ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.08.2010

BEFORE
THE HON'BLE FERDINO I. REBELLO, C.J.

Civil Misc Arbitration Application No. 14 of 2009

M/S S.K. and Associates and another ...Petitioner
Versus
Indian Farmer and Fertilizers Cooperative Ltd. and another ...Respondent

Counsel for the Petitioners:
Sri P.K. Ganguli,
Sri Rajeev Gaur

Counsel for the Respondents:
Sri Ashwani Kumar Mishra.

Arbitration Act-Section-11-application for removal of arbitrator-without taking recourse of section 15(6)-held-not maintainable.

Held: Para 4

Section 13 (5) provides that if a party is aggrieved by such an award then such party can challenge the award by making an application under Section 34, wherein the challenge which was rejected, can be considered. Where the mandate of an Arbitrator terminates by virtue of Section 15 (6), a substituted arbitrator shall be appointed according to the rules that were applicable to the appointment of the Arbitrator being replaced. Once the parties fail to appoint an Arbitrator in terms of the rules, then the Chief Justice or his delegate under Section 11 (6) on a request by a party can appoint an Arbitrator. The scheme, therefore, for removal of an Arbitrator and filling the resultant vacancy is clear.

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

1. This is an application by the petitioners for revocation of the mandate of the Arbitrator appointed under Section 11 of the Arbitration and Conciliation Act, 1996 who is respondent no. 2 to this application. It is not the case of the petitioners that the Arbitrator has withdrawn himself and consequently there is a vacancy. The challenge is made on the ground that the petitioners have serious dispute about impartiality of the Arbitrator.

2. The respondents have filed their reply wherein they have raised the plea that considering the provisions of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act), it is open to the petitioners to seek direction for removal or recall of the Arbitrator. It is submitted that the Chief Justice exercising his power under Section 11 cannot exercise jurisdiction to recall an Arbitrator on the ground as has been raised on behalf of the petitioners. Section 11 can only be invoked when there is a vacancy.

3. Having heard the parties, in my opinion, the contention raised on behalf of the respondents has merit.

Section 12 of the Act provides grounds for challenge to the appointment of the Arbitrator. Section 12 (3) of the Act reads as under:-

"An arbitrator may be challenged only if--

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualification agreed to by the parties."

It is thus clear that it is open to a party to challenge the continuance of the arbitrator if circumstances exist that give rise to justifiable doubts as to his independence or impartiality.

Section 12 (4) of the Act permits an applicant to challenge the continuance of an Arbitrator, even if he was earlier a party to the appointment and the sub-section reads as under:-

"A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made."

Section 13 (2) of the Act provides the procedure for the challenge to the continuance of an Arbitrator, which includes sending a written statement of the reasons for the challenge to the arbitral tribunal.

Under Section 13 (3) of the Act, power has been conferred on the arbitral tribunal to decide on the challenge.

4. The next relevant provision is Section 13 (4), which reads as under:-

"If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award."

Section 13 (5) provides that if a party is aggrieved by such an award then such party can challenge the award by making an application under Section 34, wherein the challenge which was rejected, can be considered. Where the mandate of an Arbitrator terminates by virtue of Section 15 (6), a substituted arbitrator shall be appointed according to the rules that were applicable to the appointment of the Arbitrator being replaced. Once the parties fail to appoint an Arbitrator in terms of the rules, then the Chief Justice or his delegate under Section 11 (6) on a request by a party can appoint an Arbitrator. The scheme, therefore, for removal of an Arbitrator and filling the resultant vacancy is clear.

5. Considering these provisions in the Act, which provide for a challenge to the continuance of the Arbitrator, the present application is not maintainable and consequently, the application stands rejected.

6. On behalf of the petitioners, it is pointed out that an application has already been moved before the arbitrator. It is open to the petitioners to press that application before the arbitrator.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.08.2010

BEFORE
THE HON'BLE F.I.REBELLO, C.J.
THE HON'BLE SHRI NARAYAN SHUKLA, J.

Special Appeal No. 585 of 2010

Santosh Kumar Agnihotri and others ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
H.G.S. Parihar

Counsel for the Respondent:
C.S.C.
A.M.Tripathi
Jyotinjay Verma

<u>Constitution of India Art.226</u>- appointment of B.R.C. And ABRC-

petitioner have already worked as coordinator and Block Resource Centre-without right of Renewal after completing two years tenure-ear liar Scheme abolished-new Scheme under Sarva Shiksha Abhiyan can apply without claiming any preferential right-misconceived-appellant can not claim regular appointment but after expiry of period of two years- eligible for further consideration-Order passed by Single judge-set a side.

Held: Para 7

The present issue, therefore, was not an issue in those cases. Therefore, all the three judgments, cited above, are not relevant for deciding the controversy involved in the present special appeal. However, considering the view taken by us, here-in-above, this appeal is liable to be allowed. The impugned order, whereby it has been held that the appellants are not eligible, is set aside. The respondents are directed to allow the appellants to join the post, forthwith.

(Delivered by Hon'ble F.I.Rebello, C.J.)

1. The appellants are aggrieved by the order of the learned Single Judge dated 5.8.2010, whereby liberty was given to the respondents-State and other authorities to cancel the selection of persons who had earlier worked as BRC and ABRC and proceed with the fresh selection in that regard. The interference of the learned Single Judge was only in respect of the appellants herein, and rest of the candidates were allowed to work and paid their salary regularly every month.

2. A few facts necessary for deciding this controversy may be set out. The appellants herein, who were original petitioners 2, 7 and 11, had applied for the post of BRC and were selected for the period commencing 2010. The tenure of the post is of two years. They had also been earlier selected and worked as BRC for the period 2003 to February, 2007, thus they were not working beyond the period February, 2007, until they had applied, pursuant to the fresh advertisement.

3. The respondents-State sought to cancel all the appointments on the ground that three persons, who were earlier working as BRC and eight persons, who were earlier working as ABRC, who were not eligible, were selected. The learned Single Judge rightly held that because of this purportive defect, the entire selection cannot be cancelled, but only the selection of those candidates, who were not eligible, can be cancelled and accordingly passed the impugned order.

4. The appellants, who were earlier selected for BRC have challenged that order inasmuch as their selection was cancelled pursuant to the direction issued by this court.

5. The relevant clause on the basis of which the State-respondent ought to take a decision is the Notification of 29th of June, 2002. Clause (1) of that Notification provides that those who were working as BRC- ABRC will work for two years and after two years, they will not be selected and fresh process of selection would be initiated. The construction of this clause would mean that those who are holding the post of BRC-ABRC shall not be eligible for the next immediate successive term. That clause now does not say that after the

interregnum, they cannot apply afresh. In other words, assuming that the intent of the circular is that those who are selected, cannot claim the permanent right to those posts and also with a view to get new people to oversee the system, which appears to be also its objective. The proper construction as we have set out earlier, would be, that they would not be eligible for the immediate next term but from the subsequent terms after the expiry of two years, they will be eligible.

6. Our attention was also invited to the judgment of this court rendered in the case of **Jagdish Maurya versus State of U.P. And others,** an unreported judgment dated 7.4.2010, passed in Special Appeal No.188 of 2010. We have considered the said judgment. We find that the issue in that appeal is not in issue in the present case. In that case, the appellants who were already working on the post of Coordinator and Block Resource Centre, were contending that after the period of two years, they were eligible to continue and fresh appointment shall not be made. This court rejected the contention of the appellant. Therefore, it was the claim of the incumbent to continue for the immediate next term, which was rejected. Similar is the view taken in the case of **Krishna Pal Singh versus State of U.P. And others** in Special Appeal No.164 of 2010 decided on 23rd of March, 2010. Our attention was also invited to the judgment of a learned Single Judge passed in the case of Shailendra Kumar Mishra and others versus State of U.P. and others in Civil Misc. Writ petition No.27778 of 2003, decided on 9.4.2004, wherein the learned Single Judge of this court held that there was an earlier scheme, which was replaced by the new scheme. The contention was that they should be allowed to continue in the new scheme. The learned Single Judge, however, observed that they have no right to continue under the new scheme, as they were on deputation. However, based on the statement made on behalf of the respondent-State, they have been allowed to apply for selections under the 'Sarva Shiksha Abhiyan', with an observation that in case, they have applied in pursuance of the advertisement made earlier, or apply a fresh within a period of one month, their candidatures shall also be considered alongwith other applicants, without any preference. The petition was disposed of.

7. The present issue, therefore, was not an issue in those cases. Therefore, all the three judgments, cited above, are not relevant for deciding the controversy involved in the present special appeal. However, considering the view taken by us, here-in-above, this appeal is liable to be allowed. The impugned order, whereby it has been held that the appellants are not eligible, is set aside. The respondents are directed to allow the appellants to join the post, forthwith.

The appeal is disposed of accordingly.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.08.2010

BEFORE
THE HON'BLE F.I. REBELLO, C.J.
THE HON'BLE S.N. SHUKLA, J.

Special Appeal Defective No. 788 of 2008

Mahadev Prasad & another ...Petitioners
Versus
State Of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri O.P. Srivastava

Cousel for the Respondents:
C.S.C.

Constitution of India Art. 226-writ petition-alternative remedy-while identical Writ Petitions challenging vires pending-held -alternative remedy to approach before tribunal not proper-matter remitted back before Single Judge for decision on merit.

Held: Para 7

The question, therefore, is whether the jurisdiction is exclusive. On the facts of the case it is open to the Court to exercise its discretion or not exercise to its jurisdiction. The contention of the petitioner is that the person similarly situated like him are before the Courts and these petitions are pending and in these circumstances the direction issued by the learned Single Judge to the petitioners to go to the Administrative Tribunal to file a claim petition is not proper. The rule of alternative remedy would not bar a writ court to exercise extraordinary jurisdiction as the rule is a rule of procedure. The law has been reiterated in the case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and others (1998) 8 SCC 1.

Case law discussed:
(L&S) Vol.-1, Page -577, (1998) 8 SCC 1

(Delivered by Hon'ble F.I. Rebello, C.J.)

1. Heard counsels for the parties.

The appellants have filed the present special appeal against the order of the learned Single Judge, who refused to exercise the jurisdiction by holding that the petitioners have got equally efficacious remedy by filing claim petition before the U.P. Public Services Tribunal.

2. In the judgement of **L. Chandra Kumar Vs. Union of India and Others, reported in 1997 Supreme Court Case (L&S) Vol.- 1, Page- 577,** the Hon'ble Supreme Court in para 93 observed as under:-

Para 93- "Before moving on to other aspects, we may summarise our conclusions on the jurisdictional powers of these Tribunals. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set-up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Divisions Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the

High Court concerned may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. We may add that the Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned."

3. It is further pointed out that the provisions of the U.P. Public Services (Tribunal) Act, 1976 are different from the provisions of Central Administrative Tribunal Act, 1985. We may gainfully refer to Sections 14 & 28 of the Central Administrative Tribunal Act, 1976. The said provisions read as under:-

*14. **Jurisdiction, powers and authority of the Central Administrative Tribunal.**-(1) Save as otherwise expressly provided in this Act, the Central Administrative Tribunal shall exercise, on and from the appointed day, all the jurisdiction, powers and authority exercisable immediately before that day by all courts (except the Supreme Court in relation to-*

(a) recruitment, and matters concerning recruitment, to any All- India Service or to any civil service of the Union or a civil post under the Union or to a post connected with defence or in the defence services, being, in either case, a post filled by a civilian;

(b) all service matters concerning-

(i) a member of any All-India Service; or

(ii) a person [not being a member of an All-India Service or a person referred to in clause (c)] appointed to any civil service of the Union or any civil post under the Union; or

(iii) a civilian [not being a member of an All-India Service or a person referred to in clause (c)] appointed to any defence services or a post connected with defence,

and pertaining to the service of such member, person or civilian, in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation [or society] owned or controlled by the Government;

(c) all service matters pertaining to service in connection with the affairs of the Union concerning a person appointed to any service or post referred to in sub-clause (ii) or sub-clause (iii) of clause (b), being a person whose services have been placed by a State Government or any local or other authority or any corporation [or society] or other body, at the disposal of the Central Government for such appointment.

(2) The Central Government may, by notification, apply with effect from such date as may be specified in the notification the provisions of sub-section (3) to local or other authorities within the territory of India or under the control of the

Government of India and to corporations [or societies] owned or controlled by Government, not being a local or other authority or corporation [or society] controlled or owned by a State Government:

Provided that if the Central Government considers it expedient so to do for the purpose of facilitating transition to the scheme as envisaged by this Act, different dates may be so specified under this sub-section in respect of different classes of, or different categories under any class of, local or other authorities or corporations [or societies].

(3) Save as otherwise expressly provided in this Act, the Central Administrative Tribunal shall also exercise, on and from the date with effect from which the provisions of this sub-section apply to any local or other authority or corporation [or society], all the jurisdiction, powers and authority exercisable immediately before that date by all courts (except the Supreme Court) in relation to-

(a) recruitment, and matters concerning recruitment, to any service or post in connection with the affairs of such local or other authority or corporation [or society]; and

(b) all service matters concerning a person [other than a person referred to in clause (a) or clause (b) of sub-section (1)] appointed to any service or post in connection with the affairs of such local or other authority or corporation [or society] and pertaining to the service of such person in connection with such affairs.

*28. **Exclusion of jurisdiction of courts except the Supreme Court under article 136 of the Constitution**.- On and from the date from which any jurisdiction, powers and authority becomes exercisable under this Act by a Tribunal in relation to recruitment and matters concerning recruitment to any Service or post or service matters concerning members of any Service or persons appointed to any Service or post, [no court except-*

(a) the Supreme Court; or

(b) any Industrial Tribunal, Labour Court or other authority constituted under the Industrial Disputes Act, 1947 [14 of 1947] of any other corresponding law for the time being in force,

shall have], or be entitled to exercise any jurisdiction, powers or authority in relation to such recruitment or matters concerning such recruitment or such service matters.

4. The Supreme Court in **L. Chandra Kumar (supra)** considering these provisions was pleased to hold that the employees must first approach the Tribunal after considering the scope of the Administrative Tribunal Act.

The provisions for reference of claim to the Tribunal under the U.P. Act are contained in Section 4 of the U.P. Act, which reads as under :-

*4. **Reference of claim to Tribunal.-** (1) Subject to the other provisions of this Act, a person who is or has been a public servant and is aggrieved by an order pertaining to to a service matter within the jurisdiction of the Tribunal, may make a reference of claim to the Tribunal for the redressal of his grievance.*

Explanation.- For the purpose of this Sub-section "order" means an order or omission or in-action of the State Government or a local authority or any other Corporation or company referred to in clause (b) of Section 2 or of an officer, committee or other body or agency of the State Government or such local authority or Corporation or company:

Provided that no reference shall, subject to the terms of any contract, be made in respect of a claim arising out of the transfer of a public servant.

Provided further that in the case of the death of a public servant, his legal representative, and where there are two or more such representatives, all of them jointly, may make a reference to the Tribunal for payment of salary, allowances, gratuity, provident fund, pension and other pecuniary benefits relating to services due to such public servant.

(2)Every reference under sub-section (1) shall be in such form and be accompanied by such documents or other evidence and by such fee in respect of the filing of such reference and by such other fees for the services or execution of processes, as my be prescribed.

(3)On receipt of a reference under sub-section (1), the Tribunal shall, if satisfied after such inquiry as it may deem necessary that the reference is fit for adjudication or trial by it, admit such reference and where the Tribunal is not so satisfied, it shall summarily reject the reference after recording its reasons.

(4)Where a reference has been admitted by the Tribunal under sub-section (3), every proceeding under the relevant service rules or regulation or any contract as to redressal of grievances in relation to the subject-matter of such reference pending immediately before such admission shall abate, and save as otherwise directed by the Tribunal, no appeal or representation in relation to such matter shall thereafter be entertained under such rules, regulations or contract.

(5)The Tribunal shall not ordinarily admit a reference unless it is satisfied that the public servant has availed of all the remedies available to him under the relevant service rules, regulations or contract as to redressal of grievances.

(6)For the purpose of sub-section (5) a public servant shall be deemed to have availed of all the remedies available to him if a final order has been made by the State Government, an authority or officer thereof or other person competent to pass such order under such rules or regulations or contract rejecting any appeal preferred or representation made by such public servant in connection with the grievance;

Provided that where no final order is made by the State Government, authority officer or other person competent to pass such order with regard to the appeal preferred or representation mad by such public servant within six months from the date on which such appeal was preferred or representation was made, the public servant may, by a written notice by registered post require such competent authority to pass the order and if the order is not passed within one month of the service of such notice, the public servant shall be deemed to have availed of all the remedies available available to him.

(7) For the purposes of sub-sections (5) and (6) any remedy available the public servant by way of submission of a memorial to the Governor on any other functionary shall not be deemed to be one of the remedies, which are available unless the public servant had elected to submit such memorial.

5. There is no definition of public servant in Central Administrative Tribunal Act. Though there is definition of public servant in Section 2(b) in U.P. Act, which reads as under:-

*2(b) - **" Public Servant"** means every person in the service or pay of-*

(i) the State Government ; or

(ii) a local authority not being a Cantonment Board; or

(iii) any other corporation owned or controlled by the State Government (including any company as defined in Section 3 of the Companies Act, 1956 in which not less than fifty per cent of paid up share capital is held by the State Government) but does not include-

(1) *a person in the pay or service of any other company; or*

(2) *a member of the All India Services or other Central Services;*

and definition of service matter, section 2(bb) reads as under:-

*2(bb) **"Service Matter"** means a matter relating to the conditions of service of a public servant.*

6. Considering the Section 4 of the U.P. Act, we are of the opinion that for reference of claim to Tribunal a person has to be a public servant and the matter must pertain to a service matter. The issue where the appellant here in is holding as a public servant need not to be decided and considered.

7. The question, therefore, is whether the jurisdiction is exclusive. On the facts of the case it is open to the Court to exercise its discretion or not exercise to its jurisdiction. The contention of the petitioner is that the person similarly situated like him are before the Courts and these petitions are pending and in these circumstances the direction issued by the learned Single Judge to the petitioners to go to the Administrative Tribunal to file a claim petition is not proper. The rule of alternative remedy would not bar a writ court to exercise extraordinary jurisdiction as the rule is a rule of procedure. The law has been reiterated in the case of **Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and others (1998) 8 SCC 1.**

Considering the above facts, we are of the opinion that this would be a fit case for this Court to exercise its extraordinary jurisdiction.

8. In the light of the above as well as pendency of other writ petitions before this Court, we hereby set aside the order passed by the learned Single Judge and remand the matter back to the learned Single Judge for deciding the contrary.

9. The Special Appeal is allowed, accordingly.

No order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2010

BEFORE
THE HON'BLE F.I. REBELLO, C.J.
THE HON'BLE A.P. SAHI, J.

Special Appeal No. 1196 Of 2010

Har Charan ...Petitioner
Versus
State Of U.P.and others ...Respondent

Counsel for the Petitioner:
Sri P.K. Dubey
Sri Dharampal Singh
Sri S. Niranjan

Counsel for the Respondents:
C.S.C.

Service-U.P. Basic Education(Teachers) Service Rules 1981-Rule 29, readwith Rule 2(aa)-Superannuation of Headmaster-date of birth being 1st July 1948-his retirement on 30/06/2010-whether entitled to continue till 30th June 2011 in the next session-held,2004(2) AWC 1005(LB) Single Judge taking contra view is per incuriam-no longer resintegra-controversy decided in terms of Division Bench judgement reported in 1987 UPLBEC 566.

Held: Para 3, 5 and 6

We find that the issue is no longer res-integra as it already stands answered by a learned Coordinate Bench of this Court in the case of Ram Lal Prasad Vs. State of U.P. and others, reported in 1987 UPLBEC 566 (Paras 26 to 28).

It appears that the judgment of the Division Bench in the case of Ram Lal Prasad (supra) was not brought to the notice of the learned Single Judge in the case of Mannu Lal (supra).

In view of the judgment in the case of Ram Lal Prasad (supra) the judgment in the case of Mannu Lal and others (supra) stands overruled.

Case law discussed:
2004 (2) AWC 1005 (LB), 1987 UPLBEC 566, 2004 (2) AWC 1005 (LB) overruled

(Delivered by Hon'ble F.I. Rebello, C.J.)

1. The appellant who is a Head Master in Senior Basic School has been served with an order dated 7th April, 2010 retiring him from service with effect from 30th June, 2010. The date of birth of the appellant is 1st July, 1948.

2. The contention raised by Sri Dharmapal Singh learned Senior Counsel for the appellant is that the appellant is entitled to continue in the next session i.e. after 30th June, 2010 till 30th June, 2011. Sri Singh relies on the provisions of Rule 29 of the U.P. Basic Education Teachers Service Rules, 1981 read with Rule 2(aa) of the same rules.

3. We find that the issue is no longer res-integra as it already stands answered by a learned Coordinate Bench of this Court in the case of Ram Lal Prasad Vs. State of U.P. and others, reported in 1987 UPLBEC 566 (Paras 26 to 28).

4. A judgment of a learned Single Judge of the Lucknow Bench to the contrary in the case of Mannu Lal and others Vs. State of U.P. and others reported in 2004 (2) AWC 1005 (LB) has been relied on by the learned counsel.

5. It appears that the judgment of the Division Bench in the case of Ram

Lal Prasad (supra) was not brought to the notice of the learned Single Judge in the case of Mannu Lal (supra).

6. In view of the judgment in the case of Ram Lal Prasad (supra) the judgment in the case of Mannu Lal and others (supra) stands overruled.

7. The appeal accordingly stands dismissed.

APPELLARTE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.08.2010

BEFORE
THE HON'BLE F.I. REBELLO, CJ.
THE HON'BLE A.P. SAHI, J.

Special Appeal No. 1254 of 2010

Surendra Singh and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri P.N. Saxena
Sri Jamal Khan

Counsel for the Respondents:
Sri P.S. Baghel
C.S.C.

Societies Registration Act 1860 Sections 4(i) and 25 (i) and (ii)-Dispute regarding election of office bearers -registration of list of office bearers-Asst, Registrar Firms Societies and chits proceeded to register the list of 76 new office bearers and members-order challenge challenged-terms-election of new-office bearers disputed Single Judge relegating the case before Prescribed Authority and not Asst. Registrar-held,such a dispute lay within the scope of Sec 25 (i)-matter to be referred to Prescribed Authority after setting aside the order passed by Asst Registrar-order of Single Judge set aside.

Held: Para 15

For all the aforesaid reasons the order of the Assistant Registrar dated 20.3.2010 is unsustainable in law. In our opinion, the learned Single Judge ought to have set aside the order of the Assistant Registrar and remitted the matter to the prescribed authority for decision in accordance with the rules and the provisions of Section 25 of the Societies Registration Act, 1860. The learned Single Judge therefore fell in error in relegating the appellants on the ground of availability of alternative remedy without setting aside the order of the Assistant Registrar who was bound to refer the dispute in view of the provisions referred to herein above. The moot question which was to be decided was the validity of the elections and its office bearers who were elected on 14.9.2008. This was essentially a dispute within the scope of Section 25(1) and the jurisdiction whereof lay in the hands of the Prescribed Authority and not the Assistant Registrar. Accordingly we set aside the order of the Assistant Registrar dated 20.3.2010 and the judgment of the learned Single Judge dated 19.7.2010, and direct the Assistant Registrar to refer the dispute to the prescribed authority within 15 days of the date of production of a certified copy of this order before him. The prescribed authority shall thereafter proceed to decide the dispute within three months thereafter.

(Delivered by Hon'ble F.I. Rebello, C.J.)

1. This appeal arises out of a judgment of the learned Single Judge in relation to a dispute of a society registered under the Societies Registration Act known as 'Gramopyogi Shiksha Pracharini Samiti, Bakarganj, Goraju, Kaushambi. The challenge in the writ

petition was to the order dated 20th March, 2010 passed by the Assistant Registrar, Firms, Societies and Chits Allahabad who proceeded to register the list of officer bearers and the members of the committee of management under Section 4(1) of the Societies Registration Act, 1860 submitted by the contesting respondents No. 4 and 5. The said list of office bearers are alleged to have been elected in the elections held on 14.9.2008.

2. The undisputed position is that the elections were previously held in the year 2001 and since the term of the said elections expired, a meeting is stated to have been convened on 10th April, 2004 for holding of fresh elections on 6th June, 2004. One Mr. Durga Prasad Singh was appointed as the Election Officer. The contesting respondents allege that 76 members had been newly enrolled. This position was resisted by the appellants and Durga Prasad Singh the Election Officer passed an order on 6.6.2004 staying the elections till the dispute of the aforesaid 76 members was decided. Consequently no elections were held and the matter remained pending.

3. The society also manages educational institutions including Dilip Singh Inter College Bakarganj, District Kaushambi. According to the scheme of administration of the said institution as alleged by the appellants, the same electoral college of the parent society also holds the elections of the committee of management of the institution. The elections of the committee were also being delayed and on a direction of the High Court in a writ petition filed, the Joint Director of Education finalized the electoral college vide order dated 23.1.2008 holding that the 328 members of the parent society were entitled to participate in the elections.

4. The appellants contend that the said 328 members are the valid members with whom the elections have to be held and the 76 members stated to have been allegedly inducted were not entitled to participate in the elections. It is submitted on behalf of the appellants that since the electoral college is the same therefore the elections of the parent society which is presently in dispute has to be held on the basis of the same electoral college. The appellants allege that the term of the committee of management elected in 2001 had expired long back and no fresh elections had been held therefore in such a situation the Assistant Registrar was empowered to hold elections under Sub Section 2 of Section 25 of the Societies Registration Act,1860. In view of the said provision the outgoing President of the society Smt. Urmila Devi made a request on 8th February, 2008 to the Assistant Registrar, Firms, Societies and Chits Allahabad to get fresh elections held.

5. The Assistant Registrar vide order dated 12th February 2008 called for a list of the electoral college from the Joint Director of Education who had finalized the same vide his order dated 23.1.2008. The Joint Director of Education forwarded the said list to the Assistant Registrar on 22.2.2008.

6. It is alleged that the some notice was published on 27.8.2008 for holding of the elections on 14.9.2008. A complaint was made by Suryabali Singh respondent on 28.8.2008 against the holding of such elections on the ground that no such meeting was convened for holding of elections. It is also alleged that one

Madan Singh who is a Lekhpal of the same village and is also alleged to be a life member of the society was nominated to act as an Election Officer. It is on the strength of such a notice that the alleged elections is claimed to have been held by the respondent Awadhesh Singh on 14.9.2008 in which 6 members and 6 officer bearers are stated to have been elected.

7. A complaint was made by the appellants Surendra Singh on 24.9.2008 to the Assistant Registrar that the said list of office bearers stated to have been elected on 14.9.2008 could not be accepted inasmuch as the Assistant Registrar has not held the said elections, the elections are founded on an incorrect electoral college, no meeting had been convened for holding of the said elections, no report of the elections having been actually held has been submitted by the Election Officer and there were no documents to support the same and finally the constitution of the committee which requires one patron six office bearers members and five members is not in accordance with the bye-laws.

8. The Assistant Registrar who had no jurisdiction to decide the matter according to the learned counsel for the appellants was proceeding to decide the same on an undue influence exercised by the contesting respondents as such a complaint was made before the Registrar on 19.8.2009 that the Assistant Registrar be asked not to proceed with the matter and the file be summoned from him. The Registrar Firms, Societies and Chits Uttar Pradesh Lucknow accordingly summoned the file but instead of taking any action the file was returned to the Assistant Registrar on 7.12.2009. The Assistant Registrar thereafter accordingly appears to have summoned the Election Officer for producing the documents who did not produce the same and without following the principles of natural justice and without conducting any proper hearing the Assistant Registrar proceeded to pass the impugned order. Prior to this the appellants had filed a writ petition No. 11659 of 2010 apprehending that the Assistant Registrar might pass a mala fide order, which was dismissed on the ground that such objections can be raised before the Assistant Registrar himself.

9. The Assistant Registrar has proceeded to accept the list of office bearers and has recorded a finding that Madan Singh the Election Officer appears to have been won over by the appellants and has deliberately not produced the documents in relation to the conduct of the elections, therefore, the office bearers having been elected on 14.9.2008 were validly elected.

10. Learned counsel for the appellants Sri P.N. Saxena contends that the aforesaid procedure adopted by the Assistant Registrar was without jurisdiction as he had no authority to declare an election valid or invalid and even otherwise the order was in violation of principles of natural justice and also for the reasons stated hereinabove.

11. The learned Single Judge dismissed the writ petition on the ground that the issues raised by the petitioner are factual in nature and therefore it can be determined by the prescribed authority under Sub Section (1) of Section 25 of the Societies Registration Act, 1860 which is an alternative remedy to be availed of by the appellants. The learned Single Judge

observed that in case the matter is entertained by the prescribed authority the same shall be decided by hearing the parties within a period of three months.

12. Sri Saxena contends that the learned Single Judge once having arrived at the conclusion that the matter could have decided by the prescribed authority, the order of the Assistant Registrar ought to have been quashed. He submits that the Assistant Registrar was bound to have referred the dispute as it was in relation to the election of the office bearers held on 14.9.2008. The validity of the elections being directly involved, the matter ought to have been referred to the prescribed authority and the learned Single Judge erred in dismissing the writ petition treating the said remedy to be an alternative remedy. In essence the submission is that the order of the Assistant Registrar deserves to be set aside whereafter the matter has to be decided by the prescribed authority under Section 25(1) of the Act.

13. Learned counsel for the contesting respondents Sri P.S. Baghel submits that the Assistant Registrar was well within his jurisdiction to have registered the list of office bearers keeping in view the proviso contained in Section 4 of the Societies Registration Act as amended and applicable in the State of UP. He submits that the Assistant Registrar was within his authority to invite objections and thereafter register the list of office bearers which has been done in the instant case. He further submits that the Election Officer Madan Singh has colluded with the appellants and has not appeared before the Assistant Registrar which would not amount to lack of any evidence in support of the elections dated 14.9.2008. He further submits that the list of office bearers of the contesting respondents is a valid list and the contention raised on behalf of the appellants is without any substance. Learned Standing counsel has also been heard for the respondents No. 1, 2 and 3.

14. Having heard learned counsel for the parties, the first issue which has to be determined was the validity of the meeting that had been convened for the purpose of holding of the elections dated 14.9.2008. The meeting ought to have been convened by the outgoing committee and it could not have been a decision by persons who are not entitled to proceed with the elections. The order of the Assistant Registrar does not reflect on this issue and even otherwise the same would be a matter of consideration by the prescribed authority while proceeding to consider any doubt or dispute with regard to the elections of office bearers. It is also on record that the elections which had been convened in the year 2004 were never held and there was an ongoing dispute with regard to the alleged induction of 76 new members. It is also on record that the Joint Director of Education had found 328 members entitled to participate in election which was a piece of evidence to be looked into before finalizing the electoral college. Apart from this if the elections of the committee of management of the society were not held within time then after such a finding is recorded by the prescribed authority, it is the Assistant Registrar who can proceed to hold the elections under Sub Section 2 of Section 25. In the instant case the elections were not held after 2001. This issue was also relevant and which has been completely over looked

by the Assistant Registrar while passing the impugned order dated 20.3.2010.

15. For all the aforesaid reasons the order of the Assistant Registrar dated 20.3.2010 is unsustainable in law. In our opinion, the learned Single Judge ought to have set aside the order of the Assistant Registrar and remitted the matter to the prescribed authority for decision in accordance with the rules and the provisions of Section 25 of the Societies Registration Act, 1860. The learned Single Judge therefore fell in error in relegating the appellants on the ground of availability of alternative remedy without setting aside the order of the Assistant Registrar who was bound to refer the dispute in view of the provisions referred to herein above. The moot question which was to be decided was the validity of the elections and its office bearers who were elected on 14.9.2008. This was essentially a dispute within the scope of Section 25(1) and the jurisdiction whereof lay in the hands of the Prescribed Authority and not the Assistant Registrar. Accordingly we set aside the order of the Assistant Registrar dated 20.3.2010 and the judgment of the learned Single Judge dated 19.7.2010, and direct the Assistant Registrar to refer the dispute to the prescribed authority within 15 days of the date of production of a certified copy of this order before him. The prescribed authority shall thereafter proceed to decide the dispute within three months thereafter.

16. The appeal is accordingly allowed. No order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2010

BEFORE
THE HON'BLE F.I. REBELLO, C.J.
THE HON'BLE A.P. SAHI, J.

Special Appeal No.1342 of 2006

Cantonment Board, Varanasi and another ...Appellants
Versus
Shambhu and another ...Respondents

Counsel for the Petitioner:
Sri S.D.Dubey

Counsel for the Respondents:
Sri M.M. Sahai
Sri Ashok Nigam
A.S.G.I.

Constitution of India Art.226-Termination-on medical grounds-employee working as (Class IV) Safai Karamchari in Cantonment Board-employee suffering from pulmonary tuberculosis, with Pott's spine and backpain-medical board declared unfit to carry out hard work-but recommended sheltered appointment on compassionate ground as per fitness reports-no indication in medical report about absolutely unfitness-further recommendations of sheltered appointment also not extended to him-Single Judge held that termination unless certified to be completely unfit for any work and-also that disease was a curable one-direction to medically re-examine and consideration of other benefits-during pendency of Special Appeal Medical Board re-examine him after a lapse of about five years-improvement found-declared medically fit without any neurological deficit and can do moderate work-Held not disentititled to raise claimafter receiving Retiral benefits-such directions can be issued in the larger interest of justice,principle of equality and good conscience-view of Single Judge affirmed.

Held: Para 15

In our considered opinion, keeping in view the aforesaid decisions of the Supreme Court, respondent no.1-writ petitioner be awarded 50% of the back wages for the period he was out of employment. Respondent no.1-writ petitioner shall, apart from this, be entitled for all consequential benefits. The amount already paid to respondent no.1-writ petitioner, as per the interim order of this Court dated 10.10.2006, shall be adjusted towards the payment of back wages.

Case law discussed:

2007 (7) SCC 689, 2009 (2) SCC 592

(Delivered by Hon'ble F.I. Rebello, C.J.)

1. Heard Mr. S.D. Dubey, learned counsel for the appellants-Board and Mr. M.M. Sahai, learned counsel for respondent no.1-writ petitioner.

2. This special appeal questions the correctness of the judgment and order of the learned Single Judge dated 10.8.2006, whereby the writ petition filed by respondent on.1-writ petitioner, who is a Class-IV employee (Sweeper) in the Cantonment Board, Varanasi, has been allowed and a direction has been issued to the Cantonment Board to get respondent no.1-writ petitioner medically examined. Further direction has been issued to the effect that the services of respondent no.1-writ petitioner shall not be terminated until he is certified to be completely unfit for work and after giving him a proper opportunity of hearing and medical examination. Learned Single Judge also directed that all benefits, to which respondent no.1-writ petitioner was entitled, shall be paid to him.

3. The appeal was entertained and an interim order was passed on 10.10.2006. The operative portion of the interim order is to the following effect:-

"The impugned order will remain stayed until further orders of Court, if and only if Rs.1,25,000/- (One lac twenty five thousand) is paid to the writ petitioner within a period of two weeks hereof. It is made clear that the appellant will be under an obligation only to make an offer of payment and it is up to the writ petitioner to present himself and accept the money. Payment and acceptance will be without prejudice. The writ petitioner will offer himself for examination by a Medical Board of the Cantonment, Varanasi and the report of the examination shall be filed in Court on the next date of hearing. The Medical Board shall be of the choice of the Cantonment Board. It will be the duty of the writ petitioner to present himself regularly to obtain information as to when his examination is scheduled to be made. In case the writ petitioner leaves an address for communication to him with the Cantonment Board within a period of a fortnight from the date hereof, then and in that event, notice for the medical examination might be sent to that address.

Let the matter be listed after four weeks."

4. During the pendency of the appeal, the Cantonment Board has carried out the medical examination of respondent no.1-writ petitioner and the report of the Medical Board dated 03/04.11.2006 has been placed before the Court, which is quoted below:-

"APPENDIX-A

MEDICAL EXAMINATION OF SHRI SHAMBHOO.

NAME: Shri Shambhoo S/O Late Sri Jinjar

ADDRESS: C/O Sri Prem Ram, H.No. 16, Kali Mahal, Mughalsarai, Chandauli.

IDENTIFICATION MARKS:

1. One black mole on the tip of the nose -0.5 cm lateral & left side.

2. One black mole on the cheek - 1 cm medial to right ear lobule

3. One black mole on left chest - 5.5 cm diagonally lateral to the nipple.

HISTORY: He had been suffering from tubercular bronchitis and low backache (pott's spine) six years back. He had taken treatment from a private practitioner for complete two years. At present he has no complaints.

MEDICAL EXAMINATION:

GENERAL EXAMINATION: Thin built person, Height 5.0 ft, Weight 49.5 Kg. No pallor, No jaundice, No pedal oedema, J.V.P. Not raised, No significant lymphadnopathy, Clubbing is present in all fingers of both hands.

PULSE: 72/mt, regular, normal volume, synchronous, palpable in all limbs.

B.P. - 100/70 mm of hg. Eyes-vision is normal in both eyes, no colour blindness.

EARS- Hearing appears- normal in both ears.

SYSTEMIC EXAMINATION:

1- Respiratory System- Trachea is centrally placed, no visible deformity of the chest, respiratory rate- 28/mt, regular, chest moment are normal in both side.

Air Entry - Normal on both sides, normal breath sounds.

2- Abdomen- Scaphoid shape, no distension, no visible lump or abnormal movements, umbilicus is normal, liver & spleen are not palpable, bowel sounds are normal, hernial orifices are free.

P/R EXAMINATION- Normal, Genitalias are normal.

3. Central nervous system-

a- mental status- normal

b- Muscle - power, tone & movements are normal in all limbs

c- There is no neurological deficit

d- Spine- normal curvature, slight protuberance on L3- L4 which is non tender, no abnormality.

e. Hip joint - both hip joints are normal.

INVESTIGATION-

Blood- TLC, DLC, Hb%, ESR, Blood Sugar, Blood Urea, HIV- I & II,

IgG, IgM, IgA for tuberculosis, Urine-R/M

X-Ray - x-ray chest PA view

x-ray pelvis with both hip joint-AP view

x-ray L-S spine AP/Lateral

MRI of L-S spine.

Investigations reveal no abnormality except no headed lesion of L3 L4 DISC on x....of spine e MRI.

Sd/-

03.11.2006
Dr. Sudhir K. Gupta, Medical Officer, CGH
Member-Medical Board.

APPENDIX 'A2'

REMARKS OF THE MEDICAL BOARD

The medical board was of the unanimous opinion that it was necessary to review past medical condition of Sri Shambhoo, ex s.w. and therefore while going through his previous records it was observed :-

1- That on his medical examination on 22.03.2001 by a panel of two doctors, he had been found to have been suffering from pulmonary tuberculosis with pott's spine (having tenderness at the lumbosacral region with no neural deficit) and having symptoms of pain at the back, cough and breathlessness which further aggrevated on doing hard physical work. Based on this he was declared medically unfit to carry out hard labour work which he was expected to do by virtue of his trade as Safaiwala.

2- On his medical examination on 29.6.2001 a medical board consisting of three doctors he was again found to be medically unfit to carry out his trade work of safaiwala because his physical condition was not suitable for having been suffering from pulmonary tuberculosis with bronchitis and pott's spine. However, the medical board further recommended that he can be given sheltered appointment on compassionate ground as per fitness to be reviewed at regular intervals.

3- While reviewing available records, Shri Shambhoo ex. Sw had been found to be chronically ill in the past as evident from the facts that he had been perpetual absentee on medical ground as per the details obtained as follows:-

1996---------------41 days
1997---------------60 days
1998---------------37.5 days
1999---------------26 days
2000---------------44.5 days
2001---------------31 days

Concluding remarks:- On medical examination of Shri Shambhoo, ex. sw. on this day of 3rd Nov. 2006 (after a lapse of over 5 years from last medical examination held on 29.06.2001) and on the basis of his investigation reports advised by the medical board, there appears to be marked improvement in the medical condition of Shri Shambhoo, might be due to the anti tubercular treatment he had been undertaking in the past as reported by Shri Shambhoo ex. sw. Presently he does not complaint of cough, breathlessness and backache and he is capable of performing body and limbs movements without any problems as observed by the Medical board. Undoubtedly, as per his previous records

he had been suffering from Pulmonary kocks with pott's spine from which he has remarkably recovered with anti tubercular treatment.

Therefore, in view of the above & as per the opinion of Dr. S. Kumar Singh orthopaedic and spine surgeon (enclosed as Appendix 'A.3') as of now, Shri Shambhoo ex. s.w. in question is medically fit without any neurological deficit and can do moderate work without any difficulty.

Sd/-
1. Sig. of C.O. MH, Chairman
Sd/-
2. Sig. of R.M.O. CGH Member
Sd/-
3. Sig. of M.O. CGH Member"

5. The matter was directed by the Court to be placed after four weeks, but due to some unavoidable intervening factors, it could not be taken up for one cause or the other. The matter has now finally been placed before us today.

6. Sri Dubey, learned counsel for the appellants contends that respondent no.1-writ petitioner was found medically unfit to discharge any duty and, therefore, his services were terminated. He has invited the attention of the Court to the medical report dated 22.3.2001, which indicates that respondent no.1-writ petitioner, who was found to be suffering from pulmonary tuberculosis, was declared medically unfit for doing hard labour work. This medical unfitness was put forward to the Medical Board for re-assessment and the Medical Board constituted by the competent authority, opined as follows:-

"**10.** Order given to the individual by the President of the medical board:- You are being boarded out from service on medical ground because your physical condition are not suitable to carry out your trade work. However, he can be given sheltered appointment on compassionate ground as per fitness to be reviewed at regular intervals."

7. Sri Dubey, contends that respondent no.1-writ petitioner has accepted his post retiral benefits and, therefore, no relief can be granted to him even otherwise. He submits that respondent no.1-writ petitioner is out of employment and, therefore, there is no question of his reinstatement.

8. Sri M.M. Sahai, learned counsel for respondent no.1-writ petitioner, contends that the report, which was submitted on 29.6.2001, clearly indicates that respondent no.1-writ petitioner could be given sheltered appointment on compassionate ground as per fitness to be reviewed at regular intervals. He submits that in spite of the aforesaid recommendation of the Medical Board, no such exercise was undertaken by the appellants-Board. There is nothing on record to indicate that, at any point of time, the case of respondent no.1-writ petitioner was considered for alternate appointment.

9. He further submits that respondent no.1-writ petitioner was illegally thrown out of employment, therefore, the appellants are obliged to take back him in employment and pay him full back wages. The contention is that the subsequent medical report leaves no room for doubt that respondent no.1-writ petitioner was fit so as to discharge

his duties, therefore, he is entitled for his reinstatement along with back wages. He further submits that even if respondent no.1-writ petitioner had accepted some retiral benefits from the appellants, the same would not dis-entitle him for asserting his claim for reinstatement and back wages.

10. We have heard learned counsel for the parties and perused the records.

11. The medical report relied upon by the appellants dated 22.03.2001 does not indicate that the disease from which respondent no.1-writ petitioner was suffering, was not curable. This is further fortified by the report of the Medical Board dated 29.6.2001, which clearly demonstrates that it was the weak physical condition, as assessed by the Board, due to which respondent no.1-writ petitioner was not fit to carry out his trade work, but he could be offered sheltered appointment on review of his physical condition.

12. From the records, we do not find that any exercise has been undertaken by the appellants-Board to apply their mind to the aforesaid recommendation made by the Medical Board. As a matter of fact, respondent no.1-writ petitioner was summoned and he was handed over an order for receiving his retiral benefits.

13. In our opinion, receiving of such retiral benefits by the respondent no.1-writ petitioner, does not dis-entitle him from raising his claim against his termination from service. We do not find any such indication in the report of the medical board that respondent no.1-writ petitioner was absolutely unfit to discharge any duty. In such a situation, in view of the subsequent medical report dated 03/04.11.2006, which declares that respondent no.1-writ petitioner is medically fit without any neurological deficit and is capable to do moderate work without any difficulty, the submission of the appellant-Board deserves to be rejected and is accordingly rejected. The judgment and order of the learned Single Judge is affirmed. In view of the medical report dated 3/4.11.2006 extracted above, the appellants-Board are directed to reinstate respondent no.1-writ petitioner in service forthwith.

14. Insofar as the payment of back wages is concerned, in the case of **Commissioner, Karnataka Housing Board Vs. C. Muddaiah,** reported in (2007) 7 SCC 689, the Supreme Court in para 34 of the said judgement observed as under:

"34. We are conscious and mindful that even in absence of statutory provision, normal rule is "no work no pay". In appropriate cases, however, a court of law may, *nay* must, take into account all the facts in their entirely and pass an appropriate order in consonance with law. The court, in a given case, may hold that the person was willing to work but was illegally and unlawfully not allowed to do so. The court may in the circumstances, direct the authority to grant him all benefits considering "as if he had worked". It, therefore, cannot be contended as an *absolute* proposition of law that no direction of payment of consequential benefits can be granted by a court of law and if such directions are issued by a court, the authority can ignore them even if they had been finally

confirmed by the Apex Court of the country (as has been done in the present case). The bald contention of the appellant Board, therefore, has no substance and must be rejected."

The same view has been reiterated in the case of **Somesh Tiwari Vs. Union of India,** reported in (2009) 2 SCC 592. In para 23 of the said judgment, the Supreme Court observed as under:-

"23. This Court in *Karnataka Housing Board v. C. Muddaiah* [(2007) 7 SCC 689] laid down the law, thus :(SCC pp. 700-01, paras 33-34)

"33. The matter can be looked at from another angle also. It is true that while granting a relief in favour of a party, the court must consider the relevant provisions of law and issue appropriate directions keeping in view such provisions. There may, however, be cases where on the facts and in the circumstances, the court may issue necessary directions in the larger interest of justice keeping in view the principles of justice, equity and good conscience. Take a case, where ex facie injustice has been meted out to an employee. In spite of the fact that he is entitled to certain benefits, they had not been given to him. His representations have been illegally and unjustifiably turned down. He finally approaches a court of law. The court is convinced that gross injustice has been done to him and he was wrongfully, unfairly and with oblique motive deprived of those benefits. The court, in the circumstances, directs the authority to extend all benefits which he would have obtained had he not been illegally deprived of them. It is open to the authorities in such case to urge that as he has not worked (but held to be illegally deprived), he would not be granted the benefits? Upholding of such plea would amount to allowing a party to take undue advantage of his own wrong. It would perpetrate injustice rather than doing justice to the person wronged.

34. We are conscious and mindful that even in absence of statutory provision, normal rule is "no work no pay". In appropriate cases, however, a court of law may, nay must, take into account all the facts in their entirely and pass an appropriate order in consonance with law. The court, in a given case, may hold that the person was willing to work but was illegally and unlawfully not allowed to do so. The court may in the circumstances, direct the authority to grant him all benefits considering "as if he had worked". It, therefore, cannot be contended as an absolute proposition of law that no direction of payment of consequential benefits can be granted by a court of law and if such directions are issued by a court, the authority can ignore them even if they had been finally confirmed by the Apex Court of the country (as has been done in the present case). The bald contention of the appellant Board, therefore, has no substance and must be rejected."

15. In our considered opinion, keeping in view the aforesaid decisions of the Supreme Court, respondent no.1-writ petitioner be awarded 50% of the back wages for the period he was out of employment. Respondent no.1-writ petitioner shall, apart from this, be entitled for all consequential benefits. The amount already paid to respondent no.1-writ petitioner, as per the interim order of this Court dated 10.10.2006,

shall be adjusted towards the payment of back wages.

16. Accordingly, this special appeal is disposed of subject to the directions made hereinabove. Interim order dated 10.10.2006 stands vacated and the impugned judgment stands modified accordingly. No order as to costs.

17. Medical Report dated 03/04.11.2006 submitted by the appellants-Board be kept with the record.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.08.2010

BEFORE
THE HON'BLE S.K. TRIPATHI, J.

Criminal Revision No. 1489 of 2004

Udai Narain Singh ...Applicant
Versus
State of U.P. and another ...Opposite Parties

Counsel for the Revisionist:
Sri Kamal Krishna

Counsel for the Respondents:
Sri A.K. Singh
Sri P.N. Rai
Sri R.N. Rai
A.G.A.

(A) Code of Criminal Procedure 1973 Sec. 227, IPC Sec. 302, 201-Evidence Act Sec 30-Accused implicated only on the basis of confessional statement of the co accused-held, such a statement can only bind the maker, but not those who had been implicated therein-could be read in evidence as a corraboratime piece of evidence-if materials before the Court make out even a case of strong suspection.

(B) Criminal Procedure Code 1973 Sec.227,401-IPC Sec.302, 201-Revision against order rejecting discharge application-held, though Addl Session Judge expected to pursue confessional statement of the accused and other materials in the case diary-He was not required to consider the pros and cons off the evidence and to record a final verdict-only a prima facie consideration of material on face value necessary-impugned order suffering from material infirmity-set a side.

Held: Para 17

In the instant case, the learned trial court has relied on the statements of the witnesses, Smt Hira Mani Singh, Amresh Kumar Pandey, Smt. Beena Singh and Anad Kumar and has excluded the statements of witnesses Manoj Kumar and Anand Kumar on the ground that their statements had merely proved the confessional statements of co-accused, which were not relevant and held that the statements of other witnesses were sufficient to frame charges under section 302 and 201 I.P.C., but without indicating as to whether the other witnesses had spoken anything in regard to the complicity of the applicant or not. The submission of the learned counsel for the applicant or not. The submission of the learned counsel for the applicant is that except the confessional statements, there is no other evidence against the applicant. The statements of the witnesses Smt. Hira Mani Singh, Amresh Kumar Pandey, Smt. Beena Singh and Anand Kumar are not in any way against the applicant, but the learned Additional Sessions Judge has misread their statements, therefore, the finding of the Additional Sessions Judge, being based on misreading of the statements of the said witnesses cannot be upheld. It is true that the confession of a co-accused is not a substantive evidence and there should be some evidence beyond the confessional statement of co-accused, but the learned

Additional Sessions Judge was not expected to Writ down a final judgement at the stage of charge by holding that the confessional statements of co-accused was not relevant, without giving due consideration to the legal position that the confessional statements of co-accused could be read in terms of section 30 of the Evidence Act, as a corroborative piece of evidence. Therefore, the learned Additional Sessions Judge was expected to peruse the confessional statements of co-accused and other materials available in the case diary together and to find out whether or not any charge against the applicant was made out. In doing so, he was not required to consider pros and cons of the evidence and to record a final verdict, only a prima facie consideration of the materials was necessary by taking into consideration the statements of the witnesses and co-accused at their face value.

Case law discussed:
2002(2) Sec.135, 2008(10) Sec.394, 2009(2) Sec(Cri)850, 2009(2)EFR 216, 2005 CrlJ 1827.

(Delivered by Hon'ble S.K.Tripathi, J.)

1. Heard Sri Kamal Krishna for the applicant, Mr. R.N. Rai for the respondent no. 2 and learned AGA for the respondent no. 1 and perused the record.

2. This is a revision against the order dated 22.3.2004 passed by Additional Sessions Judge, Fast Track Court No. 2, Varanasi in S.T. No. 55 of 2004, whereby the learned Additional Session Judge refused to discharge the applicant.

3. It appears that the applicant Udai Narain Singh is an accused in S.T. No. 55 of 2004(State Vs. Udai Narain Singh and others) pending before the Additional Session Judge, Fast Track Court No.2, Varanasi.

4. Learned counsel for the applicant contended before the trial court that from the facts placed in support of the charge sheet no prima facie case for framing charges under section 302 and 201 I.P.C. was not made out against the applicant. The learned Additional Sessions Judge passed the order dated 22.3.2004 and arrived at the conclusion that there were sufficient materials on record to frame the charges against the applicant accordingly, refused to discharge him.

5. Mr. Kamal Krishna ,the learned counsel for the applicant submitted that there is no evidence against the applicant except the confessional statement of co-accused Pradeep Kumar before the witness Manoj Kumar.

6. It was next submitted that the statement of the witness Anand Kumar was not in any way against the applicant except that the applicant moved with his father and others on a tempo in the night of the incident. The other witnesses including the complainant did not state anything against the applicant, therefore, the learned Additional Sessions Judge has misread the evidence and recorded the incorrect finding that a prima face case for framing charges was made out against the applicant. The learned counsel for the applicant further submitted that the learned Additional Session Judge has himself came to the conclusion that the confessional statement of co-accused was not relevant against tha applicant and as such the learned lower court excluded confessional statement of co-accused Pradeep Kumar, which was made before the witness Manoj Kumar. It was next submitted that after exclusion of the confessional statement of co-accused, there was no material against the applicant to frame any charge.

7. Mr. R.N. Rai, on the other hand, submitted that the learned Additional Sessions Judge has considered the statements of Smt. Hira Mani Singh, Amresh Kumar Pandey, Smt. Beena Singh, Anand Kumar and Manoj Kumar. The impugned finding based on the statements of these witnesses cannot be upset b the revisional court.

8. The provisions of section 227 Cr.P.C. deal with the matter of discharge of an accused. In the case of ***Dilawar Balu Kurane Vs. State of Maharashtra(2002) 2 Supreme Court cases 135,*** the Apex court had examined the ambit and scope of section 227 Cr.P.C. and held:-

"In exercising powers under section 227 Cr.P.C., the settled position of law is that the Judge while considering the question of framing the charges under the limited purpose of finding out whether or not a prima facie case against the accused has been made out, where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained the court will be fully justified in framing a charge and proceeding with the trail; by and large if two views are equally possible and the Judge is satisfied that the evidence produced before him gave rise to some suspicion but not grave suspicion against the accused, he will be fully justified to discharge the accused, and in exercising jurisdiction under section 227 Cr.P.C., the Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the board probabilities of the case, the total effect of the evidence and the documents produced before the court but should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducing a trial."

9. In case of ***Yogesh alias Sachin Jagdish Joshi Vs. State of Maharashtra(2008) 10 Supreme Court Cases 394,*** the apex court has almost perpounded the same principles in the following terms:-

"It is trite that the words "not sufficient ground for proceeding against the accused" appearing in section 227 Cr.P.C., postulate exercise of judicial mind on the part of the Judge to the facts of the case in order to determine whether a case for trial has been made out by the prosecution, However, in assessing this fact, the Judge has the power to sift and weigh the material for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine a prima face case depends upon the facts of each case and in this regard it is neither feasible not desirable to lay down a rule of universal application. By and large, however, if two views are equally possible and the Judge is satisfied that the evidence produced before him gives rise to suspicion only as distinguished from grave suspicion, he will be full within his right to discharge the accused. At this stage, he is not to see as to whether the trial will end in conviction or not. The broad test to be applied is whether the materials on record, if unrebutted, make a conviction reasonably possible."

10. In the case of ***Palwinder Singh Vs. Balwinder Singh and others(2009) 2 Supreme Court Cases (Cri) 850,*** the Apex court reiterated the aforesaid principles and held.:-

"The jurisdiction of the learned Sessions Judge while exercising power under section 227 Cr.P.C. is limited. Charges can also be framed on the basis of strong suspicion. Marshalling and

appreciation of evidence is not in the domain of the Court at that point of time."

11. A perusal of the aforesaid decisions clearly reveals that charges can be framed against the accused, if the materials produced before the Court make out even a case of grave or strong suspicion against the accused. While considering the question of framing charge or discharge the Marshalling and appreciation of evidence is not in the domain of the court. What is required from the Court is to find out whether on the basis of the materials on record, if unrebutted, a conviction of the accused is reasonably possible, if the answer is in negative, the accused may be discharged.

12. The learned counsel for the applicant submitted that the Additional Sessions Judge has himself excluded the confessional statement of co-accused holding that the same was not admissible in evidence and there is no other evidence against the applicant, therefore, rejection of discharge prayer was not proper. Learned counsel further submitted that the learned trial court has perused the statements of the witnesses Smt. Hira Mani Singh, Amresh Kumar Pandey, Smt. Beena Singh, Anand Kumar and Manoj Kumar and on perusal of their statements was of the view that a prima facie case for framing charge under section 302 I.P.C. was made out against the applicant, but he has not indicated what were the statements of the said witnesses and how their statements were against the applicant and he has not assigned reason in this regard, therefore, the impugned order is liable to be set aside.

13. Learned AGA, on the other hand, submitted that the confessional statement of co-accused was relevant under section 30 of the Evidence Act. He further submitted that no doubt confessional statement of a co-accused is not substantive evidence, but the same can be used for corroboration of other evidence. It was also submitted that when the charge can be framed in a case of existence of grave or strong suspicion, the exclusion of the confessional statement of co-accused was not proper.

14. The learned counsel for the applicant, in rebuttal, submitted that the learned trial court instead of considering the case for the purpose of deciding as to whether any case for framing charge was made out or not proceeded to elaborately examine the matter on merits as if he was writing a final judgement after the trial court. Legally he was not required to do so..

15. In the case **Union of India vs. Bal Mukund & others, 2009(2) EFR 216**. In that case the Apex Court has held in para 21 as follows:

"21. *.............If an accused makes a confession in terms of the provisions of the Code of Criminal Procedure or otherwise, his confession may be held to be admissible in evidence only in terms of Section 30 of the Evidence Act and not otherwise. If it is merely a statement before any authority, the maker may be bound thereby* ***but not those who had been implicated therein.*** *If such a legal principle can be culled out, the logical corollary thereof would be that the co-accused would be entitled to cross-examine the accused as such a statement made by him would be prejudicial to his interest."*

16. In the case of ***Monish H. Bhalla VS. Satya Prakash Bahl S.P. Bahl*** @ ***S.P. And others, 2005 Crl. L.J. 1827,*** the Bombay High Court after referring to various decisions of Privy Council and the Apex Court held, in para 6, as follows:-

"On a specific query by this Court, it was admitted that besides the statement of co-accused there is no other material against the respondent No.1 Satya Prakash Bahl. In such case, the question which arises for consideration is whether the confession of one of the accused implicating the other accused, can be treated as substantive evidence. The statements of co-accused have been recorded under section 67 of NDPS Act like one under section 15 of the TADA Act, which makes the statement of an accused admissible against the co-accused, conspirators or abettors. In such case, one would have to fall back on section 30 of the Evidence Act to see what use can be made of the statement of one accused against the co-accused. This aspect has been considered by the Honourable Supreme Court in a number of matters i.e. in the case of Bhuboni Sahu v. The King, AIR 1949 P.C. 257: (1950 Cri LJ 872); Haricharan Kurmi v. State of Bihar, (1964 (2) Cri LJ 344): AIR 1964 SC 1184; Kashmira Singh v. State of M.P., 1952 SCR 526: AIR 1953 SC 159; (1952 Cri LJ 839). In Haricharan Kurmi(supra), the Supreme Court has observed in para No. 12 thus:

"It would be noticed that as a result of the provisions contained in section 30, the confession has no doubt to be regarded as amounting to evidence in a general way, because whatever is considered by the Court is evidence; circumstances which are considered by the Court as well as probabilities do amount to evidence in that generic sense. Thus, though confession may be regarded as evidence in that generic sense because of the provisions of section 30, the fact remains that it is not evidence as defined by section 3 of the Act. The result, therefore, is that in dealing with a case against an accused person, the Court cannot start with the confession of co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence. That briefly stated, is the defect of the provisions contained in Section 30. The same view has been expressed by this Court in Kashmira singh vs. State of Madhya Pradesh 1952 SCR 526: (AIR 1952 SC 159) there the decision of the Privi Counsil in Bhuboni Sahu's case(76 Ind App 147) (AIR 1949 PC 257) has been cited with approval

17. In the instant case, the learned trial court has relied on the statements of the witnesses, Smt Hira Mani Singh, Amresh Kumar Pandey, Smt. Beena Singh and Anad Kumar and has excluded the statements of witnesses Manoj Kumar and Anand Kumar on the ground that their statements had merely proved the confessional statements of co-accused, which were not relevant and held that the statements of other witnesses were sufficient to frame charges under section 302 and 201 I.P.C., but without indicating as to whether the other witnesses had spoken anything in regard to the complicity of the applicant or not. The submission of the learned counsel for the applicant or not. The submission of the learned counsel for the applicant is that except the confessional statements, there is no other evidence against the applicant. The statements of the witnesses Smt. Hira Mani Singh, Amresh Kumar Pandey, Smt. Beena Singh and Anand Kumar are not in any way against the applicant, but the learned Additional Sessions Judge has misread their statements, therefore, the finding of the Additional Sessions Judge,

being based on misreading of the statements of the said witnesses cannot be upheld. It is true that the confession of a co-accused is not a substantive evidence and there should be some evidence beyond the confessional statement of co-accused, but the learned Additional Sessions Judge was not expected to Writ down a final judgement at the stage of charge by holding that the confessional statements of co-accused was not relevant, without giving due consideration to the legal position that the confessional statements of co-accused could be read in terms of section 30 of the Evidence Act, as a corroborative piece of evidence. Therefore, the learned Additional Sessions Judge was expected to peruse the confessional statements of co-accused and other materials available in the case diary together and to find out whether or not any charge against the applicant was made out. In doing so, he was not required to consider pros and cons of the evidence and to record a final verdict, only a prima facie consideration of the materials was necessary by taking into consideration the statements of the witnesses and co-accused at their face value.

18. In view of the facts and circumstances stated above, the impugned order suffers from a material infirmity resulting in causing failure justice in the case. As such the impugned order cannot be sustained.

19. The revision is allowed. The impugned order dated 22.3.2004 is set aside and the matter is remanded to the learned Additional Sessions Judge for a fresh decision in accordance with law.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.08.2010

BEFORE
THE HON'BLE S.P. MEHROTRA, J.
THE HON'BLE S.S. TIWARI, J.

First Appeal from Order No. 1915 of 2010

Nagar Panchayat Akbarpur, Kanpur Dehat ...Petitioner
Versus
M/S Bajrang Bali Rice Mills and others ...Respondentss

Counsel for the Petitioner:
Sri Pradeep Chauhan

Court fee Act 1870 Section 6-A(1)-appeal against order regarding sufficiency of court fee-can be only by the plaintiff and not by the person filling objection-held appeal by defendant-not maintainable

Held: Para 9 and 13

Thus, the only person who can file appeal under sub-section (1) of Section 6A of the Court Fees Act, 1870, is the person called upon to make good a deficiency in court-fee. A person raising objection on the ground of insufficiency of court-fee paid in the suit has not been given any right to file an appeal under sub-section (1) of Section 6A of Court Fees Act, 1870.

In view of the above, the present appeal filed by the defendant -appellant is not maintainable, and the same is liable to be dismissed on this ground.
Case law discussed:
AIR 1954 All 188= 1953 ALJ 702.

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

1. The present appeal has been filed under Section 6A of the Court Fees Act ,1870 against the Order dated 23.3.2010

passed by the learned Additional Civil Judge(Senior Division) First, Kanpur Dehat on an application No.61C-2 filed on behalf of the defendant-appellant in Original Suit No.172 of 2009 filed by the plaintiff-respondent no.1 against the defendant-appellant and the defendant-respondent nos.2 to 5.

2. It appears that the plaintiff-respondent no.1 filed the aforesaid Original Suit No.172 of 2009 against the defendant-appellant and the defendant-respondent nos.2 to 5 inter-alia, praying for decree of declaration and prohibitory injunction.

3. The aforementioned application No.61C-2 was filed on behalf of the defendant-appellant in the said Suit on the ground that ad-valorem court-fee was payable by the plaintiff-respondent no.1 in the said Suit, and the court -fee paid by the plaintiff-respondent no.1 was insufficient.

4. Objection no.80C-2 was filed on behalf of the plaintiff-respondent no.1 against the aforesaid application filed on behalf of the defendant-appellant.

5. By the impugned Order dated 23.3.2010 passed by the Court below [Additional Civil Judge(Senior Division)First, Kanpur Dehat], the said application No.61C-2 filed on behalf of the defendant appellant has been rejected.

6. The present appeal purporting to be under Section 6A of the Court Fees Act, 1870,has been filed by the defendant-appellant against the said Order dated 23.3.2010.

7. We have heard Sri Pradeep Chauhan, learned counsel for the defendant-appellant, and perused the record.

8. Section 6A of the Court-Fees Act, 1870, inserted by the U.P.Amendment, makes provision for appeal against the order to pay court-fee. The said Section is reproduced below:

"6-A. Appeal against order to pay court-fee.-(1) *Any person called upon to make good a deficiency in court-fee may appeal against such order as if it were an order appealable under Section 104 of the Code of Civil Procedure.*

The party appealing shall file with the memorandum of appeal, a certified copy of the plaint together with that of the order appealed against.

(2) In case an appeal is filed under sub-section (1), and the plaintiff does not make good the deficiency, all proceedings in the suit shall be stayed, and all interim orders made, including an order granting an injunction or appointing a receiver, shall be discharged.

(3) A copy of the memorandum of appeal together with a copy of the plaint and of the order appealed against shall be sent forthwith by the appellate Court to the Commissioner of Stamps.

(4) If such order is varied or reversed in appeal, the appellate Court shall, if the deficiency has been made good before the appeal is decided, grant to the appellant a certificate, authorising him to receive back from the Collector such amount as is determined by the

appellate Court to have been paid in excess of the proper court fee.

(5) The Court may make such order for the payment of costs of such appeal as it deems fit, and where such costs are payable to the Government, they shall be recoverable as arrears of land revenue."

Sub-section(1) of Section 6A of the Court Fees Act, 1870 provides that any person called upon to make good a deficiency in court-fee may appeal against such order as if it were an order appealable under Section 104 of the Code of Civil Procedure.

9. Thus, the only person who can file appeal under sub-section (1) of Section 6A of the Court Fees Act, 1870, is the person called upon to make good a deficiency in court-fee. A person raising objection on the ground of insufficiency of court-fee paid in the suit has not been given any right to file an appeal under sub-section (1) of Section 6A of Court Fees Act, 1870.

10. Therefore, normally the appeal under sub-section (1) of Section 6A of the Court Fees Act, 1870 may be filed by the plaintiff, as is also evident from a perusal of sub- section (2) of the said Section. However, in case the defendant makes counter-claim in a suit under Rule 6A of Order VIII of the Code of Civil Procedure,1908, the appeal under Section 6A of the Court Fees Act, 1870 may be filed by such a defendant because such a defendant will be in position of plaintiff as regards the counter-claim.

11. Reference in this regard may be made to the decision of this Court in **Mst. Kulsumun Nisam Vs. Khushnudi Begum & another, AIR 1954 All 188= 1953 ALJ 702.**

12. Reverting to the present case, the defendant-appellant has filed the aforesaid application no.61C-2 raising objection regarding insufficiency of court-fee paid by the plaintiff-respondent no.1 in the aforesaid Original Suit No.172 of 2009. The said application has been rejected by the Court below. No appeal can be filed by the defendant-appellant against the impugned Order rejecting the said application no.61C-2, as the defendant-appellant is not the person " called upon to make good a deficiency in court-fee"

13. In view of the above, the present appeal filed by the defendant -appellant is not maintainable, and the same is liable to be dismissed on this ground.

14. The appeal is accordingly dismissed on the ground that the same is not maintainable at the instance of the defendant-appellant.

15. This order, however, will not come in the way of the defendant-appellant in pursuing appropriate remedy before the appropriate forum against the aforesaid impugned Order dated 23.3.2010.

16. Certified copy of this order will be provided to the learned counsel for the defendant-appellant within four weeks on payment of usual charges.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 11.08.2010

BEFORE
THE HON'BLE SHRI KANT TRIPATHI, J.

Criminal Revision No. 3221 of 2006

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

Counsel for the Petitioner:
Sri Sunil Kumar

Counsel for the Respondents:
A.G.A.

U.P. Juvenile (Care and Protection of children) rules 2004, Rule-22(5)- Determination of age -date of birth recorded in Municipal Corporation or in school register-relevant-in absence thereof medical opinion be taken into consideration by giving one year margin.

Held: Para 7

Under the Rule 22 (5) of the U.P. Juvenile Justice (Care and Protection of Children) Rules, 2004, the date of birth certificate issued by a corporation or a municipal authority or school is the relevant material for determining the age of the person who claims to be a juvenile. In absence of these materials, the medical opinion which is controvertible may be taken into consideration. While considering the medical opinion, a margin of one year for determining the age may be given.

Case law discussed:
AIR 2005 SC 2731, (2009) 13 SCC 211, 2009 (64) ACC 754

(Delivered by Hon'ble Shri Kant Tripathi, J.)

1. Heard Sri Sunil Kumar, learned counsel for the revisionists and learned AGA for the State.

2. This is a revision against the order dated 9.5.2006 passed by Mr. S. Lal, Additional Sessions Judge, Court No.3, Bulandshahar in S.T. No. 45 of 1995 (State Vs. Natthi and others) whereby the learned Additional Sessions Judge refused to hold the revisionists Subhash, Nanda @ Nan Kishore, Harpal and Harkesh as juveniles.

3. It appears that the occurrence of this case took place on 18.6.1994 and on that date the Juvenile Justice Act, 1986 was in force, in which a male person upto the age of 16 years was considered as a juvenile. Learned Additional Sessions Judge, Bulandshahar appears to have refused to declare the revisionists as juveniles on the ground that they had already completed 18 years before the commencement of the Juvenile Justice (Care and Protection of Children) Act, 2000 and based this finding on the verdict of a Constitution Bench of the Supreme Court in the case of ***Pratap Singh Vs. State of Jharkhand and others AIR 2005 SC 2731.***

The aforesaid Act of 2000 has been materially amended in the year 2006 by the Juvenile Justice (Care and Protection of Children) (Amendment) Act 2006 and thereby an explanation was added in section 20 of the Act of 2000 which is extracted as follows:

Explanation- In all pending cases including trial, revision, appeal or any other criminal proceedings in respect of a juvenile in conflict with law in any court, the determination of juvenility of such a juvenile shall be in term of clause (l) of Section 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the

provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed."

The provisions of Act of 2000 as amended by the Amending Act of 2006 have been considered by the Apex Court in the case of ***Hari Ram Vs. State of Rajasthan (2009) 13 SCC 211.*** *The Apex Court held:*

"The said intention of the legislature was reinforced by the amendment effected by the said amending Act to Section 20 by introduction of the proviso and the Explanation thereto, wherein also it has been clearly indicated that in any pending case in any court the determination of juvenility of such a juvenile has to be in terms of Section 2 (l) even if the juvenile ceases to be so "on or before the date of commencement of this Act" and it was also indicated that the provisions of the Act would apply as if the said provisions had been in force for all purposes and at all material times when the alleged offence was committed."

4. In view of the principles propounded in Hari Ram's case (Supra) it is crystal clear that if the revisionists were less than 18 years on the date of occurrence, though the same took place prior to the commencement of the Act 2000, they shall be treated as juveniles and their case can not be discarded on account of the fact that they had become more than 18 years on the commencement of Act of 2000.

5. The question of juvenility of the applicants is required to be decided according to the rules applicable in the matter. The Uttar Pradesh Juvenile Justice (Care and Protection of Children) Rules, 2004 have been framed, which deal with the various matters relating to the Juveniles. The Rule 22 (5) of the said rules is the relevant rule for the purposes of determining the age of the person, who claims himself as a juvenile. The learned lower Court has not considered the provisions of Rule 22 (5) of the said Rules while passing the impugned order and has overlooked the same. Rule 22 (5) of the said Rules is being reproduced as follows:

"22 (5) In every case concerning a juvenile or child, the Board shall either obtain

(i) a birth certificate given by a corporation or a municipal authority; or

(ii) a date of birth certificate from the school first attended; or

(iii) matriculation or equivalent certificates, if available; and

(iv) in the absence of (i) to (iii) above, the medical opinion by a duly constituted Medical Board, subject to a margin of one year, in deserving cases for the reasons to be recorded by such Medical Board, regarding his age; and, when passing orders in such case shall, after taking into consideration such evidence as may be available or the medical opinion, as the case may be, recorded a finding in respect of his case."

6. A similar set of rules have also been framed in the State of Jharkhand, which have been referred to in the case of ***Babloo Pasi V. State of Jharkhand &***

Anr, 2009 (64) ACC. 754. In other words, Rule 22 (5) of the U.P. Juvenile Justice (Care and Protection of Children) Rules, 2004 is pari materia with Rule 22 (5) of the Jharkhand Juvenile Justice (Care and Protection of Children) Rules, 2003. In the case of Babloo Pasi (supra) the Apex Court has interpreted Rule 22 (5) of the Jharkhand Rules and held that in the absence of birth certificate given by a corporation or a municipal authority or date of birth certificate from the school first attended or the Matriculation or equivalent certificate, the medical opinion by a duly constituted Board subject to the margin of one year, in deserving cases shall be relevant for determining the age of the alleged juvenile but the medical opinion per-se is not a conclusive proof of the age of the person concerned and it is merely an opinion. The Apex Court further held that it would be imprudent to formulate a uniform standard for the determination of the age. True the Medical Board's opinion based on radiological examination is a useful guiding factor for determination of the age of a person but is not incontrovertible. The date of birth is to be determined on the basis of material on record and appreciation of the evidence adduced by the parties.

7. Under the Rule 22 (5) of the U.P. Juvenile Justice (Care and Protection of Children) Rules, 2004, the date of birth certificate issued by a corporation or a municipal authority or school is the relevant material for determining the age of the person who claims to be a juvenile. In absence of these materials, the medical opinion which is controvertible, may be taken into consideration. While considering the medical opinion, a margin of one year for determining the age may be given.

8. The occurrence took place on 18.6.1994. Therefore, the relevant date for determining the age of each of the revisionists is the date of the occurrence. If on that date the revisionists have not completed the age of 18 years, they will be deemed to be juveniles and in that event they have to be referred to the Juvenile Justice Board for inquiry and appropriate order. The Additional Sessions Judge has not specifically recorded any finding regarding the exact age of each of the revisionists on the date of the occurrence. The prayers of the revisionists were turned down merely on the ground that they had completed the age of 18 years on the date of the commencement of the Act of 2000. While recording this finding the learned lower court had merely assumed the age of each of the revisionists as 16 years on the date of the occurrence, which is nothing except to guess work, therefore, the same cannot be upheld. The question of juvenility needs to be decided a fresh in accordance with the aforesaid rule-22(5). Therefore, the matter has to go back to the learned trial court for a fresh finding.

9. The revision is allowed and the impugned order dated 9.5.2006 is set aside and the matter is remanded to the learned Additional Sessions Judge for afresh decision in accordance with law.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.08.2010

BEFORE
THE HON'BLE SHRI KANT TRIPATHI, J.

Criminal Revision No. 3502 of 2010

Deep Narain and others ...Petitioner
Versus
State Of U.P. and another ...Respondent

Counsel for the Petitioner:
Sri Shashi Bhushan

Counsel for the Respondent:
Sri S.N. Tripathi
A.G.A

Criminal Revision-against Summoning order u/s 319 Cr.P.C. without specific finding-if evidence remained uncontroverted-conviction of Revisionist can be held-order not sustainable

Held: Para 12

In the present case, no doubt the learned Additional Sessions Judge has passed a detailed order but he nowhere recorded any specific finding whether or not the evidence adduced in support of the application filed under section 319 CrPC, if uncontroverted, would reasonably lead to conviction of the revisionists. In absence of a finding in this perspective, the summoning order can not be upheld.

Case law discussed:
2009 (66) ACC 32, 2009 (66) ACC 273, (2000) 3 SCC 262, 2004 (7) SCC 792, 2010(5) ADJ 628

(Delivered by Hon'ble Shri Kant Tripathi, J.)

1. Heard Mr. Shashi Bhushan for the revisionists, Mr. S.N. Tripathi for the respondent no.2 and the learned AGA for the respondent no.1 and perused the impugned judgment and order.

2. With the consent of the learned counsel for the parties, the instant revision is being disposed of finally at the stage of admission.

3. The instant revision has been filed against the order dated 6.8.2010 passed by the Additional Sessions Judge (Fast Track Court) Sant Kabir Nagar in S.T. No. 53 of 2009 ? State vs. Nagendra Shukla, whereby the learned Additional Sessions Judge has summoned the revisionist no.1, Deep Narain with regard to the offences under section 376/302 IPC and has summoned the remaining revisionists in regard to the offence under section 302 IPC.

4. It appears that the respondent no.2 lodged an FIR with the allegations that her daughter (deceased Km. Meena) had made an oral dying declaration before her, according to which the revisionist no.1 Deep Narain committed rape on her and after that the remaining revisionists put her on fire after sprinkling kerosene, consequently, the deceased sustained burn injuries. In the hospital, the deceased made a similar statement but the doctor did not record her statement and referred her to Gorakhpur but she died while she was on way to Gorakhpur.

5. During the trial, the statements of PW-1 Smt. Geeta Shukla, PW-2 Km. Reena Shukla and PW-3 Km. Vedika Shukla were recorded. These witnesses have supported the prosecution story stated in the FIR. Learned Additional Sessions Judge found it proper to summon the revisionists under section 319 CrPC and accordingly passed the summoning order dated 6.8.2010.

6. The learned counsel for the revisionists submitted that the learned Additional Sessions Judge has not recorded any finding as to whether the evidence adduced against the revisionists, if uncontroverted, is sufficient to record a conviction against the revisionists.

7. In the case of ***Sarabjit Singh and another vs. State of Punjab and another 2009 (66) ACC 32***, the Apex Court held that indisputably, before an additional accused can be summoned for standing trial, the nature of the evidence should be such which would make out grounds for exercise of extraordinary power. The materials brought before the court must also be such which would satisfy the court that it is one of those cases where its jurisdiction should be exercised sparingly. The Apex Court further observed that an order under section 319 CrPC, therefore, should not be passed only because the first informant or one of the witnesses seeks to implicate other person. Sufficient and cogent reasons are required to be assigned by the court so as to satisfy the ingredients of the provisions. Mere ipse dixit would not serve the purpose. Such an evidence must be convincing one at least for the purpose of exercise of the extraordinary jurisdiction. After making these observations, the Apex Court further held that the courts are required to apply stringent tests; one of the tests being whether evidence on record is such which would reasonably lead to conviction of the person sought to be summoned.

8. Another Division Bench of the Apex Court in the case of ***Brindaban Das and others vs. State of West Bengal, 2009 (66) ACC 273***, propounded the same principle and held that in matters relating to invocation of powers under section 319 CrPC, the Court is not merely required to take note of the fact that the name of a person who has not been named as an accused in the FIR has surfaced during the trial, but the Court is also required to consider whether such evidence would be sufficient to convict the person being summoned. The Apex Court further observed that the fulcrum on which the invocation of section 319, CrPC rests is whether the summoning of persons other than the named accused would make such a difference to the prosecution as would enable it not only to prove its case but to also secure the conviction of the persons summoned.

9. In the case of ***Michael Machado & Anr. V. Central Bureau of Investigation & Anr., (2000) 3 SCC 262,*** the Apex Court propounded that power under section 319 CrPC vested in the Court should be used sparingly and the evidence on which the same was to be invoked should indicate a reasonable prospect of conviction of the person sought to be summoned.

10. The prospects of conviction as one of the requirement for summoning a person as accused under section 319 CrPC has been propounded even in the case of ***Krishnappa vs. State of Karnataka, 2004 (7) SCC 792.*** It has been held in that case that invocation of the power under section 319 CrPC should not have been resorted to, since the chances of conviction on the basis of the evidence on record was remote. Applying the principles laid down in the cases of ***Michael Machado (supra),*** the Apex Court further ruled that the power to summon an accused is an extraordinary power conferred on the Court and it should be used very sparingly and only if compelling reasons exist for taking cognizance against the person other than the accused.

11. After considering the aforesaid case laws and few other decisions of the Apex

Court, this Court in the case of **Rajol v. State of U.P., 2010(5) ADJ 628** has observed in para 22 as follows:

"22. In the cases of Sarabjeet (Supra), Brindawan Das, Michael Machado (supra) and Krishnappa (supra), it has been clearly held that summoning order should be passed only when the evidence, if uncontroverted, is of such a nature as to reasonably lead to conviction of the person sought to be summoned. The standard of evidence required for summoning an additional accused should be higher than the evidence required for framing charges because the jurisdiction under section 319 CrPC is to be exercised sparingly in an extra ordinary situation. Whether or not any evidence is of such a quality as to record conviction if it remains uncontroverted, is a variable question depending upon the facts and circumstances of each case and no hard and fast rule can be laid down in this regard. However, the court considering the evidence for the purpose of section 319 CrPC is not legally required to evaluate the evidence as it is ordinarily done while rendering the final judgment but the court has to see whether or not, the evidence on record appeals to the reason for the purposes of section 319 CrPC and the story narrated by the witnesses against the person sought to be summoned is not improbable and absurd and a conviction is possible on such statements, if uncontroverted. A non observance of this legal requirement would render the summoning order illegal."

12. In the present case, no doubt the learned Additional Sessions Judge has passed a detailed order but he nowhere recorded any specific finding whether or not the evidence adduced in support of the application filed under section 319 CrPC, if uncontroverted, would reasonably lead to conviction of the revisionists. In absence of a finding in this perspective, the summoning order can not be upheld.

13. For the reasons discussed above, the revision is allowed. The impugned order dated 6.8.2010 is set aside. The learned Additional Sessions Judge is directed to reconsider the application filed under section 319 CrPC in the light of the observations made hereinabove and pass an appropriate order afresh in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.08.2010

BEFORE
THE HON'BLE F.I. REBELLO, C.J.
THE HON'BLE A.P. SAHI, J.
THE HON'BLE S.K. GUPTA, J.

Civil Misc. Writ Petition No. 3733 of 2009

Jitendra Kumar Soni and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare,

Counsel for the Respondents:
Sri V.K. Singh,
Sri C.K. Rai,

<u>Constitution of India Article 226,14,254-</u> Education-Admission to special BTC course-exclusion by the State Court of degree diploma/certificate in LT/B.P.Ed/D.P.Ed/C.P.Ed from institutions/university duly recognised by the NCTE, but situate outside Uttar Pradesh-Held,all institutions imparting training courses approved by the NCTE are a class by themselves-no distinction can be made by State Government-notification imposing restriction held unreasonable, violation of Article 14-

such candidates,petitions pending eligible for being considered for special BTC courses-all judgements to the contrary overruled.

Held: Para 28 and 29

Once that be the case, it must follow the degree/diploma/ certificate, if obtained from an institution recognized by the NCTE, may be from the State of Madhya Pradesh, that degree/diploma/certificate would entitle a person, who possesses it, to apply for admission to Special B.T.C. Course or the B.T.C. Course itself. That the Special B.T.C. Course was started for the purpose of filling in the vacancies of teachers, who possess the Special B.T.C. certificate, is irrelevant.

We may now answer the reference:

(1) In answer to Question No.(a), it is not open to the State or the State authorities to exclude the students, who have obtained degree/diploma/certificate in LT/B.P.Ed./D.P.Ed./C.P.Ed. from Institutions/Universities established by law situate at place outside the State of Uttar Pradesh and duly recognized by the NCTE, from applying either for the Special B.T.C. Course or B.T.C. Course. Any such exclusion is illegal. Question No, (a) is answered, accordingly.

(2) Insofar as Question No.(b) is concerned, the classification, if any, is unreasonable and violative of Article 14 of the Constitution of India. At any rate, the only ground given by the State Government for not putting restriction on B.Ed. degree, and putting restriction on LT/B.P.Ed./D.P.Ed./C.P.Ed., is not sustainable in terms of the rules of N.C.T.E., as the admission can only be based on merit.

(3) Insofar as Question No.(c) is concerned, the judgement in Vijay Kumar Kushwaha (supra) did not answer the issue of admission to Special B.T.C. Course, but dealt with the issue of appointment to the post of Assistant Teacher. Even otherwise, considering the findings on question nos.(a) & (b), we will have to hold that the judgement in Vijay Kumar Kushwaha does not lay down the correct law.

Case law discussed:

2002 (2) UPLBEC 1340, 2008 (3) UPLBEC 432, 2008 (1) UPLBEC 641, 2009 STPL(Web) 174 SC, 2005 (5) SCC 172, 2006 (9) SCC 1, 2000 (5) SCC 231, AIR 1982 SSC 933, 1989 (2) SCC 250, 1995 (4) SCC 104, 1996 (3) SCC 15, CMWP No.3733/2009, CMWP No.2856 (M/S) of 2004, CMWP No. 2933/2004, CMWP No. 27948/1999, CMWP No. 29107/1999, 2003 (3) UPLBEC 2211

(Delivered by: Justice F.I. Rebello, C.J.)

1. The questions referred to this Full Bench and which we have re-framed for consideration are;

(a) Whether the degree obtained by a student from an institution/university established by law, situate at a place out side the State of Uttar Pradesh but duly recognized by the N.C.T.E. can be refused acceptance as valid qualification for being admitted to Special B.T.C. Course- 2008 by the State?

(b) Whether the classification under the Government Order between the degree of B.Ed. obtained from other State being valid for admission to B.T.C. Course-2008, while the degree of C.P.Ed., B.P.Ed. and D.P.Ed. similarly obtained from the institutions situate outside the State of Uttar Pradesh being invalid for considered for admission to B.T.C. Course-2008 is arbitrary and without any reasonable rational and therefore hit by Article 14 of the Constitution of India?

(c) Whether the Division Bench judgment in the case of **Vijay Kumar**

Kushwaha & Ors. Vs. State of U.P. & Ors. (2003) 3 UPLBEC 2211 lays down the correct law?

2. A learned Single Judge of this Court, while hearing the writ petition of applicants, who had applied for admission to Special B.T.C. Course, 2007 in **Jitendra Kumar Soni and others Vs. State of U.P. & Others** in Civil Misc. Writ Petition No.3733 of 2009, noted that their candidature had been rejected only on the ground that they had obtained a degree of Bachelor of Physical Education (B.P.Ed.)/Diploma of Physical Education (D.P.Ed.) from the colleges/University situate outside the State of Uttar Pradesh in view of the terms and conditions of the Government Order dated 14th November, 2008, regulating admission to B.T.C. Course-2007. By that order, only the students, who had passed their B.P.Ed./D.P.Ed. from the institutions situate in the State of Uttar Pradesh were alone entitled to apply for Special B.T.C.-2007. This condition was challenged before the learned Single Judge on various grounds, which can be enumerated as under:-

"(a) The degree obtained by the petitioners is from a recognized University established by law, although situate outside the State of Uttar Pradesh. Such degree cannot be discriminated viz-a-viz the degree granted by an University of the State of Uttar Pradesh. It is, therefore, submitted that the classification itself is arbitrary. Reference in that regard has been made to the judgment of the Hon'ble Supreme Court in the case of **Dr. B.L. Asawa v. State of Rajasthan and others,** reported in AIR 1982 SC 933 (Para 10).

(b) It is contended that the condition imposed, referred to above, results in complete exclusion of students, who have obtained identical qualification from the Universities outside the State of Uttar Pradesh. He submits that although the State can exercise preference in respect of the students, who have obtained degree from the institutions within the State of Uttar Pradesh, but such preference cannot be so extensive so as to completely exclude all the students, who have obtained degree from the institution of other States, i.e. total exclusion. In support thereof he has placed reliance upon the judgment of the Hon'ble Supreme Court in the case of **Dr. Sachin D. Kulkarni and others v. State of Maharashtra and others,** reported in (1989) 2 SCC 250.

(c) There is no reasonable justification for accepting the degree of B.Ed. granted by the Universities situate outside the State, while refusing the B.P.Ed., C.P.Ed. and D.P.Ed. degree granted by University situate outside the State. It is stated that in some cases the B.Ed. and B.P.Ed. and D.P.Ed. degrees have been granted by the same University situate outside the State."

On behalf of the State, reliance was placed on the judgment in the case of **Rajeshwar Singh Vs. State of U.P. & Others** (Writ Petition No.2856 (M/S) of 2004, where the following question was referred for consideration of the Full Bench:-

"1. In Upendra Rai's case reported in 2000 (2) UPLBEC 1340, the Division Bench of this Court has held that the restrictions imposed by the State Government are not valid and B.T.C.

Certificate for appointment on the post of Assistant Teacher issued by an institute situated outside the State of U. P. but recognized by the N.C.T.E. is valid. The other Division Bench's judgment of this Court reported in (2003) 3 UPLBEC 2211 in Vijay Kumar Kushwaha's case, upheld the government rights as well as Government Order which provides that the State has got right not to admit a candidate for appointment as Assistant Teacher in case the training certificate is provided by an institute situated outside the State of U.P. The proposition of law as per Vijay Kumar Kushwaha's case have been reiterated in Lalit Kumar Dixit's case reported in (2004) 1 UPLBEC 754 which division bench out of two lay down the correct law?"

The Full Bench noted that the Supreme Court in the case of **U.P. Basic Education Board vs. Upendra Rai,** reported in (2008) 1 UPLBEC 641 has reversed the judgment of this Court in the case of Upendra Rai (supra) and upheld the finding of the Division Bench in Kushwaha's case (supra).

It was contended before the Full Bench that since the special leave petition filed by the Board has been allowed and the judgment and order of the Division Bench of this Court in the case of Upendra Rai has been reversed, it logically follows that law laid down in the case of Vijay Kumar Kushwaha (supra) is the correct law and, therefore, in terms of the judgment of the Division Bench in the case of Vijay Kumar Kushwaha (supra) the restriction imposed under the Government Order qua non-consideration of the candidates, who have obtained C.P.Ed. and B.P.Ed. Degree, from Institutions from outside the State of Uttar Pradesh, has to be upheld. Reference has also been made to the judgment of the Hon'ble Single Judge in the case of **Hena Afroj Vs. State of Uttar Pradesh & Others** in Writ Petition No.2933 of 2004, wherein similar restriction in respect of B.T.C. Course -2004 has been upheld.

Standing Counsel further submitted that it is within the competence of the State to lay down the policy guidelines for admission to Special B.T.C. Course 2008. The State in its wisdom has decided to consider only those candidates who have obtained C.P.Ed., B.P.Ed. and D.P.Ed. degree from the institutions situate within the State of Uttar Pradesh. Such policy decision cannot be examined under Article 226 of the Constitution of India nor can it be said to be violative of Article 14 of the Constitution of India, as has been held by the Division Bench of this Court in the case of Viijay Kumar Kushwaha.

The learned Single Judge after having considered the arguments and the judgment of the Supreme Court in the case of **U.P. Basic Education Board** (supra) was pleased to note that one aspect still requires consideration, which reads as under:-

"The issue as to whether the State is competent to put any such restriction and as to whether when there is no such restriction with regard to the candidates who have obtained the B.Ed. degree from out side the State of Uttar Pradesh could the B.P.Ed., C.P.Ed. and D.P.Ed. be excluded has arisen for consideration in this case. The question which has been referred to in the Full Bench has direct bearing on the issues which have been raised in this writ petition. When the

issues which have arisen for consideration in this case have already been referred to the Full Bench, it is appropriate that these writ petitions be finally decided after the above reference is answered." From a reading of the judgment of the Division Bench in the case of Vijay Kumar Kushwaha as well as the judgment of the Hon'ble Supreme Court in the case of U.P. Basic Education Board Vs. Upendra Rai, this Court finds that the issue, as noticed above, has not been examined and the competence of the State Government to impose such restrictions in respect of the B.P.Ed., C.P.Ed., and D.P.Ed. degree only while accepting the B.Ed. degree granted by out of State Universities still needs to be examined."

Accordingly, the learned Single Judge, made the reference of the first two questions, which we have re-produced earlier.

3. The matter was placed before a learned Division Bench. That Division Bench was pleased to note that the judgment in **Vijay Kumar Kushwaha Vs. State of U.P. & Ors.,** reported in (2003) 3 UPLBEC 2211, which had upheld the restrictions imposed by the Government Order for admission to B.T.C. course was required to be re-considered for the reasons set out therein and accordingly, referred a 3rd question and in view of that, the matter was placed before the Chief Justice, for constituting a Larger Bench.

4. At the hearing of this reference, "Whether the degree obtained by a student from an institution/university established by law, situate at a place out side the State of Uttar Pradesh but duly recognized by the N.C.T.E. can be refused acceptance as valid qualification for being admitted to Special B.T.C. Course-2008 by the State?" various contentions have been urged. It has also been contended that Question (a) is restricted only to B.T.C. Course-2008, whereas there are petitions pending in this Court in respect of similar notification for the B.T.C. Course-2004 and B.T.C. Course-2007, therefore, we ought to re-frame question (a), so that the issue is answered in all the writ petitions, as the contentions advanced are the same. Question (a) as referred, reads as under:-

"(a) Whether the degree obtained by a student from an institution/university established by law, situate at a place out side the State of Uttar Pradesh but duly recognized by the N.C.T.E. can be refused acceptance as valid qualification for being admitted to Special B.T.C. Course- 2008 by the State?"

With the consent of the learned counsel for the parties, we have re-framed question (a), as under:-

"(a) Whether the degree obtained by a student from an institution/university established by law, situate at a place out side the State of Uttar Pradesh but duly recognized by the N.C.T.E. can be refused acceptance as valid qualification for being admitted to Special B.T.C. Courses by the State."

5. To understand the controversy, we may first refer to the judgment in the case of **Upendra Rai Vs. State of U.P. & Others,** reported in (2000) 2 UPLBEC 1340 (decided on February 18, 2000). In that case, the appellant before the Division Bench had obtained a Diploma in Education from Zila Shiksha and Prashikshan Sansthan (DIET), Jabalpur an

institution recognized under the provisions of the National Council for Teacher Education Act, 1993 (hereinafter refereed to as the Act, 1993). The circular and advertisement insofar as it had the effect of excluding the candidates having teacher qualification obtained from an Institution recognized under the provisions of the Act, 1993 was challenged on the ground that it being void in view of Article 254 of the Constitution. The appellant was equipped with the requisite qualification for being considered for appointment as Assistant Teacher in Junior Basic School. The learned Division Bench held that the classification between the candidates, who had passed requisite teacher training course from a recognized institution of Gorakhpur and those who have passed such course from a recognized institution outside Gorakhpur is arbitrary and violative of Article 14 of the Constitution of India. The Government by a Circular had decided to fill up the post of Assistant Teacher in Junior Basic School only from such candidates, who have, according to the provisions of the U.P. Basic Education (Teachers) Service Rules, 1981, obtained BTC, Hindustani Teachers Certificate, Junior Teachers Certificate and Teacher Certificates from institutions run by the Government of Uttar Pradesh and equivalent to BTC course and other training courses and degrees/diplomas. Insofar the advertisement was concerned, it had been envisaged that only those candidates could apply for appointment to the Institution as per the provisions of the Act, 1993. The Court held that the impugned Government Circular and the advertisement insofar as they excluded candidates who had obtained their teachers education certificate from an institute recognized by the N.C.T.E. was void being ultra-vires Article 354 of the Constitution of India.

6. In **Ghanshyam & Others Vs. State of U.P. & Others** (Civil Misc. Writ Petition No.27948 of 1999), an unreported judgment, the writ petitioners had prayed for a mandamus directing the respondents to permit them to join BTC training course in pursuance of the advertisement dated 8.3.1998. The advertisement was issued in pursuance of the Government Order dated 9.1.1998. The validity of the same had been upheld in the case of **Alok Kumar Pandey Vs. State of U.P. & Others** (C.M.W.P. No.29107 of 1999-decided on 19.7.1999). The special training was to be given only to the teachers who had got their B.Ed./LT/C.P.Ed./D.P.Ed. from the institutions which are in Uttar Pradesh and not to those who got such certificates from outside U.P. Challenge was on the ground that this is violative of Articles 14 and 21 of the Constitution of India. The learned Single Judge observed that he could not accept the contention, as there was no violation of Articles 14 and 21 of the Constitution of India. Accordingly, he dismissed the writ petition with some directions.

7. The same matter was taken up in an appeal in the case of **Vijay Kumar Kushwaha** (supra). The learned Division Bench noted, what had been held by the learned Single Judge and that the Government Order was not violative of Articles 14, 16 and 21 of the Constitution of India and observed that there is no ground to interfere with the matter, and dismissed the appeal.

It may be noted that in both the judgments of the learned Single Judges as

also the Division Bench, no reasons have been assigned as to why Articles 14 and 21 of the Constitution of India are not attracted. This is for the reason, that to be a *ratio decendi*. It is required amongst others that the issue must be answered by giving reasons.

8. Noticing the difference of opinion, the matter was referred to the Larger Bench in the case of **Rajeshwar Singh Vs. State of U.P. & Others** (Writ Petition No.2856 (M/S) of 2004), where the learned Full Bench noted the judgment in the cases of Upendra Rai (supra) and Vijay Kumar Kushwaha (supra). The learned Bench then noted that the attention of the Court had been drawn to the Apex Court judgment in the case of **Basic Education Board, U.P. Vs. Upendra Rai and others,** reported in (2008) 3 SCC 432, wherein the Supreme Court set aside the judgment of Upendra Rai's (supra) passed by this Court and upheld the finding of the other Division Bench judgment in the case of **Vijay Kumar Kushwaha** (supra).

9. It may be noted that what was considered and answered by the learned Division Bench in Kushwaha's case (supra) were the appointment of candidates, who had obtained their degrees/diplomas/certificates from the Institutions within the State of U.P. to post in the office of Basic Education Board. In the case of **Basic Education Board U.P.** (supra), the question for consideration was about the qualification of the respondents for being appointed as Assistant Teacher in Junior Basic School in the State of Uttar Pradesh. The appointment is governed by the provisions of the U.P. Basic Education (Teachers) Service Rules, 1981 (hereinafter referred to as "the Rules, 1981'). In paragraph 19 of the judgment, the Supreme Court was pleased to observe as under:

"19. ......Hence, the qualification for appointment as teacher in the ordinary educational institutions like the primary school, cannot be prescribed under the NCTE Act, and the essential qualifications are prescribed by the local Acts and Rules in each State. In U.P. the essential qualification for appointment as a primary school teacher in a Junior Basic School is prescribed by Rule 8 of the U.P. Basic Education (Teachers) Service Rules, 1981, which have been framed under the U.P. Basic Education Act, 1972. A person who does not have the qualification mentioned in Rule 8 of the aforesaid Rules cannot validly be appointed as an Assistant Master or Assistant Mistress in a Junior Basic School."

10. Attention of the Court is then invited to the judgment of the Supreme Court in **Irrigineni Venkata Krishna & Others Vs. Government of Andhra Pradesh & Anr.,** reported in 2009 STPL (Web) 174 SC. The Supreme Court noted that a Division Bench of this Court in **Basic Education Board, U.P.** (supra) had taken a view that the regulations framed under the Act, 1993 do not bind the State Government in the matter of fixation of qualifications for teachers in formal schools. The learned Bench found that it would be in the fitness of things, if the appeals are being heard by a three-Judges' Bench for authoritative pronouncement on the following questions of law:-

1.Whether NCTE Act only deals with the teachers' training institutes and

the power conferred upon the National Council for Teachers' Education under section 12 (d) of that Act in laying down guidelines in respect of minimum qualifications for a person to be employed as a teacher is confined to such institutes i.e., teachers' training institutes?

2. If answer to the aforesaid question is in negative, whether the Regulations framed in exercise of the powers under Section 32 (2) (d) (i) read with Section 12 (d) of NCTE Act by the National Council for Teacher Education laying down qualifications for employment of teachers in primary schools is binding on the state government and in view thereof, the state government is denuded of its authority to enact qualification for appointment as teachers in primary schools?

11. Before proceeding to answer the issues, we may note that regulations have been framed under the National Council for Teachers Education Act, 1993, which are known as "The National Council for Teacher Education (Recognition Norms and Procedure) Regulations, 2009' (hereinafter referred to as "the Regulations, 2009'). Regulation 8 of Regulations, 2009 deals with conditions for grant of recognition and Regulation 9 thereof, deals with the Norms and Standards for various teachers education courses, as specified in Appendixes 1 to 13. Insofar as Appendix-I is concerned, to which we are concerned, Regulation 3 (3) reads as under:-

"3. Intake, Eligibility and Admission Procedure

...

(3) *Admission Procedure*,-- Admission shall be made on merit on the basis of marks obtained in the qualifying examination and/or in the entrance examination or any other selection process as per the policy of the State Government/UT Administration."

12. It would, thus, be clear that one of the criterion for grant of recognition to an Institution for imparting education, is that admission must be based on merit, which could either be on the basis of marks obtained in the qualifying examination and/or in the entrance examination or any other selection process as per the policy of the State Government/UT Administration. The only criteria, therefore, for an Institution to be given recognition by the NCTE under the Regulations, is that the admission can only be on merit. Any other condition imposed, which deports from the criteria of merit for admission to a teachers training course would be illegal. A condition to restrict applicants, who may be more meritorious than the students passing out from another institution recognized by the N.C.T.E. in the State of U.P., would be clearly illegal.

13. The Supreme Court in **Rajesh Kumar Gupta and others Vs. State of U.P. & Others,** reported in (2005) 5 SCC 172, was concerned with the Special BTC Course-2001. There were several issues. The present issue was not one of them. One of the issues for consideration was as to whether the selection of candidates for Special B.T.C. training is contrary to the provisions of the U.P. Basic Education Act, 1972 and the U.P. Basic Education Teachers Service Rules, 1981. This was further in the context of the National Council for Teacher Education Act, 1993. We may gainfully refer to the following

paragraph of the said judgment. Paragraph 20 thereof is as under:-

"**20.** The U.P. Basic Education (Teachers) Service Rules, 1981 provide under Rule 5 for direct recruitment to the posts of Assistant Masters and Assistant Mistress to junior basic schools. The Rules prescribe the qualifications requisite for such posts. Academic qualification required is a bachelor's degree from a university established by law in India or a degree recognized by the Government together with "training qualification" consisting of a Basic Teacher's Certificate, Hindustani teacher's certificate, junior teacher's certificate, certificate of teaching of any other training course recognized by the Government as equivalent thereto. In the face of these Rules, and particularly keeping in view the provisions of the National Council for Teacher Education Act, 1993, no fault can be found with the impugned judgment of the High Court that the Special BTC training course formulated by the State Government was contrary to the provisions of the impugned Act and the Rules and the 1993 Central Act."

Thus, it would be clear that the Supreme Court in the case of U.P. Basic Education Act, 1972 and the National Council for Teacher Education Act, 1993 has held that no B.T.C. Course could be treated as recognized, if it was not recognized by the N.C.T.E.

14. The scope of the 1993 Act has been considered in various judgments. We may refer to the judgment in **State of Maharashtra Vs. Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya and others,** reported in (2006) 9 SCC 1 and to the following paragraphs:-

"**24.** Whereas Article 248 provides for residuary power of legislation, Article 254 covers cases of inconsistency between laws made by Parliament and by legislatures of the States.

25. Schedule VII to the Constitution comprises of three Lists: *(i)* Union List, *(ii)* State List and *(iii)* Concurrent List. While exclusive power to enact laws lies with Parliament under List I, the power to enact laws under List II is with the State Legislatures. In respect of subjects falling under List III, it is open to Parliament as well as the State Legislatures to enact laws subject to the provisions of Article 254.

45. We may, however, state that NCTE and contesting respondents are right in relying upon a decision of this Court in *Adhiyaman* [(1995) 4 SCC 104] referred to earlier. In *Adhiyaman* this Court was called upon to consider the constitutional validity of some of the provisions of the Tamil Nadu Private Colleges (Regulation) Act, 1976 and the Rules made thereunder as also the Madras University Act, 1923 and the Rules made thereunder. It was contended that certain provisions of the State Act were inconsistent with the provisions of the Central Act (All India Council for Technical Education Act, 1987) and hence were inoperative. This Court upheld the contention of the petitioners and ruled that the State Legislature could not enforce an Act if it is inconsistent with the Central Act and to the extent of such inconsistency, the Central Act would operate and the State Acts would be inoperative."

62. From the above decisions, in our judgment, the law appears to be very well settled. So far as coordination and determination of standards in institutions for higher education or research, scientific and technical institutions are concerned, the subject is exclusively covered by Entry 66 of List I of Schedule VII to the Constitution and the State has no power to encroach upon the legislative power of Parliament. It is only when the subject is covered by Entry 25 of List III of Schedule VII to the Constitution that there is a concurrent power of Parliament as well as the State Legislatures and appropriate Act can be made by the State Legislature subject to limitations and restrictions under the Constitution.

63. In the instant case, admittedly, Parliament has enacted the 1993 Act, which is in force. The preamble of the Act provides for establishment of National Council for Teacher Education (NCTE) with a view to achieving planned and coordinated development of the teacher-education system throughout the country, the regulation and proper maintenance of norms and standards in the teacher-education system and for mattes connected therewith. With a view to achieving that object, the National Council for Teacher Education has been established at four places by the Central Government. It is thus clear that the field is *fully* and *completely* occupied by an Act of Parliament and covered by Entry 66 of List I of Schedule VII. It is, therefore, not open to the State Legislature to encroach upon the said field. Parliament *alone* could have exercised the power by making appropriate law. In the circumstances, it is not open to the State Government to refuse permission relying on a State Act or on "policy consideration".

64. Even otherwise, in our opinion, the High Court was fully justified in negativing the argument of the State Government that permission could be refused by the State Government on "policy consideration". As already observed earlier, policy consideration was negatived by this Court in *Thirumuruga Kirupananda Trust* [(1996) 3 SCC 15] as also in *Jaya Gokul Educational Trust* [(2000) 5 SCC 231]."

From these paragraphs, it would be clear that once Parliament has made a law covering the field, it is not open to the State to make any law or have any policy insofar as admission to an institution established for Teachers Training. In fact, as the record shows, the Government itself had moved NCTE to grant permission for Special B.T.C. Courses, which NCTE has granted. The provisions of the Act, Rules and Regulations, therefore, will apply for admission to a B.T.C. Courses and any other law or policy to the contrary would be violative or ultra-vires Article 254 of the Constitution of India.

15. The recruitment of teacher in Basic Schools is governed by the provisions of the Rules of 1981. Rule 5 (a) (ii) of the Rules, 1981 provides for recruitment of Assistant Teacher in Junior Basic School. The essential qualifications of candidates for appointment to a post referred to in clause (a) (ii) of rule 5 of Rules, 1981 is, a Bachelor's Degree from a University established by law in India or a Degree recognized by the Government as equivalent thereto together with the training qualification consisting of a Basic

Teacher's Certificate, Vishisht Basic Teacher's Certificate (B.T.C.), Hindustani Teacher's Certificate, Junior Teacher's Certificate, Certificate of Teaching or any other Training Course recognized by the Government as equivalent thereto.

16. We are here concerned with the Vishisht Basic Teacher's Certificate. For appointment to a post as set out in rule 5, the essential academic qualifications are in terms of rule 8 of Rules, 1981. This requires passing of a course as set out therein.

17. The real question for our consideration, before we answer the three questions, is as to whether it is possible to make a distinction between the prescribed educational qualifications for the posts as set out in rule 5 and the criteria for admission to BTC Courses approved by the NCTE to correctly understand the issue.

18. One of the grounds raised by the writ petitioners in the writ petitions is that the candidates, who had passed B.Ed. examination from the institution outside the State of Uttar Pradesh, are eligible for admission to the Special B.T.C. Courses, but insofar as the LT/B.P.Ed./D.P.Ed./C.P.Ed. are concerned, the State Government has restricted it to the candidates, who have passed from Institutions located in the State of Uttar Pradesh.

In answer to that, the State has filed its counter affidavit through Sri Vinay Kumar Pandey, Principal, District Institute of Education and Training, Mahoba. It is stated in the counter affidavit that proposal was sent by the State Government to the NCTE, New Delhi on 22.6.2006 for obtaining permission to conduct the Special B.T.C. Course-2006 from the candidates having B.Ed./LT/B.P.Ed./C.P.Ed./D.P.Ed. from an institution situated within the territory of State and recognized by the NCTE for filing up of 50,000 vacancies of Assistant Teachers in Primary Schools controlled and managed by the Basic Shiksha Parishad. It was mentioned that similar proposal was made earlier and the NCTE had accorded permission for conducting the training for the year 2004, as Special B.T.C. Course, 2004. Under the proposal dated 22.6.2006, it was set out that the Special B.T.C. Course was only for the candidates having B.Ed./LT/B.P.Ed./ C.P.Ed./D.P.Ed. from an institution situated within the territory of State and recognized by the NCTE. The NCTE accepted the proposal only for B.Ed. certificate holders, vide order dated 27.6.2006 and LT/B.P.Ed./D.P.Ed./ C.P.Ed. certificate holders were not permitted and consequently, a Government Order was issued to that effect followed by an advertisement from eligible candidates, who had B.Ed. N.C.T.E. did not impose any condition that such candidates must have passed out from an Institution situate within the State of Uttar Pradesh, nor did the State Government insist on such requirement. As the candidates having degree/diploma/certificate of LT/B.P.Ed./D.P.Ed./C.P.Ed. were excluded, they had preferred writ petitions before this Court. This Court, vide order dated 31.7.2007 permitted LT/B.P.Ed./D.P.Ed./C.P.Ed. certificates holders to also apply apart from the holders of B.Ed. degree. After various requests made, the NCTE, vide order dated 20.09.2007 granted permission to include LT/B.P.Ed./D.P.Ed./C.P.Ed.

certificates holders also in continuation to previous permission of 27.06.2007. The only reason given by the State for imposing this condition, is that, since there was a proposal made by the State Government to NCTE and NCTE has accepted the said proposal, that condition was imposed.

19. An ancillary objection was raised based on Article 14 of the Constitution of India. The objection was that insofar as the candidates, who possess B.Ed. Degree from an Institution situate outside the State of Uttar Pradesh, they are eligible to apply for Special B.T.C. Course, but not the candidates, who possess LT/B.P.Ed./D.P.Ed./C.P.Ed. from an Institution situate outside the State of Uttar Pradesh. It is submitted that this is arbitrary as the exclusion is unreasonable. There is no answer by the State to this contention except to contend that they had sought approval from the N.C.T.E. for that purpose. Factually, N.C.T.E., whilst granting permission initially granted it only to applicants who had B.Ed. qualifications. There was no stipulation that they had to pass B.Ed. from institutions in U.P. Thereafter at the State further request, LT/B.P.Ed./D.P.Ed./C.P.Ed. were also included. Again there was no stipulation that they must possess the qualifications from institutions in State of U.P.

In our opinion, all institutions imparting training course for teachers approved by the N.C.T.E. are a class by themselves and there can be no distinction as to whether they pass their B.Ed. from an institution in the State of U.P. or other States of India, as long as the institutions are recognized by the N.C.T.E. and also have recognition of any other body in the State, if required. The State has also not provided for any reservation based on the State's interest. In our opinion, therefore, the notification excluding such degree/diploma/certificate holders as well as the advertisement would be clearly arbitrary and unreasonable.

Once the teachers training institutions constitute a class by themselves, the further classification could only be based on the grounds, which have a nexus with the object, which is imparting quality education by conferring degrees/diplomas/certificates through institutions recognized by N.C.T.E. As all institutions, which impart a course in teachers training must have the same standard, then mini classification is unreasonable. It was not open to the State Government to treat only a class of applicants, who possess B.Ed. for admission to the Special B.T.C. Course and exclude those candidates having degree/diploma/certificate in LT/B.P.Ed./D.P.Ed./C.P.Ed.

20. Considering the requirement of sub-clause (3) of Clause-3 of Appendix-I of the Regulations, 2009, one of the conditions for grant of recognition is that "the admission shall be based on merit'. Therefore, it would not be open either to the Institution or to the Government to impose any condition contrary to the aforesaid Regulations. On this count itself, the condition imposed that only those candidates, who have passed the afore-mentioned courses from the Institutions situate within the territory of the State of Uttar Pradesh, will be entitled to apply for Special B.T.C. Courses, is liable to be set aside, as it keeps out other meritorious candidates who have passed out from a teaching institution recognized

by NCTE, may be from out side the State. That a candidate who successfully pursues the B.T.C. Course, considering the present number of vacancies and would be fulfilling one of the eligibility conditions is irrelevant for admission to the B.T.C. Course.

21. We are concerned with answering the questions referred to for our consideration. We have earlier, to some extent, referred to the judgments, both in the case of **Upendra Rai** (supra) and **Vijay Kumar Kushwaha** (supra). We propose to re-visit the judgments to find out the ratio of each of the judgments.

The challenge in **Upendra Rai** (supra), as noted, was to the legality of the advertisement dated 28.4.1999 and the Government Circular dated 11.8.1997. In terms of Government Circular dated 11.8.1997, the Government had decided to fill up the post of Assistant Teacher in Junior Basic Schools only from such candidates, who have, according to Rules, 1981, obtained the respective certificates from the Institutions run by the Government of Uttar Pradesh and to rescind with immediate effect the equivalence to BTC granted to other training courses and degrees/diplomas. The issue, therefore, was for filing up of the post of Assistant Teacher in Junior Basic School from the certificate holders mentioned earlier. In paragraph 2 of the judgment, the learned Bench framed the question for consideration, which was, "whether the appellant was eligible for appointment to the post of Assistant Teacher in Junior Basic Schools run by the Uttar Pradesh Basic Shiksha Parishad'. The entire issue was thereafter considered in that context. No doubt, the learned Division Bench also noted the provisions of the Act, 1993 and observed that if any provision in the U.P. Basic Education Act, 1972 or rule made thereunder is found to be in conflict with any provision embodied in the aforestated Central Act, the same will have to be discounted to the extent of inconsistency in view of the provisions contained in Article 254 of the Constitution of India. It is in that context, the Court held that the circular and the advertisement insofar as it has the effect of excluding the candidates having teacher qualification obtained from an Institution recognized under the provisions of NCTE Act are void in view of Article 254 of the Constitution. The Division Bench further held that the appellant was equipped with the requisite qualification for being considered for appointment as Assistant Teacher in Junior Basic School. Therefore, the Court held that the impugned circular and advertisement, which have the effect of excluding the candidature of candidates having obtained teachers education certificate from any Institution recognized under the NCTE Act, were void being ultra vires the Article 354 of the Constitution.

22. The next judgment is **Vijay Kumar Kushwaha** (supra). Before the Division Bench, what was under consideration, was the judgment of the learned Single Judge dated 27.8.1999 in Civil Misc. Writ Petition No.27948 of 1999. There also, an advertisement was issued permitting only those candidates, who had obtained B.Ed./LT/B.P.Ed./D.P.Ed./C.P.Ed. degrees/certificates from the Institutions situate within the State of Uttar Pradesh, to apply. The learned Bench then noted the contention of the learned counsel for

the respondents, where it was observed that the Government Order dated 9.1.1998 had already been upheld in the case of Alok Kumar Pandey Vs. State of U.P., decided on 19.7.1999 (Writ Petition No.29107 of 1999) and in paragraph 5 of the judgment, without giving any reason merely affirmed the order of the learned Single Judge by holding that the restriction was valid and could not be said to be violative of Articles 14, 16 and 21 of the Constitution of India. The issue of Article 254 of the Constitution was not in issue, nor considered. The judgment of the learned Single Judge, from which the appeal arose, also has given no reasons as to why Articles 14, 16 and 21 of the Constitution were not attracted.

23. In **Basic Education Board, U.P.** (supra) again the issue of appointment of Assistant Master in Junior Basic School. In paragraph 2 of the impugned Circular, it has been said that the appointment to the post of Assistant Teacher in Junior Basic School will be made from the candidates, who have obtained BTC, Hindustani Teaching Certificate, JCT or Certificate of Teaching from the Institutions situate within the State of Uttar Pradesh, as per the Rules, 1981, and other qualification equivalent to BTC be cancelled with immediate effect. Grant of equivalence and/or revocation of equivalence is for the body empowered and normally it would not be interfered with by the Court. The learned Bench, then referred to the NCTE Act, 1993 and observed that the qualification for appointment as teacher in the ordinary educational institutions like the primary school, cannot be prescribed under the NCTE Act.

24. A Full Bench of this Court in the case of **Rajeshwar Singh** (supra) noted the two judgments, **Upendra Rai** (Supra) and **Vijay Kumar Kushwana,** (Supra) and observed that the Supreme Court had set aside the judgment of Upendra Rai and upheld the findings in the case of **Vijay Kumar Kushwaha** (supra). We may note that in **Basic Education Board, U.P.** (supra), neither Upendra Rai (supra) nor Vijay Kumar Kushwaha (supra) were considered, but what was referred to was the judgment of Single Judge in **Hiraman** (Writ Petition No.33856 of 1997) and **Smt. Karuna Kumari** (Writ Petition No.3218 of 1997).

25. Having considered the aforesaid judgments, the issue as to whether a candidate can be excluded from consideration for admission to the Special B.T.C. Course on the ground that he had obtained degree/diploma/certificate in LT/B.P.Ed./D.P.Ed./C.P.Ed. from an institution recognized by the NCTE situate outside the State of U.P. was not under consideration, nor in issue in any of the judgments. In all the judgments considered, what was under consideration, was merely an issue in the matter of essential qualification for appointment to the post of Assistant Teacher. As we have noted earlier, the essential distinction is (1) appointment to a post under the Rules of 1981 and (2) eligibility for admission to Special BTC course, which may result in a candidate becoming eligible for appointment as an Assistant Teacher by acquiring an essential educational qualification.

26. On behalf of the writ petitioners, learned counsel had drawn our attention to the judgment in the case of **Dr. B.L. Asawa Vs. State of Rajasthan and others,** reported in AIR 1982 SC 933. The question before the Supreme Court was whether the Commission was right in law in excluding

the appellant from consideration on the ground that he did not possess the academic qualification prescribed by cl. (vii) of Ordinance No.65 of the Rajasthan University Ordinances for the post of Lecturer in Forensic Medicine. The appellant was held to be ineligible by the University, as the Post Graduate Degree in Forensic Medicine possessed by the appellant is not awarded by the University of Rajasthan and the said degree has also not been recognized by the University of Rajasthan as an educational qualification. The Supreme Court, after considering this aspect, observed as under:-

"11. ...... A Post-graduate Medical Degree granted by a University duly established by statute in this country and which has also been recognized by the Indian Medical Council by inclusion to the Schedule of the Medical Council Act has ipso facto to be regarded, accepted and treated as valid throughout our country. In the absence of any express provision to the contrary, such a degree does not require to be specifically recognized by other Universities in any State in India before it can be accepted as a valid qualification for the purpose of appointment to any post in such a state."

Then, following paragraph will also be relevant:-

"11. ...... In the case of a Post-graduate degree in the concerned subject awarded by a statutory Indian University, no recognition or declaration of equivalence by any other University is called for. This is all the more so in the case of a medical degree basic as well as Post-graduate that is awarded by a statutory Indian University and which has been specifically recognized by the Indian Medical Council."

27. Thus, from the judgment of the Supreme Court what follows, is that if a Post-graduate Medical Degree is awarded by the statutory Indian University and it has been specifically recognized by the Indian Medical Council, that is a valid qualification for the purpose of appointment to any post in any part of the country insofar as the academic qualification is concerned.

The learned counsel submitted that considering the provisions of the NCTE Act, 1993, it is the only authority under that Act that can grant recognition to the Institution for imparting training. The Scheme of the Act would also show that they have power to lay down guidelines in respect of minimum qualifications for a person to be admitted in a teachers training institution as also to ensure planned and co-ordinated development of standard for teacher education and for the purpose of performing its functions under this Act.

28. Once that be the case, it must follow the degree/diploma/ certificate, if obtained from an institution recognized by the NCTE, may be from the State of Madhya Pradesh, that degree/diploma/certificate would entitle a person, who possesses it, to apply for admission to Special B.T.C. Course or the B.T.C. Course itself. That the Special B.T.C. Course was started for the purpose of filling in the vacancies of teachers, who possess the Special B.T.C. certificate, is irrelevant.

29. We may now answer the reference:

(1) In answer to Question No.(a), it is not open to the State or the State authorities to exclude the students, who have obtained

degree/diploma/certificate in LT/B.P.Ed./D.P.Ed./C.P.Ed. from Institutions/Universities established by law situate at place outside the State of Uttar Pradesh and duly recognized by the NCTE, from applying either for the Special B.T.C. Course or B.T.C. Course. Any such exclusion is illegal. Question No, (a) is answered, accordingly.

(2) Insofar as Question No.(b) is concerned, the classification, if any, is unreasonable and violative of Article 14 of the Constitution of India. At any rate, the only ground given by the State Government for not putting restriction on B.Ed. degree, and putting restriction on LT/B.P.Ed./D.P.Ed./C.P.Ed., is not sustainable in terms of the rules of N.C.T.E., as the admission can only be based on merit.

(3) Insofar as Question No.(c) is concerned, the judgment in **Vijay Kumar Kushwaha** (supra) did not answer the issue of admission to Special B.T.C. Course, but dealt with the issue of appointment to the post of Assistant Teacher. Even otherwise, considering the findings on question nos.(a) & (b), we will have to hold that the judgment in **Vijay Kumar Kushwaha** does not lay down the correct law.

30. Reference is answered, accordingly. All judgments to the contrary are overruled.

31. The Government has issued orders closing these courses except for those, whose applications were rejected on the ground that they did not possess the L.T./B.P.Ed./D.P.Ed./C.P.Ed. from institutions in U.P. and the matters are pending before this Court. With respect to the Special B.T.C. Courses for the years 2004, 2007 or 2008, if the petitioners, whose petitions are pending, are eligible, they shall be considered for training for the Special B.T.C. Courses, which shall be commenced within a reasonable period.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.09.2010

BEFORE
THE HON'BLE D.P. SINGH, J.
THE HON'BLE VEDPAL, J.

Service Bench No. 3754 of 1993

Vivek Kumar Mittal ...Petitioner
Versus
State Of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri G.Beg
Sri Ajay Tiwari
Sri C.B.Pandey
Sri P.K.Srivastava
Sri P.L. Yadav

Counsel for the Respondents:
C.S.C.

Constitution of India, Art-226-readwith Civil Services Rules-Rule-351-A-Post retiral benefits-withheld-on charges of misconduct and loss to the Depott.-allegation prior to 4 years-from the date of retirement-no sanction from Governer taken-during pendency of writ petition-delequent employee died-even the widow of deceased employee died-enquiry not possible-direction to pay all amount to the heirs of deceased employee given.

Held: Para 9

In view of the above, at the face of record, it is apparent that the impugned chargesheet has been issued without having prior sanction of the State Government and secondly, the period during which the original petitioner is

alleged to have caused loss to the Government, is of four years before the date of retirement. Accordingly, the impugned chargesheet seems to have been issued in violation of provisions contained in Regulation 351-A of the Regulations. There is one another aspect of the matter. During the pendency of writ petition, the original petitioner died and is represented by his legal heirs. Hence also, no inquiry can be instituted after death of the employee.

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

1. Heard learned counsel for the petitioner, learned standing counsel and perused record.

2. The petitioner was appointed as Junior Plant Protection Assistant in the Department of Agriculture, U.P. on 13.1.1954. Thereafter, he was promoted on the post of Deputy Director Plant Protection and retired from service on 30.11.1990. According to petitioner's counsel, after retirement, petitioner moved an application for payment of post retiral dues. According to petitioner's counsel, the Chief Accountant Officer, Directorate, Agriculture Department is competent authority to release pension and gratuity in accordance with the Government order contained in Annexure No.1 to the writ petition but the pension and gratuity of the petitioner was not released hence he submitted representation to the Director, Agriculture U.P. on 22.2.1991 contained in Annexure No.2 to the writ petition followed by another representation dated 30.5.1991, contained in Annexure No.3 to the writ petition.

3. Submission of the petitioner's counsel is that instead of adjudicating the controversy with regard to payment of post retiral dues, chargesheet dated 4.7.1991 was served on the petitioner along with covering letter a copy of which has been filed as Annexure No.4 to the writ petition. After receipt of chargesheet the petitioner submitted letter dated 12.7.1991 to the inquiry officer in which the petitioner inter alia pleaded that after retirement, no proceeding can be held since the charges are 5 years old. The petitioner relied upon the Regulation 351A of U.P. Civil Service Regulations (in short the Regulations). Representation submitted by the petitioner was followed by another representation dated 24.9.1991 contained in Annexure No.6 to the writ petition. Instead of adjudicating the controversy in the light of Regulation 351A of the Regulations, by a letter dated 23.9.1991 contained in Annexure No.7 to the writ petition, the petitioner was informed with regard to change of inquiry officer. However, by subsequent representation dated 29.10.1991 followed by another representation dated 5.9.1992 contained in Annexurer No.9 and 10 to the writ petition, the petitioner again took stand that no inquiry can be proceeded against the petitioner.

4. It appears that since the petitioner failed to receive any response from the respondents, he approached this Court under writ jurisdiction under Article 226 of the Constitution of India challenging the chargesheet dated 4.7.1991 contained in Annexure No.4 to the writ petition.

5. From the perusal of the chargesheet it appears that the petitioner has been charged on three counts and the charges relates to the period between 26.7.1983 to 18.7.1986, when the petitioner was posted as Plant Protection Officer at Meerut. The allegation against the petitioner is that the petitioner had caused loss to the State Government during the period in question.

6. During the pendency of the writ petition, the original petitioner left for heavenly abode on 4.11.2005 and his wife and children were substituted as legal heirs. However, later on, petitioner's wife Prem Lata Misra also died on 2.8.2009. Nor the original petitioner nor his wife could avail the benefit of post retiral dues. In pursuance of the interim order passed by this Court, an amount of Rs.1,16,000/- was paid to the petitioner.

7. Regulation 351A of the Regulations provides that Governor reserves right to order for recovery of pension of an officer, of any amount on account of loss, found in departmental or Judicial proceedings to have been guilty of grave misconduct or to have caused pecuniary loss to Government by misconduct or negligence during his service, including service rendered on re-employment after retirement. For convenience, Regulation 351A of the Regulations is reproduced as under:

"351-A. The Governor reserves to himself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused Government, if the pensioner is found in departmental or Judicial proceedings to have been guilty of grave misconduct, or to have caused pecuniary loss to the Government by misconduct or negligence, during his service, including service rendered on re-employment after retirement:

Provided that--

(a) such departmental proceedings, if not instituted while the officer was on duty either before retirement or during re-employment--

(i)shall not be instituted save with the sanction of the Governor.

(ii)shall be in respect of an event which took place not more than four years before the institution of such proceedings; and

(iii)shall be conducted by such authority and in such place or places as the Governor may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made.

(b) Judicial proceedings, if not instituted while the officer was on duty either before retirement or during re-employment, shall have been instituted in accordance with sub-clause (ii) of clause (a); and

(c)the Public Service Commission, U.P. shall be consulted before final orders are passed.

[Provided further that of the order passed by the Governor relates to a cash dealt with under the Uttar Pradesh Disciplinary Proceedings, (Administrative Tribunal) Rules, 1947, it shall not be necessary to consult Public Service commission]."

8. Regulation 351-A empowers the Government to take action against retired employee for recovery of damage caused to the Government during course of employment. Condition precedent is that sanction must be granted by the Governor of the State and must be within four years of retirement and not earlier to that. In the present case, at the face of record, the incident falls between the period from 26.7.1983 to 18.7.1986. The original

petitioner attained the age of superannuation on 30.11.1990. Thus, on the face of record, the service period for which the petitioner had been charged for causing loss to the Government, relates to the period of four years before the date of retirement.

9. In view of the above, at the face of record, it is apparent that the impugned chargesheet has been issued without having prior sanction of the State Government and secondly, the period during which the original petitioner is alleged to have caused loss to the Government, is of four years before the date of retirement. Accordingly, the impugned chargesheet seems to have been issued in violation of provisions contained in Regulation 351-A of the Regulations. There is one another aspect of the matter. During the pendency of writ petition, the original petitioner died and is represented by his legal heirs. Hence also, no inquiry can be instituted after death of the employee.

10. In view of the above the writ petition is allowed. A writ in the nature of certiorari is issued quashing the impugned chargesheet dated 4.7.1991 contained in Annexure No.4, the order dated 2.2.1993 issued by the Special Secretary, Agriculture U.P., Lucknow, for recovery of Rs.1,16,188.80, with all consequential benefits. It has been brought to the notice of this Court that the wife of the original petitioner had died on 2.8.2009 and in case, the writ petition is allowed, the heirs shall be entitled for arrears of family pension till the date of death of the wife of the original petitioner i.e., 2.8.2009. A writ of mandamus is issued directing the opposite parties to pay all post retiral dues including regular family pension in accordance with Rules. A writ in the nature of mandamus is further issued to the opposite parties to ensure payment of arrears of post retiral family pension and pass orders keeping in view the observations made hereinabove, within three months from the date of receipt of the certified copy of this order. The Principal Secretary, Agriculture, U.P., shall ensure that a speaking and reasoned order be passed within aforesaid period with regard to payment of post retiral dues and arrears of family pension to the heirs of the original petitioner.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.07.2010

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 9213 of 1992

Sant Ram ...Petitioner
Versus
The District Inspector of Schools, Basti and another ...Respondent

Counsel for the Petitioner:
Sri Raj Kumar Jain
Sri Rahul Jain

Counsel for the Respondents:
C.S.C.

U.P. High School and Intermediate (Payment of Salary) Act, 1971/U.P. Secondary Education Board 1982-Ad-hoc appointment made without notifying vacancy in 2 News Paper-view of Full Bench judgement Kumari Radha Raizada case subsequently the Apex Court as well as High Court-such Appointment made in violation there to illegal and no benefits could be arrived at.

Held: Para 20, 21 and 22

Lastly, for the same proposition the judgement in the case of "H.C. Puttaswamy and others Vs. The Hon'ble Chief Justice of Karnataka High Court,

Bangalore and others reported in 1991 SC 295" has been relied upon.

At the very out set the Court may record that Section 16 of the Selection Board Act, 1982 declares that if any appointment is made contrary to the provisions of the said Act the same would be void. Section 16 of the Act reads as follows:

16.Appointment to be made only on the recommendation of the Board.-(1) Notwithstanding anything to the contrary contained in the Intermediate Education Act, 1921 or the regulations made thereunder but [subject to the provisions of ["Sections 12, 18, 21-B, 21-C, 21-D, 33, 33-1, 33-B, 33-C, 33-D, 33-E and 33-F, every appointment of a teacher, shall on or after the date of the commencement of the Uttar Pradesh Secondary Education Services Selection Board (Amendment) Act, 2001 be made by the management only on the recommendation of the Board").

In the facts of this case the Court has found that the appointment of the petitioner was be hors the statutory provisions applicable as per the Act, 1982 and therefore it has to be treated as void in view of Section 16 of 1982 Act. No amount of judicial discretion under Article 226 of the Constitution of India can infuse life in a dead appointment.

Case law discussed:

1994 (3) UPLBEC 1551, 2000 (3) ESC 2075 (All), 1991 SC 295,2008 (4) ALJ 207, 2006 (4) SCC 1, 2006 (5) SCC 493, 2006 (1) JT 331

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

1. The Krishak Odyogik Pal Inter College, Harharpur, District Basti is an institution recognized under the provision of Intermediate Education Act. The institution is also on the aid list of the State Government. The provisions of the U.P. High School and Intermediate (Payment of Salary) Act, 1971 as well as those of U.P. Secondary Education Services Selection Board, 1982 are fully applicable to the said institution.

2. The substantive vacancy was caused in the institution in L.T. Grade due to retirement on 1st July, 1990. The Committee of Management notified the vacancy to the District Inspector of Schools on 25.7.1991.

3. Since the U.P. Secondary Services Selection Board failed to recommend any suitable candidate, the Committee of Management invited application for the said post and the petitioner claims to have been appointed vide letter dated 8.10.1991. The petitioner joined in pursuance thereof on 9.10.1991, and claims to be working since then.

4. The District Inspector of Schools did not accord approval to the said appointment of the petitioner. He has therefore, approach this Court for a writ of mandamus directing the respondents to approve his appointment as L.T. Grade since 9.10.1991 and further not interfere in the working of the petitioner. The writ Court while entertaining the present writ petition issued an order directing the respondents to pay salary to the petitioner as L.T. Grate teacher or show cause within one month.

5. Cause has been shown although only on 18.5.1992. In the counter affidavit filed it was stated that the requisition received from the Committee of Management was incomplete and therefore, it was not forwarded to the Selection Board. It has further been stated that in absence of the proper requisition the Committee did not have power to make any ad-hoc appointment under Section 18 of the Commission Act. Therefore, the ad-hoc appointment of the

petitioner is illegal and he is not entitle to salary from the State Exchequer.

6. A rejoinder affidavit has been filed and it has been replied that the requisition as submitted was in prescribed proforma complete in all respect. The District Inspector of Schools did not raise any objection with regards to the proforma so submitted at any point of time. Reference is made to the document enclosed as Annexure No.1 to the writ petition. It has therefore, been contended that the objection taken is unsustainable. Counsel relies upon the judgment of this Court in the case of ***"Aizaz Husain Rizvi Vs. Selection Commission & others",*** which law laid down stated to have been affirmed by the Division Bench, wherein it has been held that if requisition has not been forwarded by the District Inspector of Schools to the Selection Board then the Committee will not loose its power to make ad-hoc appointment under Section 18.

7. Heard learned counsel for the parties and examined the record.

8. On examination of the requisition which has been forwarded by the Committee of Management under letter dated 6.8.1991 and which bears the endorsement of receipt dated 6.8.1991. This Court finds that in the column no.4 the college was required to disclose the categories of posts created with regards to the pay scale, those filled by way of direct recruitment and promotion separately and the actual number of persons working. In the said column 4 the only information supplied by the college is that there were 32 posts out of which 9 persons have been appointed by way of promotion in all 31 persons are working and the vacancy which was caused in 1990 is L.T. Grade is required to be filled by direct recruitment.

9. The information supplied is incomplete on the face of it. As per requirements of relevant column the petitioner was required to disclose the number of posts sanction with reference to the pay scale separately i.e. in Lecturer Grade, L.T. Grade and C.T. Grade in the institution and it is with reference to each of these pay scales the petitioner was required to supply information with regards to the number of persons appointed by promotion and direct recruitment separately. The college had further informed the details of persons appointed in the respective grade within the reserved categories.

10. The college has not disclosed as to how many person in L.T. Grade were working against the duly sanctioned posts, the number of persons appointed by promotion and by direct recruitment in L.T. Grade was not disclosed separately nor the details of reservation have been furnished. In absence of the aforesaid information the Selection Board could not have determined the reservation applicable to the post nor could ascertain as to whether the vacancy was within the quota for direct recruitment or promotion.

11. It is needless to emphasize under Chapter II 50% post in L.T. Grade are required to be filled by promotion from C.T. Grade. This 50% can only be worked out if the number of sanctioned posts and the persons actually working in the institution including the method of their appointment is known. The District Inspector of Schools is justified in contending that the requisition supplied was incomplete and therefore, was not acted upon.

12. The District Inspector of Schools is further right in stating that on such requisitions the Committee will not get a

right to appointment a teacher on ad-hoc basis under Section 18 of the Commissions Act, Section 18 reads as follows:-

"18. Ad hoc Teachers.-(1) *Where the Management has notified a vacancy to the [Board] in accordance with sub-section (1) of Section 10 and the post of a teacher actually remained vacant for more than two months, the Management may appoint by direct recruitment or promotion a teacher on purely ad hoc basis, in the manner hereinafter provided in this section."*

13. Therefore, the first condition for Section 18 to apply is that a requisition in the prescribed proforma complete in all respect is forwarded to District Inspector of Schools as per the rules applicable. Thus in the facts of the case where the requisition is not in accordance with Section 10 (1) of the Act, 1982, the Committee cannot exercise powers under Section 18 of the Act.

14. This Court further finds from the record of the writ petition that the appointment has been offered to the petitioner on ad-hoc basis against a substantive vacancy in L.T. Grade only after the vacancy was advertised on the notice board.

15. The Full Bench of this Court in the case of ***"Km. Radha Raizada vs. Committee of Management, Vidyawati Darbari Girls Inter College reported in (1994) 3 UPLBEC, 1551"*** has specifically held that for ad-hoc appointment under the First Removal and Difficulties Order the vacancy has to be advertised in two news paper and it has been held that the advertisement of the vacancy on the notice board of the institution is no advertisement.

16. In view of the aforesaid, this Court finds that there is no ground for granting the mandamus as prayed for.

17. By means of amendment application the petitioner has prayed for a direction upon the respondents to regularize the petitioner as L.T. Grade teacher in the institution. Since the appointment of the petitioner itself was illegal and contrary to the statutory provisions applicable. No direction for regularization can be issued.

18. The Court may now consider the judgments which have been relied upon for the purpose. Supreme Court in the case of ***"Naresh Chand Vs. District Inspector of Schools & others"*** after noticing that the appointment of the person was in violation of the provisions of the 1982 Act, the facts of that case recorded that the teacher has continued and had been regularized by the education authority on the post in question. Then the Supreme Court in para 9 issued following directions:-

"On the special facts and circumstances, we are of the view that interests of justice would be served by permitting the appellant to continue as a Lecturer in Chemistry on ad-hoc basis, till the vacancies are filled. Respondents 1 and 2 shall also release the salary of the appellant for the period of such ad-hoc appointment. Further, as and when the Service Commission or other authority concerned with the selection and appointment invites applications for filling the posts of Lecturer in Chemistry, in the third Respondent College, the Appellant's application for such post shall be considered by relaxing the age limit. Steps shall be taken to fill the vacancies expeditiously."

19. A Division Bench of this Court in the case of ***"Dr. Prabhu Narain Saxena Vs. The Chancellor, Agra University and others, reported in 2000 (3) ESC 2075(All.),*** in para 14 has been held that even if the new appointment of the employees is bad on account of some infirmity but he has continued for long years under the interim order of the Court it would be unfair to remove such an employee:

Para 14 of the judgment is quoted below:-

"14. Lastly it may be noted that the petitioner has been working since 21st December, 1987. This Court admitted the writ petition on 6.12.1988 and suspended the operation of the impugned order of the Chancellor dated 28.11.1988 and since then the petitioner is continuing in service. The petitioner was selected by the Selection Committee on merits and it has been approved by the Executive Council. It has not been shown that his selection was not on merits. In these circumstances also it will not be proper to dislodge him from working in the institution. In Rajendra Prasad Srivastava v. District Inspector of Schools, Gorakhpur, 1994 (3) ESC 117 (All), it was held that an employee whose initial appointment may be bad on account of some infirmity therein but if he has been allowed to work for some years under the stay order of the court, it will be unfair to remove such an employee."

20. Lastly, for the same proposition the judgment in the case of ***"H.C. Puttaswamy and others Vs. The Hon'ble Chief Justice of Karnataka High Court, Bangalore and others reported in 1991 SC 295"*** has been relied upon.

21. At the very out set the Court may record that Section 16 of the Selection Board Act, 1982 declares that if any appointment is made contrary to the provisions of the said Act the same would be void. Section 16 of the Act reads as follows:-

16.**Appointment to be made only on the recommendation of the Board.-** (1) *Notwithstanding anything to the contrary contained in the Intermediate Education Act, 1921 or the regulations made thereunder but [subject to the provisions of ["Sections 12, 18, 21-B, 21-C, 21-D, 33, 33-1, 33-B, 33-C, 33-D, 33-E and 33-F, every appointment of a teacher, shall on or after the date of the commencement of the Uttar Pradesh Secondary Education Services Selection Board (Amendment) Act, 2001 be made by the management only on the recommendation of the Board").*

22. In the facts of this case the Court has found that the appointment of the petitioner was be hors the statutory provisions applicable as per the Act, 1982 and therefore it has to be treated as void in view of Section 16 of 1982 Act. No amount of judicial discretion under Article 226 of the Constitution of India can infuse life in a dead appointment.

23. The issue with regards to rights of an illegal appointee dispite his continuance under interim orders of High Court for a long duration has been recently considered by the Supreme Court in its judgment in the case of ***"Pramod Kumar Vs. U.P. Secondary Education Services Commission & others reported in 2008(4) ALJ 207".*** And after noticing the judgment in the case of State of ***"Secretary, State of Karnataka and***

others Vs. Umadevi(3) and others reported in 2006 (4) SCC 1", "National Fertilizers Ltd. and others Vs. Somvir Singh reported in 2006(5) SCC 493, and "Mohd. Sartaj and another Vs. State of U.P. and others reported in 2006 (1) JT 331 it has been laid down in para 19 as follows:-

19. If the essential educational qualification for recruitment to a post is not satisfied, ordinarily the same cannot be condoned. Such an act cannot be ratified. An appointment which is contrary to the statute/statutory rules would be void in law. An illegality cannot be regularized, particularly, when the statute in no unmistakable term says so. Only an irregularity can be (See Secretary, State of Karnataka and others v. Umadevi (3) and others, ((2006) 4 SCC 1) National Fertilizers Ltd. And Ors. v. Somvir Singh, ((2006) 5 SCC 493) and Post Master General, Kolkata and Ors. v. Tutu Das (Dutta), ((2007) 5 SCC 317))."

24. The judgment in the case of Naresh Chand (supra) lay down any binding proposition of law as is clear from the opening sentence of para 9 quoted above. The direction has been issued in the facts of the case. Such exercise of jurisdiction is referable to Article 142 of the Constitution of India.

25. The law as explained by the Division Bench of this Court in the case of Dr. Prabhu Narain Saxena (supra) stand impliedly overruled by the judgment of the Apex Court in the case of Proamod Kumar (supra).

26. The judgment in the case of H.C. Puttaswamy deals with the powers of the Hon'ble Chief Justice under Article 229 of the Constitution of India and is clearly distinguishable with the facts of the case in hand.

27. The writ petition is dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.08.2010

BEFORE
THE HON'BLE S.K. TRIPATHI, J.

Criminal Misc. Application No. 12014 of 1987

Dharmendra Singh and others **...Petitioner**
Versus
Sant Saran Gupta and another **...Respondents**

Counsel for the Petitioner:
Sri V.S.Singh

Counsel for the Respondents:
Sri G.S.Dwivedi
Sri A.G.A.
Sri C.P.Mishra

Code of Criminal Procedure-Section 482- **summoning order by magistrate-offence under Section 415, 417,418, 420 I.P.C.-allegations disclose breech of agreement-not constitute any criminal charges-but purely civil nature-held complaint can not proceed.**

Held: Para 9 and 10

A mere breach of promise does not constitute any criminal charge. There is nothing in the entire complaint to show that the intention of the applicants were dishonest from the very beginning. If they changed their attitude later on, the

same cannot constitute the criminal charges levelled against them.

In my opinion, the dispute is of civil nature and as such the complaint can not proceed.

Case law discussed:
(2009) 6 SCC 77

(Delivered by Hon'ble S.K. Tripathi, J.)

1. Heard learned counsel for the applicants and the learned A.G.A. for the respondent no. 2 and perused the record. None is present for the respondent no. 1.

2. This is an application under section 482 Cr.P.C. for quashing the proceedings of criminal complaint case no. 373/IX-1987 under sections 417/420 I.P.C., Sant Saran Gupta Vs. Dharmendra Singh and others pending in the court of Judicial Magistrate-Ist Class, Karvi, District Banda.

3. The learned counsel for the applicants submitted that according to the allegations made in the complaint no criminal charge is made out and the dispute is of civil nature. The respondent no. 1 had given the dealership on the basis of an agreement and if any breach of the agreement was committed, the same does not constitute the offences under sections 415, 417, 418, 420 and 120-B I.P.C.

4. It appears that the respondent no. 1, Sant Saran Gupta is the proprietor of Sant Agencies, Ganesh Bazar, Karvi. The applicant nos. 1 and 3 are the proprietor of the Hindustan Sales Corporation, Chandigarh and the applicant no. 2 is the Manager of the Hindustan Sales Corporation. An agreement between the applicants and the respondent no. 1 took place whereby the applicants agreed to appoint the respondent no. 1 as their dealer for supplying gas and the dealership continued for certain period and when the applicants stopped the supplies to the respondent no. 1, he contacted the applicants and any how get executed a fresh agreement and the dealership thereafter continued on the basis of the fresh agreement. But again, the applicants committed breach of the agreement and failed to supply despite taking security money of Rs. 10,000/-. In this way, the applicants committed forgery and cheated the respondent no. 1.

5. The learned counsel for the applicants submitted that according to the allegations made in the complaint, only a dispute of civil nature is made out, therefore, the complaint was not maintainable. If the applicants, in pursuance of the agreement, made supplies to the respondent no. 1 for certain period and later on stopped the supplies, the intention of the applicants cannot said to have been dishonest at the beginning of the contract. Therefore, the proceedings of the complaint case are liable to be quashed.

Section 415 IPC defines cheating, which reads:

"*415*. Cheating.-Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to 'cheat'."

6. An offence of cheating, therefore, is not made out unless the following ingredients exist:

(i) deception of a person either by making a false or misleading

representation or by other action or omission;

(ii) fraudulently or dishonestly inducing any person to deliver any property; or to consent that any person shall retain any property and finally intentionally inducing that person to do or omit to do anything which he would not do or omit.

7. In the case of ***V.Y. Jose and another (supra),*** the Apex Court has held that for the purpose of constituting an offence of cheating the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making promise or representation. Even in a case where allegations are made in regard to failure on the part of the accused to keep his promise, in the absence of a culpable intention at the time of making initial promise, no offence under section 420 IPC can be said to have been made out. In para 21 and 28 the Apex Court further observed:

"21. There exists a distinction between pure contractual dispute of a civil nature and an offence of cheating. Although breach of contract per se would not come in the way of initiation of a criminal proceeding, there can not be any doubt whatsoever that in the absence of the averments made in the complaint petition where from the ingredients of an offence can be found out, the court should not hesitate to exercise its jurisdiction under section 482 of the Code of Criminal Procedure.

....

28. A matter which essentially involves dispute of a civil nature should not be allowed to be the subject matter of a criminal offence, the latter being not a short cut of executing a decree which is non-existent. The superior courts, with a view to maintain purity in the administration of justice, should not allow abuse of the process of court. It has a duty in terms of section 483 of the Code of Criminal Procedure to supervise the functioning of the trial courts."

8. A similar principle has been propounded in the case of ***S.V.L. Murthy vs. State represented by CBI, Hyderabad (2009) 6 SCC 77.*** In that case the Apex Court has held that one of the ingredients of cheating, as defined in section 415 IPC, is existence of an intention to cheat at the time of making initial promise or existence thereof from the very beginning of formation of contract.

9. A mere breach of promise does not constitute any criminal charge. There is nothing in the entire complaint to show that the intention of the applicants were dishonest from the very beginning. If they changed their attitude later on, the same cannot constitute the criminal charges levelled against them.

10. In my opinion, the dispute is of civil nature and as such the complaint can not proceed.

11. The application is allowed. Consequently, the summoning order as well as the proceedings of the aforesaid complaint case are quashed.

ORIGINAL JURISDICTION
CIVIL SIDE'
DATED ALLAHABAD 31.08.2010

BEFORE
THE HON'BLE V.M. SAHAI, J.
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No. 13684 of 2010

Raj Kumar ...Petitioner
Versus
State Of U.P. and another ...Respondent

Counsel for the Petitioner:
Sri Vinod Kr. Agrawal

Counsel for the Respondent:
Sri Y.S.Bohra (A.C.S.C.)
C.S.C

Constitution of India Art. 226-Alternative Remedy-Petition seeking direction for payment of Rs.502713/-towards work done by contractor-during pendency of suit contractor died-Executive Engineer required succession certificate-after paying court fee of Rs.30,000/-on production of succession certificate-payment of Rs. 60,000/ made-for remaining amount plea of demand of necessary fund-not available-entire amount be paid within two months with 8% interest-in Case of default 10% interest

Held: Para 13

We are of the view that the performance of the duty of the State and its officials must be above board. Here in this case, we find that the respondents are taking a casual stand in not releasing the payment to the petitioner whose father has performed his part of contract. The petitioner has also invested about 30,000/- towards court fees in getting the succession certificate and after submitting the succession certificate only a meagre amount of Rs.60,000/- (Rs.65,788/- according to respondents) has been released in favour of the petitioner. The Apex Court in numerous cases has held that alternative remedy is not absolute bar and in appropriate cases the petitions can be entertained under Article 226 of the Constitution of India. The reference may be given to the Apex Court decision 2003 SC 107 Harbanslal Sahnia and another Vs. Indian Oil Corporation and others and 2005 8 SCC 242 Sanjana M Wig (Ms.) Vs. Hindustan Petroleum Corporation Ltd. This Court also in the Writ Petition No. 14821 of 2008 Vijay Kumar Yadav Vs. State of U.P. and others decided on 13.7.2009 Writ Petition No. 40595 of 2004 Messrs. Anup Agencies and another Vs. State of U.P. and others decided on 14.12.2005 has taken the same view.

Case law discussed:
2003 SC 107, 2005 8 SCC 242, W.P. No. 14821 of 2008,W.P. No. 40595 of 2004

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

1. The petitioner happens to be son of late Jai Deo Prasad who was contractor and completed certain work under contract with the respondents. The father of the petitioner was not paid the entire amount of the contract and an amount of Rs. 5,02,713/- remain due against the respondents. Pending that payment the petitioner's father died. After death of the father, the petitioner moved an application before the respondent no. 2 for the payment which was to be released in favour of his father. After receipt of the application of the petitioner, the Executive Engineer has required the succession certificate. The petitioner has filed a case before the Civil Judge for granting the succession certificate for which an amount of Rs. 30,588/- was paid towards court fee. On 29.3.2007 the succession certificate was issued by the Civil Judge, (Senior Division), Mathura in favour of the petitioner. After receiving the same, the petitioner has submitted the succession certificate before the respondent no. 2 on

30.3.2007. After submission of the aforesaid certificate, the respondent no. 2 has paid Rs.60,000/- out of Rs. 5,02,713/-. For remaining payment petitioner has filed an application on 25.5.2006 but nothing has been done. Thereafter the petitioner has sent several reminders before the respondent no. 2 but it remain unattended, copies of the few reminders have been brought on record of the writ petition.

2. Aggrieved by the inaction of the respondents the petitioner has filed present writ petition with the prayer to issue a writ of mandamus directing the respondents to make payment of an amount of Rs.4,37,713/- along with 10% interest.

3. A counter affidavit has been filed by the State respondents. In paragraph 4 of the counter affidavit the claim of the petitioner to the extent of Rs. 502713/- has been admitted by the respondents. According to that an amount of Rs. 65,788/- was paid to the petitioner vide Boucher No. 226H dated 31.3.2007 after deducting a sum of Rs. 1474.00/- as income tax. For remaining the payment the letter has been written to the government but the budget has not been allocated therefore the payment has not been made and as soon as the amount is received the entire payment of the petitioner shall be made to him.

4. For better appreciation the contents of paragraph 4 of the counter affidavit is quoted below.

(4) *That the contents of paragraph no. 3 of the writ petition are not admitted as stated. It is submitted that the father of the petitioner completed the work for an amount of Rs. 5,02,713.00 as per records. The petitioner has been paid Rs. 65,788.00 vide Boucher No. 226H dated 31.3.2007 after deducting a sum of Rs. 1474.00 as income tax. For the rest amount letters dated 16.11.2006, 20.2.2008 and 18.8.2009 have been sent by the answering respondent for making fund available in order to make payment to the petitioner. As soon as the amount is received the same shall be paid to the petitioner. There is no provision for making payment of interest on the aforesaid amount. True copies of letters dated 16.11.2006, 20.2.2008 and 18.8.2009 are being filed herewith and marked as Annexure Nos. CA-1, CA-2 and CA-3 respectively to this counter affidavit.*

5. In the submissions of learned counsel for the petitioner since the claim is admitted therefore a direction be issued to the respondents to pay the entire amount along with 10% interest.

6. Refuting the submissions of learned counsel for the petitioner learned standing counsel has submitted that the writ court is not an appropriate remedy for redressal of such kind of grievance. The petitioner may either invoke the arbitration clause under the terms of the contract or file suit for realization of the alleged amount.

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

8. From the perusal of contents of paragraph 4 of the counter affidavit, it transpires that the respondents have admitted the claim of the petitioner and the reason for non-payment as has been assigned in the counter affidavit is non allocation of fund by the government for payment.

9. After hearing learned counsel for the parties, and perusing the record we are

unable to swallow the stand taken by the respondents in not releasing the payment, when the work performed by the petitioner's father has not been disputed and liability of payment has been admitted, in such situation, it is incumbent upon the government to release the payment.

10. From the bare perusal of contents of paragraph 4 of the counter affidavit, it transpires that respondent no. 2 is writing letter after letter to the State government for releasing the payment and it appears that even after respondent no.2's continuous effort the payment is not being released by the State government.

11. It is noticeable that the entire work has been completed by the petitioner's father and in completion thereof he had invested huge amount of money. It is very strange that on the one hand the government has taken the work from the father of the petitioner who had invested his own money in performing his part of the contract and on the other hand the State government is lacking to perform its part of contract.

12. We find that there appears to be no cogent reason for non-performance of the duty imposed upon the state government in releasing the payment in lieu of the completion of work under the contract. For such meagre amount the State can take shelter that there is no fund. We are of the view that the authorities working under government while entering into the agreement must be aware of their financial status for which agreement has been entered into between the parties and if the financial condition was not good then the agreement should not have been entered into and if it has been entered into there must have been clear mention in the notice that fund is not available with the government and the contractors are required to complete the work under contract and as soon as fund is available the payment be released in absence of such mention in the notice action of the respondents cannot said to be justified.

13. We are of the view that the performance of the duty of the State and its officials must be above board. Here in this case, we find that the respondents are taking a casual stand in not releasing the payment to the petitioner whose father has performed his part of contract. The petitioner has also invested about 30,000/- towards court fees in getting the succession certificate and after submitting the succession certificate only a meagre amount of Rs.60,000/- (Rs.65,788/- according to respondents) has been released in favour of the petitioner. The Apex Court in numerous cases has held that alternative remedy is not absolute bar and in appropriate cases the petitions can be entertained under Article 226 of the Constitution of India. The reference may be given to the Apex Court decision ***2003 SC 107 Harbanslal Sahnia and another Vs. Indian Oil Corporation and others and 2005 8 SCC 242 Sanjana M Wig (Ms.) Vs. Hindustan Petroleum Corporation Ltd.*** This Court also in the ***Writ Petition No. 14821 of 2008 Vijay Kumar Yadav Vs. State of U.P. and others decided on 13.7.2009 Writ Petition No. 40595 of 2004 Messrs. Anup Agencies and another Vs. State of U.P. and others decided on 14.12.2005*** has taken the same view.

14. In view of that looking into the admitted liability of payment we feel no hesitation in allowing the writ petition with the direction to respondents to release the admitted amount to the petitioner within a period of two months from the date a certified copy of the order is produced

before respondent no. 2. We further provide that as the respondents without there being any cogent reason have delayed the payment, therefore the petitioner is also entitled 8% interest. It is further provided that in case the remaining amount is not released within a period of two months, the petitioner shall be entitled 10% interest till the date of entire payment, which has to be paid by the respondents.

With the aforesaid directions, the writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.08.2010

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

Civil Misc. Writ Petition No. 13862 of 2004

Virendra Pal Singh ...Petitioner
Versus
Joint Director of Education Kanpur Region and others ...Respondents

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

Counsel for the Respondents:
Sri Shashi Kant Shukla
Sri Ambrish Kumar
S.C.

Service-U.P. Secondary Education Service Rules 1998,Rule 14-Promotion to the post of Lecturer (History)-vacancy arose on retirement of permanent incumbent on 30/06/1998-Management promoted X illegally, defying claims of petitioner and respondents No.5-Again X retired, and vacancy arose on 01/07/1999-Respondent No.5 become eligible for that post on 08/07/1998-Held,since vacancy arose initialy on 30/06/1998, and the post having not been legally filled up will continue-therefore relevant date for qualification would be 01/07/1998-thus petitioner found liable to be promoted-petition allowed.

Held: Para 13

Having heard learned counsel for the parties, the Rules require the possession of the requisite qualification as on the first day of the year of recruitment. The relevant Rule is Rule 14 of the U.P. Secondary Education Service Selection Board Rules, 1998. There is no dispute that the vacancy occurred on 30.6.1998 and, therefore, the qualification had to be seen on 1.7.1998. The Committee of Management did proceed to make a promotion but it promoted Shishu Pal Singh and did not consider the claim either of the petitioner or of the Respondent No.5. The Respondent No.5 subsequently staked his claim on the ground that he has acquired qualification on 8.7.1998. It appears that after Shishu Pal Singh retired, the Respondent No.5 was supported by the Committee of Management. In the opinion of the Court, this could not have been done inasmuch as the vacancy which occurred on 30.6.1998 cannot be said to have been occupied lawfully by Shishu Pal Singh in the absence of any approval by the competent authority. It is the same vacancy which continued and, therefore, the date on which the qualification had to be considered according to Rule 14 aforesaid was 1.7.1998. The Joint Director of Education committed a manifest error by shifting the said date of consideration on the ground of the alleged action of the Committee of Management by promoting Shishu Pal Singh which was never approved by the competent authority. In such a situation, the impugned order is unsustainable.

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

1. Heard Sri Prakash Padia, learned counsel for the petitioner, learned Standing Counsel for Respondent Nos. 1, 2, 6 & 7

and Sri Shashi Kant Shukla for Respondent No.5.

2. Counter-Affidavits have been filed on behalf of Respondent Nos. 3 and 4 as well.

3. The dispute relates to the claim of promotion of the petitioner on the post of Lecturer (History) in Dayanand Inter College, Amritpur, district - Farrukhabad, which is an institution governed by the provisions of U.P. Intermediate Education Act, 1921 and the U.P. Secondary Education Service Selection Board Act and the regulations framed thereunder.

4. The vacancy on the post of Lecturer in History came into existence on the retirement of the permanent incumbent on 30.6.1998. The respondent No.5 is admittedly senior to the petitioner and one Shishu Pal Singh was also senior to the petitioner and the Respondent No.5. The Respondent No.5 succeeded in completing his Post Graduation in the subject of History with the declaration of his result on 8.7.1998. The Respondent No.5 was, therefore, admittedly not qualified on the first day of the year of recruitment upon the vacancy coming into existence. The relevant date, which is admitted between the parties, would be 1.7.1998.

5. The Management appears to have promoted Shishu Pal Singh whose promotion was never approved and he also retired.

6. The Respondent No.5 claimed that he became qualified as on 1.7.1999 and since Shishu Pal Singh had retired, therefore, he ought to have been promoted.

7. The Respondent No.5 had staked his claim before the District Inspector of Schools which was not being considered as a result whereof he filed Writ Petition No.43080 of 1999 which was disposed of on 6.10.1999 to consider his claim. The matter was taken up by the District Inspector of Schools who vide order dated 19.8.2000 came to the conclusion that the Respondent No.5 was not qualified as on the first date of the year of recruitment and hence his claim was, accordingly, rejected. The order, therefore, practically went in favour of the petitioner and which was never challenged in any court of law.

8. The said order of the District Inspector of Schools was not being implemented by the Committee of Management as a result whereof the petitioner approached this Court by filing Writ Petition No.28605 of 2001 in which orders were issued on 6.8.2001 commanding the Management to take a decision with regard to the claim of the petitioner. The Manager, on his own, passed an order on 1.10.2001 rejecting the claim of the petitioner. It is in these circumstances that the dispute came to be taken up further before the Joint Director of Education. The petitioner filed another Writ Petition No.21997 of 2002 which was disposed of with a direction to decide the claim of the petitioner. Accordingly, the Joint Director of Education, being the Chairman of the Regional Level Committee, proceeded to pass the order dated 28.2.2004 and rejected the claim of the petitioner and reversed the order of the District Inspector of Schools passed earlier accepting the claim of the Respondent No.5. The Joint Director of Education recorded a finding that the date of occurrence of vacancy stands shifted to 1.7.1999 on account of the circumstances indicated therein namely that the claim of

Shishu Pal Singh had not been recognized and then held that the Respondent No.5 was qualified on the said date and, therefore, deserves to be promoted.

9. It is this order, which is under challenge together with the communication dated 8.3.2004.

10. Sri Prakash Padia, learned counsel for the petitioner, submits that the impugned order proceeds on an erroneous construction of the relevant rules inasmuch as once the claim of Shishu Pal Singh had not been accepted then the same vacancy which occurred on 30.6.1998 will continue. He submits that accordingly the date of occurrence of vacancy and the first day of the year of recruitment would not alter and the qualification has to be seen on 1.7.1998 and not on any date subsequent thereto.

11. On the strength of the aforesaid submissions, it is urged that the order deserves to be set aside and the Regional Level Committee be directed to re-consider the claim of the petitioner in the light of the relevant rules.

12. Sri Shashi Kant Shukla, on the other hand, for the Respondent No.5 contends that having passed the M.A. examination on 8.7.1998, the Respondent No.5 being senior to the petitioner was entitled to be considered more so when the claim of Shishu Pal Singh had not been accepted. It is submitted that in such circumstances, the priority has been rightly fixed by the Regional Level Committee in favour of the Respondent No.5 treating the date of occurrence of vacancy as 1.7.1999. Learned Standing Counsel has also supported the impugned order and has urged that it does not require any interference.

13. Having heard learned counsel for the parties, the Rules require the possession of the requisite qualification as on the first day of the year of recruitment. The relevant Rule is Rule 14 of the U.P. Secondary Education Service Selection Board Rules, 1998. There is no dispute that the vacancy occurred on 30.6.1998 and, therefore, the qualification had to be seen on 1.7.1998. The Committee of Management did proceed to make a promotion but it promoted Shishu Pal Singh and did not consider the claim either of the petitioner or of the Respondent No.5. The Respondent No.5 subsequently staked his claim on the ground that he has acquired qualification on 8.7.1998. It appears that after Shishu Pal Singh retired, the Respondent No.5 was supported by the Committee of Management. In the opinion of the Court, this could not have been done inasmuch as the vacancy which occurred on 30.6.1998 cannot be said to have been occupied lawfully by Shishu Pal Singh in the absence of any approval by the competent authority. It is the same vacancy which continued and, therefore, the date on which the qualification had to be considered according to Rule 14 aforesaid was 1.7.1998. The Joint Director of Education committed a manifest error by shifting the said date of consideration on the ground of the alleged action of the Committee of Management by promoting Shishu Pal Singh which was never approved by the competent authority. In such a situation, the impugned order is unsustainable.

14. So far as the claim of the petitioner is concerned, the District Inspector of Schools had passed an order on 19.8.2000. The said order has not been

appreciated in correct perspective by the Joint Director of Education while proceeding to pass the impugned order.

15. Accordingly, the writ petition is allowed and the orders dated 28.2.2004 and 8.3.2004 are set aside. The matter is remitted back to the Regional Level Committee to pass fresh orders after hearing both the parties in the light of the observations made herein above within 3 months from the date of production of a certified copy of this order before the concerned authority.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.08.2010

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 26826 of 2009

Chandra Mohan Sama ...Petitioner
Versus
Banwari Lal Ghai and another ...Respondents

Counsel for the Petitioner:
Mr. Amitabh Agarwal
Mr. Pramod Kumar Jain

Counsel for the Respondents:
Mr. V.P. Misra
Mr. J. Nagar

Constitution of India Art.226-Declaration of vacancy-Challanged by tenant on ground of limitation claiming to be in unauthorised possession since 1975-if any mafiya forcibly accupy the building and due to his fere land lord fails to approach-be allowed justified its illegal possession-even in absence of provision of time limit-held-limitation not to be read where not specifically provided.

Held: Para 23 & 24

If limitation of 12 years as reasonable period is read in the provision of the U.P. Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972, though there is a definite lack of legislative intent in the Act in this regard, it would amount to permitting illegal occupants to grant legal sanction to their acts. Occupation of building without allotment would frustrate the regulatory provisions of the Act and not germane to the object for which the Act was legislated.

It may in circumstances be also misused or misutilised e.g. if an influential powerful person or mafia occupies a building or portion thereof by force of muscle power/State power then the landlord would never be able to move any application for release for fear of him and his family. There can be other such examples also, hence in my considered opinion, limitation should not be read where it is not specifically provided for.

Case law discussed:
(2005(1) ARC-144),(1994 A.L.J.-999(F.B.), 2005(2) A.R.C.-665, (2006(63) ALR-677), (2006(62) ALR 383), (2009(10) A.D.J.-607), (1984(1) ARC 17),(AIR 1964 SC-752).

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

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

2. The petitioner claims himself to be tenant of house, F-48 Shanti Nagar, Kanpur Nagar since 1975 without there being any allotment order. It appears that respondent no, 2 moved an application for declaration of vacancy and for allotment on the ground that petitioner is an unauthorised occupant. Objections were filed by the petitioner and he also filed certain rent receipts.

3. The Prescribed authority vide its order dated 21.2.2005 held that petitioner occupied the property in 1975 and that there is no allotment order in his favour. The property was released in favour of the landlord vide order dated 28.12.2005. Revision filed by the petitioner has also been dismissed by order dated 10.4.2009 by the revisional court.

4. Contention of the counsel for petitioner is that even if finding of the Prescribed Authority is upheld that petitioner is an unauthorised occupant and he occupied the property in 1975, even then the proceedings were not maintainable after 21 years and were barred by period of limitation. It is on these grounds that this petition has been filed. No other point has been argued.

5. Counsel for the petitioner has relied upon three judgments of this Court. First decision relied on by the counsel is **Munna Lal Agrawal Vs. Rent Control and Eviction Officer/City Magistrate, Mathura and others** (2005(1) ARC-144), in which three shops in dispute were let out without allotment order, hence the Prescribed. Authority declared the vacancy Court held that proceedings for release initiated by the landlord after reasonable period of time suffer from vice of limitation.

6. The Full Bench decision in **Nootan Kumar Vs. A.D.J.**(1994 A.L.J.-999(F.B.) was in operation at that time. It may be pointed out at this stage that judgement in Nootan Kumar's case (supra) has been set aside by the Apex Court in 2005(2) A.R.C.-665. The court in paragraph no. 9 of the judgement, has held that after reversal of the Full Bench judgment by the Supreme Court, entire scenario has changed and now agreement is binding between the landlord and tenant and landlord can file suit for eviction on the grounds mentioned under section 20(2) of the Act and and also release application under section 21 of the Act on the ground of bonafied need.

7. In the second decision relied on by the counsel for petitioner **Rajdhari Vs. Smt Ranjana Gupta and another**(2006(63) ALR-677), eviction of the tenant was also sought on the ground of vacancy and it was argued that limitation of 12 years will have to be read. Proceedings for eviction of unauthorised occupant were initiated after 21 years from the date of unauthorised occupation and it was held that proceedings for eviction on the ground of vacancy after such period is not maintainable and liberty was given to the landlady to seek eviction on the grounds available to her in law.

8. Last case cited by the counsel for petitioner is **Anil Kumar Dixit Vs. Maya Tripathi and another**(2006(62) ALR 383). In that case also building was let out without allotment order and it was held that it may be deemed to be vacant and open to allotment as agreement of letting is not binding upon Rent Control and Eviction Officer. In paragraph no. 5 and 7 of this decision, it was held that in view of section 12 and 16 of the Act, there was no limitation for initiating proceedings but application is to be filed within a reasonable period of time.

9. Learned counsel for the respondent has urged that finding of the prescribed authority that there was vacancy while allowing the release application, has been confirmed by the

revisional court in Rent Revision no. 3 of 2006, Chandra Mohan Sama Vs. Banwari Lal and others.

10. It may be noted here that aforesaid revision was allegedly dismissed ex parte vide judgment and order dated 10.04.2009 and the petitioner has moved application dated 15.5.2009 for setting aside and recall of the order dated 10.4.2009 and restoring the revision to its original number. This application is pending.

11. In **Smt. Jamuna Devi Vs. District Judge, Kanpur Nagar and others** (2009(10) A.D.J.-607), relied upon by the counsel for respondent, the Court considered provisions of section 12(1) and 16(2) of U.P. Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972, and the order declaring the vacancy and release of premises in favour of landlord-respondent. Petition was filed by the petitioner(tenant) on the ground that she was residing in the disputed premises for more than 20 years and erstwhile landlord had not initiated any action nor sent any notice for initiating any action against the petitioner and she was being evicted by respondent-builders who was trying to grab the property evicting the petitioner. The Court in those peculiar circumstances, held that Rent control and Eviction Officer had failed to consider the real question as to bar of the proceedings: that landlord during all these years had not taken any action against the petitioner and that rent was being regularly paid to the landlord who had no grievance at all, hence the release application filed by the builders was quashed. It may be noted here that decision in **Anil Kumar Dixit**(supra), cited by the counsel for petitioner as well as decision of Apex Court in **Mansa Ram Vs. S.P. Pathak and others**(1984(1) ARC 17), were considered in this case.

12. Further contention of the counsel for respondent is the petitioner has filed before this Court a photo copy of his driving license as annexure no. 5 to this petition to establish the fact that he was tenant of the building in dispute. He submits that from its perusal, it is clear that driving licence is of one Chandra Mohan and not of Chandra Mohan Sama- the Petitioner .The Address given in the Driving Licence is resident of Shashtri Nagar, Kanpur whereas the petitioner in the courts below has given his address as F-48, Shanti Nagar, Kanpur Nagar. He was vehemently argued that the person whose driving licence has ben filed as annexure no. 5 is a different person from the petitioner. Admittedly, this driving licence was not filed before the courts below.

13. As regards limitation is concerned , counsel for the respondents has urged that limitation will not come in the way in filing release application as petitioner being an unauthorized occupant of the building , there is recurring cause of action.

14. Having heard counsel for the parties and on perusal of the record, it appears that there is positive discrepancy in the name and address of the petitioner Chandra Mohan Sama as os apparent from annexure no. 5 filed by him

15. In the case of **Anil Kumar Dixit** (supra) and **Rajdhari** (supra) relied upon by the counsel for the petitioner, the Court has categorically held that a building which is let out without allotment order is deemed to be vacant and is open to allotment as the agreement of letting id not binding upon Rent Control and Eviction Officer.

However as regards limitation is concerned, the Court has held that under section 12 and 16 of the Act. There is no limitation for initiating the proceedings but application is to be filed within a reasonable period of time and period of 12 years should be taken as reasonable time for initiating proceedings.

16. In the decision in **Munna Lal Agarwal's case** (supra), the Court was considering the effect of judgment in Nootan Kumar's case which was set aside by the Apex Court as has been noted in paragraph no.9 of the judgment.

17. What should be taken as reasonable time would, therefor depends on facts and circumstances of each case.

18. In my considered opinion, once th provision do not provide for any specific limitation, then cause of action would not be barred by limitation. An unauthorized occupant cannot be clothed with legal right to remain in possession of the building, for it is to be alloted by Rent Control and Eviction Officer in accordance with law . The Petitioner in this case came into unauthorized occupation since 1975 as claimed by him, it cannot be regularized and is bound by the provision of the Act.

19. In The **Bombay Gas Co. Ltd Vs. Gopal Bhiva nand others** (AIR 1964 SC-752), the Apex Court has held that Court has no power to fix any limitation where it is not provided in the statue as this would amount to legislate the statue. In this regard, paragraph no. 13 of this decision is quoted below:

"In dealing with this question, it is necessary to bear in mind that though the legislature knew how the problem of recovery of wages had been tackled by the Payment of Wages Act and how limitation has been prescribed in that behalf, it has omitted to make any provision for limitation in enacting S.33C.(2). The failure of the legislature to make any provision for limitation cannot, in our opinion, be deemed to be an accidental omission. In the circumstances, it would be legitimate to infer that legislature deliberately did not provide for any limitation under S. 33C(2) may not always be conscious of their rights and it would not be right to put the restriction of limitation in respect of claim which they may have to make under the said provision . Besides, even if the analogy of execution proceedings is treated as relevant, it is well known that a decree passed under the Code of Civil Procedure is capable of execution within 12 years, provided, of course it is kept alive by taking step in aid of execution from time to time as required by Art. 182 of the Limitation Act; so that the test of one year r six months limitation prescribed by the Payment of Wages Act cannot be treated as a uniform and universal test in respect of all kinds of execution claims. ***It seems to us that where the legislature has made no provision for limitation, it would not be open to the courts to introduce any such limitation on grounds of fairness or justice.*** *The words of S. 33C(2) are plain and unambiguous and it would be the duty of the Labour Court to give effect to the said provision without any considerations of limitation. Mr. Kolah no doubt emphasised the fact that such belated claims made on a large scale may cause considerable inconvenience to the employer,* ***but that is a consideration which the legislature may take into account, and if the legislature feels that fair play and justice require that some limitation should be prescribed, it may proceed to do so. In the absence of any provision, however, the Labour Court can not import any such***

consideration in dealing with the applications made under S.33C(2).”

20. The cases cited by the counsel for petitioner is decision of coordinate Bench presided over by learned single Judge whereas the ratio in **Bombay Gas's case(supra)** has binding effect under Art. 141 of the Constitution.

21. It may also be noted that decision in Smt. Jamuna Devi's case cited by the counsel for respondent is dated 19.9.2008 and since the matter of limitation is pending before the Supreme Court, I am of the opinion that in the facts and circumstances the question of limitation would not arise and the release application has rightly been allowed by the prescribed authority.

22. Since this Court has already heard the petitioner on merits of the judgements passed by the prescribed authority as well as revisional court, hence remanding the matter on restoration application would be a futile exercise.

23. If limitation of 12 years as reasonable period is read in the provision of the U.P. Urban Building (Regulation of Letting, Rent and Eviction) Act, 1972, though there is a definite lack of legislative intent in the Act in this regard, it would amount to permitting illegal occupants to grant legal sanction to their acts. Occupation of building without allotment would frustrate the regulatory provisions of the Act and not germane to the object for which the Act was legislated.

24. It may in circumstances be also misused or misutilised e.g. if an influential powerful person or mafia occupies a building or portion thereof by force of muscle power/State power then the landlord would never be able to move any application for release for fear of him and his family. There can be other such examples also, hence in my considered opinion, limitation should not be read where it is not specifically provided for.

25. For all reasons stated above, the writ petition fails and is accordingly dismissed. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.08.2010

BEFORE
THE HON'BLE KRISHNA MURARI, J.

Civil Misc. Writ Petition No. 44792 of 2010

Ram Kumar and another ...Petitioners
Versus
Addl. District Judge, Chaundausi and others ...Respondents

Counsel for the Petitioner:
Sri Vishesh Kumar Gupta
Sri T.P. Bhardwaj

Counsel for the Respondents:
Sri Vishnu Gupta

Code of Civil Procedure-Order 9 Rule 13-Application for setting a side ex party Decree-on ground earlier judgment passed after hearing same of heirs-representing. Estate-Decree upheld by the Apex Court-held-application under order 9 Rule 13 not maintainable.

Held: Para 6

In view of the law laid down by the Hon'ble Apex Court, the application filed by the petitioners under Order IX Rule 13 C.P.C. for recall of the ex parte decree on the ground that they were also the heirs of the deceased defendant, who

were not impleaded, would not be maintainable and has rightly been rejected by the two courts below.

Case law discussed:

AIR 1982 SC 1397, AIR 1966 SC 792, AIR 1975 SC 733.

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

1. Shri T.P. Bharadwaj holding brief of Shri Vishesh Kumar Gupta has made a request to adjourn the case. The matter was heard at great length on 5th August, 2010. On the request made by Shri Vishesh Kumar Gupta, the matter was adjourned for after lunch session in order to enable him to look into the decision referred to in the impugned judgment reported in **Rani Choudhury Vs. Lt. Col. Suraj Jit Choudhury, AIR 1982 SC 1397.** However, after lunch he did not appear. The matter was posted for today and again, adjournment has been sought. Prayer made is refused.

2. The sole controversy in this case is as to whether after dismissal of appeal filed against the decree, whether an application is maintainable under Order IX Rule 13 C.P.C. The issue is clearly covered by the decision of the Hon'ble Apex Court in the case of Rani Choudhury (supra), wherein it has been held as under.

"A plain reading of the Explanation clearly indicates that if any appeal against an ex parte decree has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application for setting aside the ex parte decree under Order IX Rule 13 will be entertained. The words used in the Explanation are clear and unambiguous. The language used in the Explanation clearly suggests that where there has been an appeal against a decree passed ex parte and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under Order IX Rule 13 for setting aside the ex parte decree."

3. In the case in hand, suit filed by the plaintiff-respondent was decreed by the trial court by means of ex parte judgment and decree dated 10.10.1980, against which First Appeal was preferred by some of the defendants, which was partly allowed on 15.07.1982. The matter came up to this Court in Second Appeal No. 2257 of 1982, which was also dismissed on 10.11.2005. The judgment and decree has been affirmed by the Hon'ble Apex Court by dismissal of the Special Leave Petition on 17.04.2006. Thereafter the petitioner moved an application under Order IX Rule 13 C.P.C. for recall of the ex parte judgment and decree on the allegation that they were also legal heirs of the deceased defendants and were not not impleaded after his death.

4. It is undisputed that the estate of the deceased defendant was duly represented by some of the heirs, who went up in appeal. Hon'ble Apex Court in the case of **N.K. Mohd. Sulaiman Sahib Vs. N.C. Mohd. Ismail Saheb & Ors., AIR 1966 SC 792,** in identical situations, held that the principle of representation of the estate by the heirs who were joined as parties applied to the case and the decree was binding on persons who claimed to be the sons of the deceased mortgagor and sued for a declaration that the mortgage decree was not binding on them.

5. Same view has been taken by the Hon'ble Apex Court in the case of Harihar **Prasad Singh & Ors. Vs. Balmiki Prasad Singh & Ors., AIR 1975 SC 733,** wherein

it has been held that the estate of the deceased was fully represented by the heirs, who had been brought on record and these heirs represented the absent heirs also, who could be equally bound by the result.

6. In view of the law laid down by the Hon'ble Apex Court, the application filed by the petitioners under Order IX Rule 13 C.P.C. for recall of the ex parte decree on the ground that they were also the heirs of the deceased defendant, who were not impleaded, would not be maintainable and has rightly been rejected by the two courts below.

7. The writ petition being devoid of merit, stands dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.07.2010

BEFORE
THE HON'BLE SHEO KUMAR SINGH, J.
THE HON'BLE RAJESH CHANDRA, J.

Civil Misc. Writ Petition No. 48664 of 2003

Gopi Kumar Singhania ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri R.N. Singh
Sri V.K. Singh
Sri G.K. Singh

Counsel for the Respondents:
Sri A.K. Gaur
Sri Alok Kumar Singh
Sri P.S. Baghel
Sri Rajeev Misra
C.S.C.

U.P. Public Money (Recovery of Dues) Act, 1972 or any other Act-Constitution of India Article 226-The recovery proceeding under the 1972 Act found invalid quashed by the Apex Court-The Apex Court set aside the impugned order and directed to take such action under the Act or the financial Act as is legally available.

Request to restore immediately possession-held-entitled for all relief so claimed.

Held: Para 32, 33

As the recovery proceedings/citation and the entire proceedings under the Act has been found to be invalid and were quashed by the Apex Court, we are of the view that the petitioners are entitled for all the reliefs so claimed in this petition.

So far as the Private respondent who claims to be the auction purchaser, he is entitled to get the bid amount returned with a simple interest to be calculated at the rate of 7% from the date of deposit.

Case law discussed:
AIR 1970 SC 1717,AIR 1967 SC 1440, (1887) 15 Ind. App. 97, (1885) 12 Ind App. 171, (1897) 24 Ind App. 170 (PC), 2000 SC Cases Vol. 8, 395, AIR 1995 SC 1071.

(Delivered by Hon'ble Sheo Kumar Singh, J.)

1. By means of the present writ petition, the petitioner has prayed for quashing tha auction proceedings conducted pursuant to the recovery certicicate and recovery citation dated 06.01.2001 and 14.04.2001 (Annexures No. 6 and 7) respectively.

2. There is further prayer for a direction to the District Collector, Varanasi(Respondent No. 2) to restore back the possession over the properties, which were illegally auctioned pursuant to the recovery certificate/citation referred above.

3. Heard Sri R.N.Singh, learned Senior counsel assisted by Sri V.K. Singh who appeared in support of the petitioner.

4. Sri Rajeev Mishra has filed appearance on behalf of respondent No.5 and he states that he has not filed the counter affidavit as nobody turned up after filing the vakalatnama. On the asking of the Court he augued the matter in the light of the facts so available on record.

5. The State Officials are represented by the learned Standing Counsel.

6. After hearing the learned counsel for the parties, it is clear that the facts are not in dispute and, therefore, on a brief notice the writ petition can be conveniently disposed of.

7. Proceeding for recovery of certain dues from the petitioner started pursuant to the issuance of recovery certificate/citation under the provisions of U.P. Public Money (Recovery of Dues)Act, 1972 (hereinafter referred to as 'Act').

8. Recovery certificate/citation as noted above is dated 06.01.2001 and 14.02.2001.

9. Challenging the aforesaid move of the U.P. Financial Corporation (respondent No.4), petitioners filed the writ petition in this Court i.e. Civil Misc. Writ Petition No. 27141 of 2001 which was dismissed on 27.04.2001. Although, Special Leave Petition was filed in May, 2001 but before any relief could be granted, the properties in question was auctioned on 26.11.2002. the Special Leave Petition filed by the petitioner was finally decided by the Apex Court vide judgment dated 20.12.2002 which is reported in 2003 Local Bodies Education Cases, 901.

10. The Apex Court white allowing the Special Leave Petition, in the concluding paragraph gave a clear direction that the impugned order is set aside and the proceedings under the U.P. Act are quashed. It was left open for the Corporation to take action under the Act or the financial Act as is legally available to it.

11. The observation as made by the Apex Court in paragraph 16 of the judgement noted above is quoted here for convenience:

"The impugned order is set aside and the proceedings under the U.P. Act are quashed. It shall be, however, open to the Corporation to take such action under the Act or the Financial Act, as is legally available to it. The appeal is allowed without any costs."

12. There is no dispute that the judgment of the Apex Court has become final between the parties.

13. After the judgment of the Apex Court, the petitioner moved an application before the District Magistrate and served a copy of the order of the Apex court on 27.01.2003 with a request that possession of the properties in question which was so auctioned on 26.11.2002 be restored to them. As there was inaction on the part of the District Officials, the writ petition was files before this court (the present writ petition). In this writ petition, a direction was given by the Bench on 31.10.2003 that tha District Magistrate is to pass appropriate orders in accordance with law.

14. After the directions of this court, the District Collector, Varanasi rejected the petitioners' application by order dated 06-1/2-2006. it is mainly observed that as matter is pending in the court, unless there is clear direction nothing is possible.

15. By means of the amendment application, the petitioner has challenged the order of the District Magistrate dated 6-1/2-2006 also.

16. Thus, in addition to the prayers in the petition, there is a prayer for quashing the order of the District Collector by which the petitioner's claim for restoration has been rejected.

17. Submission of the learned counsel for the petitioner is that although the recovery proceedings initiated by the respondent No.4 was upheld by this Court by dismissing the writ petition but ultimately the Apex Court allowed the Special Leave Petition and the order of this court was set aside and at the liberty to the Corporation to take any action which may be permissible in law and thus the claim is that as the recovery proceeding under the Act has been quashed, petitioners are entitled for restoration of the status/possession which stood before start of the recovery proceeding.

18. Further submission is that it is not a case where only intervening proceeding has been quashed rather it is a case where entire proceedings started under the Act stood quashed and, therefore, when no recovery process started pursuant to the recovery certificate/citation remained in existence, consequential steps will have to be treated as annulled and thus petitioners are entitled to get the relief.

19. In support of the submission of applicability of principle of lis pendens in respect to court sale also reliance has been placed on a decision given by the Apex Court in the case of **Kedarnath Vs.Sheonarain** reported in **AIR 1970 SC 1717.** The observation as made by the Apex Court in the aforementioned case as is contained in para 17 is quoted hereunder:

"*Lastly it was contended that the sale was by the court auction and the doctrine of lis pendens would not apply to such a sale. This point was considered in* ***Samarendra Nath Sinha V. Krishna Kumar Nag, 1972-2 SCR 18=(AIR 1967 SC 1440)*** *by one of ou (shelat J.) and it was observed as follows:*

"The purchaser pendent elite under this doctrine is bound by the result of the litigation on the principle that since the result must bind the party to it so must it bind the person deriving from his right, tile and interest from or through him. This principle is well illustrated in ***Radhamadhub Holder V. Suresh Chandra, (1885) 12 Ind App 171 and (1897) 24 Ind App 170 (PC)."****This ground also has no validity."*

20. In support of the submission that if very imitiatiion of proceeding is found to be nullity/faulty then all consequential action is to fall though releance has been places on a decision given by the Apex Court in the case of **Badrinath V. Govt. of Tamilnadu & Ors.** Reported in **2000 SC Cases Vol 8, 395.**

The observation as made by the Apex Court in the aforesaid cae as is contained in para 27 of the judgment is quoted hereunder:

"This flows from the general principle applicable to "consequential order" Once the basis of a proceeding is gone, may be at a later point of time by order of a superior authority, any intermediate action taken in the meantime-like the recommendation of the State and by the UPSC and the action taken thereon-would fall to the ground. This principle of consequential orders which is applicable to judicial and quasi-judicial proceedings is equally applicable to administrative orders. In other words, where an order is passed by an authority and its validity is bein reconsidered by the superior authority(like the Governor in this case) and if before the superior authority has given its decision, some further action has been taken on the basis of the initial order of the primary authority, then such further action will fall to the ground the mement the supetior authority has set aside the primary order."

21. In response to the aforesaid, Sri Rajeev Mishra submits that although by the judgement of the Apex Court, order of this court dismissing the writ petition was set aside and the proceedings under the Act itself was quashed but as the auction took place on 26.11.2002 it was open for the petitioners to have informed the Apex Court about this development while the Special Leave Petition was being decided on 20th December, 2002. On the aforesaid premise, Sri Rajeev Mishra submits that the petitioners are not entitled to get any relief.

22. In view of the aforesaid fact, this Court has to deal with the matter.

23. As noticed above, there is no dispute about the fact that not only the order of this Court was set aside by the Apex Court rather the entire proceedings under the U.P. Act was quashed. The question before tha Apex court was that whether the recovery proceeding initiated by the Financial Corporation under the U.P. Public Money (Recovery of Dues) Act, 1972 can be said to be justified and within jurisdiction.

24. This issue was answered by the Apex court in favour of the petitioner and it was found that proceeding initiated by the Corporation under the Act referred above were not permissible and it is on this groung entire proceedings were quashed and at the same time the Corporation was given the liberty to take recourse as permitted in law.

25. This being the situation, tha auction pursuant to recovery citation as has taken place being a result/consequence of the recovery certificate/citation which has been found to be not permissible, this Court is convinced that petitioners are entitled to get the relief. Once the recovery certificate/citation itself stood quashed, there can not be any valid auction.

26. A similar situation arose in a matter before this Court in the case of **Mohan Lal Baghla V. Board of Revenue & Ors. (W.P. No. 4450 of 1986)** in which against the petitioners the dues were found to be of lessor amount and for the higher amount, the recovery proceedings were started and auction of property took place.

27. On examination of propriety of sale proceeding, having found the same be not in accordance with law, this Court set aside the auction proceedings and as a consequence restoration of possession was also directed.

28. The judgment of this Court was appealed in the Apex Court but the Special Leave Petition i.e. Appeal No. 8624 of 2002

was finally dismissed. The order of this Court for restoration of possession and for refund of amount with a reasonable interest was approved by the Apex Court.

29. At this stage, we may refer to a decision given by the Apex Court in the case of **Nani Gopal Paul Vs. T. Prasad Singh reported in AIR 1995 SC 1071.** Where the Apex court observed that if sale proceedings are vitiated then the courts are not to remain a mute or helpless spectator to permit the illegality committed in conduction the courts sale. Unless aggrieved party by his own conduct permits the effect of the auction to become operative, that cannot be legalized only by passage of time.

30. Here is a case where the petitioners having succeded from the Apex Court, immediately approached the District Collector for restoration of possession and thus there being no lapses on the part of the petitioners and having promptly moved for giving effect to the final decision of the Apex Court nullifying the entire thing, the court will have to come to rescue of the petitioners.

31. The observation as made by the Apex Court in the decision given in the case of **Nani Gopal Paul Vs. T. Prasad Singh(Supra)** is quoted hereunder:

"We are of the view that we can take suo motu judicial notice of the illegality pointed out by the Divison Bench, committed by the Single Judge of the High Court in bringing the properties to sale. Accordingly, we are of the view that the Court Receiver as approved by the learned Single Judge. Confirmation of sale was illegal. Though, as contended by Sri Ganesh that normally an application under Order XXI Rule 89 or 90 under Section 48 C.P.C. need to be filed within limitation to have the sale conducted by the Court set aside and that procedure need to be insisted upon. We are of the view that this Court or appellate Court would not remain a mute or helpless spectator to obvious and manifest illegality committed in conduction court sales. We are informed and it is not disputed that the appellate had deposited only Rs. 5lakhs and balance amount was assured to be deposited only after delivery of possession. That also would be illegal."

32. As the recovery proceedings/citation and the entire proceedings under the Act has been found to be invalid and were quashed by the Apex Court, we are of the view that the petitioners are entitled for all the reliefs so claimed in this petition.

33. So far as the Private respondent who claims to be the auction purchaser, he is entitled to get the bid amount returned with a simple interest to be calculated at the rate of 7% from the date of deposit.

34. As the money is lying with the respondent No. 4, we give a direction to that respondent that on moving appropriate application by respondent No.5 for refund of the amount that will be refunded within a period of six weeks from the date of receipt of the move.

35. So far as the petitioners are concerned, this Court directs that the District Collector, Varanasi will ensure possession of the property restored with the petitioners within a period of two months from the date of receipt of the certified copy of this order Under immediate/proper notice to Respondent No. 5.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.08.2010

BEFORE
THE HON'BLE DILIP GUPTA, J.

Civil Misc. Writ Petition No. 51448 of 2010

Harendra Singh Recruit Constable 45 Bn. P.A.C. Aligarh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Sanjay Kumar

Counsel for the Respondents:
C.S.C.

Constitution of India Art. 226-Principle of Natural Justice-petitioner got appointment on production of forged High School certificate-when fact admitted-departmental enquiry-futile exercise-petitioner unable to disclose on denial of opportunity what prejudice caused to him-court declined to interfere .

Held: Para 12 and 16

It is clear from the aforesaid decisions of the Supreme Court that the application of the principles of natural justice depend upon the relevant facts and circumstances of the case and whenever a complaint is made about its violation, the Court has to decide whether the observance of that Rule was necessary for a just decision on the facts of the case. It has also been observed that there can be a situation where an order need not be aside even if it is passed in violation of natural justice like where no prejudice is caused to the person concerned and in such a case interference under Article 226 of the Constitution is not necessary. The decisions also hold that where facts are admitted, an enquiry will be an empty formality.

In the present case, as noticed hereinabove, the case of the respondent is that the actual date of birth of the petitioner is 15th December, 1986 and this fact is admitted to the petitioner. It is not his case that his date of birth is 15th December, 1984. The further case of the respondents is that while seeking employment the petitioner had submitted a forged marksheet which mentioned his date of birth as 15th December, 1984. The petitioner has not denied in the entire petition that such a marksheet was not submitted by him The entire thrust of the writ petition and the contention advanced by the learned counsel for the petitioner is that it was absolutely necessary for the respondents to hold an enquiry before cancelling his selection. In view of the decisions of the Supreme Court referred to above and when the facts are admitted, it cannot be said that prejudice has been caused to the petitioner. It will, therefore, not be appropriate to quash the impugned order dated 7th September, 2007 only on the ground that opportunity had not been given to the petitioner.

Case law discussed:
2010 (6) ADJ 161, AIR 1984 SC 273, (2004) 6 SCC 299, (2004) 8 SCC 129, (2005) 3 SCC 409, (2005) 5 SCC 337, AIR 1981 SC 136, AIR 1994 SC 1074, AIR 2000 SC 2783, 2006 AIR SCW 399

(Delivered by Hon'ble Dilip Gupta, J.)

1. The petitioner, who was appointed as a Constable in the U.P. Police, has sought the quashing of the order dated 7th September, 2007 passed by the Commandant, 45th Bn. P.A.C. Aligarh by which his selection has been set aside on the ground that he had furnished a forged High School marksheet and, accordingly, his name has also been struck off from the rolls.

2. The impugned order mentions that while seeking appointment, the petitioner had submitted the High School markshet of the year 2000 with Roll No.0838447 in which he was shown to have passed with second division and 15th December, 1984 as his date of birth. On verification of the said marksheet, the Deputy Secretary of Madhyamik Shiksha Parishad, Bareilly, which Board had conducted the High School Examination, in his report dated 31st August, 2007 informed the Department that the date of birth of the petitioner entered in the records of the Board is actually 15th December, 1986 and not 15th December, 1984 and that the petitioner had also passed the Intermediate Examination in 2002 and the date of birth of the petitioner was also recorded as 15th December, 1986 in the College records. The order further mentions that the petitioner would only be 17 years and 16 days at the time of selection according to the actual date of birth, i.e., 15th December, 1986, and even if two years relaxation for OBC candidates is provided to the petitioner, then too he would not be between 18 years and 22 years at the time of selection which was the age requirement for this category. The order further mentions that only in order to secure employment, the petitioner filed a forged High School marksheet to show that his date of birth is 15th December, 1984. The selection of the petitioner has, therefore, been found to be void ab-initio and, accordingly, it has been cancelled and his name has been struck off from the rolls of the Police.

3. The sole contention advanced by Sri Sanjay Kumar, learned counsel for the petitioner is that the impugned order dated 7th September, 2007 should be set aside for the reason that it was passed without giving any opportunity to the petitioner and in support of his contention he has placed reliance upon the decision of this Court in **Rajbeer Singh (Constable 618/946) Vs. State of U.P. & Ors., reported in 2010 (6) ADJ 161.**

4. Learned Standing Counsel appearing for the respondents, however, submitted that in the facts and circumstances of the case, when it is admitted to the petitioner that his correct date of birth is 15th December, 1986 and the petitioner has not controverted the statement made in the impugned order that while securing employment the High School marksheet with date of birth recorded as 15th December, 1984 was submitted by him, it was not necessary to give any opportunity to the petitioner.

5. I have carefully considered the submissions advanced by the learned counsel for the parties.

6. The sole submission of learned counsel for the petitioner is that it was obligatory for the authorities to have given opportunity to the petitioner to place his version before cancelling his selection and deleting his name from the rolls.

7. It cannot be doubted that the principles of natural justice cannot be put into a strait-jacket formula and that its application will depend upon the fact situation obtaining therein. The said principles cannot also be applied in vacuum without reference to the relevant facts and circumstances of the case. This is what has been held by the Supreme Court in **K.L. Tripathi Vs. State Bank of India & Ors. AIR 1984 SC 273; N.K. Prasad Vs. Government of India & Ors. (2004) 6 SCC 299; State of Punjab Vs. Jagir Singh (2004) 8 SCC 129; Karnataka SRTC Vs. S.G. Kotturappa (2005) 3 SCC 409 and**

in Viveka Nand Sethi Vs. Chairman, J&K Bank Ltd. (2005) 5 SCC 337.

8. In **S.L.Kapoor Vs. Jagmohan, AIR 1981 SC 136,** the Supreme Court laid the exception that "if upon admitted or indisputable facts only one conclusion was possible", then in such a case, the principle that breach of natural justice was in itself prejudice, would not apply. In other words if no other conclusion was possible on admitted or indisputable facts, it will not be necessary to quash an order which was passed in violation of natural justice. Of course, this being an exception, great care must be taken in applying this exception.

9. The Constitution Bench of the Supreme Court in **Managing Director ECIL, Hyderabad Vs. B. Karunakar AIR 1994 SC 1074** after making reference to the two of its earlier decisions also observed:-

"**In A.K. Kraipak v. Union of India, AIR 1970 SC 150 it was held** that the rules of natural justice operate in areas not covered by any law. They do not supplant the law of the land but supplement it. They are not embodied rules and their aim is to secure justice or to prevent miscarriage of justice. If that is their purpose, there is no reason why, they should not be made applicable to administrative proceedings also especially when it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial ones. An unjust decision in an administrative inquiry may have a more far reaching effect than a decision in a quasi-judicial inquiry. It was further observed that the concept of natural justice has undergone a great deal of change in recent years. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the inquiry is held and the constitution of the tribunal or the body of persons appointed for that purpose. **Whenever a complaint is made before a Court that some principle of natural justice has been contravened, the Court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case.** The rule that inquiry must be held in good faith and without bias and not arbitrarily or unreasonably is now included among the principles of natural justice.

In Chairman, Board of Mining Examination v. Ramjee AIR 1977 SC 965 the Court has observed that natural justice is not an unruly horse, no lurking landmine, nor a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference of the administrative realities and other factors of a given case, can be exasperating. The Courts cannot look at law in the abstract or natural justice as a mere artifact. Nor can they fit into a rigid mould the concept of reasonable opportunity. **If the totality of circumstances satisfies the Court that the party visited with adverse order has not suffered from denial of reasonable opportunity, the Court will decline to be punctilious or fanatical as if the rules of natural justice were sacred scriptures."**

(emphasis supplied)

10. In **Aligarh Muslim University and Ors. Vs. Mansoor Ali Khan, AIR**

2000 SC 2783, the Supreme Court considered whether on the facts of the case the employee can invoke the principle of natural justice and whether it was a case where, even if notice had been given, result would not have been different and whether it could be said that no prejudice was caused to him, if on the admitted or proved facts grant of an opportunity would not have made any difference and observed :-

"It will be sufficient, for the purpose of the case of Mr. Mansoor Ali Khan to show that his case will fall within the exceptions stated by Chinnappa Reddy, J. in S.L. Kapoor Vs. Jagmohan, AIR 1981 SC 136, namely, that on the admitted or indisputable facts - only one view is possible. In that event no prejudice can be said to have been caused to Mr. Mansoor Ali Khan though notice has not been issued."

11. The Supreme Court in **Mohd. Sartaj & Anr. Vs. State of U.P. & Ors., 2006 AIR SCW 399,** after considering a number of its earlier decisions made the following observations with regard to the requirement of giving notice :-

"............. **Applying this principle, it could very well be seen that discontinuation of the service of the appellants in the present case was not not a punitive measure but they were discontinued for the reason that they were not qualified and did not possess the requisite qualifications for appointment.**

.... In view of the basic lack of qualifications, they could not have been appointed nor their appointment could have been continued. **Hence the appellants did not hold any right over the post and, therefore, no hearing was required before the cancellation of their services.** In the present case, the cancellation order has been issued within a very short span of time giving no probability for any legitimate expectation to the appellants regarding continuation of their service."

(emphasis supplied)

12. It is clear from the aforesaid decisions of the Supreme Court that the application of the principles of natural justice depend upon the relevant facts and circumstances of the case and whenever a complaint is made about its violation, the Court has to decide whether the observance of that Rule was necessary for a just decision on the facts of the case. It has also been observed that there can be a situation where an order need not be aside even if it is passed in violation of natural justice like where no prejudice is caused to the person concerned and in such a case interference under Article 226 of the Constitution is not necessary. The decisions also hold that where facts are admitted, an enquiry will be an empty formality.

13. It is in the light of the aforesaid observations of the Supreme Court that the facts of the present case have to be examined. The impugned order specifically mentions that at the time of securing employment the petitioner had submitted a High School marksheet in which his date of birth was entered as 15th December, 1984. There is no denial in the writ petition that such a marksheet was not submitted by the petitioner and on the other hand the petitioner has admitted in the writ petition that his date of birth is 15th December, 1986. The impugned order further mentions that if 15th December, 1986 is the actual date of birth of the petitioner, then he could not have been selected since he was not between 18 years and 22 years at the relevant time which was the age

requirement. It is, therefore, clear that in order to make himself eligible, the petitioner filed a forged marksheet in which his date of birth was entered as 15th December, 1984. The issue, therefore, that needs to be decided is whether in such a situation, when there is no denial by the petitioner about filing of the marksheet at the time of seeking employment which mentioned his date of birth as 15th December, 1984, any opportunity was required to be given to the petitioner.

14. The petitioner has placed reliance upon the judgment of this Court in Rajbeer Singh (supra) in which the following observations have been made:-

".........It appears that on the basis of some complaint regarding various persons who have obtained the appointment claiming themselves to be dependent of the employees working in the Department under the Dying in Harness Rules, some investigation was made without any notice to the petitioner and it was found as alleged by the respondent that in the certificate submitted by the petitioner of the High School the date of birth of the petitioner is entered as 15.11.1965. Though in the certificate which has been submitted by the petitioner, the date of birth is recorded as 15.11.1969.

....

I have considered the submissions made on behalf of the parties and perused the record. From the averments made by the parties in the writ petition as well as in the counter affidavit, it does not transpire that petitioner was ever given a notice and opportunity before passing the order impugned. Admittedly, the petitioner's appointment was of 1989. In case some inquiry as submitted by the respondent was made and a conclusion was arrived upon that petitioner only to get an appointment has filed a forged certificate claiming that his date of birth is 15.11.1969. Petitioner's case is that he has passed the High School in the year 1983 and certificate issued by the Board was submitted mentioning therein that the date of birth of the petitioner is 15th November 1969. The respondents have not disclosed the fact that from where they have enquired into the matter and what are the documents to show thereunder that the certificate submitted by the petitioner was forged. Therefore, in my opinion, it was incumbent on the part of the respondents to have a proceeding against the petitioner as provided under the Rules................."

15. The said decision does not help the petitioner. The petitioner-Rajbeer Singh at the time of securing employment had filed a marksheet which mentioned his date of birth as 15th November, 1969. The petitioner maintained that his date of birth was 15th November, 1969, while the case of the respondents was that the actual date of birth of the petitioner was 15th November, 1965. It is in such circumstances when the date of birth was disputed that the Court observed that opportunity was required to be given as the respondents had not disclosed from where they had made the enquiries and what were the documents to show that the certificate submitted by the petitioner was forged.

16. In the present case, as noticed hereinabove, the case of the respondent is that the actual date of birth of the petitioner is 15th December, 1986 and this fact is admitted to the petitioner. It is not his case that his date of birth is 15th December, 1984. The further case of the respondents is that while seeking employment the

petitioner had submitted a forged marksheet which mentioned his date of birth as 15th December, 1984. The petitioner has not denied in the entire petition that such a marksheet was not submitted by him The entire thrust of the writ petition and the contention advanced by the learned counsel for the petitioner is that it was absolutely necessary for the respondents to hold an enquiry before cancelling his selection. In view of the decisions of the Supreme Court referred to above and when the facts are admitted, it cannot be said that prejudice has been caused to the petitioner. It will, therefore, not be appropriate to quash the impugned order dated 7th September, 2007 only on the ground that opportunity had not been given to the petitioner.

17. This apart, the petitioner was not even eligible to be considered for appointment as he was less than 18 years of age at the time of selection. The Supreme Court in Mohd. Sartaj (supra) has held that when a candidate does not possess the requisite qualification, he cannot be continued and no hearing is required. In paragraph 21 of the writ petition it is stated that the petitioner started receiving salary from September 2006 as a permanent Constable. The impugned order was passed on 7th September, 2007. It cannot, therefore, be urged by the petitioner that there was delay in passing the impugned order. It is also seen that the impugned order has been challenged by the petitioner after a period of more than three years without giving any satisfactory explanation for the delay.

18. Thus, for all the reasons stated above, the writ petition deserves to be dismissed and is, accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.07.2010

BEFORE
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE KASHI NATH PANDEY, J.

Civil Misc. Writ Petition No.58527 of 2008

Kamla Srivastava & another ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Ashok Khare
Sri Siddharth Khare
Sri Rohit Upadhyaya

Counsel for the Respondents:
Sri Pushpendra Singh
Sri P.S. Baghel
C.S.C.

U.P. Prosecuting officer Service Rules, 1991 Section-15, U.P. Public Services (Reservation for SC/ST/Backward Classes) Act 1994-Right of appointment-Petitioners name included in waiting list-14 post still vacant-Petitioners bonafidely agitating their claim-their name also found place in list approved by High Court as well as the Hon'ble Supreme Court-entitled for appointment-direction issued accordingly

Since the Petitioners were perusing their Writ Petitions bona-fide for appointment and were placed in the Waiting list, they were entitled to be appointed against 14 vacancies which could not be filled up in selection of examination held in the year 1997. The judgement of the Supreme Court and the High Court clearly shows that the benefit has to be given only to those persons who were diligently agitating the matter. It is not denied that though there were some persons available over and above the petitioner ,they were not given appointment as they did not agitate the matter in the

High Court . The petitioners were the only 2 persons who had filed the Writ Petitions claiming appointment from the waiting list on the unfilled vacancies.

Held: Para 13

After perusing the record, we are of the opinion that since the petitioners pursuing their writ petitions bonafide for appointment and were placed in the waiting list, they were entitled to be appointed against 14 vacancies, which could not be filled up in the selections of examination held in the year 1997. The judgment of the Supreme Court and the High Court clearly shows that the benefit has to be given only to those persons, who were diligently agitating the matter. It is not denied that though there were some persons available over and above the petitioner in wait list on merit, they were not given appointment, as they did not agitate the matter in the High Court. The petitioners were the only two persons, who had filed the writ petition claiming appointment from the waiting list on the unfilled vacancies.

(Delivered by Hon'ble Sunil Ambwani, J.)

1. The petitioners Ms. Kamla Srivastava and Shri Ghanshyam appeared in the selections in pursuance to the Advertisement No.A-5 E-1/1997-98 issued by the Public Service Commission, U.P., for selection on the post of Asstt. Prosecuting Officers in the Asstt. Prosecuting Officers Examination, 1997 held under Section 15 of the U.P. Prosecuting Officer Service Rules, 1991. The advertisement was made for total 218 posts of APO to which reservation was applied in accordance with the U.P. Public Services (Reservation for Scheduled Castes/Scheduled Tribes/Other Backward Classes) Act, 1994.

2. Shri Sheo Shyam and 5 others filed Writ Petition No.28192 of 2002 alleging that the appointments were made in pursuance to the selection by the State Government on three dates. A large number of selected candidates failed to join. The number of these candidates was found to be 30 out of 218 recommended by the Public Service Commission. The High court found that the result was declared on 20.3.1999, and that even if the appointments were given on different dates, waiting list was valid only for a period of one year upto 20.3.2000, and in view of the decision of the Division Bench in Surendra Kumar Pandey Vs. State of U.P. in Writ Petition No.16899 of 2001 decided on 1.3.2002, the waiting list was no longer valid and operative to be used for making appointments.

3. The petitioners challenged the judgment in the Supreme Court in SLP (Civil) No.6505 of 2003, which was converted into Civil Appeal No.1035 of 2004. The Supreme Court found that the appointments were given on different dates from 10.5.1999 to 26.7.2001. It posed a question to itself as to whether the period of validity of the waiting list has to be one year from the date of the first recommendation made by the Commission, or from the date of the last of the recommendations. In view the peculiar nature of the fact situation, the Supreme Court allowed the Special Appeal with directions that the appellants shall be considered by the Commission and the State Government for appointment and that they will be appointed, if otherwise found suitable and eligible after verification of such credentials, documents and background as are necessary to be done for appointment. The last four paragraph of the judgment of the Supreme Court are quoted as below:-

"In the aforesaid background, in a case of this nature and in view of the peculiar nature of the first situation noted above, it would be inequitable and unjust to compute the one year period form the date when the first recommendation was made by the Commission. Undisputedly, appointments were made till the end of 2001. Therefore, it would be proper to reckon the period from the last date when the recommendation was made. But another situation has developed subsequently. The state Government itself had requisitioned for 56 posts including the unfilled posts of the previous selection and examinations are stated to have been already held. The fate of present 11 appellants has sufferred a set back on account of the action of both the Commission and the State Government. If the Commission's stand is that the validity period of the waiting list is one year, it should have sought for clarification from State Government as to why unfilled posts were included in the requisition, when its specific stand in the office memorandums referred to above was to the contrary. AT the same time, the State Government having taken a positive stand all through that the date of reckoning would be the last date on which the recommendation was made, it should not have included the unfilled posts in its requisition. The career of 11 candidates cannot be jeopardized in this battle of inconsistent and varying stands taken and moves adopted by the State Government and the Commission at different stages for different purposes.

Had the Commission on receipt of the office memorandum dated 14.1.1999 pointed out to the State Government that its view was not in line with the Commission's view that would have sorted out the areas of differences. Interestingly, in a particular case referred top by the appellants, commission accepted that the period was to be from the last date of recommendation. Though there cannot be any estoppels in law, yet a statutory body like the commission cannot blow hot and cold at the same breath. There has to be consistency in its view. To rule out unfortunate situations like the present one being allowed to recur again, both the State Government and the Commission are required to be more vigilant and constructive in their approach. When dealing with the careers of large number of candidates, their stands have to be consistent and not varying to avoid giving room for unsavory suspicions and ensuring the systems to work more transparently to add to its reputation and strength.

In the peculiar circumstances noted above, we direct that the appellants shall be considered by the Commission and the State Government and they would be appointed if otherwise found suitable, and eligible after verification of such credentials, documents and background as are necessary to be done for appointment.

The appeals are allowed to the aforesaid extent without any order as to costs.

Sd/-
(Doraiswamy Raju)
Sd/
(Arijit Pasayat)"

4. By letter dated 28th December, 2004 the Special Secretary, Government of U.P. informed the Secretary of the Public Service Commission that the Commission has made available a list of 7 persons in its letter dated 30.6.2004 and further list of 17 persons with its letter dated 3.11.2004, as wait list. Out of these only 8 persons were appellants in the Supreme Court. The names

of three persons were not made available. The State Government in pursuance of the direction of the Supreme Court dated 16.2.2004 decided that the appointments is to be given to 11 persons, if they are found eligible after verification. The 11 persons, who were appellants before the Supreme Court were thus given appointments.

5. The five writ petitions namely Writ Petition Nos.28192 of 2002; 39796 of 2002; 29793 of 2002, 28840 of 2002 and 34081 of 2002 were dismissed by the High Court vide its judgment dated 18.12.2002. The Supreme Court allowed the Civil Appeal No.1035 of 2004 by its judgment and order dated 16.2.2004. In the said judgment and order of the Hon'ble Supreme Court the writ petitions filed by Smt. Kamla Srivastava in the year 2002 was also disposed of vide judgment and order dated 2.12.2005 and similar directions were issued in her favour. The State Government vide order dated 30.1.2006 refused to consider her claim for appointment on the ground that judgment and order of Hon'ble Supreme Court was limited to 11 appellants, who had filed special leave petition. Shri Ghanshyam-petitioner No.2 in this writ petition was also similarly placed and his writ petition was also decided by judgment dated 2.12.2005. The State Government by its order dated 30.1.2006 refused to consider the claim of the petitioners on the ground that the judgment of the Supreme Court was limited only to 11 appellants, who had filed special leave petition. Aggrieved the petitioners filed Writ Petition No.24190 of 2006 and Writ Petition No.20176 of 2007. Both these writ petitions were allowed with following directions:-

"We have heard counsel for the parties and gone through the records of the present petition.

The petitioner had approached this Court in the year 2002 itself, for reasons beyond the control of the petitioner her writ petition could not be decided by this Court. While petitions filed by other similarly situate candidates were dismissed under the judgment and order dated 18.12.2002, giving rise to Special Leave to Appeal being filed before the Hon'ble Supreme Court. The Special Leave to Appeal has been allowed vide judgment and order dated 16.2.2004 with the direction as noticed hereinabove. The Division Bench of this Court, therefore, following the judgment and order of the Hon'ble Supreme Court dated 16.2.2004 disposed of the writ petition filed by the present petitioner in the year 2005 on similar terms and directions.

In our opinion, the petitioner who has been vigilant and has been contesting before this Court with due diligence cannot be permitted to suffer because of the fact that this Court could not decide her writ petition within reasonable time.

It is settled law that no party is to suffer because of the act of the Court. In any view of the matter, once the Division Bench has issued directions under its judgment and order dated 2.12.2005 following the judgment and order of the Hon'ble Supreme Court referred to above, the State Authorities are bound to carry out the said directions with all promptness and due diligence. They cannot be permitted to refuse the consideration of the claim of the petitioner on the ground that the petitioner had not approached the Hon'ble Supreme Court. As already noticed hereinabove, there was no occasion for the petitioner to approach the Hon'ble Supreme Court as her petition remained pending before this court itself.

In view of the aforesaid, we are satisfied that the order passed by the State Government dated 30.1.2006 is illegal and cannot be sustained. The order impugned is hereby quashed. The writ petition succeeds and is allowed. The respondents are directed to consider the claim of the petitioner for appointment strictly in accordance with law in the light of the Division Bench judgment and order dated 2.12.2005, subject however to the condition that the vacancies which were subject matter of advertisement in the year 1997, within the category to which the petitioner belongs is still available and no person over and above the petitioner in the merit list still remains to be offered appointment."

6. The petitioners, thereafter, made representations to the State Government, which have been rejected by the impugned order dated 13th October, 2008 by the Principal Secretary (Home), Government of U.P. giving rise to this writ petition.

7. The State Government has rejected the representation on the grounds that there were 24 vacancies, which could not be filled up in the Asstt. Public Prosecuting Officer Examination, 1997. The Commission has made available the wait list of 24 persons out of which 10 persons have been given appointment and that there are still 14 vacancies available to be filled up from the examination held for direct recruitment in the year 1997. The petitioners, however, cannot be given appointment, as their names are not included in the wait list. Thus it is clear that the persons available in the wait list are higher in merit than the petitioners.

8. Shri Ashok Khare assisted by Shri Siddharth Khare would submit that the petitioner's name were included in the wait list. The High Court while deciding the writ petitions on 28.2.2008 gave the petitioners same benefit, which was given by the Supreme Court with two conditions namely that the vacancies, which were subject matter of the advertisement in the year 1997 within the category to which the petitioners belong are still available, and that no person over and above the petitioners in the merits list still remains to be offerred appointment.

9. Shri Ashok Khare would submit that the petitioners' names were included in the wait list. The Commission committed an error in failing to send their names to the State Government for appointment and that the condition put by the High Court that no person over and above the petitioners in the merit list still remains to be offerred appointment, has to be read in the context of the facts of the case in which no one was offerred appointment, or that no one has come forward to be appointed in pursuance of the selections and placement in the wait list.

10. Shri P.S. Baghel appearing on behalf of the Commission would submit that though there is provision under Rule 15 (4) of the Rules of 1991, to prepare wait list not larger by more than 25% of the candidates in order of merit, on the basis of marks secured in the written examination and interviews, the Commission continuing with its past practice of preparing wait list of 50% of the advertised vacancies actually prepared wait list in which name of petitioner No.1 were included at Sl.No.106 with 297 marks. Shri Ghanshyam with 289 marks, and Shri Girija Shankar Pandey was at Sl.No.310 in OBC category with 283 marks. He would submit that the person with same marks were arranged in merit list and wait list in accordance with date of birth. Since there are number of persons in

the wait list, who were not offerred appointment by the State Government, the condition No.2 put by the High Court was not satisfied.

11. We have examined the original record and find that the Commission prepared a combined merit list for each category according to reservation and that on the same day on 20.3.1999 the wait list were also prepared in which name of Kamla Srivastava is included in the general category and name of Ghanshyam was included in OBC category. The wait list in general category starts from 298 marks, whereas Kamla Srivastava secured 297 marks and wait list in the category of OBC starts with 291 marks, where as the petitioner Ghanshyam has secured 289.

12. The averments in paragraph 4 of the counter affidavit clearly admit that the Commission had prepared the wait list and thus the stand taken by the Commission and the State Government that the wait list was not prepared is not correct. We are not called upon in this case to decide whether both the petitioners could be included within the wait list prepared under the Rules, as the wait list prepared by the Commission included their name and that under the orders of the Supreme Court and the High Court in the case of petitioners, which have become final, the petitioners could be given appointment subject to satisfying with two conditions.

13. After perusing the record, we are of the opinion that since the petitioners pursuing their writ petitions bonafide for appointment and were placed in the waiting list, they were entitled to be appointed against 14 vacancies, which could not be filled up in the selections of examination held in the year 1997. The judgment of the Supreme Court and the High Court clearly shows that the benefit has to be given only to those persons, who were diligently agitating the matter. It is not denied that though there were some persons available over and above the petitioner in wait list on merit, they were not given appointment, as they did not agitate the matter in the High Court. The petitioners were the only two persons, who had filed the writ petition claiming appointment from the waiting list on the unfilled vacancies.

14. The petitioners are graduates in law and are eligible for the post. They competed and were placed in the waiting list. They are, therefore, entitled to be appointed, on the vacant post of APOs, which could not be filled up in the year 1997 and that there is no statement of fact come form the Commission or the State Government that these 14 vacancies were offerred subsequently and were filled up in any subsequent recruitment.

15. The writ petition is **allowed** with directions to the respondents to offer appointment to the petitioners within a period of six weeks. The Commission will forward their names within three weeks and that the appointment letters will be issued to the petitioners by the State Government within three weeks, thereafter.

16. The petitioners will not be entitled to salary for the period they could not be appointed and have not worked. The question of their seniority with the batch of the selectees of 1997 will, however, be decided by the State Government, after they are appointed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.8.2010

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

Civil Misc. Writ Petition No. 55774 of 2003

Smt. Jaitoon ...Petitioner
Versus
Joint Director of Consolidation and others ...Respondents

Counsel for the Petitioner:
Sri Shekhar Srivastava
Sri A.K. Gupta
Sri Rakesh Ojha
Sri A. Kulshrestha
Sri B.P. Singh

Counsel for the Respondents:
Sri Prabhakar Dubey
Sri Anuj Kumar
Sri Preetam Yadav
Sri M.N. Singh
C.S.C.

U.P. Consolidation of Holdings Act-Section 48-A-read with Evacuee.Property Act-Section 24, 27-Sale certificate issued by custodian on 26.5.76-No appeal or revision filed.by Gaon Sabha or State-consolidation officer allowed objection placing reliance upon decision of court appeal after two years-without application to condone to delay duly supported with affidavit-can not be allowed-The S.O.C.and the joint Director of consolidation both Committed manifest error-ignoring statutory provision of section 48-A-before the court the litigants are or on same futting either private or state authority or state.

Held: Para 14 & 15

For the aforesaid reasons, apparently there is no legal justification for allowing the substitution application which was much beyond time without any explanation or request for condonation of delay. The orders of the Settlement Officer Consolidation as well as Joint Director Consolidation impugned in the instant writ petition are therefore, manifestly erroneous and blatant disregard to the procedure provided by Code and in the circumstances, the impugned orders are without any basis.

There is yet another circumstance which I can not ignore. In a decision of this Court Niadar Vs. D.D.C. and others, 1987 RD, 17, it was held that the order passed by Custodian became final and in case the petitioner was feeling aggrieved either with the order of Custodian or Sale Certificate in favour of the respondents, he should have preferred an appeal under Section 24 or revision under Section 27 of the Evacuee Properties Act but having failed to do so the said order can not be challenged. Any civil or revenue suit to challenge the order passed by the Custodian was completely barred. Besides, Section 48A of U.P.C.H. Act provides special provision with respect to Evacuee Property. Section 48A of U.P.C.H. Act completely prohibits to entertain any dispute on the orders passed by Custodian and it cannot be challenged before the consolidation authority

Case law Discussed:
AIR 1964 Supreme Court, 215, JT 2009 (5) SC, 283, 2005 (99) RD 657, 1987 RD, 17

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

1. Heard learned counsel for the petitioner and Standing Counsel on behalf of respondents.

2. Counter and rejoinder affidavits have been exchanged and writ petition is being heard finally.

3. The prayer in the instant writ petition is for quashing judgment and

orders dated 16.7.2001 passed by Settlement Officer Consolidation, District Bijnor, Annexure-3 to the writ petition and 17.5.2002 passed by Joint Director Consolidation, Muzaffar Nagar, Annexure-7 to the writ petition.

4. The property in dispute was originally enemy property which was purchased by petitioner along with some others vide sale certificate dated 26.5.1976 issued by the Custodian of the Enemy Property at Lucknow, U.P. This sale was never challenged at any stage but according to the petitioner, they came to know that their names have not been recorded in the revenue records though they were actual owners on the basis of Sale-Certificate dated 26.5.1976 and were in possession. When the consolidation proceedings commenced in the year 1990-91 of the village where the disputed land is situated only then it came to their knowledge that the name of the petitioner could not be mutated. An objection under Section 9(2) of the Consolidation of Holdings Act was moved before the Consolidation Officer where the entry was challenged. The Sale-Certificate was produced before the Consolidation Officer who allowed the objections of the petitioner vide order dated 21.5.1994. Reliance was placed by the Consolidation Officer on a decision reported in 1987 RD, 17. It was held that consolidation courts should enter the name of purchaser of the Enemy Properties if Sale Certificates issued by Custodian of Enemy Property in India is produced. It was also held that any objection regarding genuineness of the Sale Certificate can only be raised before the Custodian General and it can not be examined by the Consolidation Officer. In fact the limited power to the Consolidation Officer is to ascertain genuineness of the Sale Certificate. In the instant case, evidently, there was no contest or objection regarding genuineness of the said Sale Certificate. Accordingly name of the petitioner and 21 co-owners were recorded. Name of the petitioner was only for the portion mentioned in the original Sale Certificate issued by Custodian of Enemy Property. The State preferred an appeal before the Settlement Officer Consolidation challenging the order of the Consolidation Officer under Section 11(1) of the Act. During pendency of the appeal, two respondents namely Sri Naseebudin son of Shri Alibeg respondent no. 1 and Sri Raziul Hasan son of Sri Innayat respondent no. 21 expired. Applications were filed before the Settlement Officer Consolidation on 2.6.1999 and 9.4.1999 in appeal bringing this fact to the notice of the opposite party. This fact is specifically mentioned in paragraph 3 of the writ petition. However, this has been denied in the counter affidavit.

5. Subsequently the State of U.P. as well as Gaon Sabha moved substitution application on 25.4.2001 after lapse of two years. The claim set up by respondents was that Sri Naseebudin died issueless as such the property should revert back to the State. The main grievance which revolves in the present writ petition is that this substitution application was filed after lapse of two years without any application for condonation of delay. No application under Section 5 of the Indian Limitation Act or any assertion in the form of explanation on affidavit was filed along with substitution application. Substitution application and objection of the petitioner have been annexed as Annexures 1 and 2

to the writ petition. There is positive assertion in paragraph 5 that neither date of death of the deceased persons was mentioned nor date of knowledge. Perusal of application shows that there is an assertion that since the application to substitute deceased party was liable to be moved from the date of knowledge, therefore, substitution application will be deemed to be filed within time. No date of knowledge or the date of death is mentioned. The Assistant Consolidation Officer allowed the substitution application vide order dated 16.7.2001 and permitted to enter the name of Gaon Sabha. Names of heirs of late Sri Raziul Hasan with their respective shares were mutated in the revenue records vide Annexure-3 to the writ petition. The petitioner along with others filed a revision before the Joint Director Consolidation against the order dated 16.7.2001 which was also dismissed on 17.5.2002. The two orders are impugned in the instant writ petition.

6. The petitioner has annexed a questionnaire as Annexure-6 to the writ petition which denotes that there was no separate application under Section 5 of the Limitation Act along with substitution application and admittedly no affidavit which was filed after lapse of two years.

7. Submission of learned counsel for the petitioner is that the Joint Director Consolidation erred in upholding the order dated 16.7.2001 as well as Consolidation Officer by allowing substitution application without explanation of delay whereas the natural consequence is that once the substitution application is filed within time then whether any party files an abatement application or not, natural consequence is that in absence of substitution application, the proceeding stands abated. It is only when application for condoning the delay supported by an affidavit giving explanation and reasons for delay, the substitution application can be allowed provided the court accepts the explanation after giving an opportunity to the opposite party to file objections.

8. In the written submission learned counsel has also mentioned that a third person namely Alam deen son of Nazaur made his claim as heir of late Sri Naseebuddin on the basis of Will which was ignored by the Settlement Officer Consolidation as well as Joint Director Consolidation. However, at present the question of succession on the basis of Will is not involved in the present dispute.

9. Standing Counsel has disputed each and every arguments on behalf of respondents. Submission is that since the substitution application was filed within 90 days of knowledge, therefore, Settlement Officer Consolidation and Joint Director Consolidation did not commit any error whatsoever and writ petition is liable to be dismissed.

10. After hearing the respective counsels at length and going through entire record, admitted position is that substitution application was filed after lapse of two years and there was no application under Section 5 of Limitation Act. There is no explanation whatsoever and Settlement Officer Consolidation as well as revisional court allowed substitution application illegally whereas they should have directed the State to file an affidavit giving detailed explanation and reason for delay on oath. The order dated 17.5.2002 passed by the Joint

Director Consolidation as well as that of the Settlement Officer Consolidation suffers from apparent error of law. Section 40 of the Consolidation of Holdings Act provides that proceedings before the consolidation court are judicial proceedings and Section 41 of U.P. Land Revenue Act is also applicable. Meaning thereby the proceedings before the consolidation courts are judicial proceedings and as such the provision of C.P.C. are squarely applicable. In absence of procedure under the Consolidation of Holdings Act or separate Rules for substitution, provision of Order 22 C.P.C. is applicable. It is settled law that an affidavit should support an application for condonation of delay and affidavit should contain all the detailed reasons, explanation and inability to substantiate a justifiable cause for condoning the delay. No doubt, the courts have all along ruled that a liberal approach should be adopted while considering an application for condonation of delay in a substitution application but if there is no such application whatsoever, no liberty can be granted to any of the parties even if the party concerned is a State or Union of India. The law and procedure provided is same. The Apex Court in the case of ***Union of India Vs. Ram Charan through its legal representatives, AIR 1964 Supreme Court, 215*** held that the court can not invoke any inherent powers for the purposes of impleading the legal representatives of a deceased respondent, if the suit had abated and the appellant has not taken appropriate steps within time to bring the legal representatives of the deceased party on record. Mere allegation about belated knowledge of death of opposite party is not sufficient. Reasons leading to not knowing of death within reasonable time must be stated. Paragraph 8 of the said decision is quoted below:-

"(8) There is no question of construing the expression 'sufficient cause' liberally either because the party in default is the Government or because the question arises in connection with the impleading of the legal representatives of the deceased respondent. The provisions of the Code are with a view to advance the cause of justice. Of course, the Court, in considering whether the appellant has established sufficient cause for his not continuing the suit in time or for not applying for the setting aside of the abatement within time, need not be over-strict in expecting such proof of the suggested cause as it would accept for holding certain fact established, both because the question does not relate to the merits of the dispute between the parties and because if the abatement is set aside, the merits of the dispute can be determined while, if the abatement is not set aside, the appellant is deprived of his proving his claim on account of his culpable negligence or lack of vigilance. This, however, does not mean that the Court should readily accept whatever the appellant alleges to explain away his default. It has to scrutinize it and would be fully justified in considering the merits of the evidence led to establish the cause for the appellant's default in applying within time for the impleading of the legal representatives of the deceased or for setting aside the abatement.

11. Similar view was adopted in a recent decision by the Apex Court in the case of ***Katari Suryanarayana and others Vs. Koppisetti Subba Rao and others, JT 2009 (5) SC, 283.*** It was held by reason of various decisions of the Court that

different considerations arise in the mater of condoning the delay in filing an application for setting aside an abatement upon condonation of delay in a suit and an appeal. It is further neither in doubt nor in dispute that such applications should be considered liberally. The Court would take a more liberal attitude in the matter of condonation of delay in filing such an application.

12. It is thus apparent that the Apex Court has held that a liberal view should be adopted while considering an application for condonation of delay but in the instant case, there is no application whatsoever, neither an affidavit with some explanation and, therefore, in absence of any request for condonation of delay, the Settlement Officer Consolidation and Joint Director Consolidation could not have allowed the substitution application and natural consequence is that the proceedings stood abated.

13. In the case of ***Damodaran Pillai and others Vs. South Indian Bank Ltd., 2005 (99) RD, 657,*** the Apex Court held that the principles underlying the provisions prescribing limitation are based on public policy aiming at justice, the principles of repose and peace and intended to induce claimants to be prompt in claiming relief. Hardship or injustice may be a relevant consideration in applying the principles of interpretation of statute, but cannot be a ground for extending the period of limitation. The starting period of limitation for filing of a restoration application would be the date of the order and not the knowledge thereabouts The period of limitation can not be stretched by invoking inherent powers under Section 151 C.P.C.

14. For the aforesaid reasons, apparently there is no legal justification for allowing the substitution application which was much beyond time without any explanation or request for condonation of delay. The orders of the Settlement Officer Consolidation as well as Joint Director Consolidation impugned in the instant writ petition are therefore, manifestly erroneous and blatant disregard to the procedure provided by Code and in the circumstances, the impugned orders are without any basis.

15. There is yet another circumstance which I can not ignore. In a decision of this Court ***Niadar Vs. D.D.C. and others, 1987 RD, 17,*** it was held that the order passed by Custodian became final and in case the petitioner was feeling aggrieved either with the order of Custodian or Sale Certificate in favour of the respondents, he should have preferred an appeal under Section 24 or revision under Section 27 of the Evacuee Properties Act but having failed to do so the said order can not be challenged. Any civil or revenue suit to challenge the order passed by the Custodian was completely barred. Besides, Section 48A of U.P.C.H. Act provides special provision with respect to Evacuee Property. Section 48A of U.P.C.H. Act completely prohibits to entertain any dispute on the orders passed by Custodian and it cannot be challenged before the consolidation authority.

16. In view of this, the writ petition stands allowed and orders dated 16.7.2001 passed by the Settlement Officer Consolidation and 17.5.2002 passed by the Joint Director Consolidation are quashed. If any correction in the revenue records have been made by the consolidation

authorities on the basis of impugned orders, the same are liable to be corrected and revenue entries be rectified.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.09.2010

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

Civil Misc. Writ Petition No. 61214 Of 2008

Urmila Devi ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Ram Autar Verma,
Sri Ghan Shyam Das

Counsel for the Respondents:
C.S.C.

Constitution of India Art. 226- Compassionate appointment-cancelled after 11 years ground lack of educational qualification-petitioner on basis of Madhayama equivalent intermediate-was given appointment on class III post-subsequently if found that the certificate of Sahitya Sammelan is not equivalent to Intermediate-held-being High school entitled for appointment on class 4th post- petitioner not guilty committed any fraud- appointment on class 4th post be made within 3 weeks.

Held: Para 7

So far as the status of the petitioner is concerned, it is undoubtedly admitted to the opposite parties that she was entitled for compassionate appointment. The petitioner did not play any fraud nor has she committed any such act which may amount to misrepresentation. In such a situation the petitioner was entitled for an employment and keeping in view the fact that she has passed her High School from the U.P. Board, she was entitled for a compassionate appointment against a post commensurate to such qualification.

Case law discussed:
(2006) 1 U.P.L.B.E.C 719.

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

1. The petitioner is the widow of late Sri Ved Prakash who was a Lekhpal and died in harness on 16th December 1996. The petitioner was offered appointment on compassionate basis on the strength of her certificate from Hindi Sahitya Sammelan which the petitioner claims equivalent to the Intermediate examinations conducted by the Board of High School and Intermediate, Uttar Pradesh. The petitioner was accordingly appointed as a Class III employee keeping in view the aforesaid qualification.

2. The petitioner however did not make any efforts to learn typing and subsequently the petitioner was put to notice that her services would be terminated in case she does not improve upon herself. The petitioner has been now found ineligible to continue on the said post, vide order dated 25th September 2008 on the ground that her qualification at the time of her initial appointment was not Intermediate, inasmuch as the certificate from the Hindi Sahitya Sammelan obtained by her was not an equivalent qualification.

3. Learned counsel contends that the said order works great hardship inasmuch as the petitioner has lost her service that too even after 11 years of having served

the respondents and therefore the impugned order deserves to be set aside.

4. Learned Standing Counsel on the other hand contends that the law as declared by the Supreme Court is that an illegality cannot be cured and had the petitioner improved upon her qualifications the same could have been regularised keeping in view the offer made by the respondents which opportunity was not availed of by the petitioner. He therefore submits that the impugned order does not suffer from any infirmity much less a legal infirmity so as to interfere in the exercise of jurisdiction under Article 226 of the Constitution of India.

5. Having heard learned counsel for the parties and perused the affidavits, the fact that the petitioner was ineligible could not be successfully disputed by the learned counsel for the petitioner inasmuch as the certificate of the petitioner for Intermediate examinations has not been found to be equivalent upon a verification by the Board. In such situation, the petitioner was therefore not eligible for being appointed against a Class III post.

6. Needless to say that the alleged ineligibility of the petitioner cannot be cured in view of her long years of service as per law laid down by the Apex Court in the case of **Mohd. Sartaj & another Vs. State of U.P. & Ors., reported in (2006) 1 U.P.L.B.E.C 719.**

7. So far as the status of the petitioner is concerned, it is undoubtedly admitted to the opposite parties that she was entitled for compassionate appointment. The petitioner did not play any fraud nor has she committed any such act which may amount to misrepresentation. In such a situation the petitioner was entitled for an employment and keeping in view the fact that she has passed her High School from the U.P. Board, she was entitled for a compassionate appointment against a post commensurate to such qualification.

8. Accordingly the Court is of the firm opinion, that even though the impugned order dated 25.9.2008 may not require any interference, in view of the conclusions drawn hereinabove the petitioner is entitled for a mandamus directing the respondents to forthwith appoint the petitioner against a Class IV post or any other post equivalent and commensurate to the qualifications possessed by the petitioner keeping in view her status as indicated hereinabove. She would be entitled for relaxation in age in the event she has crossed the upper age limit for such employment.

9. Accordingly the writ petition is allowed to the aforesaid extent with a direction to the respondent District Magistrate Etah to ensure that the petitioner is appointed against a Class IV post without any further delay as early as possible but not later than three weeks from the date of presentation of a certified copy of this order before him.

10. It is further made clear that the respondents shall not take any further action pursuant to the impugned order including recovery of salary etc.

APPELLATE JURISDICTIONS
CIVIL SIDE
DATED: ALLAHABAD 18.08.2010

BEFORE
THE HON'BLE FERDINO I. REBELLO, CJ.
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE VIRENDRA SINGH, J.

Special Appeal No.1093 of 2010

Constable cp 201 Vinod Kumar and another ...Appellants
Versus
State of U.P. & others ...Opposite Parties

Counsel for the Petitioners:
Mr. Ram Kumar Dubey
Mr. Vijay Gautam
Mr. V.K. Singh

Counsel for the Respondents:
Mr. M.C. Chaturvedi, (C.S.C.)
Mr. Piyush Shukla, (S.C.)
Dr. Y.K. Srivastava, (S.C.)
Mr. M.S. Pipersenia, (S.C.).

U.P. (Civil Police) Constable and Head Constable Service Rules, 2008-Read with U.P. Police Act-1861-Section 2-Constitution of Board without including Director General of Police-instead of one-four Board Constituted-held-proper sufficient compliance of direction of Apex Court in Prakash Singh case-constitution of Board. even not traceable to Act-can be termed as irregularity-transfer of Constable and Head Constable in terms of Service Rules Regulation on approval of Board not initiated.

Held Para 21

In these circumstances, we are clearly of the opinion that, though we have found that the notification constituting the Board is not traceable to Section 2 of the Police Act, the same at the highest, amounts to an irregularity and not illegality and would not vitiate the transfers, if they have been done in terms of the Regulations and after the approval of the Board.

Case Law Discussed:
[2010 (3) ADJ 241 (DB)], [2009 (10) ADJ 381], [1961 (1) Crl. L.J.773], [AIR 1964 SC 1361], [(2002) 6 SCC 127], [2005 (2) AWC 1191 (FB)], [(2010) 1 SCC 353], [2009 (2) ADJ 607]

(Delivered by: Justice Ferdino I. Rebello, C.J.)

1. Noticing the conflict of views in two Division Bench judgments of this Court in **Shishu Pal Singh Vs. State of U.P. & Others** [2010 (3) ADJ 241 (DB) and another in Special Appeal No.850 of 2010 **(State of U.P. & Others Vs. Jagannath Prasad Gaur and others)** decided on 28.5.2010, in the matter of transfer of Constables and Head Constables and the interpretation of the U.P. (Civil Police) Constable and Head Constables Service Rules, 2008 (hereinafter referred to as 'the Rules, 2008'), the matter was referred to a Full Bench by order dated 14th of July, 2010, to answer the following issue:-

"(i). Whether pursuant to framing of the U.P. (Civil Police) Constable and Head Constables Service Rules, 2008, the directions issued by the Supreme Court in the case of **Prakash Singh Vs. Union of India** [2006 (8) SCC 1) in exercise of power under Article 142 of the Constitution of India, are no longer applicable in view of what is set out in paragraph 31 of the judgment?"

2. In paragraph 31 of **Prakash Singh** (supra), the Supreme Court was pleased to direct as under: "In discharge of our constitutional duties and

obligations having regard to the aforenoted position, we issue the following direction to the Central Government, State Governments and Union Territories for compliance till framing of the appropriate legislations. One of the directions was the establishment of the Police Establishment Board, being direction no.5, which reads as follows:-

Police Establishment Board

(5). There shall be a Police Establishment Board in each State which shall decide all transfers, postings, promotions and other service related matters of officers of and below the rank of Deputy Superintendent of Police. The Establishment Board shall be a departmental body comprising the Director General of Police and four other senior officers of the Department. The State Government may interfere with the decision of the Board in exceptional cases only after recording its reasons for doing so. The Board shall also be authorized to make appropriate recommendations to the State Government regarding the postings and transfers of officers of and above the rank of Superintendent of Police, and the Government is expected to give due weight to these recommendations and shall normally accept it. It shall also function as a forum of appeal for disposing of representations from officers of the rank of Superintendent of Police and above regarding their promotions/transfers/disciplinary proceedings or their being subjected to illegal or irregular orders and generally reviewing the functioning of the police in the State."

Earlier in paragraph 29 of the judgment also, it was observed as under: "It is not possible or proper to leave this matter only with an expression of this hope and to await developments further. It is essential to lay down guidelines to be operative till the new legislation is enacted by the State Governments."

3. In Civil Misc. Writ Petition No.69798 of 2009: **Shishu Pal Singh** (supra), the learned Single Judge, in respect to the challenge of transfer order dated 10.11.2009 and relieving order dated 08.12.2009, noted the contention on behalf of the writ petitioner that the transfer order had been passed without approval of the Police Establishment Board or even the Director General of Police, Uttar Pradesh. On behalf of the State, it was submitted that for various personnel of the police department, various Police Establishment Boards have been established and the Director General of the Police is the Chairman of the Police Establishment Boards relating to police personnel other than Head Constable and Constable. The learned Single Judge was pleased to note that the transfer was effected after approval of the Police Establishment Board and, therefore, was pleased to dismiss the writ petition.

The writ petitioner, being aggrieved, preferred a special appeal before the learned Division Bench of this Court, being Special Appeal (Defective) No.148 of 2010: *Shishu Pal Singh Vs. State of U.P. & Others,* [2010 (3) ADJ 241 (DB] (decided on 9th of February, 2010) wherein the learned Bench noted the contention raised on behalf of the State that the State had framed the Rules, known as U.P (Civil

Police) Constable and Head Constables Service Rules, 2008 and Rule 26 thereof, says that if any matter is not specifically covered by the aforesaid Rules, 2008, then it will be applicable as per the rules, regulations or orders applicable to the general Government servants. Therefore, the learned Bench held that there was no reason to interfere with the order impugned in the appeal.

4. In Civil Misc. Writ Petition No.25016 of 2010: *Jagannath Prasad Gaur and others Vs. State of U.P. & Others,* the writ petitioners challenged the order of transfer dated 26.4.2010 by the which the writ petitioners were transferred from one place to another. The writ petitioners also prayed for quashing of the Government Order dated 19.02.2010 as well as Clause-5 of the transfer policy dated 21.04.2010. The submission of the writ petitioners before the learned Single Judge was that the order of transfer has been effected in an arbitrary manner without adhering the policies made from time to time and also without application of mind by a common order. The stand of the State was that the transfers were effected by the Board constituted for that purpose on administrative grounds and based on Govt. Order of 1986 which stated that the police personnel shall not be posted near their hometown. The learned Bench found that about 300-400 police personnel had been transferred by one order on the ground that they are posted near their hometown since 1995, 1997, 1998 and 2000. After considering the minutes of the Board, which approved the transfer of the writ petitioners, it prima facie came to the conclusion that the Board has not applied its mind and, therefore, by means of an interim order dated 07.05.2010, stayed the transfer of the writ petitioners.

5. Being aggrieved by the aforesaid interim order dated 07.05.2010, the State of U.P. preferred an appeal, being Special Appeal No.850 of 2010: *State of U.P. & Others Vs. Jagannath Prasad Gaur & Others,* which came to be decided on 28.5.2010. The submission of the respondents-writ petitioners before the learned Bench was that the State Government had not constituted the Board in terms of the directions given by the Supreme Court under Article 142 of the Constitution of India. The Board constituted did not have the Director General of Police, but Additional Director General of Police/Inspector General (Establishment), who had no authority to preside over the said Board in view of the directions given by the Supreme Court, which was binding on the State Government. On behalf of the State-Appellants, it was pointed out that the State had submitted its proposal for constitution of Boards before the Supreme Court, which had not rejected to the same. Reliance was placed on the judgment of **Rishi Pal Singh Vs. State of U.P. & Others** [2009 (10) ADJ 381, wherein the learned Bench held that the Board presided over by the Inspector General of Police (Establishment) is a validly constituted Board.

The learned Bench after considering the issue, observed that if the State of U.P. wants to deviate, it is open to it to take necessary permission from the Hon'ble Supreme Court, which in the present case it had not been done. The learned Bench, further held that the

Board, which had considered and approved the transfer order in question was not constituted in accordance with the specific directions given by the Hon'ble Supreme Court and, therefore, the transfer order has not been passed in accordance with law, and accordingly, dismissed the appeal. This judgment was delivered on 28th of May, 2010. The judgment in **Shishu Pal Singh** (supra) was not noted by the subsequent Division Bench in **Jagannath Prasad Gaur** (supra) as it was not brought to its notice.

6. At the hearing of these matters, on behalf of the private respondents, it has been contended that the Supreme Court in Prakash Singh (supra) sought to insulate the police machinery from partisan political interference, in discharge of lawful function and prevention and control of crime including the investigation of cases and maintenance of law and order. In this context, the Supreme Court had been pleased to direct the establishment of the Police Establishment Board, which would consist of the Director General of Police and four other senior officers of the department. Our attention was also invited to the various efforts made by the other States giving effect to the directions issued by the Supreme Court including the State of Kerala, State of Assam as also a draft Bill by the State of Gujarat. Once there were directions under Article 142 of the Constitution of India, the State could not depart from the same and consequently, the view taken by the Division Bench in **Jagannath Prasad Gaur** (supra) ought to be upheld. On behalf of the original petitioners, it was sought to be contended that the Rules framed do not constitute 'legislation'.

7. On the other hand, on behalf of the State of Uttar Pradesh, the learned Standing Counsel has drawn our attention to the strength of the police personnel from Director General to Constable as on 31.03.2010. Against the sanctioned strength of 3,83,644, only 1,88,844 are serving and there are vacancies of 1,94,604. The learned Standing Counsel pointed out that they have appointed another 35,000 and more are in the process. It has been pointed out that looking to these figures, in the State of Uttar Pradesh, it is not possible to appoint one Board and accordingly, the State by Notification dated 12.03.2008 in exercise of its power under Section 2 of the Police Act, 1861 had constituted four different Boards for various ranks. It is submitted that the Supreme Court in Prakash Singh (supra), while issuing directions under Article 142 of the Constitution of India, had made it clear that these directions would apply till such time a legislation was enacted by the States. It is also pointed out that the State Government, pursuant to the powers conferred by Section 2 and Section 46 (3) of the Police Act, 1861 had framed the U.P. (Civil Police) Constable and Head Constable Service Rules, 2008. Our attention is invited to Rule 26 of Rules, 2008, which reads as under:-

"26. Regulation of other matters.-- In regard to the matters not specifically covered by these rules or special orders persons appointed to the service shall be governed by the rules, regulations and orders applicable generally to Government Servants

serving in connection with the affairs of the State."

Transfer, it is submitted is covered by Regulations 520 to 526 of the U.P. Police Regulations, which henceforth shall be referred to as the Regulations. It is, therefore, set out that considering the rules and the regulations, the State has enacted legislation and consequently, the directions issued by the Supreme Court in **Prakash Singh** (supra) are no longer applicable to the State of U.P.

8. The first question, therefore, for our consideration is, as to whether an exercise in subordinate legislation can be said to be a legislation. To answer that issue, we may first consider the decided case law under the Police Act and the rules framed thereunder. In **State of Uttar Pradesh Vs. Babu Ram** [1961 (1) Crl. L.J.773, the Supreme Court held that the rules made under the Police Act are not administrative directions. The Police Act and the rules made thereunder constitute a self-contained code providing for the appointment of police officers and prescribing the procedure for their removal. In the **State of Rajasthan Vs. Ram Saran** [AIR 1964 SC 1361, referring to Section 2 of the Police Act, the Supreme Court was pleased to hold that under that Section, it is not the Inspector General of Police but the State Government that is empowered to frame rules regulating the conditions of service of members of the police force. In **Chandra Prakash Tiwari Vs. Shakuntala Shukla** [(2002) 6 SCC 127, dealing with the Police Act, 1861 and rules made for the civilian employees under Article 309 of the Constitution of India, the Court was pleased to hold that the Act is a complete code insofar as the police personnel are concerned and the service conditions, which are referable to the Act, are not replaced by the general service conditions.

9. The Police Act and the Rules made thereunder were the subject matter of consideration before a Full Bench of this Court in **Vijay Singh and others Vs. State of U.P. & Others** [2005 (2) AWC 1191 (FB). Dealing with Section 2 of the Police Act, the Full Bench held that Section 2 enables the State Government to prescribe service conditions from time to time. It further observed that the Legislature, while enacting the provisions of Section 2 of the Police Act, 1861, itself delegated the powers to the statutory authority to fix eligibility criteria including the age etc. As the Police Act is a pre-Constitution law, that aspect was also considered and answered. We may gainfully reproduce paragraph 16 of the judgment, which is as under:-

"**16.** Police Act, 1861 is one of the earliest enactment immediately subsequent to the Indian mutiny of 1857. Preamble thereof provides that it was expedient to reorganize the police and to make it a more efficient instrument for the prevention and detection of crime. After the commencement of the Constitution into force in 1950, police became the State subject as it appears at item No.2 of List-II of 7th Schedule, which reads as Police (including railway and village police) subject to the provisions of Entry 2A of List-I. Entry 2A of List-I provides for deployment of any armed force of the Union of India or any other force subject to the control of Union.

Thus, it becomes clear that the police is a subject of State List and State Government is competent even to amend the Act and it has been amended by the States from time to time. The "pre-Constitution law continues to remain operative by virtue of provisions of Articles 313 and 372 of the Constitution. A Constitution Bench of Hon'ble Supreme Court in *South India Corporation Pvt. Ltd. v. Secretary, Board of Revenue, Trivendrum and another, AIR 1964 SC 207,* examined the issue of continuation and validity of the pre-Constitution laws and held that such provisions are valid and enforceable, observing that pre-Constitution law made by a competent authority, though it has lost its legislative competency under the Constitution, shall continue in force provided the law does not contravene other provisions of the Constitution. While deciding the said case, reliance had been placed upon large number of the judgments of different High Courts and also the judgment of Hon'ble Apex Court in *Amalgamated Coalfields Limited and others v. Janapada Sabha Chhindwara, AIR 1961 SC 964,* wherein the Constitution Bench had held that the coal tax originally imposed under Section 51 of the Central Provinces Local-self Government Act, 1920, on 2nd March, 1935, was valid and continued to be valid after Government of India Act, 1935 and the Constitution, by virtue of Article 372 of the Constitution."

From the above, it emerges that the Police Act and the Rules made thereunder and/or statutory orders passed under Section 2 of the Police Act, constitute a self-contained code relating to the police service in the State, which is a part of the civil services of the State.

10. Do the Rules and orders form a part of legislation. In our opinion, the following observations in **Babu Ram** (supra) would be important:-

"23. … … ...

Rules made under a statute must be treated for all purposes of construction or obligation exactly as if they were in the Act and are to be of the same effect as if contained in the Act, and are to be judicially noticed for all purposes of construction or obligation: see Maxwell "On the Interpretation of Statutes", 10th edn., pp. 50-51. The statutory rules cannot be described as, or equated with, administrative directions. If so, the Police Act and the rules made thereunder constitute a self-contained code providing for the appointment of police officers and prescribing the procedure for their removal."

Thus, the rules whether under Section 2 or Section 46 when made have to be read as if they are a part of the Act and have the same effect as if contained in the Act. They have to be read, therefore, as a part of the Act itself. The State Government has made the Rules, 2008 subsequent to the judgment in **Prakash Singh** (Supra). To the extent the rules provide for matters covered by the directions, the directions will no longer apply as the State has enacted legislation. We may also note that the Supreme Court in **Prakash Singh** (supra) has not held the existing legislation as to trespass invalid. The Rules, 2008, however, do not contain

any provision for setting up of Boards for effecting transfers. The State has placed reliance on Rule 26 thereof, which we have reproduced earlier. Rule 26 of the Rules says that in regard to the matters not specifically covered by these rules or special orders persons appointed to the service shall be governed by the rules, regulations and orders applicable generally to Government Servants serving in connection with the affairs of the State. By referring to the Notification issued by the State Government constituting the Boards, learned counsel had sought to contend before us that this order has been made pursuant to the power exercised under Section 2 of the Police Act. The purported order was issued by the Special Secretary. The Circular does not recite that it is pursuant to the power exercised under Section 2 of the Police Act. It is no doubt true that Section 2 does not specify the manner in which an order should be issued. This notification was issued on 12th March, 2008. The rules were notified and published in the Government Gazette on 2nd December, 2008. There is nothing on record that the notification of 12th March, 2008, if it be rules were made in terms of the Act. We are, therefore, of the opinion that it cannot be said that the said Notification is an exercise of power under Section 2 of the Police Act. To that extent constitution of the Boards would be pursuant to the directions issued under Article 142 of the Constitution of India.

11. The power under Article 142 of the Constitution is to do complete justice in the matter. Though the Supreme Court would not pass any order under Article 142 which would amount to supplanting substantive law applicable or ignoring express statutory provisions dealing with the subject, at the same time these Constitutional powers cannot in any way, be controlled by any statutory provisions. However, this power it has been held, cannot be used to supplant the law applicable to the case. The power, it has been held, has to be used sparingly in cases which cannot be effectively and appropriately tackled by the existing provisions of law or when the existing provisions of law cannot bring about complete justice between the parties. (See: *Laxmidas Morarji v. Behrose Darab Madan, 2009 AIR SCW 6124).*

Our attention was invited to the judgment of the Supreme Court in **University of Kerala Vs. Council of Principals of Colleges, Kerala and others** [(2010) 1 SCC 353], wherein the learned Bench of the Supreme Court was of the opinion that several issues require to be referred for consideration by the Constitution Bench, of which one is , as under:-

"What is the scope of Articles 141 and 142 of the Constitution? Do they permit the judiciary to legislate and/or perform functions of the executive wing of the State."

Until such time the Constitution Bench answers the issue, we have to proceed on the basis of the law as existing, which is, that the directions issued under Article 142 of the Constitution would be binding on all authorities till such time a legislation is enacted.

12. As we have noted earlier, the State Government, pursuant to the judgment in **Prakash Singh** (supra) has made the Rules, 2008. However, it has not, in the Rules, provided for the Constitution of the Boards. To that extent, though a legislation has been enacted, the direction regarding constitution of the Board would be binding till such time the State enacts legislation for constituting Boards. In paragraph 25 of the judgment in **Prakash Singh** (supra), the Court was further pleased to observe that 'we expect that the State Governments would give it due consideration and would pass suitable legislations on recommended lines, the police being a State subject under the Constitution of India.' These directions by the highest Court of the land, ordinarily ought to have been considered by the State Government by giving statutory recognition to the same of course, considering the State needs and the fact that there is a large police force. Though the power of the Legislature in enacting laws is plenary and cannot be controlled by any other Constitutional Body, the views of the Highest Judicial Body, which had issued the directions in larger public interest, must be given the highest consideration.

13. Under the provisions of the Act, Regulations have been framed, which are knows as the U.P. Police Regulations. Chapter XXXIV deals with the transfers. Regulations 520 to 525, which we are reproducing below, provide for the mode of transfer. The said Regulations read as under:-

"**520.** Transfer of Gazetted Officers are made by the Governor in Council.

The Inspector General may transfer Police Officers not above the rank of inspector throughout the province.

The Deputy Inspector General of Police of the range may transfer inspectors, sub-inspectors, head constables and constables, within his range; provided that the postings and transfers of inspectors and reserve sub-inspectors in hill stations will be decided by the Deputy Inspector-General of Policed, Headquarters.

Transfers which result in officers being stationed far from their homes should be avoided as much as possible. Officers above the rank of constable should ordinarily not be allowed to serve in districts in which they reside or have landed property. In the case of constables the numbers must be restricted as far as possible.

Sub-inspectors and head constables should not be allowed to stay in a particular district for more than six years and then years respectively and in a particular police station not more than three years and five years respectively. In the Tarai area (including the Tarai and Bhabar Estates) the period of sub-inspectors, head constables and constables should not exceed five years.

521. The Inspector-General may, without the sanction of Government--

(a) transfer to--

(i) foreign service within the province other than to service in an Indian State, and

(ii) another department of Provincial Government, any Government servant whom he can without reference to Government appoint or transfer in the ordinary course of administration and may also fill any post so vacated by promotion and enlistment when necessary, and

(b) subject to the same restrictions as in clause (a) transfer as Government servant to a temporary appointment outside the province for a period not exceeding two years in the first instance and may extend the period of such temporary transfer up to a period of two years.

522. The Superintendent when proposing a transfer from the district should send the character and service roll of the officer to be transferred.

With the consent of the Superintendents concerned mutual exchanges may be arranged by head constables and constables. The proposed exchanges shall be reported to the Deputy Inspector-General. Travelling allowance will not be payable on the occasion of such transfers.

523. On receipt of an order of transfer of a subordinate officer to another district the Superintendent will arrange to relieve him of his duties within ten days.

Officers transferred are entitled to joining time, but the Superintendent may not grant leave to an officer under order of transfer.

An inspector relieved on transfer from another district is entitled to sign a certificate of taking over charge from the date of arrival in the new district. If the officers to be relieved cannot be present at headquarters, the charge certificate should be signed for him by the Superintendent of Police, or, in his absence, by an Assistant Superintendent of Police or Deputy Superintendent of Police. The effect of this will be that an officiating officer will be considered to have been reverted, and permanent incumbent's joining time or leave or discharge, will be counted from the date on which the relieving officer takes over charge.

524. The Superintendent may, within his district, transfer all officers of an and below the rank of inspector. In the case of inspectors and officers in charge of police stations, he must before passing orders obtain the approval of the District Magistrate. Should the District Magistrate and Superintendent of Police be unable to agree in regard to the transfer of any officer, the matter may be referred to the Deputy Inspector-General of range for decision:

Provided that in the district where the Collector/Deputy Commissioner is Collector/Deputy Commissioner-in-charge of the Division, his functions under this sub-paragraph will be exercised by the Additional District Magistrate (Executive).

Officers-in-charge of police stations shall ordinarily be retained in their charges for at least two years. Subordinate officers at police stations should not be transferred without good reason. No officer liable to station duty shall be withdrawn from that duty for a longer period than one year, except in

Kumaun where the withdrawal of head constable for two years at a time from station duties is permitted.

525. Constable of less than two years' service may be transferred by the Superintendent of Police from the armed to the civil police or *vice versa.* Foot police constables may be transferred to the mounted police at their own request. Any civil police constable of more than two and less than ten years' service may be transferred to the armed police and vice versa by the Superintendent for a period not exceeding six months in any one year. All armed police constables of over two years' service and civil police constables of over two and under ten years' service may be transferred to the other branch of the force for any period with the permission of the Deputy Inspector-General.

In all other cases the transfer of Police Officers from one branch of the force to another or from the police service of other Provinces to the Uttar Pradesh Police requires the sanction of the Inspector-General."

These Regulations are an exercise in subordinate legislation. It is no doubt true that the Hon'ble Supreme Court in **Prakash Singh** (supra) had directed the constitution of the Police Establishment Boards as also directed that the Board is to decide all transfers below the rank of Deputy Superintendent of Police. The directions have not held that the legislations in force in the matter of transfer are illegal. The directions to an extent supplement the law in force. The said directions, therefore, have to be read along with Regulations in the context that if the authorities under the Regulations in exercise of the power have at the local level proposed the transfers in terms of the policy, that has to be decided by the Police Establishment Board before the transfers are given effect to.

14. The question then is, what is the meaning of the expression 'decide'. We open with a caveat. Judgments cannot be read as statutes and so interpreted. The judgment must speak for itself. The expression 'decide' has to be considered in the context of direction no.5, which is to establish the Police Establishment Boards where the Supreme Court has used the expression 'decide'. The word 'decide' according to the Law Lexicon by P. Ramanatha Aiyar, 8th Edition, 1987, is as under:-

"Decide. To determine; to form a definite opinion; to render judgment; to give judgment for or against a party to suit or other proceeding in Court.

AS APPLIED TO FUNCTIONS OF A JURY. "To decide includes the power and right to deliberate, to weigh the reasons for and against, to see which preponderate and to be governed by that preponderance."

In K.T. Aiyar, 13th Edition, 2001, the expression 'decide' has been set out as under:-

"Decide. According to *Concise Oxford Dictionary* 'to decide' means 'settle question, issues, disputes, by giving victory to one side; give judgment (between or in favour of, against); bring 'come to a resolution'; and 'decision' means 'settlement (of question etc.); conclusion; formal

judgment; making up one's mind; resolve; resoluteness; decided character'. [*Ramkrishna Gangaram Rathi v. Kishan Zingraji Madke* AIR 1971 Bom 305 (310)]."

In words and phrases Vol. 2, 3rd Edition, 1989 'To "decide" a matter means to take it into consideration and to settle it.' *Judes v. Registrar of Mining Rights Krugerdorfs* 1907 TS 1049 per Innes CJ. Thus the expression is used in the context of a decision making process to settling questions. Thus, the Board itself need not determine every act of transfer, it could decide on the proposals before it.

A learned Single Judge of this Court in **Bhanu Pratap Vs. State of U.P. & Others** [2009 (2) ADJ 607] was considering the aspect of what would be the meaning of expression 'decide'. The expression 'decide' as in Oxford English Dictionary, the Court observed means 'decide as a term to determine (a question, controversy or clause) by giving victory to one side or the other: to bring the settlement, resolve (a matter in dispute, doubt or suspense). The stand of the State before the learned Single Judge was that the expression 'decide' cannot be read to be interpreted as to effect transfers. The State Government, pursuant to the directions issued by the Supreme Court in **Prakash Singh** (supra) had constituted the Boards and when the difficulties were experienced the Range Deputy Inspector Generals and Zonal Inspector General of Police were allowed to make orders of transfers within their respective jurisdictions. The learned Single Judge noted that the transfer orders had been passed in exercise of power in Paragraph 520 of the U.P. Police Regulations within the Zone. The learned Single Judge held that there was no violation of the recommendations of the Supreme Court. The learned Single Judge further observed that the directions cannot confer an enforceable right upon the writ petitioners and that there was no mandate that the transfers, postings and promotions in breach of the recommendations are declared as illegal and inoperative.

The directions of the Supreme Court are to enable the State to enact legislation to achieve the desired objective as set out in the judgment of **Prakash Singh** (supra). Thus, the directions cannot be read literally, but will have to be considered in their broader aspect, which would also be to consider the 'existing law' and the ultimate exercise of control by the Board to effect the transfers. The expression 'decide', therefore, will have to be read in that context.

We may only mention that once a direction is issued by the Supreme Court, in the absence of a legislation, those directions to that extent will be part of additional conditions of service, as that would be law, and any violation of law, would give right to a person in whose favour, the law has been enacted and who complains of breach thereof. To that extent, the observations by the learned Judge in **Bhanu Pratap** (supra) would not be correct. The direction for setting up of the Boards by itself does not mean that all transfers would be personally done by the Boards. If under the Regulations, there is specific transfer policy and the authorities have proposed the transfers, the Board will

exercise its powers to decide on those transfers. The power, therefore, will have to be read in that context, meaning thereby, before effecting transfer it is the Board which must ultimately decide the transfers. Considering the number of police personnel in service, it is not possible to read the directions issued under Article 142 to have conferred the power on the Board alone, when there is an existing law in force or legislation has been enacted subsequently.

15. The next question, we have to answer is, what is the effect of the notification, which has constituted the four Boards. The only objection is to the constitution of one of the Boards, which is headed by the Inspector General of Police (Establishment) and not by the Director General of Police and which is empowered to consider the transfer of Head Constable and Constable. The learned Division Bench, considering the matter in Jagannath Prasad Gaur (supra), was of the opinion that the Board had not been constituted in terms of the directions in Prakash Singh (supra). It is true that the Chairman of the Board is not the Director General of Police, but the Inspector General of Police (Establishment). We have earlier quoted the sanctioned strength of the police personnel in the State of Uttar Pradesh. Insofar as the Constables are concerned, the State carried out an exercise of transfer of about 50,000 (Fifty Thousand) Constables under an 'existing law'. The transfers have been effected by the Board, as constituted. These transfers are regular transfers in terms of the Regulations under the Police Act. The Regulations themselves provide for regular transfer after completing a particular tenure at a station on the administrative instruction in force. In other words, in respect of such transfers, question of any application of mind, really does not arise. If any person has any grievance in respect of his individual case considering the hardship, if any, on account of transfer, then the redressal mechanism provided for, will continue to govern him.

16. **In Rishi Pal Singh** (supra), the learned Judge was again considering the issue of transfer in the context of the directions issued in **Prakash Singh** (supra) and noting the object of the Act held that the Constitution of the Board, which includes senior officers of the Police Department having specialized knowledge of the police administration is sufficient compliance of the guidelines issued by the Apex Court and mere non-inclusion of the Director General of the Police as its Chairman by itself would not make the constitution of the Board illegal as it is otherwise able to serve the purpose for which it has been established. The learned Single Judge, then proceeded to hold that the approval so granted would not stand vitiated only for the reason that the Director General of Police has not been included as one of its members, specially when the approval granted by the Police Establishment Board is further required to be approved by the Director General of Police. The learned Single Judge, then observed as under: "Thus, in effect the guidelines issued by the Supreme Court with regard to the creation of the Police Establishment Board have been followed and implemented by the State Government in pith and substance according to the true spirit. Any technical infraction in the implementation of the said

guidelines cannot be a subject of consideration by this Court."

The learned Single Judge noted that the Police Act, 1861 and the U.P. Police Regulations provide a complete mechanism for the transfer of the police personnel. The guidelines issued by the Supreme Court read with the Act and Regulations occupy the field.

17. We find that another learned Single Judge of this Court in **Bhanu Pratap Vs. State of U.P. and others** [2009 (2) ADJ 607], considered the question of substantial compliance and then was pleased to observe in paragraph 10, which is as under:-

"10. There appears to be considerable force in the submissions raised by learned Standing Counsel that a large police force consisting of different categories of employees at different levels would require the issuance of large number of orders of transfers and postings. It will not be possible for the Boards constituted at the Headquarters to make or approve thousands of such orders but in such case the police officers if they are aggrieved can raise their grievance with the Police Establishment Board."

18. The judgment in **Prakash Singh** (supra) was to ensure that in the matter of transfers and promotions etc., the officers and men would be considered based on their merit and uninfluenced by any political decision, patronage or consideration. Merely, because one of the functionaries named by post in the directions of the Supreme Court, is not in the Board, per se would not make the entire action of transfers void or non est. The administrative instructions are an exercise of the executive power of the State under Article 162 of the Constitution of India, which power extends to matters with respect to which the Legislature of the State has power to make laws. The transfers will have to be done in terms of the Police Regulations in force. To that extent, Rule 26 of the Rules, 2008 will have to be so read with the expression 'orders applicable generally to Government Servants serving in connection with the affairs of the State' which includes the Regulations. It is only in an area where conditions of service are not covered by the Act, Rules or Regulations, with the rules in the matter of conditions of service applicable to other Government Servants, would be applicable. As long as the Regulations are in force, they will continue to be applicable in the matters of transfer. The Regulations also provide for regular transfers, which are transfers not on account of administrative exigency or in public interest. Rule 26 cannot be read to mean that all existing rules and regulations in the matter of conditions of service including transfer are no longer in force. Rule 26 only contemplates a situation where there is a vacuum or no provision.

19. It is true that there may be no strict compliance in terms of the directions issued by the Supreme Court in **Prakash Singh** (supra) insofar as one of the Boards is concerned. The Government has attempted to contend that the notification has to be read with the exercise of power under Section 2 of the Police Act. There is a power in the State Government under Section 2 to

have issued notification constituting the Boards. The section does not provide for the publication or laying of the Rules or Regulations made thereunder before the Legislature. In other words, the power conferred on the Government, as a delegate, to make Rules is not subject to any control by the Legislature. Rules as held by the judgment of the Supreme Court can be made under Section 2 of the Police Act. The Government, in the absence of legislation, in exercise of its power under Article 309 of the Constitution should have made rules governing the conditions of service. In the instant case, there is legislation governing transfers, but there is no provision for constitution of Boards. The Boards have been constituted by the State in exercise of its executive powers. It is now well settled that in an area, where rule or existing law is silent in the matter of conditions of service, administrative instructions can be issued to fill in the void or gap, which the State has done. However, we have held that the notification for reasons given cannot be held to be an exercise of power under Section 2 of the Police Act.

20. In our opinion, therefore, considering the fact that the Rule 26 of the Rules, 2008 makes applicable the rules pertaining to the government servants, i.e. persons appointed to public services and posts in connection with the affairs of the State, and as Regulation 520 deals with the transfers of the police personnel, who are also a part of the public services of the State, therefore, insofar as the police are concerned, the Regulation pertaining to transfer would continue to apply to them. Therefore, though one of the Boards constituted is not strictly in terms of the directions issued by the Supreme Court in **Prakash Singh** (supra), nonetheless considering the exercise that has to be done and the provisions for transfer, as contained in the Police Regulations, there has been sufficient compliance.

21. In these circumstances, we are clearly of the opinion that, though we have found that the notification constituting the Board is not traceable to Section 2 of the Police Act, the same at the highest, amounts to an irregularity and not illegality and would not vitiate the transfers, if they have been done in terms of the Regulations and after the approval of the Board.

22. The State has substantially complied with the requirement by enacting legislation, the only area, not covered by the State by such legislation, is Constitution of Board in respect of which, they have constituted the Boards in exercise of the executive power. The notification will continue to apply till the State makes a rule under Section 2 of the Police Act or any other provisions by enacting legislation to constitute the Boards.

23. In summing up and concluding, we hold that;

1. The State has substantially enacted legislation, which includes existing legislation, which are in consonance with the directions issued under Article 142 to give effect to the directions issued by the Supreme Court in **Prakash Singh** (supra).

2. Though there is no legislation on the aspect of constituting the Police Establishment Boards, they are governed by the administrative instructions issued by the State. The non-inclusion of the Director General of Police for the Boards for Head Constables and Constables, will not vitiate the transfers or render the transfers illegal.

24. All judgments, which have taken a contrary view, are over ruled.

25. The Reference is answered, accordingly.

26. The Registry is directed to place the petitions/appeals before the appropriate Benches for their disposal.