28.2.2005, whereby the appointment of the excess appointees i.e. four Stenographers was ceased. It appears that the aforesaid four persons approached the Administrative Judge of Saharanpur at the relevant time by way of representation. The Administrative Judge passed an order dated 10th July, 2005 directing that the aforesaid four persons be adjusted against the posts, which have been made

available for the Fast Track Court's. The order on the administrative side passed by the Hon'ble High Court is not on record, only the letter indicating the said direction has been annexed as Annexure No.RA-1 to the rejoinder affidavit. The four persons claim to be working in terms of the order passed by the Administrative Judge.

8. They were not paid their salary in absence of suitable posts against which their salary could be drawn. The District Judge, Saharanpur forwarded a letter to the High Court on administrative side dated 19.7.2005 (Annexure No.R.A.-2) seeking a direction as to under which head the salary of the aforesaid four persons is to be released.

9. From the record, it appears that no reply was sent by the High Court to said query. The aforesaid four persons have, therefore, approached this Court by means of these two petitions for a mandamus commanding the respondents to ensure payment of salary as well as for quashing of the order dated 28.2.2005, which has since been modified by the Administrative Judge on the representation made by the petitioner as stated above. On behalf of the petitioner it is vehemently contended that since they are working in the judgeship at Saharanpur, the respondent authorities are under legal obligation to make payment of salary for the work which has been taken from them. It is alleged that begar is prohibited under the Constitution of India.

10. This Court vide order dated 17th March, 2010 required the Registrar General of this Court to examine the grievance of the petitioner and to take a stand on administrative side either in favour of petitioner or against him.

11. Today a supplementary counter affidavit has been filed by the Registrar General of this Court enclosing the decision taken qua the claim of the petitioner. A copy whereof has been enclosed as Annexure-SC-1 to the supplementary counter affidavit. The Registrar General has held that if the petitioners are working as Stenographers in Fast Track Court, their salary be released from the Fast Track Courts' Account and if they are working on the civil side then their salary be drawn from "03-District & Sessions Judge" head.

12. It is worthwhile to reproduce paragraph-8 of the counter affidavit filed on behalf of District Judge in Civil Misc. Writ Petition No. 41816 of 2005 by the Additional District Judge, Court No.8, Saharanpur, which reads as follows:

"8. That in reply to the contents of para 6 of the writ petition it is stated that the selection of 7 posts of Stenographer was illegal and unauthorized. When there was advertisement of only 3 posts, the then District Judge, Saharanpur was not authorized to select/appoint more than 3 candidates. The variation clause in the advertisement is immaterial as opined by the Apex Court."

It is also worthwhile to reproduce paragraphs-12 and 13 of the Counter Affidavit filed by the Deputy Registrar (General), High Court, Allahabad on behalf of the High Court, which reads as follows:

"12. That the answering respondent submits most humbly that it appears that

the aforesaid facts could not be placed for the consideration of or notice of the Hon'ble Administrative Judge of this Hon'ble Court and because of this, His Lordship proceeded on the assumption that the Petitioners had been appointed in vacancies in Fast Track Courts. The order dated 11.7.2005 came to be passed by the Registrar General of this Hon'ble Court in implementation of the above order made by the Hon'ble Administrative Judge.

13. That the appointment of the petitioner is a nullity in light of the judgment of this Hon'ble Court rendered in the case of ***District Judge, Baghpat versus Anurag Kumar, reported in 2005 (2) ESC 1509****."*

13. This Court is sorry to record that the Registrar General has not cared to examine as to whether the appointment of the petitioner was in accordance with law or not and as to how any person appointed in excess of sanctioned posts in the judgeship at Saharanpur, can be paid salary from the State Funds.

From the facts, which have been noticed herein above, it is apparently clear that there were only 3 posts of Stenographer actually vacant within the sanctioned strength in the Judgeship of Saharanpur. Advertisement published for the purpose also mentioned that there were three vacant posts, yet the District Judge concerned passed an order appointing 7 persons. The High Court on the administrative side should have cancelled such appointment, inasmuch as the Hon'ble Supreme Court of India has repeatedly held that (a) once the number of vacancies advertised have been filled, the select list became non est and cannot be utilized for any purpose whatsoever, (b) any appointment in excess of the sanctioned posts would be void ab nitio.

In the case of **Ashok Kumar & Ors. versus Chairman, Banking Service Recruitment Board & Ors.**, reported in *AIR 1996 SC 976*, the Hon'ble Supreme Court of India has held as follows:

"5. Article 14 read with Article 16 (1) of the Constitution enshrines fundamental right to every citizen to claim consideration for appointment to a post under the State. Therefore, vacant posts arising or expected should be notified inviting applications from all eligible candidates to be considered for their selection in accordance with their merit. The recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16 (1) of the Constitution..... Boards should notify the existing and excepted vacancies and the Recruitment Board should get advertisement published and recruitment should strictly be made by the respective Boards in accordance with the procedure to the notified vacancies but not to any vacancies that may arise during the process of selection. (Emphasis added)

14. In the case of **State of Punjab Vs. Raghbir Chand Sharma & Ors.**, reported in *AIR 2001 SC 2900*, the Apex Court examined the case where only one post was advertised and the candidate whose name appeared at Serial No. 1 in the select list joined the post, but subsequently resigned. The Court rejected the contention that post can be filled up offering the appointment to the next candidate in the select list observing as follows:

"With the appointment of the first candidate for the only post in respect of to exist and has outlived its utility and at any rate, no one else in the panel can legitimately contend that he should have been offered appointment either in the vacancy arising on account of the subsequent resignation of the person appointed from the panel or any other vacancies arising subsequently."

15. Any appointment made beyond the number of vacancies advertised, is without jurisdiction, therefore, a nullity, in-executable and un-enforceable in law.

16. The factual situation in this case is worst, as there was no vacancy against any sanctioned post qua which the four persons could be appointed.

17. This Court may clarify that petitioner relied upon an order passed by the Administrative Judge of the Judgeship of Saharanpur at the relevant time, wherein petitioner was directed to be adjusted in the Fast Track Courts. I am of the prima facie opinion that such orders of the Administrative Judge will not infuse life in void appointment of the petitioner and the High Court should have normally taken appropriate action to ensure that any person appointed in excess of the sanctioned and advertised post, is not permitted to work. Mistake, if any, should have been corrected, but such is not the practice in the High Court. For five years, the Registrar General has slept over the file and today an affidavit is being filed on his behalf that since the petitioners are working, they should be paid salary.

18. In my opinion, the stand of the Registrar General is patently a negation of *which the consideration came to be made and select list prepared, the panel ceased*

rule of law, which applies to the employees of the Courts under the superintendence of the High Court like to any other citizens of the Country. Public money cannot be permitted to be used for payment of salary to such void appointees.

19. However, if the Registrar General of the High Court has taken a decision to pay salary to such class of appointees, let him do so from his own pocket. It is made clear that Government money shall not be utilized for the purposes of payment of salary to the petitioners, whose appointment, prima facie, has been made in excess of the sanctioned post and in excess of advertised posts. He must transmit requisite money to the District Judge, Sahanpur for the purpose from his personal account within four weeks from today.

20. List this matter for further orders after four weeks. In the meantime, petitioners are at liberty to file an affidavit justifying their appointment.

ORIGINAL JURISDCITION
CIVIL SIDE
DATED: ALLAHABAD 15.03.2010

BEFORE
THE HON'BLE B.K. NARAYANA, J.

Civil Misc. Writ Petition No. 61111 of 2008

Smt. Somawati and others ...Petitioners
Versus
The District Magistrate, Bareilly and others ...Respondents

Counsel for the Petitioner:
Sri Pradeep Saxena

Counsel for the Respondents:
Sri S.N. Rahul
C.S.C.

Uttar Pradesh Punchayat Raj (Removal of Pradhan-Up Pradhan and Member) enquiry Rules 1997-Rule 4 (2)- Preliminary enquiry by executive officer-village Pradhan was found prima faci guilty of mis appropriation-ceasing financial and administrative power-three members committee appointed-under political pressure the D.M. appointed joint enquiry committee-based upon such collusive enquiry report-power restored back to village Pradhan-held-illegal-No provision of joint enquiry-nor any satisfactory explanation given for appointment of second joint enquiry-order passed by D.M.-restoring financial & administrative power quashed-direction issued to finilised the proceeding for Removal within time bound period.

Held: Para 11

The financial and administrative powers of the Gram Pradhan so ceased cannot be restored unless the Pradhan is exonerated of the charges made against him in the final enquiry as provided by first proviso to Section 95 (1) (g) of the Act. This having not been done in the present case, the impugned order restoring the financial and administrative powers of the Gram Pradhan cannot be sustained.

Case law discussed:
2005 (99) R.D. 434.

(Delivered by Hon'ble B. K. Narayana, J.)

1. Heard learned counsel for the petitioners and the learned standing counsel for the respondents.

2. This writ petition has been filed challenging the order dated 22.11.2008 passed by the District Magistrate, Bareilly.

3. The petitioners claim that they are elected members of Gram Panchayat, Badagaon, Village-Badagaon, Block Bhadpura, Tehsil-Nawabganj, District-Bareilly. The Gram Sabha consists of three villages. One member of Gram Panchayat was elected from each of the village. On a complaint made by the Gaon Sabha regarding irregularity in working of the Gram Pradhan, his financial and administrative powers were ceased.

4. A preliminary enquiry was conducted by the respondent no. 2 the Zila Panchayat Raj Officer, Bareilly wherein he found that respondent no. 5 guilty of misappropriation and recommended for action against the Gram Pradhan in accordance with law.

5. The Zila Panchayat Raj Adhikari, Bareilly thereafter constituted a Committee for exercise of financial powers of Gram Pradhan. The members of the Gram Sabha were not satisfied with the steps taken by the D.P.R.O., hence they made a complaint to the District Magistrate, Bareilly in this regard. Thereafter the Zila Panchayat Raj Adhikari, Bareilly, directed the Block Development Officer, Block Bhadpura, District- Bareilly for convening a meeting of elected members of Gram Panchayat for constituting a three members committee amongst themselves for functioning in place of Gram Pradhan. After the meeting the District Magistrate (1) constituted a three members committee including the petitioners and also nominated Sri D. K. Jain Executive

Engineer, PWD, Bareilly as Enquiry Officer, who has submitted his report with the finding that respondent no. 5 had misappropriated an amount of Rs. 74,457/- in the various development works undertaken under the government schemes for upliftment of the village.

6. Consequently a show- cause notice dated 24.03.2008 was issued by the District Magistrate under Section 95 (1) (g) to the Gram Pradhan to show cause as to why he should not be removed from the post of Gram Pradhan. By the same notice, the financial and administrative powers of the Gram Pradhan were also ceased by him in the exercise of his power under first proviso to Section 95 (1) (g) of the U.P. Panchayat Raj Act, 1947 (hereinafter referred to as the Act).

7. The grievance of the petitioners is that instead of showing cause, the Pradhan brought political pressure upon the authorities for nomination of another enquiry officer and the District Magistrate thereafter appointed Sahayak Nidesak (Matsya), Bareilly and Junior Engineer (Gram Abhiyantran Sewa), Block Nawabganj, District-Bareilly, Sri D. K. Jain to inquire into the matter afresh, who has been arrayed as respondent no. 3 and 4 in the writ petition.

8. It is stated that that without considering the facts and circumstances of the case, the enquiry officers submitted enquiry report in favour of the Gram Pradhan and the District Magistrate on the basis of report so submitted by respondent nos. 3 and 4 restored the financial and administrative powers of respondent no. 5.

9. Learned counsel for the petitioners contended that the enquiry report submitted by the respondent no. 3 and 4 is collusive and that it has been given under political pressure as they were appointed under political pressure exerted by the Gram Pradhan, respondent no. 5 through the Minister/MLS's and MP's of various political parties.

10. Learned standing counsel submitted that the second enquiry was ordered in view of the fact that the enquiry report submitted by the Executive Officer was not found to be satisfactory however he miserably failed to substantiate his submission and to indicate any reason as to why the enquiry report submitted by the Executive Officer was not satisfactory. He also failed to show any provisions under the Act authorising the District Magistrate upon receipt of the preliminary enquiry report under Rule 4 (2) of the Uttar Pradesh Panchayat Raj (Removal of Pradhans, U.P.-Pradhans and Members) Enquiry Rules, 1997 (hereinafter referred to as the Rules) to order a fresh preliminary enquiry.

11. After examining the contentions advanced by the learned counsel for the parties and perusing the record of the writ petition as well as the impugned order, I have no hesitation in holding that there is no provision either under the Act or the Rules for holding joint enquiry after the preliminary enquiry report under Rule 4 (2) of the Rules has been submitted. The District Magistrate clearly erred in law and acted without jurisdiction in ordering joint enquiry in the matter after the preliminary enquiry was conducted by the Executive Officer and he submitted in his report that the Pradhan of the Gram Sabha was guilty of all the charges made against him and thereafter the show cause notice was issued on the basis of said

preliminary enquiry report to the respondent no. 5 for filing his reply to the charge sheet and his financial and administrative powers were ceased. The financial and administrative powers of the Gram Pradhan so ceased cannot be restored unless the Pradhan is exonerated of the charges made against him in the final enquiry as provided by first proviso to Section 95 (1) (g) of the Act. This having not been done in the present case, the impugned order restoring the financial and administrative powers of the Gram Pradhan cannot be sustained.

12. It is apparent that the the second enquiry was conducted without jurisdiction with a view to confer undue advantage upon the petitioners.

13. This court in the case of ***Govind Prasad Vs. State of U.P. and other reported in 2005 (99) R.D. 434***, while considering the same issue, held in paragraph 9 and 10, as quoted here under:

"9. Thus, it is not open to the District Magistrate to recall his order ceasing the financial and administrative powers of the Pradhan until the final enquiry report has been obtained and the Pradhan is exonerated of the charges levelled against him/her.

10. In view of the aforesaid settled legal position, the Court is satisfied that the District Magistrate had no authority of law to recall the order whereby the financial and administrative powers of the Pradhan had been ceased, so long as final enquiry report as contemplated by Rule 5 had not been obtained from the nominated final Enquiry Officer and the District Magistrate on the basis of said enquiry report is satisfied that the charges as levelled against the Pradhan were not made out."

14. For the aforesaid, the impugned order dated 22.11.2008 as well as the enquiry report date 12.11.2008 cannot be sustained and are liable to be set aside.

15. The writ petition is allowed. The order dated 22.11.2008 (Annexure no. 1 to the writ petition) passed by respondent no. 1 District Magistrate Bareilly and the enquiry report dated 12.11.2008 submitted by respondent nos. 3 and 4 are hereby quahsed.

16. The District Magistrate Bareilly is directed to finalise the proceedings for removal of Pradhan of Gram Sabha within a period of one month from the date of production of certified copy of this order before him.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.03.2010

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 67881 of 2006

Allahabad Bank Staff Association and others ...Petitioners

Versus

Chairman and M.D., Allahabad Bank H.O. Kolkata and others ...Respondents

Counsel for the Petitioners:
Smt. C.K. Chaturvedi

Counsel for the Respondents:
Sri Tarun Varma
Sri Himanshu Tiwari

Constitution of India, Art. 226- Compassionate appointment-claim of

petitioner-processed by Bank by order 9.10.2004 prior to final consideration by circular dated 4.2.2005 change of policy-instead of compassionate appointment-bank decided to provide ex-gratia direction for appointment within six weeks issued.

Held: Para 10

This Court therefore, holds that both on the date the application was made as well as on the date it was finally considered by the Personnel Administrative Department of the Bank, the scheme as was applicable provided for compassionate appointment. The enforcement of scheme dated 04.02.2005, which has done away with compassionate appointment, has no application qua the case of the petitioner.

Case law discussed:

(2007) 2 SCC (L&S) 578 (specifically para 26), 1998 (1) ESC, 74 (S.C.).

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

1. The applications made by the petitioners no. 3 and 4 for compassionate appointment in view of the death of their father during harness while working with Allahabad Bank have been refused acceptance with the remark that in view of the changed scheme of the Allahabad Bank, only ex gratia payment is to be provided to the dependents of an employee dying during harness. The petitioners may, therefore, submit their applications in proper form for computation of ex gratia payment. The order dated 20.02.2006 in that regard has been challenged by means of the present writ petition. It has been stated that the applications of the petitioners for compassionate appointment were processed as early as on 09.10.2004 by the Personnel Administrative Department at the Head Office of the Allahabad Bank.

amount hence no appointment can be made-held-circular dated 04.02.2005 being prospective nature-can not come in way of appointment of petitioner-

Compassionate appointments were approved under the said resolution. However before the resolution could be given effect to and appointment could be offered, there was change in the Scheme pertaining to compassionate appointment enforced in the Bank. On 04.02.2005 a Circular was issued by the Allahabad Bank for providing payment of ex gratia amount to the dependent of the employees dying during harness. It is stated that under the said Scheme which was become effective from 18.12.2004, the right of compassionate appointment has been taken away.

2. The counsel for the petitioner submits that Scheme is prospective in nature and will not have the effect of taking away the right of the petitioners for compassionate appointment which was approved by the Personnel Administrative Department of the Bank in its Meeting dated 09.10.2004. He submits that since the Scheme is prospective in nature, the right accrued in favour of the petitioner under the earlier scheme will not be adversely effected. He has placed reliance upon the judgment of the Hon'ble Supreme Court in the case of State Bank of India and others vs. Jaspal Kaur, (2007) 2 SCC (L&S) 578 (specifically para 26), which lays down that the case of compassionate appointment has to be considered on the date the application was made. He points out that on the date of making the application and even on the date of final consideration of his application by the Personnel Administrative Department of Bank in its meeting held on 09.10.2004, the scheme

providing for compassionate appointment was in force.

3. On behalf of the respondent Bank, it is stated that mere approval of the name of the petitioner for compassionate appointment will not create any right in their favour and, therefore, if the Bank has decided to do away with compassionate appointment under its Scheme floated on 04.02.2005 which has come into effect on 18.12.2004, no compassionate appointment can be offered subsequent to that date irrespective of the fact whether the application for compassionate appointment was made, processed and approved prior to the enforcement of the new Scheme. He submits that in view of the judgment of the Hon'ble Supreme Court in the case of Government of Orissa through Secretary Commerce and Transport Department, Bhubaneshwar vs. Haraprasad and others reported in 1998 (1) ESC, 74 (S.C.), no right is conferred merely because of empanelment of the candidate in the select list.

4. Counsel for the respondent bank clarifies in reply that since no appointment letter was issued and in between the scheme was altered, it cannot be said that his claim was finally considered under resolution dated 09.10.2004. No appointment on compassionate ground can be offered after the enforcement of scheme of 2005.

5. I have heard learned counsel for the parties and have gone through the records of the writ petition.

6. The issue with regard to the consideration of an application for compassionate appointment has been examined by the Hon'ble Supreme Court in the case of State Bank of India and others vs. Jaspal Kaur (supra) and in paragraph 26 it has been held as follows:

"26. Finally in the fact situation of this case, Shri Sukhbir Inder Singh (late), Record Assistant (Cash & Accounts) on 1-8-1999, in the Dhab Wasti Rm, Amritsar Branch, passed away. The respondent, widow of Shri Sukhbir Inder Singh applied for compassionate appointment in the appellant Bank on 5-2-2000 under the scheme which was formulated in 2005. The High Court also erred in deciding the matter in favour of the respondent applying the scheme formulated on 4-8-2005, when her application was made in 2000. A dispute arising in 2000 cannot be decided on the basis of a scheme that came into place much after the dispute arose, in the present matter in 2005. Therefore, the claim of the respondent that the income of the family of the deceased is Rs 5855 only, which is less than 40% of the salary last drawn by late Shri Sukhbir Inder Singh, in contradiction to the 2005 scheme does not hold water."

7. In view of the aforesaid conclusion drawn by the Hon'ble Supreme Court it has to be examined in the facts of the present case as to under which scheme the claim of the petitioner has to be considered. Since the application for compassionate appointment was made by the petitioner in the year 2002-2003 and at the relevant point of time the scheme in force provided for compassionate appointment, his application was liable to be considered in accordance with the said scheme only.

8. This Court may now deal with the contention raised on behalf of the

respondent bank to the effect that there has been no final consideration of the application of the petitioner till the issuance of scheme 2005.
Department of the Bank as per its meeting dated 09th October, 2004 the application of the petitioner for compassionate appointment was allowed and he was directed to be offered compassionate appointment. The application of the petitioner stood finally disposed of and what remained was the performance of the ministerial act of issuance of the appointment letter.

10. This Court therefore, holds that both on the date the application was made as well as on the date it was finally considered by the Personnel Administrative Department of the Bank, the scheme as was applicable provided for compassionate appointment. The enforcement of scheme dated 04.02.2005, which has done away with compassionate appointment, has no application qua the case of the petitioner.

11. The writ petition is therefore allowed. Respondent bank is directed to take appropriate action for appointment of the petitioner in terms of the decision of the Personnel Administrative Department of the Bank dated 09.10.2004, preferably within six weeks from the date a certified copy of this order is filed before the authority concerned.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.03.2010

BEFORE
THE HON'BLE R.K. AGRAWAL, J.
THE HON'BLE MRS. JAYASHREE TIWARI, J.

Civil Misc. Writ Petition No. 24138 of 2002

9. In the opinion of the Court the contention is totally misplaced. Under the resolution of the Personnel Administrative

S.N. F. Alloy Private Limited ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Dinesh Dwivedi
Sri S. Ali Murtaza

Counsel for the Respondents:
Sri Ajay Bhanot
C.S.C.

Constitution of India, Art. 226-U.P. Zamindari Abolition and Land Reform Rules, 1952-Rules 255 and 259-Recovery of 10% collection charges-held untenable, unsustainable-except Rs.3.75 no other amount can be charged against collection charges.

Held: Para 6

In view of the case law as referred above, it is apparently clear that collection charges at the rate of 10% is wholly unjustifiable and hence the petition succeeds and is allowed. The respondents are directed not to insist payment of collection charges more than Rs.3.75 in respect of recovery of the amount as claimed by them in the demand notice which is annexure 4 to the writ petition.

Case law discussed:
1998(2) AWC 1196, writ petition No. 4307 of 1981.

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

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

2. By virtue of present writ petition the petitioner is challenging the order of

recovery of the collection charges to the tune of 10%. It is contended by the learned counsel for the petitioner that the recovery certificate was issued for recovery of the amount due. Subsequently, vide letter dated 24.12.2001 the same recovery certificate was requested to be returned immediately for consideration, confirmation and verification of the account which is Annexure 2 to the letter. Again recovery certificate was issued for recovering the amount mentioned in the alleged recovery certificate which is annexure 3 to the writ petition. By virtue of annexure 4 a demand notice was sent for recovery of collection charges upto the tune of 10% of the amount sought to be recovered.

3. The contention of the learned counsel for the petitioner is that the first recovery citation was suo moto called back by the issuing authority and subsequently another recovery citation was issued. Infact, no proceedings in pursuance of the recovery certificates were started or commenced which may cause an occasion for enhanced demand for collection charges. He submitted that he is mainly aggrieved on the point of demand of collection charges @10% and submitted that such demand can not exceed beyond the rate of Rs.3.75 and demand in excess is wholly unsustainable.

4. Learned Standing counsel for the State conceded the facts and situations raised by the learned counsel for the petitioner regarding the processing of the recovery certificate.

5. Learned counsel for the petitioner referred to a case law reported in 1998(2) AWC 1196 **Asha Textiles (P) Ltd. & another vs. State of U.P. & others** wherein it has been held that U.P. Zamindari Abolition and Land Reforms Rules, 1952- Rules 255 and 259- Recovery as Arrears of Land Revenue - Collection Charges- Recoverable at rate of Rs.3.75 and not more- Demand in excess thereof - wholly unsustainable. In the same Division Bench ruling the decision given in Civil Misc. writ petition No. 4307 of 1981 **M/s. Chemopulp Tissues Limited Vs. State of U.P. and others** has been referred as such that the collection charges can be recovered at the rate of Rs.3.75 only and not more than that. It was held in the aforesaid case referred above that recovery charges can not exceed more than Rs.3.75 and the demand of the respondents in excess thereof is wholly untenable.

6. In view of the case law as referred above, it is apparently clear that collection charges at the rate of 10% is wholly unjustifiable and hence the petition succeeds and is allowed. The respondents are directed not to insist payment of collection charges more than Rs.3.75 in respect of recovery of the amount as claimed by them in the demand notice which is annexure 4 to the writ petition.

7. The writ petition succeeds and is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.03.2010

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

Civil Misc. Writ Petition No. 25871 of 2009

Pancham Giri ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Praveen Kumar Giri
Sri K.M. Tripathi

U.P. Subordinate Police Officers (Punishment and Appeal) Rules 199- Dismissal order on ground of having second wife-without divorce his first wife-complaint made after 24 years of second marriage-first wife suffering from cancer in utress-explanation given to get male issue for last spiritual performances as from fist wife there were three daughters who have been married earlier-entering into second marriage may be punishable offence but has no concern with affairs of his duty-for omission prior to 24 years at the end of service carrier-punishment of dismissal too much harsh-direction issued to award minor punishment.

Held: Para 43 & 44

The conduct of the petitioner was an absolute personal affair of the petitioner in relation to the consummation of second marriage and the same had got nothing to do with the affairs of the State or the discharge of his public duty to that extent. The judgment in the case of Amal Kumar Baruah of the Guwahati High Court (supra) comes to the aid of the petitioner.

Accordingly, for the reasons given herein above and in the peculiar facts of the present case as discussed I would prefer to set aside the order of the revising authority dated 18th November, 2008 passed by the Inspector General of Police, Allahabad Zone, Allahabad to the aforesaid extent only. The Inspector General of Police may, therefore, consider the aforesaid limited aspect of proportionality as the other aspects need not be interfered with. To that extent, the order dated 18th November, 2008 is set aside with a direction to the respondent no. 2 to pass an order after assessing the aforesaid factors in accordance with law.

Counsel for the Respondents:
C.S.C.

Case law discussed:
W.P. No. 27963 of 2007 decided on 23.07.2009, W.P. No. 7080 of 1995, 2006 (3) GLR 106, 2006 (2) ALT 112, 2002 (1) LBESR 1046, 2008 (1) ESC 350, 2006 (5) ALJ 307, 1983 (2) SCC 442, 1987 (4) SCC 611, 1994 Supp. (3) 775, 1998 (9) SCC 416, 2005 (2) SCC 489, 2005 (7) SCC 338.

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

1. The petitioner, a Head Constable of the U.P. Police and a government servant, has been dismissed from service on the charge of contracting a second marriage, even though the first spouse was living without permission of the competent authority. This case is not unique because of the point of law involved, but because of its peculiar facts where the petitioner has been assessed by the respondents to be the perpetrator of his own misfortunes. Interestingly enough, the petitioner basking in the glory of his cultural belief, set upon to have a second wife during the life time of the first one, only to realise after quarter of a century that he was guilty of misconduct as a government servant for having entered into this bigamous relationship.

2. This began with, as usual, by a complaint made by one Mr. Matamber Tiwari, who is a resident of the same village as the petitioner. The petitioner alleges that Mr. Matamber Tiwari was annoyed on account of a land transaction, which involved the two wives of the petitioner, and this long enmity manifested itself in the complaint made by Mr. Matamber Tiwari to the Deputy Inspector General of Police, Allahabad. By this time,

when the complaint was made in the year 2007, the petitioner had almost completed his service tenure and was about to retire after a year. The complaint which was made in 2007 contained a recital that the petitioner had entered into a second marriage without requisite permission and he was, therefore, continuing in service in violation of Rule 29 of the U.P. Government Servant Conduct Rules, 1956. Rule 29 is quoted below for ready reference:

"29. Bigamous marriages-(1) No Government servant who has a wife living shall contract another marriage without first obtaining the permission of the Government, notwithstanding that such subsequent marriage is permissible under the personal law for the time being applicable to him.
(2) No female Government servant shall marry any person who has a wife living without fist obtaining the permission of the Government."

3. The petitioner is a Hindu by religion, which fact is undisputed. Section 17 of the Hindu Marriage Act makes bigamy punishable under Sections 494 and 495 of the Indian Penal Code. Section 17 of the Hindu Marriage Act is quoted below:

"17. Punishment of bigamy-Any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living; and the provisions of sections 498 and 495 of the Indian Penal Code (45 of 1860), shall apply accordingly."

4. The complaint which was the outcome of a evil neighbours design, saw its way to an inquiry, which in the preliminary round was conducted by the Circle Officer, Shri A.K. Shukla, who submitted a report on 25th March, 2008. The petitioner was issued a notice informing him that the report in relation to his alleged bigamous relationship has been received and one Mr. Shiv Baran Singh another Circle Officer was appointed as an Enquiry Officer to conduct a regular inquiry under the U.P. Subordinate Police Officers (Punishment and Appeal) Rules, 1991. The Enquiry Officer served the petitioner with a charge sheet dated 5th April, 2008 and after conducting the inquiry submitted a report on 28th May, 2008. The petitioner was found to have contracted a second marriage without permission of the State Government which amounted to a misconduct. A show cause notice, after the inquiry, was issued to the petitioner on 1st June, 2008 whereafter the explanation submitted by the petitioner, the Enquiry Officer's report and the evidence on record was taken into account and the petitioner was punished by dismissal from service on 21st June, 2008. The petitioner preferred an appeal, which was also dismissed on 20th August, 2008 and a revision filed before the Inspector General of Police against the order of the Appellate Authority was also dismissed on 18.11.2008. The petitioner has justified his actions and questioned the legality and correctness of the aforesaid orders impugned in the present writ petition and has prayed for quashing of the same with a direction to the respondents to treat him as a regular employee and award him all such benefits even after his retirement. It is undisputed that the petitioner has also attained his age of superannuation which he would have attained even otherwise during the course of these proceedings.

5. The petitioner having been deprived of his livelihood and his future pension contends that while he was in service in the prime of his life, he was blessed with four daughters from his first wife Parvati. One of the daughters died and three, who survived were married by the petitioner respectively. However, his first wife was allegedly suffering from cancer of the uterus and, therefore, with her consent the petitioner contracted the second marriage with Dewrati in the year 1982 only for the sole purpose of having a son, whose birth would guarantee his salvation and emancipation from this world as per accepted Hindu religious belief. The petitioner contends that this second marriage was under the aforesaid compulsory circumstances, which emanated out of this old traditional and orthodox belief that had a moral and religious sanction behind it. The petitioner consummated the second marriage for the said purpose, which has been admitted by himself throughout the inquiry proceedings and is also corroborated by the statement of the first wife Parvati, who was produced as a witness during the inquiry proceedings. The petitioner had also taken a defence that he had duly intimated the then Superintendent of Police, Farrukhabad, Mr. G.P. Sharma about his intention to do so, and a plea was also set up before the authorities that permission had been granted by the then Superintendent of Police. The petitioner, however, failed to produce any documentary evidence to demonstrate the same on this score. The Enquiry Officer found the petitioner to have misconducted himself, which finding was accepted by the Disciplinary Authority and the services of the petitioner were dispensed with accordingly.

6. In appeal, the petitioner raised several grounds including the ground of dis-proportionality of the punishment and all other grounds which had been raised before the Disciplinary Authority. The Appellate Authority, in addition to the reasons given by the punishing authority, further held that even otherwise the Superintendent of Police had no authority to extend any such permission and it was to be given by the State Government or an Officer authorized in this behalf. In the absence of any such document to substantiate the said plea, the conduct of the petitioner was in breach of Rule 29 aforesaid. The Appellate Authority further recorded that such a permission can only be granted where the first wife is dead, or she is mentally unsound or there is a divorce established under law. The Appellate Authority held that none of these contingencies did exist and even if, the subsequent marriage was permissible under the personal law of the petitioner, he was not entitled to any such permission. Thus, the conclusion of the Appellate Authority was that firstly, there was a complete lack of evidence of permission and secondly, no such permission could have been granted to the petitioner. On the question of proportionality, the Appellate Authority did not find any valid reason to interfere with the same and accordingly rejected the appeal.

7. The petitioner in his revision raised all the aforesaid issues and further questioned the correctness of proportionality on the ground of sub Rule 3 of Rule 29 that a different punishment ought to have been awarded. He further raised the issue that if the second marriage was not permissible in law then it was void and a void marriage cannot be made the basis for invoking the provision of Rule

29, which contemplates a subsisting and valid bigamous relationship. The petitioner further submitted that no evidence was led by the department to dislodge the stand of the petitioner that he had sought permission and since no evidence was led in the negative, therefore, the procedure adopted by the respondents is defective and no inference of not having sought valid permission could have been drawn. The issue of proportionality was again repeated but the revisional authority negatived all these contentions by recording clear findings. It was found by the revising authority that sub-Rule 3 of Rule 29 had already been deleted through a notification dated 20.10.1976 and, therefore, a lesser punishment could not have been awarded. The question of marriage being void was also turned down on the ground that the conduct of the petitioner of having the company of another woman and begetting a child out of the said relationship under any circumstance cannot be accepted as a circumstance to avoid punishment of misconduct, inasmuch as, the petitioner had according to his own admission contracted the second marriage. Taking an over all view of the situation, the Inspector General of Police did not find the punishment to be disproportionate and upheld the orders under challenge.

8. Shri K.M. Tripathi, learned counsel for the petitioner has advanced his submissions to the best of his abilities and he submits that apart from the correctness of the orders that have been assailed, the petitioner has been punished disproportionately which shocks the conscience in the given background of the case and, therefore, the orders impugned are liable to be set aside. Learned counsel has relied on several decisions to substantiate his arguments. The judgments relied on are that of (1) ***Writ Petition No. 27963 of 2007 (Smt. Raj Bala Sharma Vs. State of U.P. and others)*** decided on 23.07.2009, (2) ***Writ Petition No. 7080 of 1995 (Awadhesh Chandra Sharma Vs. U.P.P. Service Tribunal Lucknow and others,*** (3) ***Amal Kumar Baruah Vs. State of Assam and others*** reported in 2006 (3) GLR 106, (4) ***Syed Azad Vs. Divisional Security Commissioner, Railway Protection Force, Scr and another*** reported in 2006 (2) ALT 112 and (5) ***Narendra Kumar Jain Vs. Food Corporation of India and others*** reported in 2002 (1) LBESR 1046.

9. Learned standing counsel, on the other hand, urged that the petitioner having admitted the second marriage, it is not open to him to question the factual basis of the same to gain any advantage by raising a legal argument. It is submitted on behalf of the State that the action of the petitioner was a clear case of misconduct and the same having been discovered after more than 25 years, does not in any way dilute the misconduct committed by the petitioner. There is no dilution of the impact of Rule 29 merely because of passage of time and the consequences have to be accepted in law. Learned standing counsel relied on two decisions namely that of ***Ramesh Pal Singh Vs. Union of India and others*** reported in ***2008 (1) ESC 350*** and ***Veerpal Singh Vs. Senior Superintendent of Police and others*** reported in ***2006 (5) ALJ 307*** to contend that the guilt having been established, the petitioner has been clearly found to have committed a misconduct and, therefore, the punishment is not dis-proportionate. It is submitted that the petitioner has voluntarily entered into the second marriage and there was no such legal

compulsion or any other justification available to petitioner in law so as to justify his conduct of second marriage and, therefore, a mere convenience which has been given the shape of a moral sanction, disentitled the petitioner from any compassion. The impugned orders therefore deserve to be affirmed.

10. I have heard Shri K.M. Tripathi and Shri P.K. Giri, for the petitioner, the learned standing counsel for the respondents and perused the affidavits that have been exchanged between the parties.

11. The petitioner's effort is to justify his second marriage on the principles of certain moral and religious sanctions which he believes to be necessary for his benefit and the benefit which he is likely to receive upon his departure from this world. His belief is that his soul and that of his ancestors will rest in peace if he dies leaving behind a son to discharge his pious obligations. It is not only the petitioner but his first wife Parvati as well who has clearly stated in her statement before the Enquiry Officer that husband and wife both profess honestly to believe that if the husband contracts a second marriage for the purpose of having a son, this will help to bring about salvation of the parents. The son born out of the second wedlock would in their belief would be the only competent person who would be entitled to perform the rites and duties for such obligations, and as fate would have it, the petitioner and his second wife has been blessed with three sons and one daughter. The petitioner, in my opinion, has a right to have believed in his moral convictions and for that it was open to him to conduct himself in a manner so as to furnish faith to his belief. But it was not open to the petitioner to do this without the permission of the State Government. It is for this reason that the limitations have been prescribed in Rule 29. Rule 29 is permissive in nature and not prohibitory to the extent of absolute exclusion of a second marriage. The limitations are, however, in the absence of the first spouse or her mental unsoundness or a situation where the husband is a divorcee. These are the limitations prescribed by law to define the limits of a decent conduct of a government servant. Bigamy would not be a misconduct to the aforesaid extent. The permission to be granted by the State Government takes care of the basic need of human life and in my opinion, is a measure of social improvement. The petitioner may be thinking rightly and for him it was courteous to have obtained the consent of the first wife, but in my opinion, the personal morals of the petitioner was confined to his own necessity of satisfying his religious belief. This personal need of the petitioner to make it convenient for him to fortify his religious belief may have a moral sanction but it does not have a sanction in law. The law as indicated above declares bigamy as an offence after 1955. Such an act under the 1956 Rules is a misconduct if the second marriage is contracted without permission. The words used in Rule 29 is clearly notwithstanding anything contained in the personal law of the government servant that may make such a subsequent marriage permissible. Thus, the rigour of Rule 29 makes it obligatory for a permission to be granted by the State Government. The petitioner did attempt to establish this permission but has failed. He did not produce any oral or documentary proof to establish any attempt having been made to seek permission and obtain it from the appropriate authority. His mere statement, therefore, was rightly disbelieved by the authorities and in the absence of any material proof this finding

on a question of fact cannot be a subject matter of judicial review under Article 226 of the Constitution of India. It is, thus, clear that having failed to establish anything with regard to the grant of permission by the State Government, the petitioner has himself invited the invoking of the aforesaid Rule which may have been at the instance of a unruly neighbour.

12. The law recognizes the act of the petitioner as a misconduct and the supporting statement of his first wife, in my opinion, cannot improve the situation. The attempt of the petitioner, according to his own statement, was to fill the void of a son in the family. The second marriage brought about three sons later on. This was his personal choice but was a legal lapse, little realising that the petitioner may have to face the consequences of such a folly.

13. I have considered the entire facts and circumstances of the case and it is difficult to even push a needle into the findings of the authorities that link each other perfectly. There is no legally permissible way to drive a wedge and create a space for faulting the findings recorded by the authorities below. The petitioner, therefore, could not dislodge the findings of misconduct in law on the basis of the facts that have emerged.

14. The only issue which now tinkers with the conscience is the fact that this dismissal has come after a lapse of more than a quarter century of the services of the petitioner, who was at the fag end of his career and had a little more than one year to superannuate. The complaint itself emanated in the year 2007 and the complainant Mr. Matamber Tiwari in his statement during inquiry while being cross-examined stated that he came to now about the misconduct Rules only in the year 2007 even though he had knowledge of the bigamous relationship from before and, therefore, the complaint was made in the year 2007. It is quite possible that the bitterness of his personal enmity with the petitioner may have been also one of the causes of complaint, but the fact remains that the complaint was made after 25 years of the marriage, which took place in 1982.

15. The petitioner has three sons and a daughter from the second marriage. This aspect of the matter that the complaint has come up at the fag end of the career of the petitioner, can be a circumstances for going into the question of proportionality of punishment. However, such examination can be made only if the punishment shocks the conscience of the Court. The circumstances are that the petitioner had four daughters from his first married out of whom one died and the other three were married by him to the satisfaction of his first wife. From his second marriage, the petitioner has three sons and one daughter. It is, therefore, now a very large family which has to be looked after by the petitioner and the petitioner himself has to sustain his own family with two wives. All three persons namely the petitioner and his two wives, must now be in their advance age and incapable of any further resources to sustain their livelihood apart from what has already been acquired by them. Not only this, the social obligations of such a family have to be undertaken. These circumstances also add to the misery of the petitioner, who has been dismissed from service. The petitioner has admittedly superannuated during these proceedings and, therefore, he also looses the right to receive pensionary benefits. The petitioner's misconduct was an adventure undertaken by him, which

ultimately turned out to be his own disaster. The desire to have salvation in future life has ruined his present prospects. The approach of the petitioner was therefore not only unpragmatic but was an invitation founded on his own follies. The consequences that have visited the petitioner does not involve him alone but his entire family. It is this aspect of the matter which tends to bring about a pause in the process of reasoning for the purpose of considering the proportionality of the punishment.

16. Before entering into this a word about the decisions which have been cited at the bar on both sides. The case of Awadhesh Chandra Sharma (supra) relied upon by the learned counsel for the petitioner was with regard to a charge against an employee, who allowed a truck to enter within the municipal limits without payment of octroi duty. The case was disposed of with a finding of disproportionate punishment by relying on the Division Bench judgment of Narendra Kumar Jain (supra). In the decision of Narendra Kumar Jain a finding was recorded that the government servant may have been negligent in the performance of his duty but the same would not constitute misconduct. In my opinion, both these judgments do not apply on the facts of the present case, inasmuch as, in those cases there was a negligence of duty and the lapse had resulted into some loss to the State Government. These cases are not in relation to a misconduct founded on bigamy or violation of Rule 29 of the 1956 Rules.

17. The other two decisions are of the Guwahati High Court and the Andhra Pradesh High Court. The Andhra Pradesh High Court came to the conclusion that the punishment of compulsory retirement on the ground of bigamy was disproportionate and was substituted by stoppage of two increments with cumulative effect. It was a case of a marriage by a Muslim couple and it was held that the fact of the marriage receded into the background and, therefore, on the peculiar facts of the said case it was held that they being Muslims a second marriage could have been contracted. Nonetheless, in spite of the fact that the marriage was without permission as required under the Rules the punishment was reduced.

18. In the decision of the Guwahati High Court referred to herein above the second marriage was admitted but it was held that the second marriage had got nothing to do with the official position or the discharge of official duties of a person. The Court further came to the conclusion that the findings of bigamy as defined under Sections 494 and 495 I.P.C. has been made a compoundable offence invoking Section 320 Cr.P.C. In such circumstances where the criminal law treats different offences on different footing making such an offence compoundable, the Court came to the conclusion that it would be too harsh to dismiss a person from service. The award of dismissal was set aside with a direction to award some lesser punishment leaving it to the authority to consider the proportionality thereof.

19. On the other hand, the decisions which have been relied upon by the learned standing counsel, it is to be seen that in the case of Ramesh Pal Singh (supra), the delinquent employee had taken shelter of a false statement about the knowledge of the second marriage to the first wife. It was found as a measure of fact that the employee had not informed the

first wife and she was totally ignorant of the same. On the contrary, he had misguided his first wife and had consummated the second marriage. In such circumstances, it was found that the circumstances did not shock the conscience of the Court and rather an appropriate punishment had been rightly awarded. The facts of the said case, therefore, are entirely different from the facts of the present case because, here the petitioner and his first wife, both have joined together in defence of the consummation of the second marriage.

20. The decision in the case of ***Veerpal Singh (supra)*** as relied upon by the learned standing counsel has also proceeded to hold that the punishment was founded on the basis of the misconduct of the petitioner and the scope of interference being limited, there was no occasion to reduce the punishment. The Court held in the penultimate paragraph that where bigamy is a criminal offence, a government servant having committed a misconduct on this score cannot ask for award of minor or lesser punishment.

21. There is yet another decision, which has been relied upon by the learned counsel for the petitioner namely that of ***Smt. Raj Bala Sharma (supra)***. The petitioner therein was a lady Officer, who married a constable in the U.P. Police Services. She was a widow, who after having lost her husband married the said constable. She, however, took a plea that she was not aware that the person, whom she married, was already married to someone else. Both of them lost their services. This Court found that the conduct of the lady Officer, who was the petitioner in the writ petition, was a natural course undertaken by a young widow to support her life. The relevant paragraph is quoted below:

"Here is a case of a widow of a police personnel who was given compassionate appointment on the death of her husband in harness on 10.2.92. At the time of the death of her husband, the petitioner had two minor children to maintain. She was given compassionate appointment on 21.11.92 on the post of constable (m). It is evident from record that the petitioner was subsequently promoted on the higher post of Assistant Sub Inspector of Police (m). This shows that her work, conduct and performance in the services had remained satisfactory. It was natural for a young widow like the petitioner to get attracted to a colleague working in the same department. Both were in the ministerial establishment working in the same office. The love is blind. It also appears from the record that Sri Ajeet Singh was supporting his senior colleague Smt. Raj Bali Sharma and her children in the time of need. It is borne out from the record that Sri Ajeet Singh was providing mental and other support to the petitioner and her children to carry on in life at a small city, i.e., Bulandshahr. In peculiar circumstance in which the widowpolice personnel was living, it was natural for her to be attracted to a supportive man. Like in garden a creeper (Lata, vallarre) needs

a strong support to climb up and sustain itself, a woman also may need a support who could stand with her facing the life garden in hard times. Even a small stream needs support of its banks,strong hills rocks to proceed further in the process to transform itself into a big mighty river."

22. The court further went on to hold that since the petitioner had not been

charged with having failed to obtain permission, therefore, Rule 29 could not have been invoked. The finding is as follows:

"As far as petitioner's statement is concerned , she has demonstrated that she had no knowledge about the first marriage of Sri Ajeet Singh. As far as the offence of remarriage (as per section 494 IPC) is concerned, in the present case the petitioner Smt. Raj Bala Sharma had married after the death of her first husband. Section 494 I.P.C. deals with a person who had a husband or wife living. This charge cannot be fastened on Smt. Raj Bala Sharma, petitioner. There is substance in the submission of the learned counsel for the petitioner that according to section 17 of Hindu Marriage Act, no marriage between two Hindus could be solemnised if one of them has a husband or wife living. If such marriage is solemnised after the commencement of this Act it would be null and void. The provisions of section 494 and 495 IPC shall apply in such cases. Applying this law, the marriage of the petitioner with Sri Ajeet Singh was null and void under law and no punishment could be awarded against her under section 29 of the U.P. Govt. Servant Conduct Rules, 1956. As per section 11 read with section 5 of the Hindu Marriage Act, 1955, the marriage may be held as void. The petitioner's case cannot be dealt with under under rule 29 of the U.P. Govt. Servant Conduct Rules, 1956. Sri Ajeet Singh had given in writing to the Enquiry Officer that he had not informed the petitioner regarding her earlier marriage. The petitioner appears to be innocent in the present case.

In Rule 29 of the U.P. Govt. Servant Conduct Rules, 1956, the main thrust has been given on the term " without obtaining prior permission of the government". In this case the petitioner has not been charged for this misconduct. She has been charged only for remarriage and not for charge of not obtaining the permission of the government. Neither there was such accusation against the petitioner nor it was found proved."

23. In my opinion, I have certain reservations about the consummation of a second marriage on natural instincts rather than a legal necessity. Nonetheless, the facts of the said case are entirely different from the present case and, therefore, the said ratio would not apply herein. Secondly, the finding recorded is that there was no charge of not having taken permission under Rule 29. This aspect also makes the case distinguishable and in the instant case the specific charge is in relation to violation of Rule 29. The said decision, therefore, in my opinion would not come to the aid of the petitioner. On the aforesaid grounds accordingly the Court appears to have been emotionally driven to hold that the punishment was not commensurate with the gravity of the charges and accordingly interfered with the punishment. It has time and again been held that a case in an authority on what it actually decides and no two cases have identical set of facts.

24. In view of these principles, the decisions relied upon by the learned counsel for the petitioner except the decision of the Guwahati High Court do not exactly fit in so as to invoke the doctrine pronounced in the said decisions to support the cause of the petitioner.

25. Coming to the decisions of the Apex Court, the leading decision on the

doctrine of proportionality which has held the field for about more than 25 years is the case of ***Bhagat Ram Vs. State of Himanchal Pradesh*** reported in ***1983 (2) SCC 442***. The view was followed in the case of ***Ranjeet Thakur Vs. Union of India and others*** reported in ***1987 (4) SCC 611*** and later on in the case of ***Union of India Vs. Giriraj Sharma*** reported in ***1994 Supp. (3) 775***. This doctrine of proportionality was carried forward in the case of ***B.C. Chaturvedi Vs. State of U.P.*** reported in ***1998 (9) SCC 416***.

26. I have gone through the later decisions and the other decisions in this regard up to the decision in the case of ***Bharat Forge Company Limited Vs. Uttar Manoha***r reported in ***2005 (2) SCC 489*** and the case of ***V. Ramana Vs. A.P.S.R.T.C. and others*** reported in ***2005 (7) SCC 338***.

27. All these decisions have broadly indicated that in the matter relating to power of judicial review, this doctrine is rarely invoked where the quantum of punishment can be commented upon if it is shockingly disproportionate to the guilt found and is also shocking to the conscience of the Court. Circumstances have been found to interfere with an order of extreme punishment of dismissal **if the misconduct was an out come of inevitable and unexpected circumstances with no intention to wilfully commit a misconduct**. In the case of *V. Ramana (supra)* the Apex Court had the occasion to indicate that what is shocking to the conscience of the Court means what is in defiance of logic and moral standard.

28. The word "conscience" means, according to the ordinary dictionary meaning, a knowledge of right or wrong within oneself. The conscience develops according to the circumstances of the Society in which one lives. The standards of morality of a Society, which have been carried over for long attribute to the conscience. Any lapse of morality in breach of such standards is a deviation from the conscience. It is the morality of an action which basically is the reason to invoke the conscience.

29. There is a distinction between the words "conscience" and "conscious". This distinction has been very neatly and subtly explained in a recent article written by the Editor of the Complete Wellbeing Magazine Mr. Manoj Khatri (Vol. IV Issue 4 Feb. 2010). The writer explains the distinction in his words as follows:

"Among the most common mistakes of English usages is the confusion between the words conscience and conscious. English experts say that although both are nouns and sound similar, their meanings are totally different. Different they are. But in my opinion, the confusion doesn't stop at just their usage. In fact, people often allow their conscience to dictate their conduct, when all they need is their consciousness.

Let me elaborate. Conscience is most often associated with morality-knowing "right" from "wrong", and behaving accordingly. The dictionary defines conscience as: the complex of ethical and moral principles that controls or inhibits the actions or thoughts of an individual. Note the use of the words ethical, moral, and principles, which indicate that conscience is a social phenomenon. In other words, conscience is not natural-it's acquired. It's the result of long and deep social conditioning of out minds.

But that is where the trouble begins. Because conscience is really a social phenomenon, there can never be any consensus on it. You see, what's moral or ethical for one group of people need not be for another. Think about it and you will realise that our conscience depends on many external factors-our parents. Our family, our religion, our educational institutes, out city, our country and so on. At the most basic level, conscience is the result of a list of dos and don'ts handed down to us by the society and culture we belong to.

Consciousness, on the other hand, is strictly personal. It's is an awareness that comes from being alive. It's our natural instinct that tells us what is right for us and what is not. With consciousness, there is no need for any consensus because you simply know. To me, conscience often blocks out our consciousness. That's because, conscience is due to the presence of negative feelings such as fear and guilt, whereas consciousness is due to the presence of love.

Let me explain with an example. When you see a hungry being on the street and you share your food with him because the religious scriptures say so, or because your parents instilled moral values in you, then it's your conscience at work. But if you share the food because you know how it feels to be hungry, then you're acting out of consciousness.

So, conscience pricks you [makes you feel guilty] when you don't do something you must or do something you ought not to; with consciousness, the though of moral/immoral simply doesn't arise because you act out of a knowing. If you let go of your conscience and allow your consciousness to dictate your conduct, you may find a different kind of satisfaction-and it will be one that comes minus the pricks!"

30. What has been indicated by the Supreme Court is that, something which shocks the conscience of the Court, may be a ground to invoke the proportionality doctrine. The word "shock" means a violent upset, which is stern and creates a mental impression or physical recession that has an element of horror, disgust and indignation.

31. A sincere thought and an honest understanding leads me to believe that while judging a case a Judge has to keep in mind that the effect of law is always accepted as just. This however has to be understood as not doing away with justice altogether. In other words this has to be done not at the expense of justice. I am reminded of the words of our former Chief Justice A.N. Ray (2005-07) that "when we were young, we were told that Law is good but Justice is better." There is also an age old principle that "Equity follows Law" and not the converse. It is here where the role of "Conscience" and the "Consciousness" of the Court presided over by a Judge, who is also a human being, comes into play. To my mind the duty of a Judge is to balance the call of conscience when it is shocked, with a conscious approach to the effect of law. This is necessary to do Justice, both to the cause, and to the Law of the land, for the protection whereof oath has been administered to a Judge. It is this approach which inspires confidence in the mind of the public for the institution of justice. One is obliged to uphold the rule of Law akin to the cause of humanity. The application of law, dry as it is, has to be made that

advances the cause of humanity at the same time without violating the law. The Judge is duty bound to act and pronounce so as to bring about a fusion of law and justice without any element of indiscipline to law.

32. A perusal of the decisions of the Supreme Court, therefore indicate that it is the conscience of the Court, which has to be shocked and not the personal opinion which is formed on any happening. Such an abhorrence should be an out come of outrageous defiance of logic and rationality. In my opinion, it is within these parameters that the case of the petitioner has to be gauged. The facts as disclosed demonstrate that the act of second marriage was a voluntary act of the petitioner. The misconduct was committed 25 years ago and was discovered at the fag end of his career. In this regard there is an indication in the decision of Bharat Forge Company Limited (supra). The said case arose out of the provisions of the Industrial Dispute Act, where the domestic inquiry against the employee on the charges having been found fast asleep during duty hours, was taken to be a gross misconduct and the employee was dismissed from service. The complaint of the employee was, that it was unfair labour practice, and the Labour Court on this complaint came to the conclusion that the inquiry was fair and proper and the findings of the inquiry officer was not perverse, but the Labour Court held that the punishment of dismissal imposed upon the employee was harsh and disproportionate. The employee aggrieved by the reduced punishment and the employer aggrieved by such reduction both filed revision applications before the Tribunal. The Tribunal reversed the order of the Labour Court and held that the order passed by the Labour Court was not justified.

33. On a writ petition filed before the Bombay High Court, a learned Single Judge came to the conclusion that the Labour Court had nowhere found that the punishment was shockingly disproportionate and upheld the order of the revising authority to that effect. The learned Single Judge further went on to hold that while considering the reduction in punishment the Labour Court could not have over emphasized the length of service, which in that case was 10 years of service of the employee, to the detriment of previous disciplinary action and observed that this would amount to discounting quality as against quantity.

34. Against the judgment of the learned Single Judge an appeal was preferred before the Division Bench of the High Court, which went on to investigate the gravity of the offence, set aside the order of dismissal as also the judgment of the learned Single Judge and substituted the same by ordering that instead of reinstatement the employer would pay a sum of Rs. 2, 50, 000/- (two lacs fifty thousand). The employer went up in appeal before the Apex Court and the judgment of the Division Bench was set aside and held that such an order could not have been passed on a compassionate ground.

35. The case of the petitioner is still more peculiar as against the decisions referred to by the Apex Court and referred to herein above.

36. This is a case of bigamy, which is a serious misconduct. The punishment which has been meted out is a major penalty under Rule 4 of the 1991 Rules.

The said Rule provides for major and minor penalties. Sub Rule 2 of Rule 4 provides for additional punishments to be inflicted. The heading of major penalties under which the petitioner was proceeded with mentions dismissal from service, removal from service and reduction in rank including reduction to a lower scale or to a lower stage in a time scale. Rule 8 of the 1991 Rule provides for the holding of an inquiry and Sub Rule 4 (a) (b) provides for severe punishment in two cases namely allowing a person in police custody to escape and conviction in an offence involving moral turpitude. The same carves out of an exception that it can be a lesser punishment provided the Punishing Authority has to record reasons as to why it considers otherwise to award a lesser punishment.

37. The case of the petitioner is that he entered into bigamy and, therefore, the proceedings against him cannot be said to be in defiance of any logic. Had this misconduct been discovered promptly when it was committed in the year 1982, the question of proportionality may not have arisen at all. The judgement of the learned Single Judge of the Bombay High Court, which was upheld in the case of Bharat Forge Company Limited (supra) also held that the passage of time of the service of the employee of 10 years cannot minimise the misconduct by over emphasizing the length of services as the previous actions of misconduct of the employee also deserved to be taken into account. The employee had also misconducted himself on previous occasions.

38. The case of the petitioner is, therefore, distinguishable to this extent that there is no indication of any previous misconduct that may add to his detriment as in the case of the employee referred to in the decision of Bharat Forge Company Limited (supra). The petitioner has been made a victim on account of his erroneous belief, which he says was necessary for salvation. This cannot by itself shock the conscience of the Court. On the contrary this cannot be considered to be a genuine belief of the petitioner against law and social beliefs of the time. The Society as on today may not generally give any acceptance to such a belief.

39. The second wife or the first wife did not lodge any complaint on the petitioner. The action of the petitioner in entering into a second marriage cannot be said to be an act of morally depraved conduct. He contracted the second marriage with the consent of the first wife, who has supported his cause and has carried on with the petitioner for the past 28 years without demur or complaint. In fact, the first wife has herself compounded the element of bigamy.

40. In such a situation and in view of the fact that the petitioner was to retire within one year or slightly more from his service, can the said punishment of dismissal be said to be disproportionate. Coupled with this is the huge size of family of the petitioner and the old age of the petitioner and his two wives. It is here where one has to consider the aspect of proportionality as to why the other alternative punishments under the heading of major penalties indicated in Rule 4 could not be considered to be a suitable punishment.

41. To allow a man to peacefully continue to almost complete his journey as a public servant for 28 years and then

make him stand at the edge of cliff and and push him over, resting the justification in law as misconduct, has to be observed, to my mind with a tittle diluted but human approach. The reason is his exceptionally long period of service. It is true that passage of time will not reduce the guilt, but the punishment can be proportioned with an approach towards the lesser punishments that are available in the rules itself. The mind has to be applied to find out a reason, in the peculiar facts of a case like the present one as to why the lesser punishments would not be appropriate when they have been provided under the same rules. This takes one to the gravity of the misconduct which in this case became a discovery after 28 years. It is here where one's sense of mature justice is brought to test. The proportionality of the punishment therefore requires a careful measurement on the scales of reason and justice combined. Merely because it is a serious misconduct, does not necessarily categorise it for the extreme penalty of dismissal. It has to be assessed on its own facts and the nature of the indiscipline. The petitioner has not runaway with somebody's elses wife so as to bracket the action involving moral turpitude nor has he attempted to shield himself on any such count. His case has been consistent throughout supported by his first wife. These factors, which are the other side of the coin have not been assessed by the authorities appropriately which do require a consideration. The conscience of the Court on the above noted principles has been thoroughly disturbed which in my opinion calls upon my "conscious" approach to command the authorities to invoke the principle of proportionality. The petitioner has to live with a disrepute of misconduct but that can be done with a lesser punishment without putting the entire family of the petitioner to peril. That would be unjustly outrageous.

42. To my mind, the said aspect has to be considered in the backdrop of the aforesaid facts. The continuance of the petitioner at the fag end of his career was found detrimental to a disciplined force which may in given circumstances be correct, but in my opinion, the said aspect deserves an examination by the appropriate authority as it strikingly moves the conscience to the extent as to why a lesser major penalty would not serve the purpose. Even though the Rules do not indicate any other penalty like compulsory retirement but the same can be explored by the appropriate authority in the given set of circumstances provided it is permissible under rules.

43. The conduct of the petitioner was an absolute personal affair of the petitioner in relation to the consummation of second marriage and the same had got nothing to do with the affairs of the State or the discharge of his public duty to that extent. The judgment in the case of Amal Kumar Baruah of the Guwahati High Court (supra) comes to the aid of the petitioner.

44. Accordingly, for the reasons given herein above and in the peculiar facts of the present case as discussed I would prefer to set aside the order of the revising authority dated 18th November, 2008 passed by the Inspector General of Police, Allahabad Zone, Allahabad to the aforesaid extent only. The Inspector General of Police may, therefore, consider the aforesaid limited aspect of proportionality as the other aspects need not be interfered with. To that extent, the order dated 18th November, 2008 is set aside with a direction to the respondent no.

2 to pass an order after assessing the aforesaid factors in accordance with law.

45. With the aforesaid observations, the writ petition is partly allowed.
