ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.12.2011

BEFORE
THE HON'BLE UMA NATH SINGH,J.
THE HON'BLE ANIL KUMAR,J.

Review Petition No. - 294 of 2011

Chandra Bhushan Pandey 7770 (M/B)2011 ...Petitioner
Versus
Sri Narain Singh, Minister Of Horticulture Deptt. Lko.and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Pande

Constitution of India-Article 226-Review Application-Writ petition dismissed-petitioner not within meaning of "aggrieved person"-hence no locus standi-Review can be entertained strictly within scope of order 47 Rule 1 read with Section 141 C.P.C.-no apparent error on record or fallibility by over sighting by the court-disclosed-Application not maintainable.

Held: Para 15

In view of the abovesaid facts and taking into consideration that the writ petition filed by the review petitioner initially dismissed on the ground that the petitioner is not a "person aggrieved" in the subject matter, hence no right to approach this Court by filling a writ petition under Article 226 of the Constitution of India, so on the facts and grounds on which the present review petition filed, the same can not be entertained and decided, because as stated above under the garb of review, a party cannot be permitted to re-open the case and to gain a full-fledged inning, for taking the Court to take a view contrary to what had been taken earlier. Review lies only when there is error apparent on the face of the record and that fallibility is by the over-sight of the Court.

Case law discussed:
AIR 1964 SC 1372; AIR 2002 SC 2537; AIR 1977 All. 163; AIR 1963 SC 1909; (2004) 5 SCC 353; (1980) 4 SCC 680; (1999) 9 SCC 323; AIR 2001 SC 2231; AIR 2003 SC 3365

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

1. Heard Sri Ashok Pande, learned counsel for review petitioner and Sri J.N. Mathur, learned Additional Advocate General, State of Uttar Pradesh.

2. Facts of the present case are that review petitioner, Sri Chandra Bhushan Pandey, initially approached this Court by filling a writ petition under Article 226 of the Constitution of India, and the reliefs claimed by him petitioner in the Writ Petition No. 7770 (MB) of 2011 (Chandra Bhushan Pandey Vs. Sri Narain Singh and others) are quoted hereinbelow:-

"i) to issue a writ in the nature of mandamus thereby directing the Minister for Horticulture, the respondent no. 1 to remove Sri Jeevan Lal Verma for the post of his Personal Secretary.

ii) to issue a writ in the nature of mandamus to respondent no. 2 hold an enquiry regarding the misconduct of Sri Jeevan Lal Verma.

iii) to issue a writ in the nature of mandamus to respondent no. 3, the Principal Secretary, Horticulture to ensure the proper application of the order passed by Principal Secretary dated 30th June, 2007 and to remove the officers wrongly posted accordingly.

iv) to issue a writ in the nature of mandamus directing the respondent No. 1 and 3 to give dual charge to all District

Horticulture Officers till the shortage of cadre officers is fulfilled by fresh appointment.

v) to issue a writ, order or direction which this Hon'ble Court may deem fit and proper may also be issued in favour of the petitioner."

3. By order dated 30.08.2011, the above noted writ petition was dismissed on the ground that the petitioner is not a "person aggrieved" in regard to subject matter involved in the instant case, hence , he has no locus standi to file the present writ petition under Article 226 of the Constitution of India with the observation that "Sri J.N. Mathur, learned Additional Advocate General, State of U.P. has very fairly submitted that he will look into the matter and bring it to the notice of respondents no. 1 and 2 to take appropriate action, if the same is correct. We hope and trust on the submission made by Sri Mathur, who will use his office to do the needful."

4. Sri Ashok Pande, learned counsel for review petitioner submits that the petitioner is a "person aggrieved" because he is a citizen of India and being an officer of the Horticulture Department as well as the President of the Horticulture Officers Association. Due to corruption prevailing in the department the public money is being mis-utilized and the honest cadre officers including the petitioner are being subjected to cruelty, torture and misbehaviour. So, on the basis of some judgments of the Hobn'ble Supreme Court, which were not applicable in the facts and circumstances of the case, it is highly unjust, improper, illegal and unconstitutional to not grant relief to the petitioner, as such the judgment needs to be reviewed.

5. He further submits that in spite of the assurance given by Sri J.N. Mathur, learned Additional Advocate General, State of U.P. that he will look into the matter and bring to the notice of the respondent Nos. 1 and 2 to take appropriate action, if the same is correct but nothing has been done. Sri Jeevan Lal Verma is still working as Personal Secretary to Minister, posted against the rules, still enjoying his office and the petitioner who approach this Hon'ble Court with an expectation that the Court will do justice, has been transferred from Headquarter to Sant Ravidas Nagar (Bhadohi). So, the order dated 30.08.2011 may be reviewed.

6. Sri J.N. Mathur, learned AGA had informed that the order dated 30.08.2011 of this Court passed in Writ Petition No. 7770 (MB) of 2011 (Chandra Bhushan Pandey Vs. Sri Narain Singh and others) has been communicated to the Minister concerned for necessary compliance.

7. After hearing learned counsel for petitioner and Sri J.N. Mathur, learned Additional Advocate General, State of Uttar Pradesh, the sole question which is to be considered and decided in the present case is the scope of review which is summarized as under:-

8. In **M/s. Thungabhadra Industries Ltd. Vs. The Government of Andhra Pradesh represented by the Deputy Commissioner of Commercial Taxes, Anantapur, AIR 1964 SC 1372,** The Apex Court held that a review is by no means an appeal in disguise whereby an erroneous decision is reheard and

corrected. but lies only for patent error. We do not consider that this furnishes a suitable occasion for dealing with this difference exhaustively or in any great detail, but it would suffice for us to say that where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.

9. Hon'ble the Apex Court in **Subhash Vs. State of Maharastra & Another, AIR 2002 SC 2537,** the Apex Court emphasised that Court should not be misguided and should not lightly entertain the review application unless there are circumstances falling within the prescribed limits for that as the Courts and Tribunal should not proceed to re-examine the matter as if it was an original application before it for the reason that it cannot be a scope of review.

10. This Court in the case of **Bhagwant Singh Vs. Deputy Director of Consolidation & Another, AIR 1977 All. 163,** rejected the review application filed on a ground which had not been argued earlier because the counsel, at initial stage, had committed mistake in not relying on and arguing those points, held as under:-

"It is not possible to review a judgment only to give the petitioner a fresh inning. It is not for the litigant to judge of counsel's wisdom after the case has been decided. It is for the counsel to argue the case in the manner he thinks it should be argued. Once the case has been finally argued on merit and decided on merit, no application for review lies on the ground that the case should have been differently argued."

11. In **Shivdeo Singh v. State of Punjab, AIR 1963 SC 1909,** in a review petition filed under Order 47 Rule 1 CPC the Supreme Court held that the power of review under Article 226 of the Constitution of India, in reviewing its own orders, every Court including High Court inheres plenary jurisdiction, to prevent miscarriage of justice or to correct grave and palpable errors committed by it.

12. Further, the review lies only on the grounds mentioned in Order 47, Rule 1 read with Section 141 CPC. The party must satisfy the Court that the matter or evidence discovered by it at a subsequent stage could not be discovered or produced at the initial stage though it had acted with due diligence. A party filing a review application on the ground of any other " sufficient reason" must satisfy that the said reason is analogous to the conditions mentioned in the said provision of C.P.C.

13. Thus, in view of the abovesaid facts, review can be allowed only on (1) discovery of new and important matter of evidence which, after exercise of due diligence, was not within the knowledge of the person seeking review, or could not be produced by him at the time when the order was made, or (2) when some mistake or error on the face of record is found, or (3) on any analogous ground. But review is not permissible on the ground that the decision was erroneous on merits as the same would be the province of an Appellate Court."

14. Hon'ble Supreme Court in the case of **Zahira Habibullah Sheikh Vs.**

State of Gujarat, (2004) 5 SCC 353, after placing reliance on its earlier judgments i.e. **P.N. Eswara Iyer etc. Vs. Registrar Supreme Court of India, (1980) 4 SCC 680; Sutherdraraja Vs. State, (1999) 9 SCC 323; Ramdeo Chauhan Vs. State of Assam, AIR 2001 SC 2231; and Devender Pal Singh Vs. State of NCT of Delhi, AIR 2003 SC 3365;** observed that review applications "are not to be filed for the pleasure of the parties or even as a device for ventilating remorselessness, but ought to be resorted to with a great sense of responsibility as well."

15. In view of the abovesaid facts and taking into consideration that the writ petition filed by the review petitioner initially dismissed on the ground that the petitioner is not a "person aggrieved" in the subject matter, hence no right to approach this Court by filling a writ petition under Article 226 of the Constitution of India, so on the facts and grounds on which the present review petition filed, the same can not be entertained and decided, because as stated above under the garb of review, a party cannot be permitted to re-open the case and to gain a full-fledged inning, for taking the Court to take a view contrary to what had been taken earlier. Review lies only when there is error apparent on the face of the record and that fallibility is by the over-sight of the Court.

16. For the foregoing reasons, the review petition filed by the review petitioner lacks merit and is dismissed.

17. No order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.12.2011

BEFORE
THE HON'BLE PRADEEP KANT, J.
THE HON'BLE D. K. UPADHYAYA, J.

Special Appeal No. 305 of 2007

Lal Bahadur Singh ...Petitioner
Versus
U.P. State Roadways Transport Corporation and others ...Respondents

U.P.S.R.T.C. Employees (other than officer) Regulation 1981-Regulation 67 (5)-Disciplinary Proceeding-after setting-a-side earlier dismissal with liberty to proceed in accordance with law-subsequent dismissal-without reinstatement without treating as suspended employee-entire proceeding with consequential dismissal-order held illegal-quashed-direction to reinstate and pay current salary and the salary during suspension to Quash of dismissal order-shall be subject to final outcome of disciplinary proceedings.

Held: Para 11 and 18

Any order of punishment based on an enquiry, which has been illegally initiated or which is void cannot be saved. Simply because there is a provision of deemed suspension under Clause (5) of Regulation 67 of the Regulations known as 'U.P. State Road Transport Corporation Employees (Other than Officers) Service Regulations, 1981' that would not give a defense to U.P.S.R.T.C. to cover the default.

The legal position thus, is that on quashing of the order of removal from service, liberty to hold an enquiry afresh from a particular stage could have been availed of, only after the appellant was reinstated into service and may be that after reinstatement, the appointing authority could have passed an order of

suspension and till the enquiry was concluded, he could have remained under suspension. But in any case, without reinstating the appellant, enquiry could not have been conducted afresh.

Case law discussed:

2011 (40 ESC 351 (SC)

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

1. Heard learned counsel for the appellant Sri R.P. Singh and Sri Ritesh Kumar Singh for U.P.S.R.T.C.

2. Under challenge is the order passed by the learned Single Judge dated 22.2.07, by means of which, the writ petition preferred by the appellant, challenging his order of removal from service has been virtually dismissed, though it stands allowed in part, under which direction, the appellant has been directed to be paid arrears of salary for the period commencing from 13.10.03 to 12.2.04. The learned Single Judge has described the order as order of dismissal from service, though in fact, it is an order of removal from service.

3. In nutshell, the facts of the case are that the appellant while working as Bus Conductor in U.P.S.R.T.C. was removed from service on 4.3.1983. He was suspended for holding the departmental enquiry, but later on, the suspension order was revoked and he was allowed to resume duties, and while working as such, an order of removing him from service was passed on 4.3.1983.

4. The appellant challenged the aforesaid order of removal from service by filing Writ Petition No. 8975 (SS) of 1992, which was allowed and liberty was given to U.P.S.R.T.C. to hold the enquiry afresh from the stage of submission of reply to the charge sheet, as it was found that the enquiry was not held in accordance with rules. The operative portion of the order passed by the learned Single Judge reads as under:

"In the result, the writ petition is dismissed in part. The impugned order of removal from service of the petitioner dated 4.4.1983 passed by the opposite party no. is hereby quashed. However, it will be open for the opposite parties to make inquiry afresh after stage of submission of the reply to the charge-sheet in accordance with law. In case no fresh inquiry is conducted against the petitioner within a period of three months from the date of production of certified copy of this order, the petitioner shall be deemed to have been reinstated in service with all consequential benefits. But in case, the inquiry as observed is initiated against him, the same shall be conducted in accordance with law and the parties shall abide by the decision of the said inquiry."

5. After the decision of the aforesaid writ petition, fresh enquiry was conducted from the stage of submission of reply to the charge sheet and the impugned order dated 12.12.04 was passed, removing the appellant from service. This order again became the subject matter of challenge in the present writ petition, against which order, this special appeal has been filed.

6. From perusal of the order impugned and the arguments advanced by the parties' counsel, it can be easily inferred that the sole question which was urged before the learned Single Judge was that the entire enquiry proceedings taken afresh after the decision in the earlier writ

petition were illegal and void, as the appellant was not reinstated into service and the enquiry continued without reinstatement, as per the directives issued by the learned Single Judge in the earlier writ petition.

7. It is an admitted fact that the appellant was not reinstated into service after the judgment was passed in the earlier writ petition and that the enquiry was conducted and concluded, treating him as an ex-employee of the U.P.S.R.T.C.

8. The fact that the appellant was treated as an ex-employee is also evident from the impugned order of removal from service where a specific recital has been made against the name, Lal Bahadur Singh, as Bhootpoorva Parichalak (Ex-Conductor).

9. The learned Single Judge though accepted the plea of the appellant that in view of the directives issued by the High Court in the earlier writ petition, it was obligatory upon the U.P.S.R.T.C. to reinstate the appellant into service before proceeding with the enquiry, but refused to grant relief by observing that the enquiry has already been held and in view of Clause (5) of Regulation 67, the appellant would be deemed to have been suspended and accordingly, no illegality can be said to have been committed. However, the learned Single Judge directed that the appellant would be entitled for salary for the period commencing from 13.10.03 to 12.2.04 i.e. from the date of the order passed in the earlier writ petition, till the passing of the present order of removal.

10. The learned Single Judge having come to the conclusion that illegality was committed by the U.P.S.R.T.C. in not reinstating the appellant into service, the order of removal from service ought to have been set aside, as the very initiation of fresh disciplinary proceedings was illegal and bad in law.

11. Any order of punishment based on an enquiry, which has been illegally initiated or which is void cannot be saved. Simply because there is a provision of deemed suspension under Clause (5) of Regulation 67 of the Regulations known as 'U.P. State Road Transport Corporation Employees (Other than Officers) Service Regulations, 1981' that would not give a defense to U.P.S.R.T.C. to cover the default.

12. In the case of ***Chairman-cum-M.D. Coal India Ltd. and others vs. Ananta Saha and others, 2011 (4) ESC 351 (SC),*** the apex court observed that if there had been no proper initiation of disciplinary proceedings after the first round of litigation, all consequential proceedings stood vitiated. Their Lordships also observed that on facts, a fresh enquiry was to be conducted and if the appellant had chosen to hold a fresh enquiry, they would be bound to reinstate the delinquent and put him under suspension and the delinquent would be entitled for subsistence allowances, till the conclusion of enquiry.

Nothing of this sort was done in the instant case.

Regulation 67 (5) reads as under:

"67 (5)Where a penalty of dismissal or removal from service imposed upon an

employee is set aside or declared or rendered void in consequence of or by a decision of a court of law and the appointing authority, on a consideration of the circumstance of the case, decides to hold a further inquiry against him on the allegations on which the penalty of dismissal or removal was originally imposed, whether to allegations remain in their original form or are clarified or their particulars better specified or any part thereof of a minor nature omitted-

(a) if he was under suspension immediately before the penalty was awarded to him, the order of his suspension shall, subject to any direction of the appointing authority, be deemed to have continued in force on and from the date of the original order of dismissal or removal;

(b) if he was not under such suspension, he shall, if so directed by the appointing authority, be deemed to have been placed under suspension by an order of the competent authority on and from the date of the original order of dismissal or removal."

13. It envisages two contingencies with respect to suspension as given in the aforesaid sub-clause (a) and (b).

14. The matter in issue is not covered by sub-clause (a), as the appellant was not under suspension immediately before penalty was awarded to him. So far sub-clause (b) is concerned, that would also not be of any assistance to U.P.S.R.T.C. for the reason that the appointing authority did not issue any such direction nor pass any order for suspending the appellant during the course of enquiry.

15. Thus, Clause (5) of Regulation 67 was not at all attracted in the instant case.

16. The departmental enquiry could be conducted only against an employee who is in service, unless, of course, there is a provision under the rules permitting an enquiry against the retired or ex-employee. In the instant case, the U.P.S.R.T.C. also proceeded on the assumption that it is dealing with a ex-employee and not with an existing employee. There is no such power to hold the enquiry against an ex-employee in the service regulations.

17. The learned Single Judge in his order, directed that in case no fresh enquiry is conducted against the appellant within a period of three months from the date of production of certified copy of this order, the appellant shall be deemed to have been reinstated into service with all consequential benefits. But in case, the inquiry as observed is initiated against him, the same shall be conducted in accordance with law and the parties shall abide by the decision of the said inquiry. This obviously means that in case no enquiry was conducted within the time provided, the appellant would be deemed to have been reinstated into service with all consequential benefits, but in case the enquiry was held as directed, then he would be reinstated into service, but consequential benefits would depend upon the final outcome of the enquiry.

18. The legal position thus, is that on quashing of the order of removal from service, liberty to hold an enquiry afresh from a particular stage could have been availed of, only after the appellant was reinstated into service and may be that

after reinstatement, the appointing authority could have passed an order of suspension and till the enquiry was concluded, he could have remained under suspension. But in any case, without reinstating the appellant, enquiry could not have been conducted afresh.

19. For the reasons aforesaid, the order of removal from service of the appellant dated 12.2.04 is liable to be set aside, which is hereby set aside and the order passed by the learned Single Judge dated 22.2.07 is also set aside. As a consequence of the aforesaid order, we direct that the appellant shall be reinstated into service forthwith, but the enquiry shall be conducted afresh from the stage of submission of reply to the charge sheet, which shall be done within a maximum period of three months. The appellant shall cooperate in the enquiry. The appellant shall be paid regular salary from the date of his reinstatement, but the arrears of salary for the period commencing from date of passing of the original removal order i.e. 4.3.1983 till the date of reinstatement shall abide the result of fresh enquiry.

20. The award of salary for the period aforesaid by the learned Single Judge, without setting aside the order of removal from service, would not validate the order of removal from service nor such an order is covered by any provisions of the service regulations.

21. The special appeal is allowed. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED LUCKNOW 05.12.2011

BEFORE
THE HON'BLE UMA NATH SINGH, J.
THE HON'BLE DEVENDRA KUMAR ARORA, J.

Writ Petition No. 479 (SB) of 2010

State of U. P. and another ...Petitioner
Versus
Dev Raj Vishwakarma & another ...Respondents

U. P. Government Servants (Disposal of the representation against adverse annual confidential reports & allied matters) Rules, 1995-Rule 4 and 5- Annual confidential Report-direction of Tribunal regarding conflict between Reporting-Reviewing and Accepting officer-remark given by reporting officer shall prevail-for want of recording the reasons by the reviewing officer-held-incorrect-Tribunal ought to remand the remand matter to Reporting Officer to communicate such entries with opportunity of representation and decide the same in accordance with law-entry word "outstanding" and "good" denotes inferior in comparison of previous year-could not effective unless communicated and opportunity of hearing given-Govt. to issue clear guidelines with clear terms, whether good, fair, average, very good-in view of Dev Dutta Case.

Held: Para 46 and 48

This Court is of the view that the learned Tribunal cannot take up the role of the reviewing or accepting authority and cannot direct the authorities to take into consideration the views recorded by the Reporting Officer ignoring the entry recorded by the Reviewing or Accepting Authority. While setting aside entry given by the Reviewing and Accepting Authority, it was incumbent upon the learned Tribunal to remand the matter to

the concerned authority with the direction to act in accordance with law.

Considering the background of present case, we hereby direct the Chief Secretary to State Government of U.P. to issue appropriate Government Order/ Circular for communication of all the entries (whether poor, fair, average, good or very good) to all the state employees as per dictum of Hon'ble Supreme Court, as laid down in paras 36 & 37 of case of Dev Dutt vs. Union of India, (2008) 8 SCC 725, with a further provision for making representation to the higher authorities and if necessary, appropriate amendment be made in U. P. Government Servants (Disposal of the representation against adverse annual confidential reports & allied matters) Rules, 1995.

Case law discussed:

1996 (2) SCC 363; 2006 (3) UPLBEC 2834; (2008) 8 SCC 725; AIR 1963 SC 395; 1970 SLR 116; 1970 SLR 926; AIR 1981 SC 215; AIR 1988 SC 1069

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

1. This bunch of writ petitions have been filed on behalf of the State of U. P. for quashing of judgment & order passed by the learned U. P. State Public Services Tribunal in different claim petitions.

2. In all these writ petitions a common legal issue is involved regarding the issuance of the directions by the learned Tribunal to the effect that where-ever there is a conflict of entries between those recorded by the Reporting Officer, Reviewing Authority or the Accepting Authority, the entry as is recorded by the Reporting Officer would prevail and should be read as the actual entry of the concerned government servant. Such a direction of the learned Tribunal is based on the reasoning that the Reviewing or the Accepting Authority while altering / changing the entry from a higher one (higher grading) to a lower one, has failed to record any justifiable reason for the same and the same were recorded in utter violation of the principles of natural justice. Accordingly, all the writ petitions are being considered and decided by means of the common judgment & order.

3. Writ Petition No. 479 (SB) of 2010 (State of U. P. & others vs. Dev Raj Vishwakarma & another) is taken up as a leading case in this judgment.

4. By means of this writ petition, the petitioner (State) has challenged the judgment & order dated 28.7.2009, passed by State Public Services Tribunal in Claim Petition No. 375 of 2009 (Dev Raj Vishvakarma vs. State of U. P. and another) whereby the learned Tribunal allowed the claim petition of the opposite party no. 1 and the gradings recorded by the Reviewing Authority and the Accepting Authority lowering down the category of the petitioner from "Utkrisht" (outstanding) to "Ati Uttam" (very good) were quashed and a further direction was issued to treat these entries as "Outstanding" and take necessary steps for promotion and grant of other service benefits.

5. The learned Standing Counsel appearing for the petitioner-State challenged the order passed by the learned Tribunal on mainly two grounds. Firstly, the learned Tribunal failed to appreciate correctly the procedure prescribed by various Government Orders for recording entries in Annual Confidential Rolls (hereinafter referred to as 'ACRs') of employees. Secondly, the learned Tribunal exceeded its jurisdiction in giving a direction to the State to treat the

entry recorded by the Reporting officer as the final entry and take consequential steps regarding promotion of the claimant-respondent from the date the junior persons had been promoted.

6. Substantiating the first ground, the learned counsel for petitioner-state relied upon three Government Orders orders dated 28th March, 1984, 30th October, 1986 and 5th March, 1993, respectively. The Government Order dated 28th March, 1984 provides that in the event of conflict between the grading as given by the Reporting Officer, Reviewing Officer and Accepting Officer, it is the grading given by the Accepting Officer which would be treated as the actual grading of an employee. It further provides that the Reporting Officer should give clear and specific grounds for grading an employee as 'Utkrisht' (Outstanding). The Government Order dated 30th Oct., 1986 reiterates the same policy in principle, while enumerating various Government Orders, issued on the subject of recording entries in ACRs and summarising them in a concise manner in the annexure attached to it. In the Government Order of 5th March, 1993, the earlier Government Order issued on 28th March, 1984 has been reiterated, and in para 2 (2) thereof it has been provided that in the event of a conflict of grading at any level, the grading as recorded by the Accepting Officer would be treated as final and actual grading of an employee concerned. The learned Standing Counsel appearing for the State- Petitioner further submitted that the record reveals that none of these Government Orders were challenged by any of the claimant-respondents in any of the claim petition. The learned counsel for the State also submitted that in the normal hierarchal set up of Government, the grading recorded by the reporting officer who is subordinate to the Reviewing Officer and Accepting Officer, initiates or sets into motion the process of recording ACRs. The reviewing officer furthers the process set into motion which culminates in final grading given by the Accepting Officer. If the Reporting Officer's grading is treated as final, it would result in administrative chaos.

7. The learned Tribunal has treated the process of reviewing and accepting as that of "down grading". "Down grading" of an entry as understood in Service Jurisprudence is only when a comparison is undertaken with previous years' entries which results in lowering down of marks of an earlier period of service as recorded in the earlier ACR.

8. The learned Standing Counsel has referred to the judgment of the Hon'ble Supreme Court in the case of **U. P. Jal Nigam vs. Prabhat Chand Jain, reported in 1996 (2) SCC 363** where the Hon'ble Apex Court in para 2 has observed that if an employee legitimately had earned an 'outstanding' report in a preceding year which, in a succeeding one, and without his knowledge, is reduced to the level of satisfactory without any communication to him, it would certainly be adverse and affect him at one or the other stage of his career.

9. In the bunch of cases, at hand, the learned Tribunal had actually drawn no comparison whatsoever of the grading of an incumbent going down from the one recorded in the previous year. On the other hand, for the same year, where there has been a conflict between the entry recorded by the Reporting, Reviewing and

Accepting Officers, the learned Tribunal has read it as 'downgrading' which clearly is a misunderstanding of the term.

10. The learned counsel for the State-petitioner has, in support of the second ground of challenge, referred to the direction issued by the learned Tribunal that not only the entry impugned by the claimant respondent be treated as non-existent, it be replaced by the entry of 'outstanding' as recorded by the Reporting Officer and the employee be considered for promotion w.e.f. date his juniors have been promoted. The learned Tribunal had usurped the jurisdiction of the Administrator in replacing the impugned entries by an entry of "Outstanding." The learned Tribunal could at the most have remanded the matter to the competent authority for taking appropriate steps for re-recording of the quashed entry after giving opportunity of hearing to the employees concerned.

11. Sri Shreesh Kumar, learned counsel for claimant-respondent while countering the arguments raised on behalf of the petitioner-state has relied upon a judgment of coordinate Bench of this Court in **Surendra Kumar Vs. State of U.P. 2006 (3) UPLBEC 2834** wherein the Bench interfered in the grading of "good" given by Reviewing Officer, the D.M. Faizabad to a Tehsildar. The Division Bench has held that no opportunity of hearing was given to the employee, nor the D.M. has given any reason for converting the entires from "outstanding" to "good".

12. The Division Bench has relied upon the Supreme Court decision in the case of **U.P. Jal Nigam Vs. Prabhat Chandra Jain (1996) (2) SCC 363** where the Hon'ble Apex Court has held that even where the entry is going a step down, like falling from "Very good" to "good" , it may reflect adversely upon the career prospects of an employee and, therefore, before recording such an entry in the succeeding year, the authorities must give an opportunity of hearing. The downgrading being reflected by comparison to an earlier year; such an entry may be qualitatively downgrading and cannot be sustained without any reason for recording of the same being apparent from the record.

13. Mr. Shreesh Kumar has also referred to a Government Order dated 07.5.1981 whereby guidelines were laid down for awarding fresh remarks in case of expunction of adverse remarks and it has been provided therein that if adverse remarks are expunged by competent authority on representation of an employee, then there is no justification for awarding fresh remarks as the entry in the character roll can be made by the same officer who had seen the work of the subordinate officer for a minimum and continuous period of three months.

14. It is further submitted by Sri Shreesh Kumar that since the entire procedure for recording A.C.Rs. is governed by executive instructions and there are no statutory rules in this regard and the Government Order dated 07.5.1981 having not been superseded by any of the Government Orders, issued subsequently, it has to be followed by the administrative authorities. On the expunction of the entries made by the Reviewing and Accepting Officers, the matter could not have been remanded by the Tribunal to the State Government for making fresh entry for the year in

question as the present incumbents on the post of Reviewing and Accepting Authority have not seen the working of the respondent for three months continuously, as required by the Govt.. Orders.

15. Shri Shreesh Kumar has also relied upon the judgment rendered by Hon'ble Supreme Court in the case of *Dev Dutt vs. Union of India and others,* reported in **(2008) 8 SCC 725** in which a Division Bench of the Apex Court has laid down the law with regard to communication of all entries, of whatever nature to an employee concerned in case he wished to represent against the same to the competent authority for its up-gradation. The Hon'ble Apex Court has expanded the principles of natural justice to become applicable to the process of recording of A.C.Rs.

16. Sri Shreesh Kumar has argued that in the case of the claimant-respondent, the Reviewing and Accepting Authority had not given any opportunity of hearing to the employee before recording the entry and even after the recording of the same, it was not communicated. Thus, neither pre-decisional nor post decisional hearing was given to the claimant respondent.

17. The learned Standing Counsel for the petitioner-state submitted in rejoinder that the judgment in the case of Surendra Kumar (supra) has not considered the Government Orders dated 28th March, 1984 nor the Compilation dated 30th October, 1986, nor the Government Order dated 5th March, 1993 though it does refer to the judgment of the Hon'ble Supreme Court in the case of Prabhat Chand Jain (supra), it fails to appreciate that the said judgment was rendered in a different context and related to downgrading of an entry in A.C.R. of an employee in a subsequent year. The Division Bench has not recorded any reason for applying the concept of downgrading to the process of decision making in recording entry in A.C.R. of the same year.

18. The learned counsel for the State further submitted that after the judgment in the case of Dev Dutt vs. Union of India (supra), the legal situation has changed completely regarding communication of A.C.Rs. Now, every entry needs to be communicated to an employee, thus, giving him an opportunity to make a representation against the same which is to be decided by an authority next higher in rank to the one giving such entry.

19. Communication of the entry recorded by the Reviewing and Accepting Officer was not done at the time of recording of the same as it was not required in any of the Government Orders that mid-way in the process of finalisation of an entry for a particular year, the officer responsible for the same should consult the employee concerned and invite objections to the proposed entry, to be finally recorded.

20. Having considered the arguments raised by both the sides and having gone through the case laws submitted viz. U.P. Jal Nigam v. P.C. Jain, Dev Dutt v. Union of India and Surendra Kumar vs. State of U.P. we find that while Government Orders dated 28th March, 1984, 30th October, 1986 and 5th March, 1993 clearly provide that the entry recorded by the reporting officer is not to be considered as final and in the event of

a conflict between the grading given by the Reporting Officer and that given by Reviewing Officer or Accepting Officer, the grading of the Accepting Officer shall be final grading for the particular period of service tenure of an employee concerned. Moreover, other Government Orders referred to in the compilation dated 30th October, 1986 do not cast any duty on the Reviewing or Accepting Officer to give pre-decisional hearing to the employee concerned. The only duty cast upon the Reviewing or Accepting Officer is to give detailed reasons for not accepting the grading proposed by the Reporting Officer and in case an outstanding grading is recorded, special reasons for the same are required to be stated. The State Government has not framed any statutory rules for recording of A.C.Rs. and maintenance of service books. The executive instructions that govern the field, have not been challenged by any of the claimant respondents nor have been considered by the learned Tribunal.

21. It stands to reason that the process as started by the Reporting Officer is furthered by the observations recorded by the Reviewing Officer and finalised by the entry made by the Accepting Authority. The Hon'ble Supreme Court in the constitution bench decision rendered in the case of Bachchittar Singh vs. State of Punjab reported in **AIR 1963 SC 395** has held that internal notings on the files during the process of decision making do not confer any enforceable right upon a litigant seeking benefit from the same. Unless the order is duly authenticated by the competent authority and is issued and thereafter communicated, the whole situation is in a flux and the authority is prone to change its mind mid-way and to decide the same issue in a completely different manner than it earlier proposed.

22. While going through the law on the subject of A.C.Rs., we have come across judgments rendered earlier by the Constitution Benches of the Hon'ble Supreme Court which have neither been referred to in the afore-cited three decisions relied upon by the counsel for both the sides nor have been cited before us at any stage. However, it is settled position in law that this Court can take judicial notice of earlier binding precedents even if the same are not cited at the Bar.

23. A Constitution Bench of the Hon'ble Supreme Court in the case of **Prakash Chandra Sharma vs. O.N.G.C. 1970 SLR 116** was dealing with an employee who challenged his supercession by his juniors on the ground that adverse remarks made in his A.C.R. had not been communicated to him and as per the Circular governing the said entries to be recorded in A.C.Rs, it was necessary that every employee should know as to what were his defects. It was argued that had the appellant therein been given opportunity, he would have represented against the adverse remarks relied upon by the Commission for his supercession and might have easily satisfied the higher authority that the remarks were uncalled for and unjustified. Because of lack of communication of such adverse remarks, the petitioner had been discriminated and therefore, the said adverse remarks could not be allowed to remain in his A.C.Rs and stand in the way of his promotion. The Hon'ble Supreme Court refused to interfere in the said case.

24. Another Constitution Bench of the Hon'ble Supreme Court in the case of **R.L.Butail vs. Union of India reported in 1970 SLR 926,** while considering the arguments raised by the appellant therein, that the Reporting Officer was bound to hear the appellant before deciding to make the entry and such recording of adverse remarks amounted to censure and a penalty under rule 11 of the Central Civil Services (Control, Classification& Appeals)) Rules 1965 and therefore, could not have been given without affording an opportunity of hearing, did not agree with the said argument of the appellant.

25. The Hon'ble Supreme Court held that a confidential report is intended to be a general assessment of work performance of a government servant subordinate to the Reporting Authority. Such reports are maintained for the purposes of serving a data for determining the comparative merit when questions of promotion, confirmation etc. arise. Only in cases where a 'censure' or a 'warning' is issued, the officer making the order is expected to give reasonable opportunity to the Government Servant to represent his case.

26. The Constitution Bench in the case of R.L. Butail rejected as unsustainable the argument of the appellant that the omission to provide opportunity of hearing before making adverse remarks in the A.C.R would render such report vitiated. The Constitution Bench was of the view that rules do not provide for a prior opportunity to be heard before adverse entry is made in the A. C. R.

27. The Constitution Bench further observed that it is true that such adverse remark may be taken into consideration when a question such as that of promotion arose and when comparative merits of persons eligible are considered, but when a government servant is aggrieved by adverse remark, he has an opportunity of making representation. Such representation would be considered and the higher authority, if satisfied may either amend, correct or even expunge a wrong entry, so that it cannot be inferred that a government servant aggrieved by an confidential report is without a remedy. Making of an adverse entry is, thus, not equivalent to imposition of penalty which would necessitate an enquiry and giving of reasonable opportunity of being heard to the concerned government servant.

28. In other words, the Hon'ble Supreme Court was of the opinion that before making any adverse remark in Annual Character Roll, the Reporting Officer need not to give any opportunity of hearing. It is only after such an adverse entry is made, the same should be communicated to the government servant concerned, who may make a representation to the higher authorities against such a report. It is only 'post decisional' hearing that is envisaged in cases where reports in Annual Character Rolls are adverse.

29. In the case of **Gurdayal Singh Fiji Vs. The State of Punjab & others, AIR 1981 SC 215,** the Hon'ble Supreme Court was considering the case of the appellant who had been deprived of selection in Indian Administrative Service cadre by promotion from Punjab Civil Service cadre on the ground that the Government of Punjab had refused to give integrity certificate to him. The appellant had made a representation which was

rejected. The Hon'ble Supreme Court in the said case held that although the decision of the Selection Committee could not be influenced by an adverse report in a confidential roll unless such report is communicated to the person concerned so that he has an opportunity to improve his work and conduct or to explain the circumstances leading to such adverse report, the Court was not competent to issue a direction for promotion of the appellant. It could only direct for reconsideration of the whole case by the competent executive authority in accordance with relevant Regulations by applying the test of merit or suitability cum seniority. It was left to the discretion of the competent authority to work out the details and pass appropriate order after giving opportunity of hearing to the appellant.

30. That in the case of **Union Public Service Commission Vs. Hiranyalal Dev AIR 1988, SC 1069** the Hon'ble Supreme Court set aside the directions issued by the Central Administrative Tribunal for promotion of the petitioner after ignoring certain adverse remarks in his confidential character roll. The Hon'ble Court has held that the proper course to be adopted was that the direction be issued to the authority concerned to consider the case of the employee afresh by indicating a broad frame work within which the competent authority should act. No direction could be issued usurping the jurisdiction of the competent authority.

31. On examining the issue in light of the aforesaid facts and circumstances as well as legal position, we are inclined to accept the submission of learned counsel for the petitioner 'State' that the learned Tribunal completely misunderstood the concept of down grading. It is really a misnomer to refer to the disagreement between the reporting, reviewing and accepting authorities as *"downgrading'*. Actually, recording of Annual Confidential Remarks (ACRs) is a complete process in itself. The process is set rolling (as per the time schedule laid down in G.O.'s) with the first recording made by reporting officer. In the second step, the said recording is reviewed by the reviewing authority and in the next stage of the process the accepting authority records his grading. It is this final grading as is given by the accepting authority that ends the process of recording of grading.

32. In normal parlance, as also based on the literal meaning of the term "down-grading', it would imply when the grade of an incumbent is pushed down or goes down. The grade of an incumbent, as per the Government Orders is the one that has been recorded by the Accepting Authority. The other grades as given by the Reporting or the Reviewing officer were only part of the decision making process ending in the recording of the ACR of the government servant.

33. In Service Jurisprudence when we talk about downgrading of incumbent, it is actually meant that the grading of an incumbent has gone down as compared to his grading over the previous years. This interpretation of downgrading is deducible also from the judgment of the Hon'ble Supreme Court in the case of U. P. Jal Nigam Vs. Prabhat Chandra Jain, reported in 1996, 2 SCC, 363, in para 2 whereof it has been so observed:

".....If an employee legitimately had earned an 'outstanding' report in a

particular year, which, in a succeeding one, and without his knowledge, is reduced to the level of 'satisfactory' without any communication to him, it would certainly be adverse and affect him at one or the other stage of his career".

34. In the bunch of cases, at hand, the learned Tribunal had actually drawn no comparison whatsoever over the grading of an incumbent going down from the one recorded in the previous year.

35. On the other hand, for the same year, where there has been a conflict between the entries recorded by the Reporting, Reviewing and Accepting Authorities, the learned Tribunal has termed it as "down grading' which is clearly a misunderstanding of the term.

36. The only judgment on the subject (which has also been relied upon by the concerned government servants) is in the case of **Surendra Kumar Vs. State of U.P. (2006), 3 UPLBEC , 2834** wherein it has been held that the entry as given by the Reviewing Authority could not be sustained inasmuch as it went down by two steps without affording opportunity and without giving reasons. Noticeably, the said judgment does not take into consideration the Government Orders dated 28th March 1984, or the compilation dated 30th October, 1986 or the Government Order dated 5th March 1993. Though it does refer to the judgment of the Hon'ble Supreme Court in the case of P. C. Jain which relate to down gradation in subsequent years, but it does not record any reasons for applying the concept of down gradation to the entry of the same year.

37. Learned counsel for petitioner has placed reliance upon a case of **Dev Dutt Vs. UOI, (2008) 8 SCC, 725** in which the Hon'ble Supreme Court has developed the principle of natural justice by enlarging the ambit and scope of Article 14 to reach a conclusion that every Annual Confidential Entry, whether adverse or good or very good, deserves to be communicated to an incumbent inviting objections thereon and the same are to be disposed of by an authority higher than the one who gave the entry. However, the said judgment does not deal with situations where the reviewing and accepting authorities differ in giving grading and observations as compared to the reporting authority.

38. In the present circumstances, there is no dispute between the parties that in view of prevailing law, none of the entries were communicated to any of the government servants. Hence, the impact of such non-communication may render the entire entry as being violation of Article 14 inasmuch as it takes away the right of representation as has been elucidated in the Dev Datt's case. Still an entry would stand adverse or otherwise, in the character roll of the incumbent and would form the basis of future service benefits to the incumbent concerned.

39. As such, the judgment and order of the learned Tribunal which directs reading of annual entry recorded only by the Reporting Authority over and above Reviewing and Accepting Authorities, can not be sustained and has to be necessarily set aside.

40. The Hon'ble Supreme Court in the case of **U.P. Jal Nigam vs. P.C Jain, (1996), 2, SCC 363,** in paragraph 3 had

laid down three guide lines regarding downgrading in the character roll of an officer-

(i) communication;

(ii) recording of reasons and

(iii) opportunity to representation

41. The Hon'ble Supreme Court in the case of **Dev Dutt vs. Union of India** (Supra) while dealing with the issue of Annual Confidential Reports (A.C.R.) was pleased to observe that it is well settled that no rule or government instruction can violate Article 14 or any other provision of the Constitution, as the Constitution is the highest law of the land. The Government Orders, if they are interpreted to mean that only adverse entries are to be communicated to the employee concerned and not other entires, would become arbitrary and hence, illegal, being violative of Article 14. All similar rules, government orders/office memorandum, in respect of all services under the State, whether civil, judicial, police, or other service (except the military), will hence also be illegal and are, therefore, liable to be ignored. The Hon'ble Supreme Court held that fairness and transparency in public administration require that all entries (whether poor, fair, average, good or very good) in the annual confidential report of a public servant, whether in civil, judicial, police or any other State service (except military), must be communicated to him within a reasonable period so that he can make a representation for its up-gradation.

42. The concerned paras 36 & 37 of the aforesaid judgment are being reproduced as under:

36."In the present case, we are developing the principles of natural justice by holding that fairness and transparency in public administration requires that all entries (whether poor, fair, average, good or very good) in the annual confidential report of a public servant, whether in civil, judicial, police or any other State service (except the military), must be communicated to him within a reasonable period so that he can make a representation for its up-gradation. This in our opinion is the correct legal position even though there may be no rule/G.O. requiring communication of the entry, or even if there is a rule/G.O. prohibiting it, because the principle of non-arbitrariness in State action as envisaged by Article 14 of the Constitution in our opinion requires such communication. Article 14 will override all rules or government orders.

37. We further hold that when the entry is communicated to him the public servant should have a right to make a representation against the entry to the authority concerned, and the authority concerned must decide the representation in a fair manner and within a reasonable period. We also hold that the representation must be decided by an authority higher that the one who gave the entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar to Caesar. All this would be conductive to fairness and transparency in public administration, and would result in fairness to public servants. The State must be a model employer, and must act fairly towards its employees. Only then would good governance be possible."

43. At the end of judgment, the Hon'ble Supreme Court directed for communication of the entry to the concerned appellant within a period of two months with liberty to make representation against the said entry with further direction to decide the same within further two months thereafter and if the authorities upgrade the entry of the appellant then the opposite parties shall consider him for promotion retrospectively by the Departmental Promotion Committee (DPC) within three months thereafter and if the appellant gets selected for promotion retrospectively, he should be given higher pension with arrears of pay and interest @ 8% per annum till the date of payment.

44. In State of Uttar Pradesh there are statuary rules regarding disposal of representations made against the adverse Annual Confidential Reports and allied matters namely **U. P. Government Servants (Disposal of the representation against adverse annual confidential reports & allied matters) Rules, 1995** which provide a very strict time frame for disposal of representation made against the adverse Annual Confidential Reports and Rule 5 of the said Rules further provides that where an adverse report is not communicated or a representation against an adverse report has not been disposed of in accordance with Rule 4, such report shall not be treated as adverse for the purposes of promotion, crossing of Efficiency Bar and other service matters of the Government Servant concerned. As per the law laid down by the Hon'ble Apex Court in the case of Dev Dutt (Supra) every report/entry (whether poor, fair, average, good or very good) is required to be communicated to the concerned government servant in order to enable him to make representation for its up-gradation.

45. We have also examined the Government Order dated 7th May, 1981, relied upon by Sri Shreesh Kumar, learned counsel for the claimant-respondents; we do not agree with the submissions as the said Government Order is not applicable in the facts of present cases, as it has been provided therein that if adverse remarks are expunged by competent authority on representation of an employee, then there is no justification for awarding fresh remarks as the entry in the character roll can be made by the same officer who had seen the work of the subordinate officer for a minimum and continuous period of three months. The cases at hand are neither the case of wrongful recording of the entry by the officer and nor that the same has been decided to be expunged by the competent authority. In the present case, it is the Tribunal which issued directions for not taking into consideration the grade given by the reviewing and accepting authority as no reasons have been recorded by the concerned authority.

46. This Court is of the view that the learned Tribunal cannot take up the role of the reviewing or accepting authority and cannot direct the authorities to take into consideration the views recorded by the Reporting Officer ignoring the entry recorded by the Reviewing or Accepting Authority. While setting aside entry given by the Reviewing and Accepting Authority, it was incumbent upon the learned Tribunal to remand the matter to the concerned authority with the direction to act in accordance with law.

47. On the basis of above analysis and after considering all the facts and circumstances of the case as well as the legal position, we hereby allow all the writ petitions and quash the judgment and order of the learned Tribunal dated 28.7.2009 as well as all the other impugned judgments of learned Tribunal and direct the State Government to communicate the entries to the concerned government servants with liberty to them to make representation to the higher authorities within period of two months, which would consider and decide the same in accordance with law within a further period of two months and thereafter follow up action would be taken by the competent authorities within period of further two months in accordance with law.

48. Considering the background of present case, we hereby direct the Chief Secretary to State Government of U.P. to issue appropriate Government Order/ Circular for communication of all the entries (whether poor, fair, average, good or very good) to all the state employees as per dictum of Hon'ble Supreme Court, as laid down in paras 36 & 37 of case of Dev Dutt vs. Union of India, (2008) 8 SCC 725, with a further provision for making representation to the higher authorities and if necessary, appropriate amendment be made in *U. P. Government Servants (Disposal of the representation against adverse annual confidential reports & allied matters) Rules, 1995.*

49. All the Writ Petitions stand allowed accordingly.

50. Registrar of this Court is directed to transmit a copy of this judgment & order to the Chief Secretary to State Government of U.P, Lucknow for its necessary compliance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.12.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL,J.
THE HON'BLE S. V. SINGH RATHORE,J.

Contempt No. - 634 of 2001

State of U.P. ...Petitioner
Versus
N.B.Singh Advocate ...Respondent

Counsel for the Petitioner:
Govt. Advocate (Reference)

Counsel for the Respondents:
Sri G.K. Mehrotra
Sri N.S. Chauhan

Contempt of Court Act-1971-Section 2 (a)-criminal contempt-containing a practicing lawyer-forcibly entered in chamber of A.D.J.-abusing by cost "Chirkut", "Chorkatai" etc. as to how succession application dismissed in default-notice issued 2011-No unconditional apology tendered at first opportunity-can not be claimed as a matter of right-considering grown age of 60 years-apart from 13 years previous incident-even conduct shows lack of honest repentance, bona fide unconditional apology cannot be allowed unpunished-fine of Rs. 2000/-would meet end of justice

Held: Para 12 and 13

Considering the language which contemnor has used in the matter and also the fact that the incident, the behaviour and the utterances have not been disputed, we have no hesitation but to hold that the contemnor Sri N.B. Singh is guilty of committing criminal contempt of this Court.

Now the question of our consideration whether contemnor's alleged unconditional apology is genuine, deserves to be accepted without imposing any punishment or this Court should punish him suitably in view of above finding upholding his guilt.

Case law discussed:

(2011) 2 SCC (Crl) 821; 1984 (3) SCC 405

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

1. This criminal contempt proceeding has arisen on a reference made by Sri Sheetal Singh, the then Incharge District Judge, Raebareli forwarding copy of complaint of Sri A.K. Srivastava, the then IIIrd Additional District Judge, Raebareli about misbehaviour, misdemanor and abuse by N.B. Singh, Advocate, the contemnor.

2. The facts as discerned from the report of the complainant namely the third Additional District Judge, Raebareli in brief are as under.

3. In a matter relating to succession certificate, the contemnor moved an application seeking time for approaching appropriate Court for transfer of the case. The application was allowed and time was granted. Thereafter the matter was adjourned on several occasions. On 7.11.1998, the contemnor and his companion lawyers forcefully entered the chamber of IIIrd Additional District Judge inquiring as to why misc. case relating disposal of succession was put on an earlier date and dismissed in default of appearance. The presiding officer claimed to have explained the things but contemnor continued to shout and raised slogans "SRIVASTAVA MURDABAD", "CHORKAT" and "CHORKATAI". It is said that aforesaid conduct of contemner and his companion lawyers of creating nuisance and hampering judicial working amounts to willful criminal contempt of Court and the proceedings be initiated against the erring lowers.

4. Initially this matter was placed before a Division Bench at Allahabad wherefrom it was transferred to this Court, pursuant to Division Bench order dated 3rd March, 1999 since district Raebareli comes within the territorial jurisdiction of this Bench.

5. The matter when taken up today, an application supported by an affidavit has been filed by contemnor, Sri N.B. Singh, Advocate through Sri A.S. Chaudhary, Advocate.

6. The learned counsel for the contemnor at the outset stated that misdemeanor and misbehavior on the part of the contemnor cannot be justified and hence he is tendering unconditional apology for the aforesaid incident which took place 13 years back. He further undertake to maintain good behavior in future. Mr. Chaudhary, learned counsel for contemnor has placed reliance on the Apex Court's decision **O.P. Sharma and others Vs. High Court of Punjab and Haryana (2011) 2 SCC (Crl) 821** and submitted that contemnor at the first opportunity has extended apology which should be accepted. This Court must show magnanimity in this matter and should drop the proceedings. The fact that at the first opportunity this unconditional apology is being tendered which shows bonafide and honest repentance on the part of contemnor. He thus prayed that his undertaking be accepted and the contempt notice be discharged.

7. We have heard the learned Counsel and perused the record.

8. It is really unfortunate that the contemnor who is a practicing Advocate of district Raebareli had a long standing even 13 years ago since his age is shown today as 60 years. Having failed to persuade learned Additional District Judge, he switched gear to derogatory remarks, abusive language from persuasive advocacy, may be in that hope that such tactic would succeed. To his utter dismay, not only he failed but the learned Judge made of a stern stuff, not only refused to succumb such unprofessional conduct but made a record of disrespectful, abusive and derogatory language used by contemnor with intention to tarnish his image as Judicial Officer and forwarded report to the District Judge who in turn reported the matter to this Court to initiate appropriate proceedings.

9. Words uttered by contemnor no doubt show his clear intention of casting aspersions on learned Judge and lower him in the esteem of others. He intended to create doubt regarding judicial impartiality, independence and honesty of the learned Judge. This tendency of a Member of Bar is really unfortunate and needs to be nipped in the bud. A Member of noble legal profession is not expected to resort such cheap gimmicks. It is really painful. An attempt to scandalise not only reputation of the Judge but in the consequence the entire institution needs be deprecated in the strongest words. Use of abusive language, abrasive behaviour, veiled threats and some times condemnatory verbal attack like the present one raise larger issues touching reputation and independence of not only the individual Judge but the entire institution. If such an attitude is pardoned in a lighter way, it may give a wrong massage. If disparaging and derogatory remarks made by such impertinent person are shown any leniency, it may shake the very confidence of people in the system. Independent and bold judiciary is in essence a need of the time. The members of legal profession, in order to seek small gains, if endeavor to this extent, it shall betray a lack of respect for those who have fought for independence of judiciary and have made it to see light of this day.

10. The contemnor claims that he rendered apology at the first opportunity. This matter is pending since 2001 and after service of notice the contemnor put in appearance for the first time on 20th July, 2001. He has taken more than 10 years in submitting alleged unconditional apology claiming it to be at the earliest opportunity.

11. Can it be said to be honest and bonafide apology showing repentance in the conduct of contemnor or a mere shallow and hollow attempt on his part to wriggle out the clutches of law. He has shown, admittedly, a conduct which is highly disrespectful to the institution of justice, though the utterances are in respect to an individual member of a judicial institution. It is not unworthy to reiterate that a Court of Majesty or the High Court is sacrosanct. The integrity and sanctity of institution which has been bestowed upon itself the responsibility of dispensing justice is ought to be maintained at all cost. Judges, advocates and staff of the court all constitute part of this system. They are supposed to act in accordance with morals and ethics. An advocate's professional conduct is as

important as of a Judge. He has serious and important responsibility towards society and in particular to the institution of justice. He plays a vital role in the preservation of society and justice system. He is under an obligation to uphold the rule of law. He must ensure that the justice system enabled to function at its potential. He should be dignified in his dealings to the Court. He must believe that the legal profession has an element of service. He has a social duty to be a model for the people and to show them a beacon of light by his conduct, actions and utterances. Unfortunately, the conduct of contemnor fails in all these respects which shows that the contemnor has not preserved professional ethics and moral as also his duties towards Court in correct perspective. We can not loose sight of the fact that subordinate courts are functioning in a very different atmosphere, charged, tense and full of extraordinary work load. They are reeling under huge pendency of court cases. Most of the Judges are working for long hours and have no time virtually to raise their neck. The working atmosphere in subordinate courts is quite unfavourable yet we must give due credit to Presiding Officers in discharging their duties diligently and untirelessly. The subordinate judiciary forms the backbone of administration of justice. This Court, exercising administrative and supervisory powers, is under an obligation to ensure that the Judges of the subordinate courts are not subjected to scrupulous and indecent attacks or anything which lowers or has tendency to lower their authority. No affront to the Majesty of Justice of law can be permitted. The fountain cannot be allowed to be polluted by disgruntled elements. No one can be allowed to terrorise or intimidate Judges of subordinate courts. This is basic and fundamental. A civilized system of administration of justice can neither permit nor tolerate it.

12. Considering the language which contemnor has used in the matter and also the fact that the incident, the behaviour and the utterances have not been disputed, we have no hesitation but to hold that the contemnor Sri N.B. Singh is guilty of committing criminal contempt of this Court.

13. Now the question of our consideration whether contemnor's alleged unconditional apology is genuine, deserves to be accepted without imposing any punishment or this Court should punish him suitably in view of above finding upholding his guilt.

14. In **L.D. Jaikwal Vs. State of U.P. 1984 (3) SCC 405** the Court observed that acceptance of an apology from a contemnor should only be a matter of exception and not that of a rule. Any other view may be treated by scrupulous persons as licence to scandalise courts and commit contempt of court with impunity and whenever the proceedings are initiated, tender apology and escape from punitive liability. It may also hamper confidence of the Judges of subordinate courts and may have the effect of demoralizing them. This situation cannot be countenanced else it may damage the very foundation of system.

15. In order to stress his case, learned counsel for the contemnor has relied upon the decision rendered in the case of **O.P. Sharma (supra)** but we find therein that when matter was pending before High Court, the unconditional

apology was tendered and thereafter the contemnors also appeared before the Magistrate concerned and expressed their regret and tendered unconditional apology. Even thereafter the High Court after convicting contemnors imposed punishment of simple imprisonment of six months/three months with a fine of rupees one thousand to rupees two thousand each. There the incident took place in 1999 and the High Court decided the matter in 2004. During very this period the contemnors had already tendered unconditional apology therein. In the present case, contemnor had put in appearance before this Court for the first time on 20th July, 2001 but did not show any repentance to his conduct by filing his response or affidavit etc. The order-sheet shows that the matter was adjourned since his counsel was not present and the Court was constrained to direct for his personal appearance. This order was passed on 29th September, 2011 and despite thereto the contemnor remained absent. On the next date i.e. 21th November, 2011 when again this Court directed for his personal appearance, it is only thereto the contemnor is present today and has filed affidavit.

16. In view of the facts and circumstances, as discussed above, we are of the view that the contemnor's conduct show lack of honest repentance and bonafide in tendering unconditional apology and, therefore, we are not satisfied that the same should be accepted so as to not impose any punishment upon him and let him go unpunished. Having held him guilty of committing contempt but considering the fact that the contemnor is now in advance age of 60 years and the incident is 13 years old, the ends of justice would meet by imposing punishment of fine of Rs. 2,000/-.

17. We order accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.12.2011

BEFORE
THE HON'BLE RITU RAJ AWASTHI,J.

Misc. Single No. - 1003 of 1994

Ram Chandra ...Petitioner
Versus
Board of Revenue and others ...Respondnets

Counsel for the Petitioners:
Sri S.P. Srivastava

Counsel for the Respondents:
C.S.C.

Code of Civil Procedure-Order 47 rule 1-scope of review-explained-while exercising power-no authority to inter into merit of case except on limited grounds given in statute-however at the time of deciding reference non consideration-of public utility-order not sustainable-matter remitted back to decide fresh in light of judgment observation.

Held: Para 10

However, this fact is also to be taken note of that the Additional Commissioner while passing the order dated 15.05.1992 had not considered the relevant provisions of Section 132 (c)(vi) of the U.P.Z.A. & L.R. Act and Section 29-C of U.P. Consolidation of Holdings Act, 1953, which are very much necessary for proper adjudication of the claim of the petitioner. As such, although, I do not agree with the finding given in the impugned order, however, in the interest of justice I find it necessary that the

matter requires to be re-considered by the competent court in accordance with law, in deciding the claim of the petitioner.

Case law discussed:

1991 (1) Supreme Court cases 170

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

1. Heard learned counsel for the petitioner as well as learned Standing Counsel.

2. The writ petition has been filed challenging the order dated 13.01.1994 passed in Review Application moved by the State, whereby the review was allowed setting aside the order dated 08.06.1993 and the order dated 15.05.1992 of the Additional Commissioner and remanded the matter back to the opposite party no.3 for deciding afresh on merit.

3. The facts of the case in brief are that the petitioner was allotted *patta* with *sirdari* rights in the year 1969 on a land which was ear-marked as *Khalihan.* On the basis the *patta* the name of the petitioner was entered in the consolidation proceedings in the year 1980. Against the order of the consolidation officer the Gaon Sabha had filed an appeal before the Settlement Officer Consolidation in the year 1985. The said appeal was rejected by the Settlement Officer Consolidation in the year 1985. It was thereafter that in the year 1989 the Pradhan of the village made a complaint against the allotment of lease to the petitioner and cancellation of the same. The application of Pradhan filed under Section 198(4) of the U.P.Z.A. Act was rejected by order dated 18.10.1989 of the Additional Collector, Barabanki. Against this order a revision was filed under Section 333 of the U.P.Z.A. & L.R. Act before the Commissioner. The learned Commissioner while considering the revision made a reference to the Board of Revenue by order dated 15.05.1992 with a request to issue direction for the trial court to decide the matter afresh, in case it is required. The said reference was rejected by order dated 08.06.1993 on the ground that the *patta* was allotted on 12.05.1969 and on that basis the order was passed by the Consolidation Officer on 22.02.1980, by which the name of son-in-law of Ram Prasad was entered in the consolidation records. The appeal preferred against the said order by the Gaon Sabha was also rejected. It appears that thereafter the State as well as Gaon Sabha filed the review petition, which was allowed by the impugned order.

4. Learned counsel for the petitioner vehemently submitted that the order impugned has been passed beyond the scope of review as it indicates that while reviewing the order the learned court below has re-considered the merits of the case. In support of his submission, he has relied on a decision of the Apex Court in the case of ***Meera Bhanja (Smt) Versus Nirmala Kumari Choudhary (Smt),*** reported in ***1995 (1) Supreme Court Cases 170*** wherein it has been held that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1, C.P.C. The relevant paragraphs of the said judgment are quoted below:

*"**8.** It is well settled that the review proceedings are not by way of an appeal*

and have to be strictly confined to the scope and ambit of Order 47, Rule 1, C.P.C. In connection with the limitation of the powers of the court under Order 47, Rule 1, while dealing with similar jurisdiction available to the High Court while seeking to review the orders under Article 226 of the Constitution of India, this Court, in the case of Aribam Tuleshwar Sharma V. Aribam Pishak Sharma, speaking through Chinnappa Reddy, J., has made the following pertinent observations: (SCC p 390, para 3).

"It is true as observed by this Court in Shivdeo Singh v. State of Punjab, there is nothing in Article 226 of the Constitution to preclude the High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate power which may enable an appellate court to correct all manner of errors committed by the subordinate court."

9. *Now it is also to be kept in view that in the impugned judgment, the Division Bench of the High Court has clearly observed that they were entertaining the review petition only on the ground of error apparent on the face of the record and not on any other ground. So far as that aspect is concerned, it has to be kept in view that an error apparent on the fact of record must be such an error which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions. We may usefully refer to the observations of this Court in the case of Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale wherein, K.C. Das Gupta, J., speaking for the Court has made the following observations in connection with an error apparent on the face of the record:*

An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the fact of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior court to issue such a writ."

5. Learned Standing Counsel on the other hand while defending the impugned order submitted that in fact the public utility land such as *Khalihan* could not have been given on *patta*. The *patta*, if any, made in favour of the

original allottee was void abinitio. In support of his submission, he has relied on Section 132 sub-section (c)(vi) of the U.P. Z.A. & L.R. Act, 1950. The relevant provision is quoted below:

"132. Land in which bhumidhari rights shall not accrue- Notwithstanding anything contained in section 131, but without prejudice to the provisions of section 19, [Bhumidhari] rights shall not accrue in-

(a) pasture lands or lands covered by water and used for the purpose of growing singhara or other produce or land in the bed of a river and used for casual or occasional cultivation;

(b) such tracts of shifting or unstable cultivation as the State Government may specify by notification in the Gazettee, and

[(c) ***lands declared by the State Government by notification in the official Gazettee to be intended or set apart for taungya plantation or grove lands of a [Gaon Sabha] or a local authority or land acquired or held for a public purpose and in particular and without prejudice to the generality of this clause-***

(i) lands set apart for military encamping grounds,

(ii) lands included within railway or canal boundaries,

(iii) lands situate within the limits of any cantonment,

(iv) lands included in sullage farms or trenching grounds belonging as such to a local authority,

(v) lands acquired by a town improvement trust in accordance with a scheme sanctioned under section 42 of the U.P. Town Improvement Act, 1919 or by a municipality for a purpose mentioned in clause (a) or clause (c) of section 8 of the U.P. Municipalities Act, 1916 and

(vi) l***ands set apart for public purposes under the U.P. Consolidation of Holdings Act, 1953.]***

6. It is further submitted that under Section 29-C of U.P. Consolidation of Holdings Act, 1953 the land contributed for public purposes under this Act shall, with effect from the date on which the tenure-holder became entitled to enter into possession of the *chaks* allotted to them, vests and be always deemed to have vested in the Gaon Sabha.

7. The contention of the learned Standing Counsel is that the land vested in the Gaon Sabha for the public purpose could not have been given on patta to any individual person. His contention is that this fact was not considered in the order dated 15.05.1992 while rejecting the reference, therefore, the matter was rightly remanded back to the competent authority to decide afresh on merit.

8. I have considered the submissions made by the parties' counsel and gone through the record.

9. There is no denial of the fact that the order impugned clearly

indicates that the Board of Revenue while reviewing its order has made certain observations on the merits of the case. There is no dispute, so far about the legal proposition with regard to the scope and ambit of review is concerned, the law in this regard is well settled as held in the case of Meera Bhanja (Smt) Vs. Nirmala Kumari Choudhary (Supra).

10. However, this fact is also to be taken note of that the Additional Commissioner while passing the order dated 15.05.1992 had not considered the relevant provisions of Section 132 (c)(vi) of the U.P.Z.A. & L.R. Act and Section 29-C of U.P. Consolidation of Holdings Act, 1953, which are very much necessary for proper adjudication of the claim of the petitioner. As such, although, I do not agree with the finding given in the impugned order, however, in the interest of justice I find it necessary that the matter requires to be re-considered by the competent court in accordance with law, in deciding the claim of the petitioner.

11. In this view of the matter, the writ petition is disposed of finally with the observation that the Collector, Barabanki, shall pass fresh order under Section 198(4) of the Z.A. Act after giving opportunity of hearing to the parties concerned, in accordance with law, expeditiously, say within a period of three months from the date a certified copy of this order is produced before the Collector concerned.

12. With the aforesaid observations, the writ petition is disposed of finally.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.11.2011

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

Criminal Revision No. - 1147 of 2011

Atma Ram Prajapati and others
...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Sriprakash Dwivedi

Counsel for the Respondnets:
Govt. Advocate
Sri Vipin Chandra Pandey

Code of Criminal Procedure-Section 397/401-Criminal Revision-against summoning passed-ignoring compromise between parties offence under Section 147,323,504,506,498 A-I.P.C.-with section ¾ D.P. Act -held-pure personal family dispute settled by mediation Center of High Court-held-without hope of success of prosecution-futile exercises to continue with proceeding-summoning order quashed.

Held: Para 11

The present dispute between the parties is of purely personal nature and is a matrimonial dispute, which has been mutually and amicably settled by the parties with the intervention of Mediation and Reconciliation Centre of this Court. After compromise between the parties, it would be futile to permit criminal case pending against the applicants to continue any further. As parties have come to terms, it shall be sheer waste of time of the Court, if the criminal proceeding pending against the revisionist is permitted to reach its logical end without any hope for a result in favour of the prosecution. In these

circumstances the revision deserves to be allowed.

Case law discussed:

(2008) 4 SCC 582

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

1. Affidavit filed today is taken on record.

2. Heard Sri Prakash Dwivedi, learned AGA for the State and Sri Vipin Chandra Pandey, learned counsel for the complainant- opposite party no. 2.

3. This revision under Section 397/401 Cr.P.C. is directed against the order dated 14.1.2011 passed by C.J.M., Mirzapur in Complaint Case No. 4485 of 2010, Pooja Devi Vs. Atma Ram and others, under Sections 147, 323, 504, 506, 498A IPC and D.P. Act, P.S. Kotwali Katra, District- Mirzapur, whereby the revisionist- Atmaram Prajapati, Ramnath Prajapati, Ranno Devi, Dinesh Kumar, Mahesh and Anita were summoned to face trial, under Sections 147, 323, 504, 506 498A IPC and D.P. Act.

4. Since it is matrimonial dispute, in pursuance of order dated 24.2.2011 passed by Hon. B.K. Narayan, J, the matter was referred to Mediation and Conciliation of this Court.

5. Parties appeared before Mediation and Conciliation Centre of this Court on 20.4.2011and 17.5.2011 and settlement was arrived at between the parties and settlement-agreement was executed on 19.5.2011.

6. Para 5 of the settlement-agreement is as follows :-

"The parties hereto confirm and declare that they voluntarily and of their own free will arrived at this Settlement Agreement in the presence of the Mediation/ Conciliator.

a. That Sri Atma Ram Prajapati (revisionist no.1-husband) and Smt. Pooja Devi (opposite party no. 2-wife) have amicably resolved all their matrimonial issues that have arisen between them over the years by opting for separation and divorce.

b. That wife Smt. Pooja Devi has accepted a sum of Rs. 1,00,000/- from her husband Atma Ram Prajapati through a demand draft bearing no. 964402 dated 16.5.2011 purchased from Punjab and Sindh Bank, Katra Bazi Rao Branch, Mirzapur as a lumpsum settlement of all her claims to maintenance, alimony, stridhan and other cognate claims by whatever name called.

c. That in addition, the husband has delivered to his wife a gold ring and a gold chain which Smt. Pooja Devi/ wife has accepted.

d. That both parties do now agree that they have no other claim monetary or otherwise against one another arising out of their matrimonial relationship.

e. that Atma Ram Prajapati and his wife Smt. Pooja Devi agree that they will file for divorce by mutual consent before the Judge, Family Court, Mirzapur within 15 days from date u/s 13B Hindu Marriage Act ; and, both parties do further undertake that they will not withdraw their consent from those proceedings until decree for divorce is passed by the Family Court,. Both parties

also agree that the Hon'ble Court may in its discretion and subject to its pleasure direct the Family Court Judge to expedite of the divorce matter.

f. That the wife Smt. Pooja Devi undertakes to withdraw proceeding for maintenance initiated by her u/s 125 Cr.P.C. against her husband, said to be pending before the concerned Magistrate at Mirzapur, unconditionally within 15 days from date.

g. That the husband Atra Ram Prajapati undertakes to unconditionally withdraw a petition for restitution of conjugal right filed by him u/s 9 Hindu Marriage Act before the Judge, Family Court, Mirzapur within 15 days from date, which the wife undertakes not to oppose for costs.

h. That both parties agree that the proceeding of Criminal Case No. 4485 of 2010 u/s 147, 323, 504, 506, 498A IPC and D.P. Act, P.S. Kotwali Katra, Mirzapur, pending in the Court of the learned CJM, Mirzapur may in the discretion and subject to pleasure of the Hon'ble Court be quashed.

i. That both parties hereby covenant that they will not institute or prosecute any fresh or further legal proceeding against one another or their family members of any nature, either civil or criminal".

7. Learned counsel for respondent no. 2 admits that respondent no. 2 has received a sum of Rs. 1 lac from her husband as provided in para 5 (b) of the settlement-agreement and she has no objection if the proceedings pending before the Magistrate are quashed.

8. Though the revisionist has challenged the summoning order by means of criminal revision, since it is a matrimonial dispute and parties have come to terms and, therefore, this court can also exercise power under Section 482 Cr.P.C. and can quash the proceedings on the ground of compromise.

9. The revisionist no. 1 and opposite party no. 2 have also filed a petition for divorce by mutual consent under Section 13 (b) of the Hindu Marriage Act before the Principal Judge, Family Court, Mirzapur and parties have decided not to withdraw their consent.

10. The Apex Court in the case of '**Madan Mohan Abbot v. State of Punjab' reported as (2008) 4 SCC 582** emphasized in para No. 6 as follows :-

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

11. The present dispute between the parties is of purely personal nature and is a matrimonial dispute, which has been mutually and amicably settled by the parties with the intervention of Mediation

and Reconciliation Centre of this Court. After compromise between the parties, it would be futile to permit criminal case pending against the applicants to continue any further. As parties have come to terms, it shall be sheer waste of time of the Court, if the criminal proceeding pending against the revisionist is permitted to reach its logical end without any hope for a result in favour of the prosecution. In these circumstances the revision deserves to be allowed.

12. The revision is allowed. The impugned summoning order dated 14.1.2011 is quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.12.2011

BEFORE
THE HON'BLE UMA NATH SINGH,J.
THE HON'BLE D.K ARORA,J.

Service Bench No. - 1347 of 2010

Dr.Rakesh Kumar Mishra and others
...Petitioner
Versus
State of U.P. Through Principal Secy.Medical and Health Lko.
...Respondents

Counsel for the Petitioner:
Sri L.P.Singh

Counsel for the Respondents:
C.S.C.
Sri A.K. Vishwakarma
Sri Asit Kumar Chaturvedi
Sri Prashant Singh Atal

Constitution of India, Article 226- Selection-preference to local candidate go by to merit-if local candidate much below in merit in comparison of outside candidates-no right to question the mode of selection-petition dismissed.

Held: Para 9

Thus, priority or precedence would not mean a reservation for local candidates nor would it mean drawing of a separate merit list for them. It is only on the comparative assessment on merit of local candidates vis-a-vis outsiders that the local candidates if otherwise found eligible but left behind with narrow margin may get priority and sympathetic consideration in comparison with the outsiders. But in the instant case, the selected candidates secured 50 marks and above whereas the petitioners have obtained the marks only within the range of 30. Thus, in that case, they would not be entitled to get any priority over the outsiders.

Case law discussed:
Civil Appeal Nos.5757-5759 of 2002 (State of U.P. & another vs. Om Prakash and others); [2007 (25) LCD 1427]

(Delivered by Hon'ble Uma Nath Singh,J.)

1. We have heard learned counsel for parties and perused the pleadings of writ petitions.

2. This order shall also dispose of connected Writ Petition No.1614 (S/B) of 2010 as both the writ petitions impugn the same cause of action, namely, the exercise of selection process completed pursuant to the advertisement dated 23.06.2010 (Annexure-2 to the writ petition).

3. Learned counsel for petitioners submitted that as per condition no.1 of the advertisement, the candidates of the district concerned are to get priority/ precedence over other candidates in the selection, whereas in the instant case the local candidates have not been given any priority and instead the outsiders have

been selected for appointment on the posts in question, namely, Ayush Medical Officer and Pharmacist.

4. Learned counsel also submitted that condition no.1 should not be interpreted to read as preference, but it is to be read only as 'priority' and, thus, a separate merit list should have been drawn for the local candidates at district level.

5. On the other hand, learned counsel for respondents submitted that in the selection process, merit is to be given preference and once the advertisement has been issued for the entire State, applicants from outside the district, particularly from neighbouring districts can not be prevented in any manner from applying and participating in the selection process.

6. Beside, learned State Counsel, Shri Sanjay Bhasin also submitted that the last selected candidate in the general category has obtained 53 marks, the O.B.C. Candidate has secured 50 marks, and the candidate selected for Pharmacist 44 marks, whereas all the petitioners have remained within 30 marks.

7. On due consideration of rival submissions, we do not find any force in the contentions of learned counsel for petitioners. Priority/precedence does not mean that merit should be given a complete go by, particularly in the selection process for appointment on the specialized and technical posts, like Medical Officers and Pharmacists. Thus the submission in regard to drawing of a separate select list for local candidates does not find favour with the Court.

8. The Hon'ble Apex Court in ***Civil Appeal Nos.5757-5759 of 2002 (State of U.P. & another vs. Om Prakash and others)*** has held that the word 'preference' would mean that when the claims of all candidates who are eligible and who possess the requisite educational qualification prescribed in the advertisement are taken for consideration, and when one or more of them are found equally positioned, then only the additional qualification may be taken as a tilting factor, in favour of candidates vis-a-vis others in the merit list prepared by the Commission. But preference does not mean en bloc preference irrespective of inter-se merit and suitability. This judgment has been considered by a Full Bench of this Court in **Daya Ram Singh vs. State of U.P. [2007 (25) LCD 1427]** wherein it has been held as under:

"The word 'Variyata' has been defined in the Oxford Hindi into English Dictionary, as priority or precedence. Besides from the two Government Circulars, which are referred to above and which were issued subsequently, i.e., one dated 21.11.2005 and the latter dated 24.4.2006, the intention has been further clarified. As we have noted, the Government Circular dated 21.11.2005, gives the clarification specifically stating that an Instructor/ Supervisor, who has worked in the non-formal education Scheme, if available and if having the other conditions of eligibility, and if falls in the prescribed category of reservation, will be appointed, even if he is having less number of marks. The Government Circular of 24.4.2006, clearly states that amongst the Instructors/ Supervisors, one who has put in longer years of service, will be preferred. In the earlier Government Circular dated 10.10.2005,

those who had passed B.Ed./ L.T., were to be given the preference while stating that the work used was Adhimanyata (preference). That clause has been removed and the terms used in Clause No.4, are Prathama Variyata, which will mean 'first priority' or 'precedence'. The provisions contained in this Clause, when read with the clarification dated 21.11.2005, clearly lead to the inference that the Instructors/ Supervisors, who have worked in the non-formal education Scheme ought to be preferred en bloc with priority over the others, if such persons are available."

9. Thus, priority or precedence would not mean a reservation for local candidates nor would it mean drawing of a separate merit list for them. It is only on the comparative assessment on merit of local candidates vis-a-vis outsiders that the local candidates if otherwise found eligible but left behind with narrow margin may get priority and sympathetic consideration in comparison with the outsiders. But in the instant case, the selected candidates secured 50 marks and above whereas the petitioners have obtained the marks only within the range of 30. Thus, in that case, they would not be entitled to get any priority over the outsiders.

10. Thus, we may hold that 'priority', in the present context would mean precedence of the local candidates who are not left behind with a wide margin in the merit, but are positioned at a reasonable distance, in comparative assessment vis-a-vis the outsiders.

11. Thus, the writ petitions are dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.12.2011

BEFORE
THE HON'BLE PRADEEP KANT,J.
THE HON'BLE S.V. SINGH RATHORE,J.

Service Bench No. - 1468 of 2011

Surendra Vikram Singh ...Petitioner
Versus
State of U.P.Through Prin. Secy. Appointment Deptt. Lko. and other ...Respondents

Counsel for the Petitioner:
Sri Ashwani Kumar
Sri Adarsh Saxena

Counsel for the Respondents:
C.S.C.
Sri Manish Kumar

U.P. Higher Judicial Services Rule 1975-placement in seniority-petitioner's batchmates recommended for officiating promotion-ignoring petitioner due to adverse entry 1994-95 on 27.03.2000-but approved subsequent on 18.08.2001-Regular promotion on 13.04.2005 given-in tentative seniority list published on 03.03.2011-petitioner placed at serial no. 455-but in revised list got placed at Serial no. 678-un-communicated adverse entry can not be ground for super seating-once placed properly-hardly any occasion to disturb such placement-direction issued accordingly.

Held: Para 27

As per the own criteria/principles determined by the Seniority Committee, this was a case which will fall in the third category viz. where the officiating promotion was denied because of the presence of the adverse entry, which entry was not to be taken into account and consequently the officiating promotion was given. The Seniority

Committee in its criteria has observed that for such officers, the seniority position would be restored back. That being so, we do not find any reason as to why the petitioner should be denied his seniority to which he was entitled otherwise.

Case law discussed:

(2008) 8 SCC 725; (1999) 1 SCC 241

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

1. Heard Sri S.K.Kalia, learned Senior Advocate, assisted by Sri Adarsh Saxena, counsel for the petitioner, Sri Manish Kumar, learned counsel for the High Court and learned standing counsel appearing for the State.

2. The petitioner, who was initially appointed as Munsif on 5.11.1979, belongs to 1977 batch of U.P.Nyayik Sewa (hereinafter referred to as UPNS), was promoted as Civil Judge (Senior Division) in the year 1996. During the year 1994-95, he was communicated an adverse entry when he was posted as Civil Judge (Senior Division) at Moradabad. He made a representation against the said adverse entry but the same was rejected on 14.3.1997, aggrieved by which he preferred a writ petition bearing no. 41334 of 1997, which was disposed of on 6.12.2000 with a direction to the respondents to decide the representation of the petitioner keeping in view the observations of the Division Bench and the Hon'ble Supreme Court in the case of *Hon'ble High Court of Judicature at Allahabad versus Sarnam Singh and another,* reported in **2000(2) SCC 339.**

3. In the meantime, when the aforesaid writ petition was pending, the batch mates of the petitioner were considered for officiating promotion under Rule 22(3) of the U.P.Higher Judicial Services Rules, 1975 (hereinafter referred to as the UPHJS Rules), but the petitioner was not recommended for promotion by the Selection Committee because of the aforesaid adverse entry. He was again not recommended for promotion by the Selection Committee on 27.3.2000 because of the said adverse entry. He was also having 'fair' entries for four successive years.

4. The writ petition preferred by the petitioner, as referred to above, was decided on 6.12.2000 and thereafter the Administrative Committee of the High Court resolved on 27.4.2001 that the remarks of the Inspecting Judge for the year 1994-95 be not taken into account while considering his promotion. The selection committee thereafter approved the petitioner for officiating promotion vide resolution dated 18.8.2001 and he was promoted vide High Court's notification dated 30.10.2001 under the provisions of Rule 22(3) of the UPHJS Rules.

5. After the petitioner was given officiating promotion in U.P.Higher Judicial Service, he was considered for regular promotion and was given such promotion on 13.4.2005. The notification in this regard was issued on 17.5.2005. In this Government notification promoting the petitioner under Rule 22(1) of the UPHJS Rules alongwith his batch mates, he was rightly placed as per his seniority position.

6. It was thereafter on 3.3.2011 that the first tentative seniority list of the officers of UPHJS cadre was published. In this list, the petitioner was again rightly placed at serial no. 455 i.e. in between

Mr. Rakesh Kumar at serial no. 454 and Mr. Gyan Chandra at serial no. 456. Subsequently, on 18.5.2011, revised tentative seniority list was published, in which the petitioner was placed at serial no. 678 whereas Mr. Rakesh Kumar was placed at serial no. 451 and Mr. Gyan Chandra at serial no. 452. This necessitated a representation by the petitioner against the revised tentative seniority list, which was made on 30.5.2011, wherein he requested that his seniority be restored at due place i.e. above Mr. Gyan Chandra and below Mr. Rakesh Kumar.

7. Besides the petitioner, several other officers who were similarly circumstanced and were pushed down in the revised tentative seniority list, also represented their cases and in the final seniority list, they were given their due places. The petitioner was, however, denied the said relief.

8. Later on, final seniority list was published alongwith the seniority committee report, from where it revealed that the petitioner's representation has not been accepted and his place in the seniority list remains unchanged.

9. The placement so made in the seniority list of UP HJS officers has given a cause of action to the petitioner to approach this Court under Article 226 of the Constitution of India.

10. Learned counsel for the petitioner has submitted that the principle applied in the case of the petitioner for denying him the benefit of seniority with effect from the year 1999 i.e. when the persons junior to him belonging to his batch were given seniority, is not based on any rational and fair criteria; rather this is against the rules which govern the seniority.

11. His further submission is that by no stretch of imagination, merely because there were four successive 'fair' entries after the adverse entry for the assessment year 1994-95, which were never communicated to the petitioner, he could have been pushed down in the seniority list on the ground that he was superseded in officiating promotion, not because of the adverse entry of 1994-95 alone but looking to the entire record which included four fair entries awarded to him successively.

12. In support of his above submissions, learned counsel for the petitioner has relied upon *Dev Dutt versus Union of India and others* **(2008) 8 SCC 725**, *U.P.Jal Nigam versus S.C.Atri and another* **(1999) 1 SCC 241** and *R.K.Singh versus State of U.P. & others* **1991 Supp. (2) SCC 126.**

13. Sri Manish Kumar, appearing for the High Court has vehemently urged that the petitioner was since superseded in officiating promotion and his service record was found bad by the Full Court where he was found not fit for promotion, he cannot claim restoration of his seniority alongwith his batch mates of 1997 and in other words, from the year 1999.

14. Sri Manish Kumar has also drawn our attention to the criteria fixed by the Seniority Committee for awarding seniority to the UPHJS officers, who were first given *ad hoc* officiating promotion and were subsequently given regular promotion, wherein such officers were

allowed the benefit of officiating promotion and were given seniority from the date of their officiation.

15. Seniority Committee laid down the criteria for determining the seniority of those officers, who were given *ad hoc* promotion and were promoted on regular basis while working on officiating promotion and also of those officers who could not be given officiating promotion because of the adverse entries, but were subsequently promoted when adverse part of their service record was expunged.

16. In fact, the following criteria was adopted by the Seniority Committee for determining seniority of three sets of officers, after observing that there are certain principles on matters not specifically covered by Rule 26 of 1975 Rules; viz.

" (A) Under Rule 26 (before 15.3.1996), for D.Rs., the reckoning point of seniority is the date of joining but a few days difference in the matter of joining of D.Rs., appointed by same order, amongst themselves, would not disturb their position inter se. This principle was followed by earlier Seniority Committee which has attained finality. Same principle would be followed this time also. Therefore, amongst D.Rs., we maintain their inter se position as per their merit position and order of appointment. A few days difference, either way n the matter of joining would make no difference.

(B) Similarly in the matter of promotee Officers also, all appointed on substantive vacancies by a common appointment order, in case of minor variation in d ate of continuous officiation of such Officers, on account of difference in joining, their inter se seniority has also not been touched and is in tact as it was in feeder cadre, i.e., in order of their appointment. This was the principle followed while preparing earlier seniority list dated 6.5.1992.

(C) The earlier seniority committee headed by Dr. B.S.Chauhan, J. (as His Lordship then was) in regard to issue-3 took a decision that D.Rs., who could not join on account of interim orders will be entitled for seniority from the date of passing restraining order. In respect to Issue-3 also relating to D.Rs of 1984 recruitment, the committee decided, where appointments are delayed due to fault on the part of Government, no benefit would be given but where the appointments were delayed due to orders of Court, they may be given benefit of decision taken in issue but confined to the date the person higher in merit was appointed.

(D) In our second TR having taken the decision that continuous officiation upto the date when an Officer was found unfit for promotion on substantive basis would not be given any consideration for seniority, we received some representations from affected Officers amongst 58 total representations we have received. We find from the analysis of aforesaid objections and other record that there are three types Officers:

(i) First, those, who were initially approved for officiating appointment and given such appointment, thereafter in their turn approved for substantive appointment and given such appointment. There is no difficulty in respect to such Officers, if they are governed by pre-

amended Rule 26 of 1975 Rules to reckon their seniority from the date of the continuous officiation and the vacancy available in their quota, whichever is later.

(ii) Second, the Officers approved for officating appointment, given such appointment, but in their turn once or more disapproved for substantive appointment under Rules 22(2) but continued to officiate and later on approved for substantive appointment. These Officers have demanded that their seniority should remain unaffected and even if the members of UPNS junior to them have superseded at the time of substantive appointment, but ultimate approval shall restore seniority and they would not be affected in any manner.

(iii)Third, those approved for officiating/ad hoc promotion but could not be so promoted for any reason, may be on account of some inquiry etc., rejected for promotion on ad hoc basis and ultimately given only substantive appointment when the above inquiry resulted in exoneration or the other reason disappeared, like expunction of adverse entry etc.

(E) So far as the Officers in ***first category*** *is concerned, as already noticed, there is no difficulty. So far as* ***second category*** *Officers are concerned, we find the proposition difficult to accept that they can be allowed to reckon their seniority from the date of continuous officiation. It is true that under Rule 26, the reckoning point of seniority for promotees is the date of continuous officiation and the date of availability of vacancies within their quota, but when they are found unfit for promotion on substantive basis in their turn and juniors are promoted on substantive basis superseding them, the vacancies are provided earlier in pointy of time to the juniors approved for substantive appointment when senior is rejected. Therefore, the later approval would not result in automatic restoration of seniority from the date of association so as to score a march over juniors who had already superseded the senior Officer for substantive appointment. Any other view would amount to treating unequals as equal. Rule nowhere provides that an Officer superseded for substantive appointment by his juniors can restore his seniority due to later approval. To adjust equity amongst all the Officers so as not to nullify effect of supercession in substantive appointment, officiation of superseded Officers would count from one day later than the last rejection for promotion and immediately preceding approval for promotion on substantive basis.*

(F) There may be some Officers who were found unfit on account of some punishment or adverse entry etc. which subsequently disappeared, may be on account of some judicial order or in appeal or representation on the administrative side resulting in vanishing the very basis on account whereof the incumbent was superseded. IN such cases, as we have already decided earlier, following the decision on similar aspect by earlier committee also such Officers, if approved in following selection, would restore their position back over their juniors.

(G) In this regard, we have followed the decision of earlier Seniority Committee headed by Hon'ble S.D.

Agarwal, J. in finalizing 1992 S.L. (see para 83(e) of this report where it said that the Officers who were not given promotion under Rule 22(3) or 22(4) due to any adverse entry or enquiry pending against them, which has subsequently been wiped out, seniority of such officers shall be counted from the date next junior member of UPNS or JOS, as the case may be, of their batch who were promoted to the service prior to them started officiation). This principle was also followed by the later Seniority Committee headed by Dr. B.S.Chauhan, J. (as his Lordship then was) and was never disputed earlier or before us.

(H) Now comes ***third category.*** *The Officers considered in their turn for officiating appointment or subordinative appointment but the consideration was deferred, may be for non completion of record of A.C.R. Or otherwise, vacancies kept reserved and subsequently they were approved and promoted. In such cases, these officers shall be assigned seniority from the date their next junior I UPNS has been assigned seniority inasmuch such Officers were neither ever superseded nor denied officiating appointment nor have been otherwise allowed to suffer. The Court kept the vacancy reserved and, therefore, in the matter of seniority also they cannot be allowed to suffer."*

17. So far as the petitioner is concerned, the Seniority Committee observed as under:

227. ***Sri Surendra Vikram Singh,*** *a quite senior in UPNS made representation for not providing him seniority at his due place alongwith his juniors in UPNS. In the tentative seniority list circulated with our Second TR he has been placed at Sl. No. 678. In his representation he has said that he belongs to 1977 batch of UPNS appointed on 05.11.1979 and promoted as Civil Judge (Senior Division) on 20.02.1990. From his report we find that he was awarded an adverse entry in 1994-95 to the following effect:*

"Disposal adequate being 202 per cent. The officer enjoyed a stinkingly bad reputation as revealed in my surprise inspection made incognito on 18th of April, 1995. the remarks of the District Judge in the annual confidential report for the year 1994-95 affirmed.

Assessment of judicial performance adjudged 'very poor' on the basis of my inspection note for the year 1994-95.

Integrity doubtful."

228. His integrity was also assessed as doubtful. His representation against the aforesaid remark was also rejected on 14.03.1997. He filed Writ Petition No. 41334 of 1997 seeking a writ of certiorari for quashing the aforesaid adverse remark. Vide judgment dated 06.12.2000 this Court partly allowed his writ petition required for reconsideration of his representation against the aforesaid adverse entry in the light of decision of the Apex Court in ***High Court of Judicature at Allahabad Vs. Sarnam singh and another, 2000(2) SCC 339.*** *Direction issued by this Court reads as under:*

"In view of what has been stated above, the writ petition succeeds partly and is allowed in part. The respondents are directed to decide the representation

of the petitioner keeping in view the observations of the Hon'ble Division Bench and the Hon'ble Supreme Court in Sarnam Singh case and dispose if of afresh.

The parties will bear their own costs."

229. In the meantime, the selection committee considered him for promotion in UPHJS and vide report dated 18.05.1998 solely on the basis of adverse entry awarded for 1994-95 did not recommend him and this report was accepted by Full Court on 11.07.1998. Again he was considered by selection committee and vide report dated 27.03.2000 it did not recommend Sri Surendra Vikram Singh for promotion referring not only adverse entry of 1994-95 but also referring to his performance in the subsequent four years as is evident from the following:

"In the year 1994-95 he was rated to be a very poor officer and his integrity has been assessed as doubtful. He made two representations but th same were rejected on 14.03.1997 and 16.08.1997 respectively. Challenging the entry for the year 1994-95 he has filed Civil Misc. Writ Petition No.41334/1998 whch is pending but there is no interim order staying the operation of the adverse entry. However, in the successive four years he was assessed to be merely a fair officer. Therefore he is not recommended for promotion."

230. This report was also accepted by Full Court vide resolution dated 09.04.2000 and Surendra Vikram Singh was not recommended for promotion. After the decision of Court vide judgment dated 06.12.2000 the representation of Surendra Vikram Singh was considered by Administrative Committee in its meeting dated 27.04.2001 and it resolved as under:

"Resolved that the remarks made by the inspecting judge against the officer for the year 1994-95 be not taken into account."

231. Thereafter, the Full Court approved him for promotion vide resolution dated 18.8.2001. It is evident that, his supercession vide Full Court resolution dated 9.4.2000 was not solely on account of adverse entry of 1994-95 but also in the light of his performance adjudged as merely a "fair officer" in the successive four years. Therefore, our decision that if the sole basis disappear, ***the incumbent shall be restored to his position would not apply to the case of Surendra Vikram Singh.*** *We are also informed that while considering the Officers for promotion in HJS,m mainly preceding five year entries used to be considered by the Court and, therefore, the subsequent entries being available in respect to officer concerned which are considered when he is recommended for promotion in later year would not entitle him for restoration of his position. It will apply only when he is superseded on the basis of something which ultimately disappeared but if there is anything more then the aforesaid logic will not apply."*

18. A perusal of the criteria adopted by the Seniority Committee for determining the seniority of the petitioner shows that the reason for not giving him the seniority, which he was claiming, is that though the adverse entry of the year 1994-95 was not taken into account while

making his promotion on officiating basis, but he was superseded not because of the said adverse entry alone but also because of the four 'fair' entries awarded to him in four successive years.

19. Needless to mention that seniority is governed by Rule 26 of the UPHJS Rules, which reads as under:

"26. Seniority.- *(1) Seniority of the officers appointed in the service shall be determined in accordance with the order of appointment in the Service under sub-rules (1) and (2) of Rule 22 of these Rules.*

(2) Seniority of members of the service who have been confirmed in the service prior to the commencement of these rules shall be as has been determined by the order of the Government as amended from time to time."

20. The appointment is dealt with under Rule 22 of the aforesaid Rules.

21. The Seniority Committee has kept the petitioner's case in third category but has refused seniority for the aforesaid reason. Here, it is worthwhile to consider the plea of the petitioner that firstly, the successive four fair entries after adverse entry for the year 1994-95 could not be treated as adverse nor were they adverse; secondly, had these entries been taken as adverse, they ought to have been communicated to the petitioner, which was never done; thirdly, any entry which had not been communicated to the petitioner, could not be considered as adverse nor could be taken into consideration while making promotion, and lastly, when the petitioner was given officiating promotion on 30.10.2001 after the directive issued by the High Court in the writ petition preferred by him, these four 'fair' entries were on record and in the presence of these four 'fair' entries he was given officiating promotion simply ignoring the adverse entry of 1994-95. Submission is that these four fair entries were neither taken to be adverse nor against the petitioner for the purposes of officiating promotion; rather, after expunction of the adverse entry of 1994-95, the Selection Committee did not find anything adverse so as to deny the petitioner the officiating promotion and for that reason he was given officiating promotion.

22. Thus, if the petitioner was given officiating promotion on the basis of existing material including the four successive 'fair' entries, it cannot be said that he would not be entitled to restoration of his seniority merely because at the time of officiating promotion, there were four 'fair' entires as observed above. At the time of promotion, the entire record, which is relevant for the purpose, remains under scrutiny and if the selection committee finds that there is anything adverse on record, may be adverse entry or any restraint order or any such factor which prohibits such promotion to an officer, the selection committee would not make his promotion, but on consideration of entire record if promotion is made, then it would not be open later on to suggest that the promotion has been made but the adverse material still is to be taken into consideration while determining his seniority.

23. Admittedly, the four fair entries were never communicated to the petitioner; therefore, he could not get a chance to make any representation against

them. He was given officiating promotion after ignoring the adverse entry for the year 1994-95 but in the presence of four 'fair' entries awarded to him in the successive four years.

24. The observation of the Seniority Committee that the petitioner was superseded in officiating promotion not only because of the adverse entry of 1994-95 but also because of the four successive fair entries, is not borne out from record for the reason that when the said adverse entry was ignored, he was given officiating promotion in the presence of same very four 'fair' entries. Thus, the 'fair' entries were not taken as a bar or obstacle for giving promotion to the petitioner in UPHJS cadre on officiating basis.

25. It is significant to note that when the petitioner was promoted on regular basis on 13.4.2005, he was placed rightly as per his seniority position and also in the first tentative seniority list, he was given the correct position, but in the second tentative seniority list, his position was changed and he was pushed down and despite representations made he was not given due place in the final seniority list also which was published later on.

26. Grant of officiating promotion immediately after the expunction of the adverse entry of 1994-95 in the presence of four 'fair' entries itself reveals that the officiating promotion of the petitioner was earlier denied only because of the adverse entry and not for 'fair' entries.

27. Once at the time of regular promotion, the petitioner was placed at the proper place in the seniority list, there was hardly any occasion to disturb his seniority at the time of issuing second tentative seniority list and that too on a ground which was non-existent..

28. As per the own criteria/principles determined by the Seniority Committee, this was a case which will fall in the third category viz. where the officiating promotion was denied because of the presence of the adverse entry, which entry was not to be taken into account and consequently the officiating promotion was given. The Seniority Committee in its criteria has observed that for such officers, the seniority position would be restored back. That being so, we do not find any reason as to why the petitioner should be denied his seniority to which he was entitled otherwise.

29. For the reasons aforesaid, we allow the writ petition and direct that the petitioner shall be given his original seniority and shall be placed in between Mr. Rakesh Kumar and Mr. Gyan Chandra, who have been placed at serial nos. 451 and 452 in the final seniority list of UPHJS officers cadre. Let the seniority list dated 18.5.2011 be corrected accordingly.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.12.2011

BEFORE
THE HON'BLE S.R. ALAM, C.J.
THE HON'BLE RAN VIJAI SINGH, J.

SPECIAL APPEAL No. - 2319 of 2011

Pankaj Pandey ...Petitioner-Appellant
Versus
S.B.I. Central Recruitment and Promotion Deptt and another ...Respondents

Counsel for the Petitioner:
Sri N.K. Pandey,
Sri H.L. Pandey

Counsel for the Respondents:
Sri Satish Chaturvedi

Constitution of India Article 226- Cancellation of appointment letter-appellant was finally selected on post of clerk-cum-cashier-appointing authority considering decleration column of application regarding pendency of Trails of cases under Section 323, 504, 506, 498-A, and ¾ D.P. Act-decided to withdraw the offer letter-held-proper-sole domain of appointing authority-can not be interfered by Court-selected candidate-no feasible right to claim appointment-Single Judge rightly declined to interfere.

Held: Para 11

Otherwise also, it is within the domain of the Appointing Authority/employer to verify, before issuing the letter of appointment, the antecedents of a person to whom it is going to offer letter of appointment. Therefore, in the facts of the case, even if the appellant was selected, since the respondents have decided not to offer him appointment because of his involvement in criminal cases, we have no reason to differ with the view taken by the learned Single Judge. No other point has been urged before us.

Case law discussed:
(1996) 11 SCC 605; (2011) 1 SCC (L&S) 734; 2011 (4) ESC 634; 2007 (5) ADJ 280

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

1. This intra-court appeal arises from the judgment and order of the learned Single Judge dated 2nd November, 2011 rendered in Civil Misc. Writ Petition No.62473 of 2011, dismissing the appellant's writ petition.

2. We have heard learned counsel for the appellant and the learned counsel for the respondents.

3. The short facts giving rise to the present appeal, briefly stated, are that the State Bank of India advertised few vacancies of Clerk-cum-Cashier for selection and appointment. Pursuant to the said advertisement, the appellant also applied for the said post and appeared in the written examination and was declared successful hence called for interview, which was to be held on 7th May, 2010. However, in the declaration form, he disclosed about the pendency of three criminal cases against him, i.e. (1) Case No..... of 2000 under Sections 323, 504 & 506 IPC, (2) Case No..... of 2007 under Sections 323, 498-A, 504, 506 IPC and Section 3 of the D.P. Act, and (3) Case No.....of 2008 under Sections 323, 504 & 506 IPC. The respondent Bank, therefore, keeping in view his involvement in the aforesaid criminal cases involving moral turpitude, decided not to appoint him and, therefore, vide letter dated 23.09.2011, the offer made to appoint him was withdrawn/cancelled. The aggrieved appellant, therefore, filed

aforesaid writ petition for quashing of aforesaid order dated 23.09.2011 and further for a direction commanding the respondents to appoint him as Clerk in Gaurabadshahpur, Jaunpur Branch or any other Branch of the State Bank of India of the Zone and to pay salary as and when it falls due.

4. The learned Single Judge was of the view that it is not desirable to issue letter of appointment to a person against whom criminal cases are pending even if he has cleared the written examination, interview and has provisionally been selected. The learned Single Judge, therefore, following the judgment of the Apex Court in **Delhi Administration through its Chief Secretary & Ors. Vs. Sushil Kumar, (1996) 11 SCC 605,** dismissed the writ petition. The appellant, therefore, preferred this appeal under the Rules of the Court.

5. Learned counsel for the appellant vehemently contended that the alleged offences against the appellant, which are pending trial and being of trivial nature, the respondents are not justified in withdrawing the offer of appointment to the appellant. He placed reliance on the judgments of the Apex Court in **Commissioner of Police & Ors. Vs. Sandeep Kumar, (2011) 1 SCC (L&S) 734 and Ram Kumar Vs. State of U.P. & Ors., 2011 (4) ESC 634.**

6. We do not find any force in the submission and the authorities cited has no application in the facts of the present case, as we are of the view that it is within the sole domain of the Appointing Authority/employer to verify the antecedents of a person before issuing appointment letter. Admittedly, the appellant is facing criminal charges which are pending trial. The respondents, keeping in view his involvement in the aforesaid offences involving moral turpitude, decided not to offer him appointment.

7. In **Commissioner of Police & Ors. (supra),** the Apex Court has observed that the Court should condone minor indiscretions made by young people rather than to brand them as criminals for the rest of their lives. In that case, the selection of Sri Sandeep Kumar (the respondent therein) was cancelled on the ground that he had not disclosed in the declaration form the pendency of criminal case against him registered as F.I.R. No. 362 under Sections 325/34 IPC. The Apex Court, observing that since it was a minor offence, therefore, lenient view should have been taken by the authorities, quashed the order of cancellation of selection. Similarly, in **Ram Kumar (supra),** Ram Kumar was appointed as Constable. However, subsequently, it was found that he was involved in a criminal case under Sections, 324, 323 and 504 IPC and, therefore, his appointment was cancelled on the ground that he withheld the information about his involvement in the aforesaid criminal case. The Apex Court, in view of the fact that before applying for selection and appointment, since Ram Kumar was already acquitted, following the judgment in Commissioner of Police & Ors. (supra), set aside the order cancelling his appointment. Therefore, in the aforesaid cases, whereupon reliance has been placed by the counsel for the appellant, admittedly, the selected candidates, at the time of issuance of appointment letter, were not facing any criminal charges nor any criminal case was pending trial, whereas

in the case in hand, it is not in dispute that three criminal cases are pending against the appellant and some of them involves moral turpitude and, therefore, looking to the past antecedents of the petitioner-appellant, the Appointing Authority did not consider it fit to issue appointment letter to him.

8. More so, it is settled law that mere selection does not confer indefeasible right to claim appointment. In in **State of Haryana Vs. Subhash Chander Marwaha & Ors., (1974) 1 SCR 165,** the Apex Court held as under:

"... **One fails to see how the existence of vacancies gives a legal right to a candidate to be selected for appointment.** The examination is for the purpose of showing that a particular candidate is eligible for consideration. The selection for appointment comes later. It is open then to the Government to decide how many appointments shall be made. **The mere fact that a candidate's name appears in the list will not entitle him to a mandamus that he be appointed."**

9. In **Shankarsan Dash Vs. Union of India, (1991) 3 SCC 47,** the Hon'ble Supreme Court held as under:-

"Even if vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates do not acquire an indefeasible right to be appointed. Ordinarily, the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted."

10. A Division Bench of this Court in **U.P. Public Service Commission, Allahabad & Anr. Vs. State of U.P. & Anr., 2007 (5) ADJ 280,** took the similar view and observed as under:-

"Moreover, even in the case of a select list candidate, the law is well settled that such a candidate has no indefeasible right to claim appointment merely for the reason that his name is included in the select list as the State is under no legal duty to fill up all or any of the vacancy and it can always be left vacant or unfilled for a valid reason."

11. Otherwise also, it is within the domain of the Appointing Authority/employer to verify, before issuing the letter of appointment, the antecedents of a person to whom it is going to offer letter of appointment. Therefore, in the facts of the case, even if the appellant was selected, since the respondents have decided not to offer him appointment because of his involvement in criminal cases, we have no reason to differ with the view taken by the learned Single Judge. No other point has been urged before us.

12. The appeal, being without merit, is dismissed. However, there shall be no order as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.12.2011

BEFORE
THE HON'BLE SHRI KANT TRIPATHI,J.

Criminal Misc. Application No. 4479 of 2005
(U/S 482 Cr.P.C.)

Surya Nath & another ...Petitioner
Versus
State of U.P. & another ...Respondents

Counsel for the Petitioner:
Sri Brij Nath Singh
Sri Umesh Vats

Counsel for the Respondents:
Govt. Advocate

Code of Criminal Procedure, Section 482- Quashing of criminal proceeding-offence under section 419, 420,409 IPC-allegation of bribery of Rs. 3000/-charge framed on 08.12.1997 during 8 years prosecution failed to produce witness-speedy investigation and Trail-integral part of fundamental right to life and liberty-applicant can not be thrown at mercy of prosecution-fit case for quashing criminal proceeding.

Held: Para 9 and 10

Therefore, the petitioner who is an accused of embezzlement of a meager amount of Rs. Three thousand relating to the occurrence of the year 1982, can not be kept waiting for the final decision of the case according to the mercy of the prosecution. His fundamental right to have speedy trial of his case seems to have violated by the State without any proper reason, therefore, I find sufficient merit in the petition.

Keeping in view the aforesaid decisions of the Apex Court and the fact that the prosecution failed to examine any witness during the period of eight years and the trial remained pending without any progress and there does not appear to be any justification for the delay, I consider it proper in the interest of justice to quash the proceedings of the criminal case no. 2211 of 1993, State vs. Surya Nath Yadav and another, under sections 467, 468, 419, 420 and 409 IPC, police station Kotwali Deoria, district Deoria.

Case law discussed:
AIR 2008 SC 3077; AIR 2009 SC 1822

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

1 . Heard the learned counsel for the petitioners and the learned AGA and perused the progress report dated 10.5.2011 submitted by the C.J.M. Deoria.

2. The learned counsel for the petitioners submitted that the criminal case is of the year 1993 and since then eighteen years have elapsed, even then the trial is pending for want of prosecution evidence. According to the progress report, the trial remained pending for several years for want of attendance of the accused persons. However, the charges were framed on 8.12.1997 and case remained pending for prosecution evidence for several years and the prosecution failed to examine any witness. The trial is lying stayed from 2005 under orders of this Court.

3. A copy of the order sheet of the concerned criminal case is on record, perusal whereof reveals that several dates had been fixed for prosecution evidence but the prosecution failed to produce any evidence during the period of eight years, i.e. from the year 1997 to 2005.

4. It was the duty of the prosecution to produce relevant evidence on the dates

fixed by the Magistrate but the prosecution had been quite negligent in not cooperating with the trial and also not in examining the witnesses, though about eight years were granted to the prosecution to examine its witnesses. No criminal case can be permitted to be kept pending with no progress for indefinite period at the mercy of the prosecution and the valuable right of speedy trial of the accused can not be allowed to be taken away by the State.

5. The Apex Court had occasion to consider the question of expeditious disposal of criminal cases and has emphasized the need of speedy investigations and criminal trials and has held that speedy investigations and trial are integral part of the fundamental right to life and liberty contained in Article 21 of the Constitution of India. Some of the decisions are as follows:

(1) Pankaj Kumar vs. State of Maharashtra & others, AIR 2008 SC 3077,

(2) Vakil Prasad Singh vs. State of Bihar, AIR 2009 SC 1822.

6. In the case of Pankaj Kumar (supra) the Apex Court reiterated the aforesaid principles and held in para 17 as follows:

"17. It is, therefore, well settled that the right to speedy trial in all criminal persecutions is an inalienable right under Article 21 of the Constitution. This right is applicable not only to the actual proceedings in court but also includes within its sweep the preceding police investigations as well. The right to speedy trial extends equally to all criminal persecutions and is not confined to any particular category of cases. In every case, where the right to speedy trial is alleged to have been infringed, the court has to perform the balancing act upon taking into consideration all the attendant circumstances, enumerated above, and determine in each case whether the right to speedy trial has been denied in a given case. Where the court comes to the conclusion that the right to speedy trial of an accused has been infringed, the charges or the conviction, as the case may be, may be quashed unless the court feels that having regard to the nature of offence and other relevant circumstances, quashing of proceedings may not be in the interest of justice. In such a situation, it is open to the court to make an appropriate order as it may deem just and equitable including fixation of time for conclusion of trial."

7. In the case of Vakil Prasad Singh (supra), the Apex Court while reiterating the aforesaid principles, propounded the following principles:

"24. It is, therefore, well settled that the right to speedy trial in all criminal persecutions is an inalienable right under Article 21 of the Constitution. This right is applicable not only to the actual proceedings in court but also includes within its sweep the preceding police investigations as well. The right to speedy trial extends equally to all criminal prosecutions and is not confined to any particular category of cases. In every case, where the right to speedy trial is alleged to have been infringed, the court has to perform the balancing act upon taking into consideration all the attendant circumstances, enumerated above, and determine in each case whether the right

to speedy trial has been denied in a given case. Where the court comes to the conclusion that the right to speedy trial of an accused has been infringed, the charges or the conviction, as the case may be, may be quashed unless the court feels that having regard to the nature of offence and other relevant circumstances, quashing of proceedings may not be in the interest of justice. In such a situation, it is open to the court to make an appropriate order as it may deem just and equitable including fixation of time frame for conclusion of trial."

8. The present case needs to be examined in the backdrop of the aforesaid principles. The occurrence is of the year 1982 and the charge sheet was filed in the year 1993, therefore, the investigating agency took about eleven years to finalise the investigation. The matter remained pending for charge for about four years in the court of the Magistrate. Ultimately the charge was framed on 8.12.1997 and the prosecution failed to examine any witness up to 13.5.2005 being the date of the stay order passed by this Court, therefore,the prosecution was granted about eight years to adduce evidence but it failed to examine any witness nor assigned any reason as to why witnesses were not examined during the aforesaid period of about eight years. These facts are evident from the progress report dated 10.5.2011 submitted by the Chief Judicial Magistrate, Deoria. The State (Respondent no.1) has, in the counter affidavit, stated that the complainant Mumtaz Ahmad had come in the year 2004 in the court but his mere presence in the court cannot be treated to be one of the grounds to hold that the prosecution was vigilant in examining its witnesses. I am failing to understand as to why the complainant Mumtaz Ahmad was not examined specially when he was present in the court, therefore, the prosecution has not been able to express any plausible explanation for not examining any prosecution witness during the aforesaid period of about eight years. As such the entire delay after framing of the charge occurred due to laches on the part of the prosecution.

9. Therefore, the petitioner who is an accused of embezzlement of a meager amount of Rs. Three thousand relating to the occurrence of the year 1982, can not be kept waiting for the final decision of the case according to the mercy of the prosecution. His fundamental right to have speedy trial of his case seems to have violated by the State without any proper reason, therefore, I find sufficient merit in the petition.

10. Keeping in view the aforesaid decisions of the Apex Court and the fact that the prosecution failed to examine any witness during the period of eight years and the trial remained pending without any progress and there does not appear to be any justification for the delay, I consider it proper in the interest of justice to quash the proceedings of the criminal case no. 2211 of 1993, State vs. Surya Nath Yadav and another, under sections 467, 468, 419, 420 and 409 IPC, police station Kotwali Deoria, district Deoria.

11. The petition is accordingly allowed. The proceedings of the aforesaid criminal case are quashed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 08.12.2011

BEFORE
THE HON'BLE SUDHIR KUMAR SAXENA,J.

U/S 482/378/407 No. - 5430 of 2011

Dildar and others ...Petitioner
Versus
The State of U.P. ...Respondents

Counsel for the Petitioner:
Sri B.Q Siddiqui

Counsel for the Respondents:
Govt. Advocate

Code of Criminal Procedure-Section 309 and 311-witness are guest of court-like eye and ears of justice-if witness appear before court-proceeding should not be adjourned except for unfair reasons-but engagement of accused counsel in another court or engagement of new counsel-can not be ground for adjournment-order passed by Trail Court-justified-considering inadequate amount towards money to the witness-recommendation made for necessary amendment in Cr.P.C. itself diet

Held: Para 12 and 17

Once witness is in attendance they should not be returned unexamined, keeping in view the provisions of Section 309 Cr.P.C. as amended. Section 309 Cr.P.C. permits adjournments for special reasons. Section 309(2) Cr.P.C., excludes certain reasons like engagement of counsel in other Courts etc. A joint reading of Section 309(1) and Section 309(2) Cr.P.C would show that the intention of legislature is unambiguous i.e. once witness comes to court he should be examined. If adjournment is necessary, then case can be adjourned to next day but that too for special reasons like sudden violence, incapability of witness on account of illness etc.

Witnesses are guest of the court as they are assisting the court in reaching at the correct conclusion, therefore, they are entitled to be treated with respect as they are eyes and ears of the justice. Their stature is above the other stake holders and reluctance of the witness to depose in the court amounts to failure in dispensation of justice. This has to be checked and it is high time High Court looked into this malady and identified the problems faced by them and made their job hassle-free.

Case law discussed:
State of U.P. Vs. Shambhu Nath Singh and Ors. made in Appeal (Criminal) No. 392 of 2001; {1999(7) SCC 604}

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

Heard learned counsel for the petitioners and learned AGA.

1. The petitioners through this petition have challenged the order dated 30-11-2011 whereby application for recalling prosecution witnesses Balak Ram and Surendra Pal has been rejected.

2. It appears that the petitioners are accused under Section 302 and 201 IPC. On 11.11.2010, prosecution examined Balak Ram and Surendra Pal who had identified the skeleton as well as the clothes belonging to the deceased. It is mentioned in the order sheet that opportunity for cross-examination has been given but none came to cross-examine, consequently, cross-examination was closed. On 30.11.2011, petitioners/accused moved application for recalling the above witness as for some reason they could not be cross-examined. This application has been rejected by the trial court vide order dated 30.11.2011. This very order has been impugned herein.

3. Learned counsel for the petitioners submits that he was prepared to cross-examine now and one opportunity may be given. In the petition ground taken is that previous counsel did not cross-examine as such, new counsel has been engaged.

4. It is necessary to have a look at Sections 309 & 311 Cr.P.C.. Relevant provisions are quoted below:-

"309. Power to postpone or adjourn proceedings- *In every inquiry or trial the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded:*

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing."

Fourth proviso to Section 309(2) which has been inserted by Code of Criminal Procedure(Amendment) Act, 2008(5 of 2009) has taken care of such situation. The said proviso is reproduced below:

"(a) no adjournment shall be granted at he request of a party, except where the circumstances are beyond the control of that party;

(b) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment;

(C) where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross-examine the witness, the Court may, if thinks fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be."

5. It is apparent that once witness is in attendance, adjournment has to be refused and has to be granted very rarely and in exceptional circumstances for which special reasons have to be recorded. Even if case is to be adjourned for some reasons then adjournment would be granted only till next day. It is also evident that engagement of lawyer in other court is not a ground for adjournment and court is not supposed to wait for counsel, if witness is present in the court. The court is left with no option but to record the statement of witness and pass further orders dispensing with the cross-examination.

6. In the case at hand, trial court has done the same. It recorded the statement of witnesses and as none came to cross-examine them, opportunity for cross-examination was closed. The order was strictly in accordance with amended provisions of Section 309 Cr.P.C.

7. Section 311 Cr.P.C. gives a discretion to the court to recall or re-examine any person, if the evidence appears to be essential for just decision of the case. This provision has to be read with Section 309 Cr.P.C. as both the provisions provide a light into the scheme envisaged by Code.

8. It has become a common practice that once a witness of the prosecution appears, defence would make all efforts to get the case adjourned. One of the common grounds is engagement of the new counsel or illness of the counsel. Lawyers strike is also taken as a ground for adjournment.

9. So far as strike is concerned, Apex Court in unambiguous terms has held that lawyers have no right to go on strike as such, the Trial Court cannot adjourn the examination of the witnesses if they are present in court, on the ground of the resolution of the Bar Association or Abstention of lawyers from attending judicial work. Moreover, in a Sessions Trial, lawyer is supposed to appear after making preparations and they are not supposed to accept brief on the day, the case is posted for evidence. If client has taken a chance to engage a new lawyer on the day the trial is fixed for evidence changing his previous counsel, Trial Court is not bound by this arrangement and will be fully justified in refusing adjournment on this ground. Similarly, engagement of counsel in other courts is not the ground for adjournment as has been clarified by the amendment of 2009. Speedy trial being the fundamental right of the accused, delay in trial causes immense harm to the society as a whole.

10. If in this background, Section 309 and 311 of Cr.P.C. are interpreted, it is manifest that engagement of new counsel cannot be a ground for recalling the witnesses. Similarly, inadvertence, ignorance, absence or even incompetence of a counsel cannot be the sole ground for exercising powers under Section 311 Cr.P.C.

11. Observations of the Hon'ble Apex Court given in the case of ***State of U.P. Vs. Shambhu Nath Singh and Ors.*** made ***in Appeal (Criminal) No. 392 of 2001*** are being quoted below:

"We make it abundantly clear that if a witness is present in court he must be examined on that day. The court must know that most of the witnesses could attend the court only at heavy cost to them, after keeping aside their own avocation. Certainly they incur suffering and loss of income.....

"It is a sad plight in the trial courts that witnesses who are called through summons or other processes stand at the doorstep from morning till evening only to be told at the end of the day that the case is adjourned to another day. This primitive practice must be reformed by presiding officers of the trial courts and it can be reformed by every one provided the presiding officer concerned has a commitment to duty..... "Even when witnesses are present cases are adjourned on far less serious reasons or even on flippant grounds. Adjournments are granted even in such situations on the mere asking for it. Quite often such adjournments are granted to suit the convenience of the advocate concerned. We make it clear that the legislature has frowned at granting adjournments on that ground. ***At any rate inconvenience of an advocate is not a special reason for bypassing the mandate of Section 309 of the Code.****(emphasis mine)*

"In Rajdeo Sharma (II) Vs. State of Bihar {1999(7) SCC 604} *this Court pointed out that the trial court cannot be permitted to flout the mandate of parliament unless the court has very cogent and strong reasons and no court has permission to*

adjourn examination of witnesses who are in attendance beyond the next working day."

12. Once witness is in attendance they should not be returned unexamined, keeping in view the provisions of Section 309 Cr.P.C. as amended. Section 309 Cr.P.C. permits adjournments for special reasons. Section 309(2) Cr.P.C., excludes certain reasons like engagement of counsel in other Courts etc. A joint reading of Section 309(1) and Section 309(2) Cr.P.C would show that the intention of legislature is unambiguous i.e. once witness comes to court he should be examined. If adjournment is necessary, then case can be adjourned to next day but that too for special reasons like sudden violence, incapability of witness on account of illness etc.

13. Thus, court would be fully justified in rejecting the adjournment on the ground that a new counsel has been engaged or that counsel is engaged in another court if witness is in attendance, Trial Courts have been very lenient in giving adjournments that is why legislature intervened and amended Section 309 Cr.P.C. *Provisions of Section 309 Cr.P.C. as amended are mandatory in nature and Trial Court would be failing in duty, if they do not implement this mandate in letter and spirit.* Trial Courts are supposed to work with the sense of urgency keeping in mind the intention of legislature while amending Section 309 Cr.P.C.

14. Strike of lawyers, engagement of counsel in other cases or engagement of fresh counsel are definitely the reasons not contemplated under Section 309 Cr.P.C. and Trial court would see that no case be adjourned on this ground. If witnesses are present in the court, Sessions Judge would ensure that the courts working under them do not return the witnesses unexamined.

15. From the above, it is apparent that the Trial Court had rightly closed the opportunity of cross-examination and has committed no irregularity/illegality in not recalling those witnesses.

16. Court can take notice of the fact that witnesses in criminal cases are unwilling to testify. While insecurity of witnesses could be one reason, equally important reasons are frequent adjournments, ordeal of criminal cases and lack of proper facilities in court campus for witnesses, which further dampens their spirit.

17. Witnesses are guest of the court as they are assisting the court in reaching at the correct conclusion, therefore, they are entitled to be treated with respect as they are eyes and ears of the justice. Their stature is above the other stake holders and reluctance of the witness to depose in the court amounts to failure in dispensation of justice. This has to be checked and it is high time High Court looked into this malady and identified the problems faced by them and made their job hassle-free.

18. So far as threat or coercion to witnesses is concerned, this is already engaging the attention of law makers and soon they may evolve a witness protection programme so that safety of witnesses is ensured before, during and after trial. One thing significant to note here is that even inside the court premises, witnesses are not safe and incident of beating/misbehaviour with the witnesses in the court premises or inside the court rooms are on the rise. Needless to point out that District Judge being in-charge of the campus is duty-

bound to ensure that no violence occurs in the court's campus. If violence takes place, it should be immediately taken care of and police be immediately moved to arrest the culprits and bring them to justice irrespective of their position whether they are pairokar of the litigants or lawyer or police personnel. Violence in the court campus cannot be tolerated and if the District Judge is unable to check this, it will be treated as failure on his part and the High Court may take suitable action against such District Judge, who failed to prevent violence in the court campus or take proper action in time. The presiding officer in whose court witnesses are not allowed to depose freely without fear will immediately report the matter to the District Judge and ensure proper security as well as conducive ambience for a witness to depose independently and fearlessly.

19. It is also the duty of the District Judge to ensure proper sitting place with minimum infrastructure i.e. toilets, drinking water etc.

20. It is seen that inadequate amount is paid as diet-money to the witnesses under General Rule(Criminal). Witness comes to court from his house missing his one day wages. Even in the National Rural Employment Guarantee Scheme, one gets more the Rs. 100. Rs. 10/- to 15/- is pittance and not sufficient even for snacks what to say for meal.

21. Registrar General and Principal Secretary(Judicial), State of U.P. are directed to take steps and ensure that the amount of diet money which is ridiculously low i.e. Rs. 10/- and 15/-(figures supplied by Registry) is raised now looking to the inflation, minimum wages and the assistance that is provided by witness to the Court.

22. With the aforesaid observation petition is dismissed.

23. Copy of the judgment be sent to Registrar General for placing it before Hon'ble the Chief Justice so that efforts can be made for amending the General Rule(Criminal).

24. Copy of the judgment be sent to Registrar General, High Court and Principle Secretary, Judicial Government of U.P. for necessary action.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.12.2011

BEFORE
THE HON'BLE AJAI LAMBA, J.

Writ Petition No. 6489(MS) of 2011

Sharifunnisa ... Petitioner
Versus
State of U.P. & others ...Opposite parties

Constitution of India -Article 226- Quashing of criminal proceeding-offence u/s 363, 366 I.P.C.-victim after attaining majority-married with accused and living in her matrimonial house-application for disposes of Petition on merit keeping in view of subsequent development of compromise-direction of Magistrate to live with her father-futile exercise-Petition allowed in term of compromise.

Held: Para 8

In view of the above facts and circumstances of the case, it would be in the interest of peace and harmony to allow the petition. Direction issued by the Magistrate in the impugned order dated 10.10.2011 is to the effect that the

petitioner be directed to live with her parents. The petitioner, however, being married and having been rehabilitated in her matrimonial home, no purpose would be served in law, nor it would be in the interest of families to have the petitioner live in her parental house.

(Delivered by Hon'ble Ajai Lamba, J.

(C.M.A. No.126252 of 11:Application for disposal of writ petition)

1. This application prays for disposal of the main petition in view of changed circumstances.

2. Mohd. Iliyas, father of the alleged victim namely Sharifunnisa, lodged an F.I.R. alleging commission of offence under Sections 363 and 366 of the Indian Penal Code. The alleged victim Sharifunnisa, petitioner, admittedly has attained age of majority and has married of her own accord with Halim S/o Mohd. Sajjad on 17.09.2011.

3. As per contents of the application, the parties have settled their disputes by way of compromise, which has also been placed on record alongwith application.

4. Learned counsel contends that in view of the stand of the complainant and the alleged victim, who is living in her matrimonial home, no purpose would be served by continuance of proceedings. Rather, matrimonial life of the petitioner and her husband would be disturbed.

5. Learned counsel for parties pray that the petition be disposed of and order dated 10.10.2011 passed by the concerned Magistrate be quashed.

6. I have considered the contention of the learned counsel for parties.

7. It appears that the parties have settled their disputes by way of compromise and the husband and wife are now living together. Even the complainant, who happens to be the father of the alleged victim, has prayed for disposal of the petition in view of compromise.

8. In view of the above facts and circumstances of the case, it would be in the interest of peace and harmony to allow the petition. Direction issued by the Magistrate in the impugned order dated 10.10.2011 is to the effect that the petitioner be directed to live with her parents. The petitioner, however, being married and having been rehabilitated in her matrimonial home, no purpose would be served in law, nor it would be in the interest of families to have the petitioner live in her parental house.

9. Writ petition is accordingly allowed. Order dated 10.10.2011 is hereby quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.11.2011

BEFORE
THE HON'BLE RAJIV SHARMA, J.

Writ Petition No. 6743 (MS) of 2011

Abhimanyu and others ...Petitioners
Versus
State of U.P. and others ...Opposite parties

Constitution of India, Article 226- admission in under graduate program- minimum eligibility criteria fixed by the Govt. as 50% for general candidate and 45% for reserve category in 10+2 exam-

challenge on ground once the Apex body in meeting dated 30.06.2011 decided criteria as 45% for general and 40 % for SC/ST under AICTE Act 1987-examining body ample power to regulate improving academic standers-policy unless mala fide, arbitrary or unfair-can not be subjected to judicial review by Writ Court.

Held: Para 20

It may also be noted that the policy decision must be left to the Government as it alone can adopt which policy should be adopted after considering all the points from different angles. In matter of policy decisions or exercise of discretion by the Government so long as the infringement of fundamental right is not shown, it is not open for the court to interfere. At the same time, it is also true that the courts, in exercise of their power of judicial review, do not ordinarily interfere with the policy decisions of the executive unless the policy can be faulted on ground of malafide, unreasonableness, arbitrariness or unfairness.

Case law discussed:

[(2000) 5 SCC 231]; [(2000) 9 SCC 1]; [AIR 2004 SC 1861]; [(1999) 7 SCC 120]; [(2001) 9 SCC 157]; [(2011) 4 SCC 527]

(Delivered by Hon'ble Rajiv Sharma, J.)

1. As the common question of facts and law are involved in both the writ petitions, they are taken up together for common orders.

2. Heard Mr. Kapil Dev, Senior Advocate assisted by Mr. Pratyush Tripathi, Mr. Anurag Narain, learned Counsel for the petitioners, Mr. Sanjay Sarin, learned Standing Counsel, Mr. Sailesh Kumar, learned Counsel for the AICTE and Mr. Waseequddin Ahmed, learned Counsel for the University.

3. Afore-captioned writ petitions are directed against the impugned orders dated 10.10.2011 and 15.11.2011 issued by the State Government, by means of which the eligibility criteria in entry level qualification for admission in Under-Graduate programmes has been fixed as 50% for the General Candidates and 45% for the SC/ST candidates, which is against the decision of the Apex Body, i.e. All India Council for Technical Education approved in its meeting dated 28.6.2011 by which the entry level qualification for admission in Under-Graduate programmes was fixed as 45% for the General Candidates and 40% for the SC/ST candidates.

4. Learned Counsel for the petitioners submit that under the All India Council for Technical Education Act, 1987 (hereinafter referred to as the Act for the sake of brevity), it has been empowered to frame rules and regulations for proper management of norms and standard of technical education. The said Regulations are applicable to the Universities and Technical Institutions of Government, Government Aided and Private (Self-Financing) institutions conducting the courses in the field of Technical Education, Training and Research in Engineering, Technology, including MCA, MBA, Pharmacy, Hotel Management etc. notified by the Council from time to time.

5. Petitioners of aforementioned writ petitions are having the requisite qualification as per the eligibility criteria fixed by the AICTE. According to them, by notification dated 4.7.2011, the Apex Body has defined the entry level qualifications for admission in Under-Graduate programmes. The matter was reviewed by the Executive Committee of

the Apex Body in its 69th meeting held on 28th June, 2011 and by the Council in the 21st meeting held on 30th June, 2011 and as per the decision of the Council, the eligibility for under-graduate programmes (full time) given under 1.1 of Appendix-1 of Approval Process Handbook 2011-12 is now 45% at qualifying level for general category students and 40% for reserved category students for admission for the year 2011-12.

6. The grievance of the petitioners is that they are being denied regular admission in B.Tech course against the vacant seats though they possess 45% marks as prescribed by the AICTE and as such denial of regular admission is wholly arbitrary and unjustified.

7. It has been argued by the Counsel for the petitioners that the University or the State Government cannot impose any restriction on the institution which is in utter disregard and contravention of the provisions of the AICTE as no policy can be laid down, which lies outside the scope of the Act. The action of the opposite parties is in gross breach of the provisions contemplated under Article 19 (1) (g) of the Constitution of India and the same is also in violation of the ***Jaya Gokul Educational Trust v. Commissioner-cum-Secretary, Higher Education and others [(2000) 5 SCC 231] and 'State of Maharashtra v. Sant Dhyaneshwar Shikshan Shastra Mahavidyalaya and others [(2000) 9 SCC 1].***

8. In rebuttal, Mr. Waseequddin Ahmed, learned Counsel for the University submits that the UPSEE - 2011 was conducted by Mahamaya Technical University, which was held on 16.4.2011 and 17.4.2011 respectively for different technical courses, including B.Tech., M.B.A., M.C.A., etc. The minimum marks to appear in the examination were modified as 50% marks for General Category and 45% marks for reserved category as per eligibility criteria laid down by the AICTE in its Approval Process Handbook 2011. He further submits that the Mahamaya Technical University had already informed the public at large vide notice dated 7.2.2011 and in all the leading newspapers and also through its website much before examination scheduled for 16.4.2011 and 17.4.2011 respectively.

9. Elaborating his arguments, Counsel for the respondents submitted that the petitioners possessed below 50 % marks in 10+2 and as such they do not fulfill the minimum eligibility criteria as fixed by the Mahamaya Technical University while conducting UPSEE-20011, therefore, they are not entitled to any relief from this Hon'ble Court.

10. Lastly, it has been submitted that number of writ petitions involving similar controversy have already been dismissed and the petitioners have been refused the relief so sought and as such on this ground alone, writ petitions are liable to be dismissed.

11. The main and the only question that arises for consideration is whether it was open for the State Government to prescribe higher qualifications than the minimum qualifications prescribed by the AICTE.

12. Considered the submissions made by the learned counsel for the parties and perused the record.

13. It needs to be noticed that the AICTE has only prescribed the minimum qualifications. The State Government, in its wisdom, could therefore, prescribe qualifications higher than the qualifications prescribed by the AICTE but certainly could not have prescribed lower qualifications. This view of mine is strengthened by the decisions of the Apex Court in **State of Tamil Nadu and another v. S. V. Bratheep (minor) and others** [AIR 2004 SC 1861], following its earlier decision in **Dr. Preeti Srivastava and another v. State of M.P. And others** [(1999) 7 SCC 120] and the observations are as under:-

"..... The appellant in the present case prescribed the qualification of having secured certain percentage of marks in the related subjects which is higher than the minimum in the qualifying examination in order to be eligible for admission. If higher minimum is prescribed by the State Government than what had been prescribed by the AICTE, can it be said that it is in any manner adverse to the standards fixed by the AICTE or reduces the standards fixed by it? In our opinion, it does not. On the other hand, if we proceed on the basis that the norms fixed by the AICTE would allow admission only on the basis of the marks obtained in the qualifying examination the additional test made applicable is the common entrance test by the State Government. If we proceed to take the standard fixed by the AICTE to be the common entrance test then the prescription made by the State Government of having obtained certain marks higher than the minimum in the qualifying examination in order to be eligible to participate in the common entrance test is in addition to the common entrance test. In either event, the streams proposed by the AICTE are not belittled in any manner. The manner in which the High Court has proceeded is that what has been prescribed by the AICTE is inexorable and that that minimum alone should be taken into consideration and no other standard could be fixed even the higher as stated by this Court in Dr. Preeti Srivastava's case. It is no doubt true as noticed by this Court in Adhiyaman's case that there may be situations when a large number of seats may fall vacant on account of the higher standards fixed. The standards fixed should always be realistic which are attainable and are within the reach of the candidates. It cannot be said that the prescriptions by the State Government in addition to those of AICTE in the present case are such which are not attainable or which are not within the reach of the candidates who seek admission for engineering colleges. It is not very high percentage of marks that has been prescribed as minimum of 60% downwards, but definitely higher than the mere pass marks. Excellence in higher education is always insisted upon by series of decisions of this Court including Dr. Preeti Srivastava's case. If higher minimum marks have been prescribed, it would certainly add to the excellence in the matter of admission of the students in higher education.

Arguments advanced on behalf of the respondents is that the purpose of fixing norms by the AICTE is to ensure uniformity with extended access of educational opportunity and such norms should not be tinkered with by the State in any manner. We are afraid, this argument ignores the view taken by this Court in several decisions including Dr. Preeti Srivastava's case that the State can always fix a further qualification or additional

qualification to what has been prescribed by the AICTE and that proposition is indisputable. The mere fact that there are vacancies in the colleges would not be a matter, which would go into the question of fixing the standard of education. Therefore, it is difficult to subscribe to the view that once they are qualified under the criteria fixed by the AICTE they should be admitted even if they fall short of the criteria prescribed by the State. ....."

14. Thus, it cannot be said that the impugned order issued by the State Government whereby the eligibility criteria in entry level qualification for admission in under-graduate programmes has been fixed as 50% for the general candidates and 45% for the SC/ST candidates is unjustified or suffer from infirmities. The State Government is well competent to prescribe higher qualifications than the minimum qualifications prescribed by the AICTE in its notification dated 7th February, 2011.

15. Fixing of percentage for entry level examination in professional courses is a policy decision of the State Government or the Examining Body. Therefore, the Court should not substitute its own opinion for that of the expert body which is entrusted with the work to find out as to what principle or policy would best serve the objects and purposes of the examination and the Courts shall not sit in judgment over the wisdom and effectiveness or otherwise of the policy laid down by the academic body. It is exclusively within the domain of the academic body to determine, as a matter of policy, what measures should be incorporated for the efficient holding of examination.

16. It has been brought to the notice of the Court that 19 petitioners of Writ Petition No. 6743 (MS) of 2011, Abhimanyu and others Versus State of U.P. and others having below 50% marks in 10+2 and as such, they do not fulfill the minimum eligibility criteria fixed by the University while conducting the UPSEE-2011. Therefore, the State Government vide order dated 10.10.2011 passed a detailed order in compliance of the judgment and order dated 25.8.2011 passed in Writ Petition No. 47505 of 2011. The relevant portion of the order dated 25.8.2011 is reproduced hereunder:-

"State Government is the best judge to see what should be standard in technical education in the State of U.P. and State Government is fully empowered to fix eligibility criteria of qualifying examination over and above the eligibility criteria fixed by AICTE. In this background once decision has been taken on 04.07.2011 by AICTE and discussion has been made by Central Committee in its meeting dated 13.07.2011 and there it has been mentioned that Central Admission Committee would consider the matter after counselling process is over. The matter is thus engaging attention. As per Resolution No. 7.6 quoted above as such Technical University Noida is directed to ensure that said meeting is held at the earliest as per convenience of the members who are to participate therein preferably within two months and thereafter on the basis of decision so taken matter be referred to the Principal Secretary Technical Education who will take final decision in the matter in accordance with law, keeping in view the over all situation."

17. In **Thapar Institute of Engineering & Technology and another**

versus Gagandeep Sharma and another [(2001) 9 SCC 157], the Apex Court observed that the court would normally not interfere with such prescribed standards and especially when they are intended to improve the academic standards in their respective institutes.

18. In **Bhartia Education Society and another versus State of Himachal Pradesh and others** [(2011) 4 SCC 527, the Apex Court held that the examining body can impose its own requirements in regard to eligibility of students for admission to a course in addition to those prescribed by NCTE.

19. Thus, it is imminently clear that the State Government and the examining body has ample power to regulate the manner of admission for improving the academic standards in Institutions. The impugned government orders cannot be said to be in breach of the recommendations of the AICTE or in violation of any Article of the Constitution as if, higher minimum marks are prescribed, it would certainly add to the excellence in the matter of admission of the students in higher education. Furthermore, it cannot be said that the prescriptions formulated by the State Government in addition to those of AICTE in the present case are such which are not attainable or which are not within the reach of the candidates who seek admission in professional courses.

20. It may also be noted that the policy decision must be left to the Government as it alone can adopt which policy should be adopted after considering all the points from different angles. In matter of policy decisions or exercise of discretion by the Government so long as the infringement of fundamental right is not shown, it is not open for the court to interfere. At the same time, it is also true that the courts, in exercise of their power of judicial review, do not ordinarily interfere with the policy decisions of the executive unless the policy can be faulted on ground of malafide, unreasonableness, arbitrariness or unfairness.

21. In view of the aforesaid discussions, I am of the firm opinion that the petitioners are not entitled to any relief and the writ petition is liable to be dismissed.

22. It is not disputed by the Counsel for the parties that number of the writ petitions involving similar question have already been dismissed. However, the Counsel for the petitioners made a feign attempt to show that the points raised in the instant writ petition have not been considered on earlier occasions. Having examined the material on record and the submissions made by the Counsel for the parties, I find no force in the submission advanced by the Counsel for the petitioners.

23. It is pertinent to add that uniformity and consistency is core of judicial discipline. There should be similarity in the orders passed by the Court in the cases having identical facts and the judgment passed in earlier case should be respected by the co-ordinate bench in identical matter. In these circumstances, it would not be permissible to take different view on the same set of facts and question of law when earlier writ petitions involving identical question of law have been dismissed.

24. Thus these writ petitions are liable on this ground too as the similar writ petitions have already been dismissed.

25. Taking the holistic view of the matter, I find no good ground to interfere under Article 226 of the Constitution and the writ petitions are hereby dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 15.12.2011

BEFORE
THE HON'BLE DEVI PRASAD SINGH,J.
THE HON'BLE S.C. CHAURASIA,J.

Misc. Bench No. - 11512 of 2011

Munnu and another ...Petitioner
Versus
State of U.P.Through Prin. Secy. Revenue Lko. and others ...Respondents

Counsel for the Petitioner:
A.P.Singh Vats

Counsel for the Respondents:
C.S.C.

Urban Land (Ceiling & Regulation) Act 1976-repealed by Urban Land (Ceiling & Regulation) Repeal Act 1999-Section-4-Abatement of proceeding-pending-on date of enforcement date 18.03.1989-all proceedings stand automatically abated in view of law laid down by Apex Court in Ritesh Tiwari case.

Held: Para 5

In view of above, we dispose of the writ petitions finally directing the revenue authorities/respondents to abide by the judgment of Hon'ble Supreme Court(supra) and not to interfere with the petitioners' peaceful possession of the land in question in case in view of the provisions contained in 1976 Act (supra), the State had not taken possession of the land in dispute.

Case law discussed:
(2007) 11 SCC 90; 2011 (3) SCCD 1382 (SC)

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

1. In this bunch of writ petitions, common question of facts and law are involved, hence, the writ petitions are taken up together and are being disposed of by the present common judgment with the consent of the parties' counsel.

2. The land in dispute falls within the domain of Urban Land (Ceiling and Regulation)Act, 1976. It was repealed by Urban Land (Ceiling and Regulation) Repeal Act, 1999. According to the petitioners' counsel, after repeal of the Act, the proceedings initiated in pursuance to the Repeal Act became nonest and the petitioners are entitled to retain the possession of land in question with hereditary right. Attention of this Court has been invited to the judgment of Hon'ble Supreme Court in the case reported in **(2007)11 SCC 90 Mukarram Ali Khan versus State of U.P and others** and other other judgment reported in **2011(3) SCCD 1382 (SC) Ritesh Tewari and another versus State of U.P. & others.**

3. In the case of Mukkarram Ali Khan (supra), their Lordships of Hon'ble Supreme Court ruled that in view of repeal of 1976 Act(supra) and being adopted by the State of U.P by a resolution as required under Art. 252(2) of the Constitution and the repealing Act having come into force in the State of U.P with effect from 18.3.1999, all pending proceedings under 1976 Act shall be treated to have abated. The operation

portion of the judgment from Mukarram Ali Khan (supra) is reproduced as under :

2. Though many points were urged in support of the appeal, the primary point urged was that possession has not been taken pursuant to orders passed by the authorities under the Act. An affidavit has been filed indicating that the possession of the land has not been taken and the land in question continues to be in possession of the appellant and his sons.

3. Learned Counsel for the respondent-State and its functionaries on the other hand contended that the point regarding earlier adjudication was not urged before the High Court and therefore the High Court has rightly decided that in the absence of any specific plea a new plea cannot be taken before it.

4. It is to be noted that the Act has been replaced under the Urban Land (Ceiling and Regulation) Act, 1999 (in short the 'Repeal Act'). Admittedly the State of Uttar Pradesh has since adopted the provisions of the Repeal Act by a resolution as required under Article 252(2) of the Constitution of India, 1950 (in short the 'Constitution'). Repealing Act has since come into force in the State of Uttar Pradesh with effect from 18.3.1999.

5. Section 4 of the Repeal Act reads as follows:

4. Abatement of legal proceedings- All proceedings relating to any order made or purported to be made under the principal Act pending immediately before the commencement of this Act, before any court, tribunal or other authority shall abate;

Provided that this section shall not apply to the proceedings relating to Sections 11, 12, 13 and 14 of the principal Act insofar as such proceedings are relatable to the land, possession of which has been taken over by the State Government or any person duly authorised by the State Government in this behalf or by the competent authority.

6. In view of the affidavit filed by the appellant to which no objection has been filed, undisputed position is that the State has not taken the possession over the surplus land. Therefore, the proceedings have to be treated to have abated under Section 4 of the Repeal Act.

7. That being so, the appeal deserves to be allowed which we direct."

4. In the case of Ritesh Tewari (supra), again their Lordships of Hon'ble Supreme Court have considered the question with regard to the affect of the repeal Act. Their Lordships held that the communication between the officers of the department shall not be a ground to affect the rights of the parties. With regard to Repeal Act in the case of Ritesh Tewari (supra), Hon'ble Supreme Court has considered earlier judgment and held that all pending proceedings under 1973 Act shall be abated automatically on the commencement of Repealing Act, 1999 provided the possession of the land involved in a particular case has not been taken taken by the State. To quote relevant portion :

"13. We find full force in the submissions so made by Shri Jayant Bhushan to a certain extent, and hold that all proceedings pending before any court/authority under the Act, 1976, stood abated automatically on commencement of the Act 1999 in force, provided the possession of the land involved in a particular case had not been taken by the State. Such a view is in consonance with the law laid down by this Court in Pt. Madan Swaroop Shrotiya Public Charitable Trust vs. State of U.P. And others, (2000) 6 SCC 325: Ghasitey Lal Sahu and another vs. Competent Authority, (2004) 13 SCC 452: Mukarram Ali Khan vs. State of Uttar Pradesh and others, (2007) 11 SCC 90: 2007 (3) SCCD 1344 (SC) and Smt. Sulochana Chandrakant Galande vs. Pune Municipal Transport and others, JT 2010 SC 298."

5. In view of above, we dispose of the writ petitions finally directing the revenue authorities/respondents to abide by the judgment of Hon'ble Supreme Court(supra) and not to interfere with the petitioners' peaceful possession of the land in question in case in view of the provisions contained in 1976 Act (supra), the State had not taken possession of the land in dispute.

6. The writ petitions are disposed of accordingly. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.12.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE S. V.SINGH RATHORE, J.

Misc. Bench No. - 12692 of 2011

Ram Lallan and others ...Petitioner
Versus
State of U.P. Through Secy. Home U.P. Govt. Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri Dileep Singh Yadav

Counsel for the Respondents:
Govt. Advocate

Constitution of India, Article 226-stay of arrest-offence under section 452, 323, 504, 506 I.P.C.-with allegations police trying to arrest ignoring law laid down by this Hon'ble Court as well as the Apex Court-No doubt-direction of Apex Court equally binding upon every court as including Police officer-in absence of specific pleading in writ petition-arrest can not be stayed-as prima faci offence made out-petition dismissed with liberty if any illegality committed by Police contrary to direction of Apex Court-ca approach before appropriate forum.

Held: Para 7

In our view, in this particular case there is no such pleading substantiated with appropriate material that any Police officer is acting illegally so as to warrant any protection/direction from this Court. However, we make it clear that in case any authority acts illegally, it is always open to petitioners to approach appropriate Forum including this Court for appropriate protection but no mandamus at this stage ought be issued particularly when the first information

report shows commission of an offence warranting no interference.

Case law discussed:

Criminal Misc. Writ Petition No. 17410 of 2011 (Shaukin Vs. State of U.P. & others)

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

1. Heard learned counsel for petitioners.

2. Petitioners have come to this Court in this writ petition with prayer for quashing of first information report dated 2.12.2011 in case crime no. 276 of 2011, under Sections 452, 323, 504, 506 I.P.C., Police Station Mandhata, District Pratapgarh.

3. From a bare perusal of first information report, it cannot be said that no offence is made out. Learned counsel for petitioners, at this stage, submitted that Police is unauthorizedly trying to arrest the petitioners and, therefore, their arrest should be stayed till the report is submitted by Police. He placed reliance on a Division Bench Judgment of this Court in **Criminal Misc. Writ Petition No. 17410 of 2011 (Shaukin Vs. State of U.P. & others)** decided on 14.12.2011. A perusal of aforesaid judgment clearly shows that considering the peculiar facts and circumstances involved in that matter, the Court expressed its displeasure at the casual and routine manner by which the concerned Judicial Magistrate allowed judicial remand of accused on mere application moved by the concerned police officer without examining pre-conditions for granting judicial remand laid down in Section 41 (1) (b) Cr.P.C. and the decision of this High Court and Apex Court.

4. It admits no doubt that whenever a law is laid down by Apex Court, it is binding on all the authorities, whether executive or judicial, in the entire Country. The law laid down by Apex Court is the law of land and everybody in this Country is bound to obey the same. Article 141 of Constitution declares that the law declared by the Apex Court shall be binding on all Courts within the territory of India and Article 144 says that all authorities, civil and judicial, shall act in aid of Supreme Court. The supremacy of the law laid down by Apex Court with the binding effect admits no doubt. The executive authorities including the Police, therefore, are neither expected nor can act in a manner which would be contrary to law laid down by Apex Court else the erring official(s) would be responsible to face its consequences. Similarly, if a law has been laid down by this Court, in the State it is binding and ought to be complied by all the authorities concerned whether executive or judicial.

5. However, it cannot be said that whenever a person, against whom a first information report has been lodged, comes to this Court, on his mere asking this Court should pass an order restraining the Police from arresting him unless the pleading in writ petition demonstrate that Police is likely to arrest the petitioner and that too unauthorizedly and illegally. In other words, a petitioner must plead and substantiate that Police authorities are trying to illegally arrest the petitioner before he seeks indulgence of this Court restraining the Police authorities from doing so. The scope of writ petition under article 226 in which a request has been made for quashing of first information report should not be extended like a bail application to be considered by this Court in a routine manner without there being appropriate pleading and material to substantiate the same. It is well settled that Court shall not issue futile and superfluous writs. Unless an allegation is made and

substantiated, such direction ought not to be issued. There is no presumption that the executive authorities including Police shall not act strictly in accordance with law which includes the statutory law as well as the judicial orders issued by Court and in particular the Apex Court. We cannot presume that any authority will be acting illegally unless a specific case is pleaded and substantiated before this Court. The presumption lies in favour of executive authorities that they are acting in accordance with law unless shown otherwise. It is true that at ground level, scenario has deteriorated to some extent and time and again the matters have come wherein the highhandedness, brutality and other illegal acts of Police authorities have been reported to the Courts and the Courts have also passed stern appropriate orders therein but that does not mean that the same would form a rule of practice in every case for such presumption.

6. It is also noteworthy to mention that mere lodging of first information report does not mean that a person has to be arrested necessarily unless the circumstances so justify and the Police authorities have appropriate and genuine reasons for the same. The people's liberty is of paramount importance and cannot be curtailed merely for the reason that a first information report regarding commission of an offence has been lodged since for the purpose of arrest, different conditions are required to exist before any Police officer shall proceed to arrest any person. We have no hesitation in saying that in a suitable and appropriate case, if any illegality on the part of any Police officer is brought out before this Court, we shall not hesitate in taking appropriate stern action in the matter but that would not mean that in every case in a routine manner, this Court should/shall pass order staying arrest of the person accused in a criminal case.

7. In our view, in this particular case there is no such pleading substantiated with appropriate material that any Police officer is acting illegally so as to warrant any protection/direction from this Court. However, we make it clear that in case any authority acts illegally, it is always open to petitioners to approach appropriate Forum including this Court for appropriate protection but no mandamus at this stage ought be issued particularly when the first information report shows commission of an offence warranting no interference.

8. With the aforesaid observation, the writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.12.2011

BEFORE
THE HON'BLE RAKESH TIWARI,J.
THE HON'BLE DINESH GUPTA,J.

Civil Misc. Writ Petition no. 22220 of 2002

Chhotey Lal Dubey ...Petitioner
Versus
State of U.P. through Secy. Home and others ...Respondents

Counsel for the Petitioner:
Sri Madhusudan Dikshit

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 226- punishment withholding integrity for one year-petitioner working as constable in civil police-charged for permitting unauthorized traveling-whole on duty along with six member of Escort Police-no specific allegation against individual

role-DIG by order dated 18.05.1994-allow the representation by exhonorating a Sub-Inspector and Constable but rejected the claim of Petition-Tribunal also declined to interfere-no differentiating circumstances brought on recordfor giving different treatment-punishment based upon arbitrary illegal preliminary enquiry-held-not sustainable.

Held: Para 17

In view of the fact that two persons namely, Sri Shyamdev and Sri Chandrika Prasad, Sub-Inspector and Head Constable have been exonerated from the charge and their integrity has been directed to be certified by the Deputy Inspector General of Police, Railways, Allahabad and that no differentiating circumstances had brought on record by the respondents for giving a different treatment in punishment on basis of an illegal and arbitrary preliminary enquiry conducted in unfair manner against the principles of natural justice to the petitioner, we quash the impugned order dated 7.3.2002 passed by respondent no.2 and the orders dated 27.4.1995 and 18.5.1994 passed by the respondents.

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

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

2. This writ petition has been filed challenging the validity and correctness of the impugned order dated 7.3.2002 passed by the Member, U.P. State Public Services Tribunal, Lucknow, appended as Annexure-2 to the writ petition as well as the order dated 27.4.1995 passed by the Deputy Inspector General of Police, Railways, Allahabad, appended as Annexure-4 to the writ petition. The petitioner also challenges the order of punishment dated 18.5.94 by which his integrity has been withheld.

3. Brief facts of the case as appears from the record are that the petitioner is serving as constable in civil police. He along with six members of the Police Escort was charged for permitting two persons to travel in Train no. 2418 Down Prayagraj Express while they were on duty as GRP Escort on the train. After preliminary enquiry a show cause notice dated 18.5.1994 was issued to all the six persons in the escort including a Sub-Inspector and a Head Constable. They were found guilty and awarded punishment of withholding integrity certificate for one year. It appears from the charges levelled against all the six persons that there was no specific allegation against any one of them.

4. It also appears from the record that Sri Shyamdev, Sub-Inspector and Sri Chandrika Prasad, Head Constable preferred a representation against the order dated 18.5.1994 challenging the findings of the preliminary enquiry by pleading not guilty. The representation was decided by the Deputy Inspector General of Police, Railways, Allahabad in which two aforesaid persons were exonerated from the charge vide order dated 20.5.1995. The petitioner also preferred a representation against the order withholding of integrity which was rejected vide order dated 27.4.1995 by the Deputy Inspector General of Police, Railways, Allahabad holding the petitioner guilty while on the same facts the other two persons namely, Sri Shyamdev and Chandrika Prasad were exonerated. The petitioner, who was constable in the aforesaid escort also moved the U.P. State Public Services Tribunal, Lucknow against the order dated 18.5.1994 by preferring Claim Petition No. 1290 of 1996. It was rejected

vide impugned order dated 7.3.2002 passed by the Member (Administrative), State Public Services Tribunal, Lucknow.

5. The impugned orders are assailed on the ground that the Tribunal has failed to consider the submissions made on behalf of the petitioner and the orders passed by respondent nos. 2,3 and 4 are wholly illegal, arbitrary, contrary to record and are liable to be quashed by this Court.

6. According to the learned counsel for the petitioner, it is settled law that there can be no discrimination in punishing the persons who have been charged for the same offence arising from same incident and found guilty for it, therefore, the petitioner could not have been discriminated by withholding of his integrity with Sri Shyamdev and Sri Chandrika Prasad, the Sub-Inspector and Head Constable who had been exonerated by the same authority particularly in view of the fact that none of the six persons in the escort had been mentioned by the Checking Staff of having taken any bribe or committing any illegality.

7. It is submitted by the learned counsel for the petitioner that once it is found that all the six persons were involved in the same commission of offence then discrimination in the matter of awarding punishment cannot be sustained. It is stated that after the punishment was awarded the petitioner moved an application before the Superintendent of Police, Railways, Allahabad regarding payment of his bonus for the years 1993-94 and 1994-95 which was not given till date on the ground of punishment having been awarded to him.

8. Learned Standing counsel has supported the judgment of the Tribunal by stating that the Tribunal has rightly held that the show cause notice regarding awarding the punishment of misconduct and other show cause notice regarding withholding of integrity certificate are separate, hence mere withdrawal of show cause notice regarding awarding the punishment of misconduct will not be enough to withdraw the other show cause notice, though the aforesaid two show cause notices are based on same facts.

9. After hearing learned counsel for the parties and on perusal of the record we find that in the order dated 20.5.1995, appended as Annexure-1 to the writ petition, certifying the integrity and exonerating Sri Shyamdev and Sri Chandrika Prasad it has been specifically stated that no berth was allotted for the GRP escort in the Coach B-1 in which the Escort was travelling and wherein two unauthorized persons had been found travelling, hence when no berth was allotted by the Railways to the GRP escort in the said Coach. The order dated 20th May, 1995 reads thus:-

"आदेश

उप नि0 श्याम देव व हेड कां0 778 चन्द्रिका प्रसाद द्वारा प्रेषित प्रत्यावेदन जो पुलिस अधीक्षक रेलवे, इलाहाबाद के आदेश संख्याः द–12/94 दिनांक 18–5–94 के विरूद्ध है जिसके द्वारा प्रतिवेदक का वर्ष 1993 का तत्व निष्ठा प्रमाण पत्र रोके जाने का आदेश पारित किया गया है, का अवलोकन किया।

संक्षेप में प्रकरण का वृतान्त यह है कि वर्ष 1993 में जब प्रतिवेदक बतौर हेड0 कां0 सी0डी0ई0 केन्द्र इलाहाबाद में नियुक्त था तो दिनांक 2–9–93 को उसकी ड्यिूटी ट्रेन संख्या 2417 अप एवं 2418 डाउन प्रयाग राज एक्सप्रेस पर देन एस्कोर्ट पार्टी के साथ लगायी गयी थी। रेलवे विभाग के श्री के0सी वशिष्ठ सी0टी0आई व श्री मनोहर लाल निरीक्षक ने अपने अपने स्टाफ के साथ दिनांक 3/4–9–93 को ट्रेन

संख्या 2418 डाउन प्रयाग राज एक्सप्रेस को चेकिंग की तो कोच नं0 एस 6 के बर्थ नं0 68 पर राजेन्द्र कुमार नाम यात्री द्वितीय श्रेणी का टिक लिये हुये अनाधिकृत रूप से वर्ष पर लेटा पाया गया जो रेलवे विभाग द्वारा जी0आर0पी0 एक्कोर्ट पार्टी को आबंटित की गयी थी। पूछने पर उसने बताया कि जी0आर0पी0 वालो को 40 रूपये देकर लेटा हूँ। इसके अतिरिक्त जिस कोच में एम0ओ0पी0 स्थापित की गयी थी उसमें विश्व नाथ नाम का एक व्यक्ति बिना टिकट यात्रा करते हुये पकड़ा गया। जिसने बताया कि वह जी0आर0पी0 एस्कोर्ट वालो के साथ चल रहा है। चेकिंग स्टाफ द्वारा दोनों व्यक्तियों को चार्ज किया गया।

शिकायत प्राप्त होने पर संदर्भित प्रकरण की जांच पुलिस उपाधीक्षक रेलवे इलाहाबाद द्वारा सम्पादित की गयी जिन्होंने जांच से प्रतिवेदक को दोषी पाया। फलस्वरूप प्रतिवेदक का सत्यनिष्ठा प्रमाण पत्र सक्षम अधिकारी द्वारा रोके जाने का आदेश पारित किया गया। पारित आदेश से क्षुब्ध होकर प्रतिवेदक ने प्रस्तुत प्रत्यावेदन मेरे विचारार्थ प्रेषित किया है।

मैंने प्रतिवेदक द्वारा प्रस्तु प्रत्यावेदन उस पर पुलिस अधीक्षक रेलवे इलाहाबाद द्वारा दी गयी प्रस्तर वार टिप्पणी तथा पत्रावली पर उपलब्ध अभिलेखों का सम्यक परिशीलन किया।

दंड पत्रावली पर उपलब्ध अभिलेखों एवं प्रारम्भिक जांच आख्या के अवलोकन से स्पष्ट है कि प्रतिवेदक पर रेलवे विभाग द्वारा भ्रष्टाचार का कोई आरोप नहीं लगाया गया है जो आरोप लगा गये हैं वह केवल आरक्षियों पर है।

जहां तक एस0आर0 कोच में एम0ओ0पी0 स्थापित किये जाने का प्रश्न है अभिलेखों के अवलोकन से स्पष्ट है कि प्रतिवेदक के पूर्व एवं पश्चात भी जब तक कि स्पष्ट आदेश एस एल आर कोचों में जी आर पी एम ओ पी स्थापित न किये जाने के आदेश पारित हुये तब तक इसी कोच में एम ओ पी स्थापित की जाती रही अतः एसएलआर कोच में एम ओपी स्थापित किये जाने हेतु प्रतिवेदक मात्र को ही दोषी नहीं ठहराया जा सकता है।

अभिलेखों के अवलोकन से यह भी स्पष्ञ है कि रेलवे विभाग द्वारा थ्री टियर कोच में जीआर पी एस्कोर्ट पार्टी को कोई बर्थ लिखित रूप से आबंटित नहीं की गयी थी और न ही इस सम्बन्ध में कोई आदेश ही निर्गत किये गये।

उपरोक्त वर्णित परिस्थितियों में प्रतिवेदक का वर्ष 1993 का सत्य निष्ठा प्रमाण पत्र रोके जाने का कोई औचित्य उपलब्ध नहीं है ऐसी स्थिति में प्रतिवेदक के प्रत्यावेदन को स्वीकार किये जाने के अतिरिक्त और कोई विकल्प नहीं है।

प्रतिवेदक के प्रत्यावेदन को एतद्द्वारा स्वीकार करते हुये पुलिस अधीक्षक रेलवे इलाहाबाद द्वारा पारित प्रश्नगत आदेश को निरस्त किया जाता है और यह भी आदेश दिया जाता है कि पुलिस अधीक्षक रेलवे इलाहाबाद प्रतिवेदक की वर्ष 1993 की सत्य निष्ठा प्रमाणित करें।

ह0अ0
(एच0पी0मिश्रा)
पुलिस उप महानिरीक्षक रेलवे
इलाहाबाद।''

10. In the circumstances above, there was no occasion for them to allow any other person to sleep on the said berth alleged to have been allotted to them. Consequently, the question of payment for the berth also does not arise and the finding in this regard in the impugned order is illegal and against the record. Annexure-1 to the writ petition shows that when Train No. 2418 Down Prayagraj Express was checked by the Checking Staff it was found that in Coach No. S-6 one Rajendra Kumar was sleeping on berth no. 68 who was having ticket of second class. Another person Sri Vishwanath was found to be travelling without ticket. Sri Rajendra Kumar has stated before the Checking Staff that he has been allowed to sleep on a berth by some GRP constables by paying Rs.40/- whereas Sri Vishwanath has stated that he was along with the GRP Escort. On the complaint aforesaid two persons who were found to be travelling unauthorizedly in the coach a preliminary enquiry appears to have been held by the Deputy Superintendent of Police, Railways, Allahabad in which he found all the persons to be guilty of charge.

11. A further perusal of Annexure-1 to the writ petition shows that no berth was allotted to the GRP Escort. Therefore, the contention of learned counsel for the petitioner is that in the aforesaid circumstances it cannot be said that the petitioner or any other member of the Escort team had allowed him to sleep on a berth by taking bribe of Rs.40/-. Moreover, it appears that the Superintendent of Police, Railways, Allahabad has given credence and weightage to the statements of two aforesaid persons who were unauthorizedly travelling in the train which was not just and proper as they have made this statement to save their own skin and in any case statement of such culprit/offender of law ought not to have been given credence unless and until there existed incorrigible evidence against the accused. Even the person who has been given berth was neither named nor recognized by them.

12. It further appears from the record that during departmental proceedings the petitioner was neither permitted to cross-examine the complainant nor he was afforded any opportunity to submit documents in his favour as punishment has been awarded to the petitioner on basis of a preliminary enquiry and not a departmental enquiry , therefore, the punishment imposed upon the petitioner suffers from arbitrariness in a very arbitrary manner. The contention of learned counsel for the petitioner that if any complaint has been made and preliminary enquiry was conducted then a copy of said enquiry report ought to have been supplied to the petitioner has force, hence the enquiry on the basis of which the petitioner has been punished can not be said to have been conducted in a proper manner.

13. The record speaks that Sub-Inspector and Head Constable of the GRP Escort were let off on their representation and there was neither any differentiating circumstances mentioned in the charge against all the six persons for different treatment nor any one of them named was identified by the complainant of having committed the alleged misconduct for which they were charged. The order of punishment to the petitioner in the aforesaid circumstances appears to be discriminated.

14. In paragraph nos. 9 and 10 of the judgment the Tribunal has not given any reason as to why it was not unable to agree with the contention of the petitioner for not following the procedure and giving of opportunity of hearing to the petitioner in defence and why withholding of integrity certificate did not amount to punishment particularly when bonus and other benefits were not given to the petitioner till date on the ground that his integrity had been withheld pursuant to a preliminary enquiry conducted against all cannons of the principles of natural justice. Paragraph nos. 9 and 10 of the judgment read thus:-

"9. It was also argued that the impugned order contained in annexure-1 is a non speaking order. I have gone through the impugned order and I find that the Punishing Authority has given cogent reason for coming to the conclusion that the integrity of the petitioner is doubtful. In my opinion, this is a speaking order and no interference is required in this order.

10. It was further argued on behalf of the petitioner that integrity certificate has been withheld by way of punishment and as such the procedure prescribed for giving punishment order should have been followed. I am unable to agree with the contention of the learned counsel for the petitioner. I am of the opinion that withholding of integrity certificate is not a punishment and there appears to be no irregularity or illegality in this case in passing the impugned order. It is apparent from the perusal of the record that the show cause notice was issued before withholding the integrity certificate of the petitioner and his explanation was duly considered by the Punishing authority."

15. Sri H.P. Mishra,Deputy Inspector General of Police, Railways, Allahabad, who has rejected the representation of the petitioner appended as Annexure-4 to the writ petition(which was Annexure-1 in the claim petition before the Tribunal) and had allowed the representation of Sub-Inspector and Head Constable on the same facts arising out of the same incident, has also not given any facts which may be different in the case set up in the two representations one by the Sub-Inspector and Head Constable and the other by the petitioner. The reasons given while rejecting the representation of the petitioner are thus:-

''प्रतिवेदक का प्रथम तर्क मान्य नहीं है क्योंकि प्रारम्भिक जांच आख्या के मध्य रेलवे के चेकिंग स्टाफ के कथनों से स्पष्ट है कि जी आर पी के सिपाही ने 40/– लिया था जिसने रूपया वापस लौटा दिया अतः प्रतिवेदक के इस तर्क में कोई बल नहीं है।

प्रतिवेदक का द्वितीय तर्क मान्य नहीं है **क्योंकि प्रारम्भिक जांच आख्या के अवलोकन से स्पष्ट है कि चेकिंग कानपुर से इलाहाबाद के कोच में की गयी थी। अतः प्रतिवेदक के इस तर्क में कोई बल नहीं है।**

प्रतिवेदक का तृतीय तर्क मान्य नहीं है क्योंकि जांच से रूपया लेने और वापस करने का तथ्य प्रमाणित पाया गया अतः प्रतिवेदक के इस तर्क में कोई बल नहीं है।

प्रतिवेदक का चतुर्थ तक मान्य नहीं है क्योंकि सन्दर्भित प्रकरण में प्रारम्भिक जांच की गयी है जो दंड पत्रावली पर उपलब्ध है अतः प्रतिवेदक के इस तर्क में में कोई बल नहीं है।

प्रतिवेदक का पांचवा तक मान्य नहीं है क्योंकि प्रारम्भिक जांच से रेलवे विभाग द्वारा चेकिंग किया जाना और यात्रियों को अवैध रूप से यात्रा करते हुये पकडा जाना प्रमाणित पाया गया है कि **ऐसी स्थिति में चेकिंग स्टाफ के कथनों में भिन्नता से प्रतिवेदक को कोई लाभ प्राप्त नहीं होता है क्योंकि समय बीत जाने के कारण और याददाश्त की कमी के कारण भिन्नता स्वाभाविक है। अतः प्रतिवेदक के इस तर्क में कोई बल नहीं है।**

प्रतिवेदक ने अपने प्रत्यावेदन में किसी अन्य महत्वपूर्ण बिन्दुओं का और मेरा ध्यान आकर्षित नहीं किया है जो इस स्तर पर मेरे द्वारा विचारणीय हो और जिससे पारित आदेश अवैध होता हो।

उपरोक्त वर्णित परिस्थितियों में प्रतिवेदक के प्रत्यावेदन में कोई बल नहीं है और अस्वीकृत किये जाने योग्य है।

प्रतिवेदक के प्रत्यावेदन को एतद्द्वारा अस्वीकृत किया जाता है।

ह0अ0
(एच0 पी0 मिश्र)
पुलिस उप महानिरीक्षक रेलवे
इलाहाबाद।''

16. A perusal of the rejection of the representation of the petitioner also shows that nobody has been named as to who has returned the money. Merely because some persons have been found by the Checking Staff to be unauthorizedly travelling in the coach who claimed that they have been given berth allotted to GRP Escort on payment of money would not give any benefit to the department as it is apparent from record that no berth

will be reserved/allotted to GRP Staff on escort duty. The benefit in the circumstances, ought to have been given to the members of the GRP Escort who were neither named nor there was any evidence that they were paid money or they had permitted any unauthorized person to travel in the coach. In fact it is the duty of the Checking staff to check the tickets and not the GRP Escort, therefore, variance in the statement was to the benefit of the petitioner and other members of the Escort.

17. In view of the fact that two persons namely, Sri Shyamdev and Sri Chandrika Prasad, Sub-Inspector and Head Constable have been exonerated from the charge and their integrity has been directed to be certified by the Deputy Inspector General of Police, Railways, Allahabad and that no differentiating circumstances had brought on record by the respondents for giving a different treatment in punishment on basis of an illegal and arbitrary preliminary enquiry conducted in unfair manner against the principles of natural justice to the petitioner, we quash the impugned order dated 7.3.2002 passed by respondent no.2 and the orders dated 27.4.1995 and 18.5.1994 passed by the respondents.

18. For the reasons stated above, the writ petition is allowed. We accordingly, direct the authorities concerned to make payment of bonus with interest as well as to certify the integrity of the petitioner which has been withheld. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.12.2011

BEFORE
THE HON'BLE KRISHNA MURARI, J.)

Civil Misc. Writ Petition No. 22407 1995

Deena Nath Shukla ...Petitioner
Versus
Inspector General PAC, Western Zone, Moradabad and others ...Respondents

Counsel for the Petitioner:
Sri Anil Kumar Srivastava
Sri Swarn Kumar Srivastava
Sri Adaarsh Bhushan
Sri P.C. Srivastava
Sri Ashok Khare
Sri Siddharth Khare

Counsel for the Respondents:
C.S.C.

U.P. Temporary Govt. Servant (Termination of Service) Rules 1975 read with U.P. Provincial Armed Constabulary Act 1948-Section 5-U.P. Police Act meant applicable-Termination of Service of Police Constable during probation period-exercising power under Rule 1975-held without jurisdiction-apart from that procedure given under regulation 541-not followed-termination order-not sustainable quashed.

Held: Para 10 and 12

In view of the law settled by the decision of the Apex Court and the Full Bench of this Court, the impugned order terminating the services of the petitioner in purported exercise of powers conferred by 1975 Rules is illegal and without jurisdiction as the provisions of the said Act are not applicable in the case of the petitioner.

There is no averment in the counter affidavit filed by the respondents to

demonstrate that the procedure prescribed by Regulation 541 (2) was followed and any notice was issued setting out the grounds on which it was proposed to discharge him or any opportunity was afforded to the petitioner to show cause before passing the impugned order of termination though the counter affidavit refers to some enquiry in which the statement made by the petitioner that he was mentally disturbed on account of death of his mother was found to be false as his mother was alive but there is nothing on record to show that he was ever given notice or show cause in the manner contemplated in para 541 (2) of the Regulations. Thus, it is clear that the procedure prescribed by Regulation 541 (2) of the Regulations was not followed and the impugned order has been passed in utter violation of the said provision.

Case law discussed:

2000 AWC (3) 2367; AR 1961 SC 751; 2004 (4) ESC (All); AIR 2002 SC 2322

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

1. Heard Sri Adarsh Bhushan, learned counsel for the petitioner and the learned Standing Counsel for the respondents.

2. The facts in brief are that the petitioner was selected for the post of Constable in the year 1993 and was sent for training at Training Centre, Sitapur. While undergoing training, an order dated 26.12.1993 was passed by the Commandant 8th Battalion, PAC, Bareilly, the respondent no. 3 herein, terminating his services in exercise of powers conferred by U. P. Temporary Government Servants (Termination of Services) Rules, 1975 (herein after referred to as the "1975 Rules').

3. Learned counsel for the petitioner has assailed the impugned order on following two grounds:

1. The impugned order having been passed in purported exercise of power under 1975 Rules is illegal and without jurisidction since the said Rules are not applicable to a police constable as the services are governed by the provisions of U. P. P. A. C. Act, 1948 read with the Police Act, 1861 and the Rules and Regulations framed thereunder.

2. The impugned order has been passed in utter violation of para 541 of U. P. Police Regulations which provides the procedure for discharge of a probationer constable and the said procedure has not been followed.

4. In reply, it has been submitted by the learned Standing Counsel that the petitioner is habitual of misconduct and he was only a probationer hence his services have been terminated as no longer required by giving pay in lieu of one month's notice. Referring to the averments made in the counter affidavit, it has been submitted that while undergoing training, the petitioner absconded from the training centre on 22.10.1993 without any permission or leave and he was called back from his residence on 26.10.1993 through special messenger and in this manner he unauthorizedly abstained from the training for three days and for this lapse he was awarded punishment of of 14 days P. D. Parade Drill and the period of absence was sanctioned as leave without pay. However, he submitted his resignation on 06.11.1993 which was forwarded to the Commandant 8th Battalion P. A. C. Bareilly for acceptance but the same was withdrawn by the

petitioner on 14.11.1993 on the ground that he was medically disturbed due to death of his mother. He further submitted that the petitioner again absented himself unauthorizedly since 26.11.1993 and on enquiry his mother was found to be alive. In view of the aforesaid repeated acts of indiscipline, the Commandant 2nd Battalion recommended for suitable action against the petitioner whereupon his services were terminated vide order dated 21.12.1992 exercising powers under 1975 Rules.

5. Appeal and revision filed by the petitioner against the order of termination have also been rejected.

6. The first ground urged by the learned counsel for the petitioner that his services could not have been terminated in exercise of power under 1975 Rules is no longer res integra. A Division Bench of this Court in the case of ***Subhash Chandra Sharma Vs. State of U. P., 2000 AWC (3) 2367*** has held as under :

"Thus, there can be no doubt that if the appropriate Legislature has enacted a law regulating the recruitment and conditions of service, the power of the Governor is totally displaced and he cannot make any Rule under proviso to Article 309 of the Constitution. In ***State of U. P. Vs. Babu Ram Upadhyaya, AIR 1961 SC 751,*** a decision rendered by a Constitution Bench, the Police Act and the U. P. Police Regulations came up for consideration and it was held as follows in paragraph 12 of the Reports :

"the result is that the Police Act and the Police Regulations made in exercise of power conferred on the Government under that Act, which were preserved under Section 243 of the Government of India Act, 1935, continue to be in force after the Constitution so fas as they are consistent with the provisions of the Constitution."

7. A Full Bench of this Court in the case of ***Vijay Singh and others Vs. State of U. P. and others, 2004 (4) ESC (All)*** has held that Rules framed under proviso to Article 309 of the Constitution do not apply to Police personnel as their services are governed by the Police Act, 1861 and the U. P. Police Regulations. In view thereof, the U. P. Temporary Government Servants (Termination of Service) Rules 1975, may not be applicable. In paragraph 64 of the judgment, the Full Bench has observed as under :

"As herein the field is already occupied by the provisions of Act, 1861 which is in operation by virtue of the provisions of Article 313 of the Constitution, thus, Rules 1972 could not be attracted at all. The Government Orders issued for fixing the maximum age for recruitment on subordinate police posts operate in an entirely different field and are not in conflict with the Rules 1972. The case stands squarely covered by the Apex Court judgment in Chandra Prakash Tewari (supra) and, thus, it is not possible for us to take any other view. The submissions made by Mr. Chaudhary that pre-constitutional law stands abrogated altogether by commencement of the Rules 1972, is devoid of any merit. Therefore, our answer to question no. 1 is that the field stood occupied on account of the provisions of Section 2 of the Act 1861."

8. This view also stands fortified by large number of judgments of the Hon'ble

Apex Court referred to and relied upon in the case of Vijay Singh (supra) and also in Chandra Prakash Shahi Vs. State of U. P. and others, AIR 2000 SC 1706.

9. Reference may also be made to the decision of the Hon'ble Apex Court in the case of ***Chandra Prakash Tiwari Vs. Shakuntala Shukla, AIR 2002 SC 2322*** wherein the Hon'ble Apex Court while considering the provisions of U. P. Government Servants (Criterion for Recruitment by Promotion) Rules, 1994 framed under proviso to Article 309 of the Constitution and the Government Order dated 5.11.1965 issued under Section 2 of the Police Act, 1861 held that Rules framed under proviso to Article 309 would not apply since the field is covered by statutory order under Section 2 of the Police Act, 1861.

10. In view of the law settled by the decision of the Apex Court and the Full Bench of this Court, the impugned order terminating the services of the petitioner in purported exercise of powers conferred by 1975 Rules is illegal and without jurisdiction as the provisions of the said Act are not applicable in the case of the petitioner.

11. In so far as the second argument advanced by the learned counsel for the petitioner is concerned the Constables recruited in P. A. C. are governed by the U. P. Provincial Armed Constabulary Act, 1948. Section 5 of the said Act makes the U. P. Police Act 1861 and the Rules and Regulations framed thereunder in the matters not provided in the Act and thus, the Police Regulations are fully applicable in the case of the petitioner. In such view of the matter Regulation 541 providing procedure for termination of probationer constable becomes applicable in the case of the petitioner. Para 541 (2) of the Regulations read as under :

"In any case in which either during or at the end of the period of probation, the Superintendent of Police is of opinion that a recruit is unlikely to make a good police officer he may dispense with his service. Before, however this is done the recruit must be supplied with specific complaints and grounds on which it is proposed to discharge him and then he should be called upon to show cause as to why he should not be discharged. The recruit must furnish his representation in writing and it will be duly considered by the Superintendent of Police before passing the orders of discharge."

12. There is no averment in the counter affidavit filed by the respondents to demonstrate that the procedure prescribed by Regulation 541 (2) was followed and any notice was issued setting out the grounds on which it was proposed to discharge him or any opportunity was afforded to the petitioner to show cause before passing the impugned order of termination though the counter affidavit refers to some enquiry in which the statement made by the petitioner that he was mentally disturbed on account of death of his mother was found to be false as his mother was alive but there is nothing on record to show that he was ever given notice or show cause in the manner contemplated in para 541 (2) of the Regulations. Thus, it is clear that the procedure prescribed by Regulation 541 (2) of the Regulations was not followed and the impugned order has been passed in utter violation of the said provision.

13. In view of the above facts and discussions, the writ petition succeeds and is allowed. The termination order dated 26.12.1993 passed by the respondent no. 3, Commandant 8th Battalion, P. A. C., Bareilly as well as the appellate and revision orders dated 23.9.1994 and 30.1.1995 passed by the respondents no. 2 and 1 respectively are hereby quashed. The petitioner shall be entitled for reinstatement with all consequential benefits as admissible to him under law.

14. However, in the facts and circumstances, there shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.12.2011

BEFORE
THE HON'BLE SUNIL HALI,J.

Civil Misc. Writ Petition No. 25314 of 2007

Vinod Kumar Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri G.K. Singh
Sri V.K. Singh
Sri K.R. Singh
Sri U.C. Tripathi

Counsel for the Respondents:
C.S.C.

U.P. Recruitment of Dependants of Govt. Servants(Dying in Harness) Rules, 1974-Rule-2 (2)-Compassionate appointment-father of petitioner working as part time Tube-well operator-died in harness-appointment refused on ground of regularization of his father was rejected being appointed after cut off date-not entitled-for appointment-definitions given under rule 2(2)-no where provides the appointment should be permanent/regular basis-held-entitled for appointment.

Held: Para 6

Rules no where provides that the benefit is to be accorded to the persons who are permanently appointed. The rules provide that even persons who are appointed on temporary basis and are continuously working are also entitled to the benefit. The intended purpose of the Rules is to provide succor to the family of the deceased who died in harness. It is the continuous relationship of master and servant which gives benefit to the employee seeking such benefit. There must be an element of continuity then the benefit is to be conferred to the person who has been appointed even temporarily. The continuity of a person for a longer period of time clearly gives a message that his services is required by the State. The status of the employee in that behalf could not be relevant.

Case law discussed:
Civil Misc. Writ Petition No. 51469 of 2005 (Vijay Kumar Yadav versus State of U.P. and others).

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

1. Petitioner's father was appointed as Part-time Tube Well Operator on 26.3.1987 and was paid salary @ Rs. 299/- per month. The salary of the petitioner' father was fixed in the pay scale of rs. 950-1500/- with effect from 18.5.1994 and thereafter w.e.f. 1.1.1996 his salary was fixed in the pay scale of Rs. 3050-4590. He continuously worked on the said post without any break.

2. It is contended by the learned counsel for the petitioner that the petitioner's father was working in clear vacancy even though on temporary basis

for more than 19 years. Petitioner's father is stated to have died on 19.9.2006. After death of his father, petitioner moved an application before the Executive Engineer, Nalkoop Khand, Jaunpur seeking employment under the U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 (hereinafter referred to as the Rules). The application of the petitioner was rejected on the ground that the deceased was not a regular employee of the department and as such, the benefit of the aforesaid rules can not be given to him.

3. I have heard learned counsel for the parties.

4. Rule 2(2) of the U.P. Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 is quoted below :-

2. Definitions :- In these rules, unless the context otherwise requires :

(a) "Government servant means a Government servant employed in connection with the affairs of Uttar Pradesh, who -

(i) was permanent in such employment; or

(ii) though temporary had been regularly appointed in such employment; or

(ii) though not regularly appointed, had put in three years continuous service in regular vacancy in such employment."

Sub-rule (ii) of the aforesaid Rules contemplates that a person would be Government servant if he is regularly appointed even temporary. The case of the petitioner is that his father has continuously worked on the aforesaid post right from the year 1987, even though his services had not been regularized in terms of the rules of 1996. His case for regularisation of services was rejected on account of the fact that he was appointed after the cut-off date provided.

5. The stand of the respondent is that only the regular person appointed substantively whose legal heirs are entitled for the benefit of the aforesaid Rules.

6. Rules no where provides that the benefit is to be accorded to the persons who are permanently appointed. The rules provide that even persons who are appointed on temporary basis and are continuously working are also entitled to the benefit. The intended purpose of the Rules is to provide succor to the family of the deceased who died in harness. It is the continuous relationship of master and servant which gives benefit to the employee seeking such benefit. There must be an element of continuity then the benefit is to be conferred to the person who has been appointed even temporarily. The continuity of a person for a longer period of time clearly gives a message that his services is required by the State. The status of the employee in that behalf could not be relevant.

7. Learned counsel for the petitioner has placed reliance on a decision of this Court in **Civil Misc. Writ Petition No. 51469 of 2005 (Vijay Kumar Yadav versus State of U.P. and others).**

8. In view of the aforesaid discussion, I allow the writ petition and set aside the impugned orders dated 7.2.2007 and 23.2.2007 passed by respondent nos. 2 and 3 respectively and respondents are directed to consider the claim of the petitioner and appoint him on compassionate ground under the aforesaid Rules of 1974 provided he is eligible under the Rules to hold the post. Let this process be completed within a period of three months from the date a certified copy of this order is produced before the respondents.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.12.2011

BEFORE
THE HON'BLE SANJAY MISRA,J.

Civil Misc. Writ Petition No. 35299 of 2005

Totaram and others ...Petitioners
Versus
Asst. Comm. Saharanpur Division & others ...Respondents

Counsel for the Petitioner:
Sri Rajiv Gupta
Sri V.C. Misra
Sri H.B. Singh
Sri Vivek Misra

Counsel for the Respondents:
C.S.C

Constitution of India, Article 226-cancellation of supply-fair price dealer-challenged prior cancellation of supply no opportunity given-mere lodging F.I.R. Can not be ground for cancellation-license of petitioner neither suspended nor canceled-petitioner by producing forged receipt succeeded to get supply-even if ready to deposit said amount-supply can not be restored-fraud vitiate every thing-principle of Natural Justice can not be evoked who guilty of playing fraud-moreover can approach before S.D.O.-who consider the defence and take appropriate decision-petition disposed of.

Held: Para 25

Therefore, while upholding the imputation in the impugned order to that extent it is held that stopping the supply of essential commodities to the petitioner was not an act which was required to be done only under a power conferred but because there was fraud committed by the petitioner hence the doctrine or principle 'fraud vitiates the most solemn act' came into play and the action of the respondents in passing the impugned order cannot be held to be against law or guidelines as contained in the government order.

Case law discussed:
2011 (3) AWC 3180; 2009 All.C.J. 335; 2007 (1) AWC 54; 2001 (1) ALJ 332; 2004 All.C.J. 208

(Delivered by Hon'ble Sanjay Misra,J.)

1. Heard V.C. Misra, learned senior counsel alongwith Sri Haribansh Singh, learned counsel for the petitioner and learned Standing Counsel for the State-respondents.

2. Counter and rejoinder affidavits have been exchanged between the parties.

3. This writ petition has been filed assailing the order dated 08.08.2000 (Annexure No.4 to the writ petition) passed by the District Supply Officer, Muzaffar Nagar as also the order dated 12.04.2005 (Annexure No.6 to the writ petition) passed by the Assistant Commissioner (Food) on the appeal/representation No.66 of 2005 made by the petitioner.

4. Learned counsel for the petitioner has submitted that under the impugned order the Respondent No.2 has on the basis of lodging of an F.I.R. suspended the supply of essential commodities to the fair price shop of the petitioner and has attached the supply with the persons mentioned in the impugned order dated 08.08.2000. Learned counsel has assailed the impugned order on the ground that it has been passed without any show cause notice and without opportunity of hearing to the petitioner and secondly on the ground that mere lodging of an F.I.R. against the petitioner could not be a ground to suspend the supply of the petitioner. His other ground is that in absence of suspension of the fair price shop license or cancellation of the fair price shop license the respondent could not suspend the supply and keep the matter pending indefinitely.

5. He has assailed the appellate order by saying that the appellate authority has wrongly rejected his appeal by holding that it has no jurisdiction to entertain such appeal.

6. Learned counsel for the petitioner has placed reliance on a Division Bench decision of this court passed in the case of ***"Smt. Raj Kumari Singh Vs. State of U.P. & others", reported in 2011(3) AWC 3180*** to state that the fair price shop license cannot be cancelled merely on filing of an F.I.R. and therefore the impugned order being without application of mind requires to be set aside.

7. He has also placed reliance upon a Division Bench judgment in the case of ***"Gulab Chandra Ram Vs. State of U.P. & others", reported in 2009 All.C.J. 335,*** to state that when an order passed canceling the fair price shop license, is in violation of principle of natural justice and the procedure prescribed in the Government Order dated 29.07.2004 the same cannot be upheld and is liable to be set aside.

8. He has further placed reliance on a Division Bench judgment of this court in the case of ***"Shiv Raj Singh Vs. State of U.P. & others"*** reported in ***2007(1) AWC 54*** to state that when no notice was given before passing of the suspension order and the inquiry is not being completed within one month as required under the Government Order the suspension order automatically ceased and is deemed to have been revoked.

9. He has also placed reliance on a Division Bench judgment of this Court passed in the case of ***"Naumi Ram Vs. Deputy Collector, Azamgarh and others", reported in 2001(1) ALJ 332*** to state that supply of food grains cannot be stopped by the authority only on the basis of mere allegation or complaint, particularly, when no opportunity of hearing was provided to the petitioner.

10. He has lastly placed reliance on a decision of the Supreme Court in the case of ***"State of Bihar Vs. Lal Krishna Advani & others",*** reported in ***2004 All. C.J. 208*** to state that the right to reputation is right to live and failure to comply with the principal of natural justice render the action nonest.

11. Learned Standing Counsel has justified the impugned order by saying that neither the license of the petitioner has been suspended nor cancelled and only the supply has been stopped for the allegations made therein. He places

reliance on his counter affidavit to state that during pendency of the investigation under the F.I.R. the supply has been suspended and as soon as the Case No.87 of 2002 pending in the Court of Chief Judicial Magistrate, Ist, Muzaffar Nagar, is decided, the authority will take a decision in accordance with law on the said allegations.

12. Insofar the submission of learned counsel for the petitioner that the principle of natural justice has been violated when no notice has been given to the petitioner is concerned, the fact of the case establishes that no notice was given prior to stopping the supply of the petitioner. The fact that supply has been stopped only because of lodging of an F.I.R. and that his license has not been suspended nor it has been cancelled is also borne out from the record. The respondent has also admitted such fact and in the counter affidavit it has been stated that the matter in pursuance of the F.I.R. is pending before the Chief Judicial Magistrate, Ist, Muzaffar Nagar and, therefore, upon conclusion of the said proceedings necessary orders, if any, will be passed by the authority.

13. Insofar as the impugned order dated 08.08.2000 is concerned, the allegation made therein is that without depositing the amount in the bank, the petitioner produced a forged deposit slip of the bank and picked up the essential commodities from the godown which is a forgery and is sufficient to suspend the supply of the petitioner. To this the petitioner has referred to Annexure No.5 of the supplementary affidavit which is an opinion of the DGC (Civil) and has submitted that the petitioner is ready to deposit the amount for the supply lifted by him and he has already deposited Rs.6 lakhs with respect to a part of supply lifted by him and is ready to deposit the balance of Rs.36 lakhs.

14. The recitation in the impugned order indicates that the petitioner has submitted forged deposit slip of the bank to lift the supply. The petitioner admittedly lifted the supply on the basis of forged deposit slip produced by him, therefore, insofar as his agreeing to deposit the amount for the lifted essential commodities is concerned, that is a stand taken after forgery has been committed hence he cannot deny that he did commit forgery by depositing a forged deposit slip of the bank. Once forgery has been committed any amount of justification given for it or trying to say that he will deposit the amount cannot absolve the petitioner from the forgery committed by him.

15. The fair price shop license has not been cancelled nor it has been suspended. One of the argument is that there is no power with the authority to suspend the supply under the Government Order or the rules/guidelines applicable for running a fair price shop. The submission is that there is power of suspension or cancellation. Insofar as the above submission is concerned, there is no doubt that there is power of suspension and cancellation of the fair price shop license which has not been exercised in the present case but what the authority has done is that it has suspended the supply of essential commodities for the reason of forgery and that an F.I.R. has been lodged and the matter is pending before the Chief Judicial Magistrate, Ist, Muzaffar Nagar, in Case No.87 of 2000. In the counter affidavit it has been stated that the

supplies have been stopped and the authority will consider the resumption of supply or proceedings for cancellation or suspension of the shop in question after the case before the Chief Judicial Magistrate, Ist, Muzaffar Nagar has concluded.

16. The decision in the case of Smt. Raj Kumari Singh (Supra) related to cancellation of the fair price shop dealership merely on filing of an F.I.R. In the present case the fair price shop of the petitioner has not been cancelled hence no benefit can be given to the petitioner.

17. In the case of Gulab Chand Ram (Supra) the cancellation of license was in complete violation of the principles of natural justice. In the case of the petitioner his license has not been cancelled hence the question is quite different.

18. In Shiv Raj Singh (Supra) the license was suspended without giving any notice and the time schedule for completing the enquiry was not adhered to. In the petitioner's case there is no order of suspension of license nor any enquiry is being held by the Respondent No.2 as yet.

19. In Naumi Ram (Supra) a complaint was made with certain allegations and supply of essential commodities was stopped. The court held that mere complaint with allegations is not sufficient to stop supply particularly when there is no power to stop supply of essential commodities.

20. The Supreme Court in the case of Lal Krishna Advani (Supra) held that failure to comply with the principles of natural justice would render the action non-est. It was dealing with a case under the Commission of Inquiry Act, 1952.

21. When all these above facts and law are taken into account then while exercising jurisdiction under Article 226 of the Constitution of India, the court cannot ignore where there is allegation of forgery. Applying the principle of natural justice in a case of forgery where an F.I.R. has been lodged would be an unnatural expansion of the principle of natural justice for giving benefit to a person.

22. The Supreme Court in the case of Jharu Ram Roy Vs. Kainjit Roy and others, reported in 2010(2) AWC 2003 while dealing with a case under Section 43 of the Transfer of Property Act held that fraud vitiates all solemn acts. In the cases of State of Punjab Vs. Jagdish Singh AIR 1964 SC 521, Champak Lal Vs. Union of India AIR 1964 SC 1854, State of Bombay Vs. Sanbhghad AIR 1957 SC 892 and in R. Vishwanath Pillai Vs. State of Kerala 2004(1) UPLBEC 507 it was held that if benefit is obtained by committing fraud then the authorities are not obliged to comply the principles of natural justice before cancelling the advantage obtained by such fraud. In the cases of U.P. Junior Doctors Action Committee Vs. Dr. B. Sheetal Nandwari AIR 1991 SC 909 and in Krishna Yadav Vs. State of Haryana AIR 1994 SC 2166, it was held that fraud vitiates everything.

23. Therefore when the petitioner has played fraud by producing forged deposit receipt of the bank and taken supply of essential commodities from the godown to the extent of nearly Rs.Forty Two lakhs then all his solemn acts now

being canvassed are vitiated due to the fraud committed by him. He cannot be permitted to be spared of the fraud committed by him even if now he deposits the amount. Once his fraud was detected the authorities were not obliged to comply with the principles of natural justice otherwise it would amount to the expansion of the principle not to ensure justice but to protect an action of fraud. That cannot be a call envisaged in the concept of the principles of natural justice.

24. In view of the aforesaid circumstances, where on the one hand the petitioner cannot be deprived of conducting his business without any suspension or cancellation of his fair price shop but he also cannot be permitted to go scot free after having committed a fraud.

25. Therefore, while upholding the imputation in the impugned order to that extent it is held that stopping the supply of essential commodities to the petitioner was not an act which was required to be done only under a power conferred but because there was fraud committed by the petitioner hence the doctrine or principle 'fraud vitiates the most solemn act' came into play and the action of the respondents in passing the impugned order cannot be held to be against law or guidelines as contained in the government order.

26. This writ petition is disposed of finally by requiring the Sub Divisional Officer, Muzaffar Nagar (Respondent No.2) to consider the defence of the petitioner after giving him an opportunity and while doing so the Respondent No.2 must also take a decision as to whether the license of the petitioner requires to be suspended or cancelled for the aforesaid reason.

27. The writ petition is finally disposed of.

28. No order is passed as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 13.12.2011

BEFORE
THE HON'BLE SHRI KANT TRIPATHI,J.

Criminal Misc. Application No. 38177 of 2011

Manish Shukla and others ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Shashi Kant Shukla

Counsel for the Respondents:
Govt. Advocate

Protection of Domestic Violence-Act-Section 27-territorial Jurisdiction-incident took place at Gonda-aggrieved lady residing at Basti-held-choicer of aggrieved shall prevail-no interference called for.

Held: Para 5

The court where the respondent resides, carries on business or is employed has also jurisdiction. The court within whose local jurisdiction, the cause of action wholly or partly arises, has also jurisdiction. It is open to the aggrieved person to choose any of the said courts for filing the complaint and she can not be compelled to file the complaint according to the choice of the respondents.

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

1. Heard Mr. Shashi Kant Shukla for the petitioners and the learned AGA for the State and perused the record.

2. This is a petition under section 482 of the Code of Criminal Procedure (hereinafter referred to as 'the Code') for quashing the order dated 16.11.2011 passed by the Sessions Judge, Basti in criminal appeal no. 53/2011, Manish Shukla & others vs. Smt. Pratima and others, and also the order dated 15.10.2011 passed by the Chief Judicial Magistrate, Basti in case no. 1785/2011, Smt. Pratima Shukla vs. Manish Shukla & others,

3. Mr. Shashi Kant Shukla appearing for the petitioners submitted that according to the allegations made in the complaint the domestic violence against the respondent no.2 took place in district Gonda and the respondent no.2 moved application to the Protection Officer, Gonda regarding the domestic violence on which basis, the Protection Officer submitted domestic violence report to the court of C.J.M. Basti. It was next submitted that when the domestic violence report was of the district Gonda, filing of the complaint in district Basti was not proper, therefore, Basti court had no jurisdiction to pass any order.

4. It appears that the respondent no. 2 has filed a petition under section 12 of the Protection of Women from Domestic Violence Act (hereinafter referred to as 'the Act') against the petitioners in the court of CJM Basti and the petitioners, on appearance before the court concerned, raised the question of territorial jurisdiction and contended that the CJM Basti had no jurisdiction. The CJM rejected the contentions of the petitioners and held that he had jurisdiction to entertain the complaint. The Sessions Judge was also of the same view.

5. In my opinion, the question of jurisdiction of the Magistrate does not depend upon the domestic violence report of the Protection Officer. The said question is to be decided according to the provisions of section 27 of the Act, according to which, the court of Magistrate, within the local limits of whose jurisdiction, the aggrieved person permanently or temporarily resides or carries on business or is employed, has jurisdiction in the matter. The court where the respondent resides, carries on business or is employed has also jurisdiction. The court within whose local jurisdiction, the cause of action wholly or partly arises, has also jurisdiction. It is open to the aggrieved person to choose any of the said courts for filing the complaint and she can not be compelled to file the complaint according to the choice of the respondents. In the present matter, the respondent no.2, who lives in district Basti, chose to file complaint in the court of CJM Basti, therefore, her complaint can not be said to be not maintainable in the said court only on the ground that the domestic violence report was obtained from the Protection Officer of the district Gonda. The question of jurisdiction was not to be decided on the basis of the office of Protection Officer or his report, rather it was to be decided only in the terms of the provisions of section 27 of the Act. The learned CJM as well as the Sessions Judge have considered the question of jurisdiction according to the parameters provided in section 27 of the Act after looking into the allegations made in the

complaint and have passed proper orders, therefore, the matter requires no interference.

6. Mr. Shashi Kant Shukla lastly submitted that the domestic violence report has been transferred on the request of the respondent no.2 from the Protection Officer, Gonda to the court of CJM Basti. This could not be done and the Protection Officer has no jurisdiction to act on the request of the respondent no.2. In my opinion, when the judicial matter under section 12 of the Act was pending in the court of CJM, who was competent to decide the question of domestic violence, the submission of the report even on the request of the respondent no.2 to the court of CJM, Basti can not be said to be contrary to law.

7. The petition has no merit and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.12.2011

BEFORE
THE HON'BLE RAN VIJAI SINGH,J.

Civil Misc. Writ Petition No. 44148 of 2008

Haseeb Ahmed @ Rassu ...Petitioner
Versus
The Commissioner, Kanpur Mandal Kanpur and others ...Respondents

Counsel for the Petitioner:
Sri Shailendra Singh
Sri Ankur Goyal

Counsel for the Respondnets:
C.S.C.

Arms Act-Section 17-Cancellation of fire arm license-license given considering incident of murder of his family member involvement in crime against world without specific allegations and role can not be ground for cancellation.

Held: Para 20

After going through the reply of the petitioner to the show cause notice, it transpires that on account of two murders in petitioner's family, for his personal safety, the petitioner has applied for firearm licence and he was granted the same in the year 2000. There is no allegation, except the present one, that the petitioner has ever misused his firearm licence or have ever committed any crime. Merely by saying that a person has entered into world of crime, cannot be said to be sufficient for cancelling the firearm licence of a person, which was granted after due deliberations and due inquiry and after verifying the credentials of the petitioner. The apprehension cannot be made basis for cancellation of the firearm licence. The relevant section for cancellation of firearm licence is very unambiguous and clear in this regard.

Case la discussed:
2009 (4) ADJ 33 (LB)

(Delivered by Hon'ble Ran Vijai Singh,J.)

1. This writ petition has been filed with the following prayers:

"A. Issue a writ, order or direction in the nature of certiorari calling for the records of the case and quashing the imkpugned order dated 29.2.2008 passed by respondent no. 1 and order dated 25.10.2007 passed by respondent no. 2 (Annexure 5 and 2 to this writ petition)

B. Issue a writ, order or direction in the nature of writ of mandamus commanding the respondents to release the weapon of the petitioner during the

pendency of the writ petition before this Hon'ble Court.

C. Issue any other writ, order or direction, as this Hon'ble Court may deem fit and proper in the circumstances of the case.

D. An award of the petition in favour of the petitioner."

2. Vide order dated 25.10.2007 the petitioner's firearm license no. 53 D.B.B.L.,gun no. 29450 was cancelled by the District Magistrate, Kanpur Dehat. Whereas vide order dated 29.02.2008 petitioner's appeal against the said order has been dismissed by the Commissioner, Kanpur Division, Kanpur.

3. On an application of the petitioner for firearm licence, a license no. 53 of 2000 was issued to the petitioner for having DBBL gun. The license of the petitioner was renewed from time to time and it was lastly renewed on 31.12.2008. It appears that a first information report was lodged against the unnamed persons bearing case Crime No.50 of 2007 under Section 324/308 I.P.C., taking note of that the Superintendent of Police Kanpur Nagar has sent a report on 02.07.2007 to the District Magistrate, Kanpur Dehat on the basis of the report of Station House Officer dated 13.06.2007 stating therein, that the licencee no. 53 of 2000 has now entered in the crime, therefore, having license with him will be detrimental to the pubic peace and safety. Taking note of that, a show cause notice was issued to the petitioner by the District Magistrate requiring the petitioner to show cause as to why his license of D.B.B.L., gun be not cancelled.

4. The petitioner, herein, has filed a detailed reply on 9.8.2007, denying the allegation of the show cause notice. It has been stated in the notice that the father and dada of the petitioner were Gram Pradhans of the village about 30 years. However, dada of the petitioner, late Sultan Ahmed, was murdered by one Bikar Ahmed, Saqil and Atik on 11.1.1994. The Pairvi of that case was being done by the father of the petitioner. Because of that, he was also murdered, in which the petitioner's brother, Mujib Ahmed, is an eye witness. Taking all those into consideration, the firearm licence was issued to the petitioner for personal security and safety of the petitioner. It is also stated that the brother of the petitioner has complained against the Station House Officer, Sri B.D. Awasthi, and in inquiry, he was found guilty and later on he was transferred. The petitioner, being brother of Mujib Ahmed @ Guddu, has been made victim and proceeding for cancellation of the firearm licence of the petitioner has been initiated. It has also been stated that the petitioner was neither present on the spot when the incident took place nor he ever had used firearm. It is also contended that except the present case, on account of which, notice has been issued to the petitioner, no other F.I.R. has been lodged against the petitioner. Petitioner is a peace loving citizen and his entire family is respectable, but due to election enmity, and hostility of police against petitioner's brother, this proceeding has been initiated against the petitioner. It is also stated that the petitioner has never breached any condition of the licence.

5. The District Magistrate, after considering the contents of show cause notice, police report and the petitioner's

reply, has come to the conclusion that continuance of the firearm licence of the petitioner will not be in public interest and safety and cancelled the same by the impugned order dated 25.10.2007.
The appeal filed by the petitioner too was dismissed by the Divisional Commissioner on 29.2.2008.

6. While assailing these impugned orders, learned counsel for the petitioner submitted that merely on the basis of the apprehension of breach of peace and public safety, the firearm licence of the petitioner could not have been cancelled. There is also no material on record to suggest that the petitioner is a man of criminal nature, which has been made basis for cancellation of the firearm licence of the petitioner. It is also contended that for the cases lodged against the petitioner's brother, the petitioner cannot be blamed as he is living independently of his brother. Therefore, also this could not have been made basis for cancellation of firearm licence.

7. In the submissions of the learned counsel for the petitioner, merely on account of the apprehension, lodging of an F.I.R., the firearm licence cannot be cancelled. It is also submitted that before cancelling the licence, the District Magistrate ought to have recorded his own satisfaction with respect to the breach of peace and public safety on the basis of the material available on record, but the District Magistrate, without recording his satisfaction, after considering the material available on record, has merely endorsed the report of the police authorities and passed the impugned order. The appellate court too has committed the same error and dismissed the appeal. In the submissions of learned counsel for the petitioner, the impugned orders are unsustainable and deserve to be quashed.

8. Refuting the submissions of the learned counsel for the petitioner, learned Standing Counsel submits that the petitioner and the petitioner's brother are living together and since the petitioner's brother is a notorious criminal and large number of cases are pending against him, therefore, continuance of firearm licence in favour of the petitioner will not be in public interest, public peace and safety. In the submissions of the learned Standing Counsel, the orders passed by the authorities cannot be said to be arbitrary as the same have been passed only after considering the material available on record. Therefore, the writ petition deserves to be dismissed.

9. I have heard Sri Shailendra Singh, holding brief of Sri Ankur Goyal, learned counsel for the petitioner, learned Standing Counsel for the respondents and perused the records.

10. In substance, the proceeding of cancellation of firearm licence of the petitioner has been initiated on account of case crime no. 50 of 2007 under sections 324 and 308, I.P.C. Taking note of the aforesaid F.I.R., a show cause notice was issued to the petitioner, indicating therein that the petitioner has entered into crime world and continuance of firearm licence in his favour would not be in the public interest, public peace and safety. The copy of the F.I.R. has been brought on record as Annexure 6 to this writ petition, in which balled allegations have been made against the Muslim community.

11. The power of variation/suspension and revocation of licence is vested with the licensing authority but licensing authority can do so in accordance with the provisions contained under Section 17 of the Arms Act, 1959. For apprehension, the relevant portion of Section 17 is reproduced below:

"17. Variation, suspension and revocation of licenses :- (1) The licensing authority may vary the conditions subject to which a licence has been granted except such of them as have been prescribed and may for that purpose require the licence-holder by notice in writing to deliver-up the licence to it within such time as may be specified in the notice.

(2) The licensing authority may, on the application of the holder of a licence, also vary the conditions of the licence except such of them as have been prescribed.

(3) The licensing authority may by order in writing suspend a licence for such period as it thinks fit or revoke a licence-

(a) If the licensing authority is satisfied that the holder of the licence is prohibited by this Act or by any other law for the time being in force, from

acquiring, having in his possession or carrying any arms or ammunition, or is of unsound mind, or is for any reason unfit for a licence under this Act; or

(b) If the licensing authority deems it necessary for the security of the public peace or for public safety to suspend or revoke the licence; or

c) If the licence was obtained by the suppression of material information or on the basis of wrong information provided by the holder of the licence or any other person on his behalf at the time of applying for it; or

(d) If any of the conditions of the licence has been contravened; or

(e) If the holder of the licence has failed to comply with a notice under sub-section (1) requiring him to deliver-up the licence.

(4) The licensing authority may also revoke a licence on the application of the holder thereof.

(5) Where the licensing authority makes an order varying a licence under sub-section (1) or an order suspending or revoking a licence under subsection (3), it shall record in writing the reasons therefor and furnish to the holder of the licence on demand a brief statement of the same unless in any case the licensing authority is of the opinion that it will not be in the public interest to furnish such statement.

(6) The authority to whom the licensing authority is subordinate may by order in writing suspend or revoke a licence on any ground on which it may be suspended or revoked by the licensing authority; and the foregoing provisions of this section shall, as far as may be, apply in relation to the suspension or revocation of a licence by such authority.

(7) A court convicting the holder of a licence of any offence under this Act or the rules made thereunder may also suspend or revoke the licence :

Provided that if the conviction is set aside on appeal or otherwise the suspension or revocation shall become void.

(8) An order of suspension or revocation under sub-section (7) may also be made by an appellate court or by the High Court when exercising its powers of revision.

(9) The Central Government may, by order in the Official Gazette, suspend or revoke or direct any licensing authority to suspend or revoke all or any

licenses granted under this Act throughout India or any part thereof.

(10) On the suspension or revocation of a licence under this section the holder thereof shall without delay surrender the licence to the authority by

whom it has been suspended or revoked or to such other authority as may be specified in this behalf in the order of suspension or revocation."

12. Sub section (3) (a to d) of section 17 deals with conditions for which licensing authority may pass an order for suspending, revoking / varying the licence. Sub section (4) empowers the licensing authority to revoke a licence on the application of holder thereof. Sub section (5) provides that if the licensing authority makes an order varying the lincence under sub section (1) of section 17 or an order suspending or revoking a licence under sub section (3), it shall record, in writing, the reasons thereof and furnish to the holder of licence with the demand of brief statement of the same, unless in any case the licensing authority is of the opinion that it will not be in public interest to furnish such statement.

13. From the cogent reading of sub section (1) to sub section (5), it will transpire that for various reasons, as enumerated in sub section (3) (a to d), the licensing authority may suspend the licence and for those reasons, after a show cause, cancel the licence also, but before cancelling the same, a show cause notice is necessary to the licensee and after having the reply, in view of the language used in sub section 3(a) of section 17, the licensing authority must get him satisfy and record a definite satisfaction to the effect that the continuance of the licence, would not be in the interest of public peace or public safety.

14. Here in this case, it appears, the action has been taken, taking note of the provisions contained in sub section (b) of sub section (3), the licensing authority has issued a notice that continuance of the firearm licnece would not be in the security of the public peace and public safety. The basis for such notice is the unnamed F.I.R.

15. I have gone through the impugned order passed by the District Magistrate (the licensing authority). The licensing authority has not recorded his own satisfaction after considering the material available on record and only observed as under while cancelling the licence :

''उपरोक्त विवेचना के आधार पर शस्त्र अनुज्ञापी हसीब अहमद उर्फ रासू पुत्र तौसीफ अहमद निवासी ग्राम व थाना सट्टी को न्यायालय द्वारा दी गई नोटिस दिनांक 06.07.2007 की पुष्टि की जाती है तथा उसकी डी0बी0बी0एल0 गन नं0 29450 के लाइसेन्स नं0 53 को लोक शान्ति व लोक सुरक्षा के अनुरक्षण हेतु तत्काल प्रभाव से निरस्त किया जाता है। थानाध्यक्ष सट्टी को निर्देशित किया जाता है कि यदि अनुज्ञापी को उपरोक्त शस्त्र अभी तक न जमा किया गया हो तो तत्काल जमा करा लें। आदेश की एक प्रति पुलिस अधीक्षक कानपुर देहात को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित की जाय। शस्त्र लिपिक आदेश का अनुपालन सुनिश्चित करें बाद आवश्यक कार्यवाही यह पत्रावली दाखिल दफ्तर हो।''

16. From the reading of the aforesaid lines of the order of the District Magistrate, it transpires that the District Magistrate has only confirmed the police report and contents of the show cause notice. The confirmation of the police report and the contents of show cause notice cannot be put at par with the word "satisfaction.' Satisfaction of the District Magistrate is required for cancellation of firearm licence in view of sub section (3) (a) of section 17. The satisfaction ought to have been recorded taking note of the petitioner's reply and the police report.

17. Here the word, "satisfy' has been mentioned and the word, "satisfy/satisfaction' cannot be synonyms of word "apprehension.' The initiation of the proceeding on the basis of apprehension cannot be ruled out, but apprehension has to be proved with supporting materials, in which the police has utterly failed and the District Magistrate has erred in cancelling the firearm licence without recording the satisfaction. It is well settled that the right to life and liberty have been guaranteed under Article 21 of the Constitution of India and the firearm licences are granted for personal safety and security. As has been noticed here in this case, after the consecutive murders in the petitioner's family, the firearm licence to the petitioner was granted and that could not be cancelled in a way in which it has been cancelled.

18. A Division Bench of this Court in the case of **Satish Singh Vs. District Magistrate, Sultanpur,** 2009 (4) ADJ 33 (LB), has observed as under:-

"Needless to say that right to life and liberty are guaranteed under Article 21 of the Constitution of India and the arms licenses are granted for personal safety and security after due inquiry by the authorities in accordance with the provisions contained in Arms Act, 1959. The provisions of section 17 of the Arms Act with regard to suspension or cancellation of arms licence cannot be invoked lightly in an arbitrary manner. The provisions contained under section 17 of the Arms Act should be construed strictly and not liberally. The conditions provided therein, should be satisfied by the authorities before proceeding ahead to cancel or suspend an arms licence.

We may take notice of the fact that for any reason whatsoever, the crime rate is raising day by day. The Government is not in a position to provide security to each and every person individually. Right to possess arms is statutory right but right to life and liberty is fundamental guaranteed by Article 21 of the Constitution of India. Corollary to it, it is citizen's right to possess firearms for their personal safety to save their family from miscreants. It is often said that ordinarily in a civilized society, only civilized persons require arms licence for their safety and security and not the criminals.

Of course, in case the Government feels that arms licence are abused for oblique motive or criminal activities, then appropriate measures may be adopted to check such mal-practice. But arms licence should not be suspended in a routine manner mechanically, without application of mind and keeping in view the letter and spirit of section 17 of the Arms Act."

19. The police has utterly failed to bring any material on record to indicate that except the unnamed F.I.R., on account of which proceeding has been initiated, there was anything against the petitioner. Not even a single incident has been cited in the show cause notice or in the order of the District Magistrate. The lodging of the F.I.R. or pendency of the cases against the petitioner's brother, in my considered opinion, should not have been made basis for cancelling the firearm licence of the petitioner.

20. After going through the reply of the petitioner to the show cause notice, it transpires that on account of two murders in petitioner's family, for his personal safety, the petitioner has applied for firearm licence and he was granted the same in the year 2000. There is no allegation, except the present one, that the petitioner has ever misused his firearm licence or have ever committed any crime. Merely by saying that a person has entered into world of crime, cannot be said to be sufficient for cancelling the firearm licence of a person, which was granted after due deliberations and due inquiry and after verifying the credentials of the petitioner. The apprehension cannot be made basis for cancellation of the firearm licence. The relevant section for cancellation of firearm licence is very unambiguous and clear in this regard.

21. In view of the foregoing discussions and taking note of the dictum of Division Bench of this Court, I am of the considered opinion that the orders impugned dated 29.2.2008 and 25.10.2007 are unsustainable in the eye of law and the same are being quashed. The writ petition succeeds and is allowed. The District Magistrate is directed to take follow up action in accordance with law by restoring the petitioner's firearm licence.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.12.2011

BEFORE
THE HON'BLE R.K. AGRAWAL, J.
THE HON'BLE SURENDRA KUMAR, J.

Civil Misc. Writ Petition No. 54455 of 2010

Akhilesh Pathak ...Petitioner
Versus
State Of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri Shyam Sunder Tripathi

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 226- Principle of Natural Justice-auction sale of Bolero Jeep-after having valuation report from Transport Authority-valuation fixed as Rs. 75000/-petitioner being highest bidder for Rs. 85000/-deposited 15000/-¼ amount immediately-balance ¾ amount of Rs. 70000/-deposited within time-accepted-subsequent on political pressure-cancellation of auction proceeding and direction for re-auction on ground of low amount -behind the back of petitioners-held--illegal-perverse, unjust, arbitrary

and mala fide-direction to release vehicle to petitioner issued.

Held Para 31

Thus, after getting the whole amount of the bid received by the auctioning authority till 21.7.2010, the auctioning authority in a shocking and surprising way recommended to the S.D.M./respondent no. 2 for re-auction of the vehicle in question with some ulterior motive just on the ground of inadequacy of the price. If any inadequacy of price had been within the knowledge of the auctioning authority at the time of completion of the auction, there would not have been any reason for him to submit a report recommending for re-auction subsequently with delay. On the basis of the said report of the auctioning authority dated 22.7.2010, the S.D.M./respondent no. 2 passed the impugned order in one sentence to the effect that "agreed, the auction cancelled, the re-auction be made as per the rules." This by can no stretch of imagination be called a speaking or legal order which was passed behind the back of the petitioner. If for a moment the point of some commotion during the progress of auction was there, the same did not find place in the relevant report dated 22.7.2010 submitted to the S.D.M. by which he recommended for re-auction. The impugned order passed by the respondents appears to be illegal, perverse, unjust, arbitrary and malafide.

Case law discussed:

(1970) 3 SCR 1: (1969) 3 SCC 537; 1989 RD page 51; 1970 (2) SCC page 405

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

1. Heard learned counsel for the parties.

2. This writ petition has been preferred by the petitioner to issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 22.7.2010 passed by the respondent no.2/ Sub Divisional Magistrate, Nizamabad, Azamgarh, (Annexure No.1 to the writ petition) and also for a direction in the nature of mandamus directing the respondent nos.2 and 3 namely Sub Divisional Magistrate and Tehsildar/Auction Incharge, Nizamabad, Azamgarh, to issue a release order for the auctioned Bolero Jeep 2003 Model (Chassis No.MA-1XA2 ACB) in favour of the petitioner ensuring release of the vehicle in question from Police Station Gambhirpur, Azamgarh.

3. The respondent no.2 vide the impugned order dated 22.7.2010 had cancelled the auction dated 19.7.2010 and ordered for re-auction of the vehicle in question on the ground that the re-auction will bring more revenue to the State.

4. The facts giving rise to the present writ petition are that the certain vehicles including vehicle in question unclaimed by their owners were seized by Station House Officer, Police Station Gambhirpur, Tehsil Nizamabad, District Azamgarh. As the seized vehicles remained unclaimed by their owners for a considerable long time, the vehicles were likely to go defunct for non-use and maintenance and their value got diminished, the Administration thought it proper to put them to public auction. Before the auction, the Regional Transport Officer, Azamgarh, was requested vide letter dated 22.5.2010 by Police Station Gambhirpur for assessing value of each vehicle. The Regional Transport Officer, Azamgarh, after making physical scrutiny and assessment of the vehicle piecewise submitted a report showing approximated reasonable

value of the said vehicles. The value of the vehicle in question was assessed at Rs.75,000/- (Rupees seventy five thousand) only. Subsequently, the respondent no.2 authorized the respondent no.3/Tehsildar Nizamabad to conduct the public auction after due publication in the local daily newspapers having wide circulation in the area. The publication relating to the auction in local newspapers was made and common public interested in the vehicle in question invited to appear and bid for it in the public auction to be held on 19.7.2010. In response to the said advertisement, seven bidders including the petitioner attended the auction and made the bids. Before the bid began, a notice dated 19.7.2010 mentioning the terms and conditions of the bid was put on the board which stipulated inter-alia that each bidder shall make the security deposit of Rs.5,000/- before the bidding. The other terms and conditions were that 1/4th of the amount of final bid for the vehicle in question shall be deposited immediately and remaining 3/4th of the amount shall be deposited within fifteen days from the date of the aforesaid auction. It was also stipulated that the release order was to be issued only after the auction was accepted by the respondent no.3. Accordingly, all the seven persons made the security deposit of Rs.5,000/- (Rupees five thousand) each.

5. The auction bid continued for four rounds and ultimate bid of the petitioner to the tune of Rs.85,000/- (Rupees eighty five thousand) was found final after calling the bidders three times to go above it which the bidders did not do. Thus, the highest bid could not be crossed by further bid of higher value. A copy of the progress of the bid upto the highest bidding of Rs.85,000/- (Rupees eighty five thousand) made by the petitioner, has been annexed as Annexure No.4 to the writ petition.

6. As per the terms and conditions of the auction sale, the petitioner deposited a sum of Rs.25,000/- (Rupees twenty five thousand) with the treasury vide receipt dated 19.7.2010 on the day of the auction itself. The petitioner made the deposit of balance amount of auction bid i.e. Rs.60,000/- (Rupees sixty thousand) vide treasury receipt, accepted and issued by the respondent no.3 on 21.7.2010. The auction proceeding to the level of its finality on the highest bid of the amount of Rs.85,000/- (Rupees eighty five thousand) made by the petitioner was further explicit by the respondent no.3 in accepting the total amount of Rs.85,000/- (Rupees eighty five thousand) deposited by the petitioner within time and accepted through the receipts issued by the respondent no.3 on 19.7.2010 and 21.7.2010.

7. The respondent no. 3 namely Tehsildar/Auction Incharge, Nizamabad, Azamgarh submitted a report about the details of the auction to the respondent no. 2 Up Zila Adhikari, Nizamabad on 22.7.2010 proposing re-auction of the vehicle in question keeping in view the condition of the vehicle in question that the auction of the vehicle could bring more revenue to the State after wide publication through newspapers. The respondent no. 2 by the impugned non-speaking order dated 22.7.2010 agreed with the said report and cancelled the auction directing re-auction according to the rules without affording any opportunity of hearing to the petitioner.

8. After complying with the terms and conditions of the auction and depositing the entire amount of the auction, the petitioner approached the respondent no. 3 on 26.7.2010 for issuance of the release order of the vehicle in question so sold out to the petitioner through above auction in order to approach the police station incharge for release of the aforesaid vehicle in question. It was at that stage, respondent no. 2 disclosed this fact to the petitioner that the vehicle in question could not be released as there was some political pressure against it. The petitioner was orally asked to surrender his claim for the vehicle in question in the auction for some other vehicle.

9. When the petitioner came to know about the order dated 22.7.2010 passed by respondent no. 2, he raised grievance through the letter to the District Magistrate, Azamgarh on 26.7.2010, who called for a report from the respondent nos. 2 and 3 within three days. The respondent no. 3 submitted a report to the respondent no. 2 on 28.7.2010 wherein the facts of auction proceedings, entire deposit made by the petitioner as the highest bidder and its acceptance by respondent no. 3, was admitted. It was, however, disclosed in the said report that after acceptance of the entire bid amount of auction, it was thought proper to re-put the vehicle in question for fresh auction in expectation of the higher amount as the revenue likely to come. The report of respondent no. 3 dated 28.7.2010 submitted to the respondent no. 2 has been annexed as Annexure No. 8 to the writ petition.

10. The respondent no. 2, accordingly, informed to the Additional District Magistrate (F & R), Azamgarh that since the report/recommendation for re-auction had been made, the release order could not be issued. In the information dated 29.7.2010 made by the respondent no. 2, finality of auction at the highest bid of Rs. 85,000/- (Rupees eighty five thousand), receipt of the total amount of auction deposited by the petitioner was also accepted.

11. The petitioner sought an information under the Right to Information Act by sending a letter dated 28.7.2010 in this matter. The petitioner was furnished the relevant information to the effect that the highest bid of the auction of the said vehicle was to the tune of Rs. 85,000/- (Rupees eighty five thousand) and the highest bidder was the present petitioner Akhilesh Pathak. The auction was cancelled as it did not fetch the sufficient revenue and the amount of bidding was insufficient.

12. It has been averred in the writ petition that no auction after public advertisement having culminated in the highest bid accepted by the auctioning authority coupled with the deposit of entire auction amount accepted by the authority could be cancelled without their being any breach of the terms of the auction or element of fraud in the auction so conducted. Since after auction of the vehicle in question having reached the stage of deposit so accepted and receipt issued by the auction authority/ respondent no. 3, the auction could not be cancelled. The only stage thereafter was to issue an order for release of the vehicle in question. No auction so culminated without breach or fraud could be cancelled and that too without opportunity of hearing to the petitioner, who had

completed his part as bidder and deposited the entire amount which was accepted by the respondents.

13. According to the petitioner, the impugned order by which the auction of the vehicle in question was cancelled, is arbitrary as passed behind back of the petitioner for unwarranted political pressure and with ulterior motive to oblige the agency behind the picture. The impugned order is violative of the principle of audi-alteram partem and also violative of the right of the petitioner under Article 300A of the Constitution of India.

14. Sri Chhedi Lal Singh, Tehsildar Nizamabad, Azamgarh filed his counter affidavit on behalf of the respondents deposing that the impugned order dated 22.7.2010 was passed by the competent authority i.e. Sub Divisional Magistrate, who after considering the facts that the auction bidder has tried to get the vehicle on a very low price which would have resulted in loss of revenue to the State, had rightly cancelled the auction directing afresh auction. The vehicle in question was in a good condition and could bring a better revenue for the State. After considering the condition of the vehicle and bid amount, the re-auction of the said vehicle was recommended and the competent authority agreeing with the recommendation cancelled the auction held on 19.7.2010 and directed for re-auction of the vehicle by the impugned order.

15. It has been averred through the counter affidavit that the Regional Transport Officer, Azamgarh assessed the value of the vehicle in question tentatively. According to the respondents, the date of auction could not be properly published, only seven persons participated in the bid and only upto fourth round, the bidders signed the bid papers but in the sixth final round of auction, no one signed on the papers due to commotion. It is obligatory that all the papers must be signed by all the bidders relating to the bid. The respondent no. 3/Tehsildar was only supposed to submit a report of the auction and it was only respondent no. 2/S.D.M. who had power to accept the auction bid.

16. It has been further alleged that mere deposit of the money does not mean acceptance of the bid and there was no stipulation for the said auction that the deposit of money meant for acceptance of the bid, the auctioned property can only be released in favour of the highest bidder when the auction is accepted by the competent authority. The repeated grounds of the respondents for cancelling the said auction are that since the petitioner intended to get the vehicle in question at a very low price by all means and it brought a very low revenue for the State as the vehicle in question was in good condition and could fetch better revenue for the State, the said auction was cancelled and re-auction was directed keeping in view the interest of the State. The petitioner was advised to take his money back and the delay in taking the auction deposited money back would be at his own cost. In the counter affidavit, malafides and arbitrariness in passing the impugned order has been denied.

17. The petitioner by way of filing rejoinder affidavit repeated the averments made in the writ petition calling the auction in dispute as practical and logical on the ground that the vehicle in question

deemed to be defunct due to non use since long. Since report of the Regional Transport Officer was found reliable as the basis for the proposed auction, the process of auction was resorted to. It has been further submitted that failure to obtain signature on the last page of the bidding of the above Bolero Jeep if any can be said to be failure of the auctioning authority, the auction could not be affected. It was mere irregularity once the auction in-charge confirming and approving the last and final bid by the petitioner closed the auction as complete and immediately accepting the deposit of 1/4th and more of the highest bid of the auction. Since ¾th of the balance amount of bidding was deposited by the petitioner well within time and the same was accepted by the auctioning authority/respondent no. 3 without any objection, the auction could not be legally cancelled just on the frivolous ground that the said auction fetched less revenue to the State. It has also been submitted that the respondent no. 3 had occasion before the auction dated 19.7.2010 to postpone, adjourn or cancel the auction proceedings if there was no proper circulation or publication in the area.

18. The learned counsel for the petitioner has further submitted that the respondents may postpone, adjourn or cancel the auction proceedings on the following stages;

(a) When the R.T.O. had submitted his valuation report on 28.6.2010;

(b) When the bidders were present on 19.7.2010, they were found to be insufficient in number;

(c) When the last bid of Rs. 85,000/- was made by the petitioner and before the auction could be closed as completed or at the most on 22.7.2010 when the last deposit of 3/4th amount was made by the petitioner and the same was accepted through receipt by the respondent no. 3. There was no occasion in law for the respondents to cancel the said auction. The auction was cancelled to deny the petitioner of his accrued right to the legitimate claim for release of the vehicle in question. The purpose was to oblige non bidder because of political influence and thereby denied the petitioner of his legitimate right to claim for release of the vehicle.

19. In this writ petition, following points are involved;

(i) Whether after the hammer had been knocked down at the highest bid in a public auction and ¼ of the bid amount deposited by the highest bidder immediately after the bid and duly accepted, could an auction be cancelled ?

(ii) Whether any order cancelling such an auction behind the back of the highest bidder depositing the entire or 1/4th amount of the highest bid could be passed ?

(iii) Whether such an order could be treated to be fair, impartial or legal and without charge of arbitrariness and mala fides ?

(iv) Whether a sale by public auction could be considered on a footing better than ordinary sale in the market ?

20. We have gone through the decision relied upon by the learned

counsel for the petitioner in the case of *M/s Kayjay Industries (P) Ltd. Vs. M/s Asnew Drums (P) Ltd and others (1974) 2 SCC page 213,* wherein Hon'ble Apex Court observed that a Court sale is a forced sale and notwithstanding the competitive element of a public auction, the best price is not often forthcoming. The Judge must make a certain margin for this factor. A valuer's report, good as a basis, is not as good as an actual offer and variation within limits between such an estimate, however careful, and real bids by seasoned businessman before the auctioneer are quite on the cards. The businessman makes uncanny calculations before striking a bargain and that circumstances must enter the judicial verdict before deciding whether a better price could be had by a postponement of the sale. If Court sales are too frequently adjourned with a view to obtaining a still higher price, it may prove a self-defeating exercise, for industrialists will lose faith in the actual sale taking place and may not care to travel up to the place of auction being uncertain that the sale would at all go through. The judgment debtor's plea for postponement in the expectation of a higher price in the future may strain the credibility of the Court sale itself and may yield diminishing returns.

21. Hon'ble Apex Court has further observed in the case of *M/s Kayjay Industries (P) Ltd. (supra)* while dealing with material irregularity and substantial injury under Order XXI, Rule 90 of the Civil Procedure Code that it is the duty of the Court to satisfy itself that having regard to the market value of the property, the price offered is reasonable. The substantial injury without material irregularity is not enough even as material irregularity not linked direct to inadequacy of the price is insufficient. If the Court should go on adjourning the sale till a good price is got, it being a notorious fact that the Court sale and market price are distant neighbour. Otherwise the decree holders can never get the property of the debtor sold. Nor is it right to judge the unfairness of the price by hindsight wisdom. What is expected of the Judge is not to be a prophet but a pragmatist and merely to make a realistic appraisal of the factors and if satisfied that, in the given circumstances, the bid is acceptable, conclude the sale.

22. The Court may consider fair value of the property, the general economic trends, the large sum required to be produced by the bidder, the formation of a syndicate, the futility of postponements and possibility of the litigation and several other factors dependent on the facts of the each case. Once that is done, the mater ends there. No speaking order is called for and no meticulous post mortem is proper. If the Court has fairly, even if silently, applied its mind to the relevant considerations before it while accepting the final bid, no probe in retrospect is permissible. Otherwise, a new threat to certainty of the Court sale will be introduced. Mere inadequacy of price cannot demolish every court sale. The same principle had been laid down by Hon'ble Apex Court in the case of Neyalkha and sons Vs. Ramanya Das, (1970) 3 SCR 1 : (1969) 3 SCC 537.

23. Learned counsel for the petitioner has relied upon a Division Bench decision of this Court in the case of *Zila Parishad, Muzaffar Nagar and others Vs. Udai Veer Singh, 1989 RD page 51* wherein the Division Bench observed that

where the highest bid is accepted and highest bidder deposits 25% bid amount within time allowed, the auction cannot be cancelled thereafter. In the case of Zila Parishad (supra), the auction was held on 17.3.1988. The the subject matter of the auction was the right to ferry or load or unload animals at the cattle fair for a monetary consideration under the Uttar Pradesh Zila Parishad and Kshetra Samiti Adhiniyam, 1959. The auction was closed upon the highest bid having been received. The Zila Parishad attempted to auction the subject matter of the auction to yet another candidate outside the auction subsequently. This led to the highest bidder who had offered the highest bid upon which the auction was closed to seek an injunction to protect the right to carry on his trade by filing civil suit in the civil court. The highest bidder was granted injunction. The Administrator, (Atrikt Mukhya Adhikari) recommended re-auction to be held on 23.3.1988 on the ground that one person (non bidder) had sent higher offer. Thus re-auction was ordered after publication in the newspapers informing the previous highest bidder to take back his deposited amount, the highest bidder had not been intimated that his bid was hence not being acted upon. The cause was a secret unilateral offer, after the auction. The highest bidder was not given any opportunity of hearing before passing the order of fresh auction.

24. This Court further held that the highest bidder was entitled to an opportunity of being apprised of the circumstances for recalling or cancelling the auction. An opportunity was to be afforded before recalling the result of the auction. It was further held that the auction is a sale by a public competition to the highest bidder. Auction sales are of two kinds, with reservation and without reservation. The auction sale is with reservation when the upset price is fixed below which the auctioneer refused to sell. It is not necessary that this particular phraseology be used, it would be enough indication that the seller makes it plain and reserves the right. An auction is without reservation when the goods are sold to the highest bidder, whether the sum paid is equivalent to real value or not. The principle of sale by auction is that the announcement about the auction is a mere information to offer, the actual bids made are all offers, each higher bid superseding the previous bid, and that when the hammer falls on the last bid there is an acceptance and the contract becomes complete.

25. After discussing the provisions of Section 46 of the Contract Act, 1872 relating to reasonable time for performance of promise and Sections 63 and 64 of the Indian Sale of Goods Act, 1930 relating to sale by auction, this Court observed that the highest bidder was made to deposit substantial money within fixed time, another auction was announced without affording an opportunity to the highest bidder to have his say before such an announcement and non rejection of the highest bid within reasonable time, this virtually amounted to rejecting the highest bid without indicating it to the highest bidder and in absence of an opportunity of hearing to him. The attempt to re-auction was surreptitious and entertained unilaterally and secretly and as an after thought. Giving an objective test to the facts and circumstances of the auction and the obligation which the highest bidder had

performed and was made to perform, the contract was complete.

26. It was further held by this Court that public bodies conducting public auction will loose their credibility and the conduct or public auction might lead to endless litigations when they will be upset without cause held profitably, regularly and without defect. An auction which has been regularly conducted strictly as desired by a public body or government with no illegality having been pointed out and is at a monetary advantage over the previous year, must be finalised. This Court cannot permit an auction in which no illegality has been pointed out to be abandoned merely because of officials do not act when they should have acted, or chose to act when it was too late to act.

27. The learned counsel for the petitioner has placed reliance on a decision of Hon'ble Apex Court in the case of *Shri Radhey Shyam Vs. Shyam Behari Singh, 1970 (2) SCC page 405,* contending that any auction can be set aside only when there is proof of material irregularity or fraud and not otherwise.

28. The learned counsel for the petitioner drawing our attention to the paragraph 23 of the counter affidavit filed by Sri Chhedi Lal Singh, Tehsildar on behalf of the respondents, has submitted that the respondents conceded that there had been no breach of terms and conditions relating to the public auction in the present case. No case of material irregularity or fraud was either taken up by the respondents or the same was proved. No notice of the cancellation of auction sale in favour of the petitioner depositing the entire bid amount was given before the aforesaid cancellation of auction and order for re-auction. We may mention here the relevant part of paragraph 23 of the counter affidavit wherein it has been averred that "However, in reply, it may be stated that there is no breach of terms and conditions of the auction." Paragraph 21 of the said counter affidavit makes it evident that the petitioner was informed about the impugned order dated 22.7.2010 four days later i.e. on 26.7.2010 and the petitioner was not afforded any opportunity of hearing before passing the impugned order by which the said auction was cancelled and re-auction was ordered. Thus, the impugned order was passed behind the back of the petitioner in a clandestine manner for the reasons best known to the respondents.

29. In the case of Shri Radhey Shyam (supra) it was observed by the Hon'ble Apex Court, what has to be established is that there was not only inadequacy of the price but that inadequacy was caused by reason of the material irregularity or fraud. A connection has thus to be established between the inadequacy of the price and the material irregularity.

30. The material available on record clearly goes to establish that there was no material irregularity or fraud in the impugned auction till finality of the auction, the petitioner was asked to deposit 1/4th of the highest bid amount, there was no question of inadequacy of the price of vehicle in question. Had it been there, the auctioning authority could have cancelled or postponed the auction on the ground of inadequacy of price and submitted report to the competent authority immediately. Not only this, the petitioner who was the highest bidder,

was allowed to deposit 1/4th of the bid amount and he immediately thereafter deposited Rs. 25,000/-. The amount was accepted immediately thereafter issuing receipts by the auctioning authority on 19.7.2010. Even thereafter, if the fact regarding inadequacy of the price or material irregularity or fraud was within the knowledge of the auctioning authority, the petitioner was allowed to deposit 3/4th of the balance amount of bid i.e. Rs. 60,000/- on 21.7.2010 and the petitioner was issued a receipt of the deposit of 3/4th balance amount of the bid by the auctioning authority on the same day.

31. Thus, after getting the whole amount of the bid received by the auctioning authority till 21.7.2010, the auctioning authority in a shocking and surprising way recommended to the S.D.M./respondent no. 2 for re-auction of the vehicle in question with some ulterior motive just on the ground of inadequacy of the price. If any inadequacy of price had been within the knowledge of the auctioning authority at the time of completion of the auction, there would not have been any reason for him to submit a report recommending for re-auction subsequently with delay. On the basis of the said report of the auctioning authority dated 22.7.2010, the S.D.M./respondent no. 2 passed the impugned order in one sentence to the effect that "agreed, the auction cancelled, the re-auction be made as per the rules." This by can no stretch of imagination be called a speaking or legal order which was passed behind the back of the petitioner. If for a moment the point of some commotion during the progress of auction was there, the same did not find place in the relevant report dated 22.7.2010 submitted to the S.D.M. by which he recommended for re-auction. The impugned order passed by the respondents appears to be illegal, perverse, unjust, arbitrary and malafide.

32. The impugned order dated 22.7.2010 passed by the respondent no.2/ Sub Divisional Magistrate, Nizamabad, Azamgarh, (Annexure No.1), is set aside. The respondent nos. 2 and 3 are directed to release the auctioned Bolero Jeep 2003 Model (Chassis No.MA-1XA2 ACB) in favour of the petitioner from Police Station Gambhirpur, Azamgarh.

33. With the aforesaid observations/directions, the writ petition stands allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.11.2011

BEFORE
THE HON'BLE DILIP GUPTA, J.

Civil Misc. Writ Petition No. 58884 of 2011

Kamal Kishore Pal ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Bhola Nath Yadav
Sri Rama Nand Yadav

Counsel for the Respondents
Sri R.A. Akhtar
C.S.C.

Constitution of India, Article 226- Diploma in L.T. Grade-seeking direction regarding eligibility to participate in T.E.T. Examination-treating equivalent to B.Ed.-held in view of Section 23 (1) of Right of children to free and compulsory Education Act, 2009-not eligible to appear U.P.T.E.T.-petition dismissed.

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

1. The petitioner, who has obtained the Diploma in L.T. from the Departmental Examination U.P. in the year 1996, has filed this petition for a direction upon the respondents to consider it as a valid qualification for appearing at the U.P. Teachers Eligibility Test (hereinafter referred to as the 'U.P.-TET') scheduled to commence from 13th November, 2011.

2. It is stated that in exercise of the powers conferred by Section 23(1) of the Right of Children to Free and Compulsory Education Act, 2009 (hereinafter referred to as the 'Act') and in pursuance of the notification dated 31st March, 2010 issued by the Government of India, the National Council for Teachers Education (hereinafter referred to as the 'NCTE') issued the notification dated 23rd August, 2010 laying down the minimum qualifications for a person to be eligible for appointment as a teacher in Classes I to VIII in a School referred to in Section 2(n) of the Act, which amongst others, provides that the person should pass the TET to be conducted by the appropriate Government in accordance with the Guidelines framed by the NCTE for the purpose. The Board of High School and Intermediate Education (hereinafter referred to as the 'Intermediate Education Board'), which has been authorised by the State Government to hold such a test, issued the advertisement dated 22nd September, 2011 inviting applications from the eligible candidates for appearing in the UP-TET but persons who have obtained Diploma in L.T. have not been permitted to appear in the test. It is, therefore, asserted that the petitioner, who has obtained Diploma in L.T. stands excluded from appointment as a teacher in Classes I to VIII since a person who has cleared the TET is only considered eligible for appointment.

3. It is contended by learned counsel for the petitioner that notification dated 23rd August, 2010 issued by the NCTE under Section 23(1) of the Act regarding minimum qualification for a person to be eligible for appointment as a teacher in Classes I to VIII so far as it restricts candidates obtaining B.Ed. Degree in one year/Two years Diploma in Elementary Education/Diploma in Education (Special Education)/Four Years Bachelor of Elementary Education, should be modified to include candidates who have obtained Diploma in L.T. as such candidates are at parity with the candidates obtaining B.Ed. Degree in one year. He, therefore, submits that the petitioner, who has obtained the Diploma in L.T. should also be considered eligible under the advertisement dated 22nd September, 2011 issued by the Intermediate Education Board.

4. Sri K.S. Kushwaha, learned Standing Counsel and Sri R.A. Akhtar, learned counsel appearing for the NCTE have pointed out that Diploma in L.T. Is not the qualification prescribed under the notification dated 23rd August, 2010 for appointment as a teacher in the School and, therefore, the petitioner cannot be permitted to appear at the U.P-TET.

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

6. The petitioner, who claims to be possessing Diploma in L.T. Is desirous of appearing at the UP-TET conducted by the Intermediate Education Board so that he can possess the minimum qualification for a person to be considered eligible for appointment as a teacher in Classes I to VIII in a school referred to in Section 2(n) of the Act.

7. In order to appreciate the controversy involved in this petition, it will be necessary to refer to various provisions of the Act and the relevant Regulations and Notifications.

8. Section 23(1) of the Act deals with the qualification for appointment and terms and conditions of service of teachers and is as follows:-

"23. Qualification for appointment and terms and conditions of service of teachers.--(1) Any person possessing such minimum qualifications, as laid down by an academic authority, authorised by the Central Government, by notification, shall be eligible for appointment as a teacher."

9. Elementary Education has been defined under Section 2(f) of the Act while a School has been defined under Section 2(n) of the Act and the definitions are as follows:-

"2(f). "elementary education" means the education from first class to eight class;"

.....

(n) "school" means any recognised school imparting elementary education and includes--

(i) a school established owned or controlled by the appropriate Government or a local authority;

(ii) an aided school receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority;

(iii) a school belonging to specified category; and

(iv) an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority;"

10. The Central Government, by means of the notification dated 31st March, 2010 published in the Official Gazette dated 5th April, 2010, has authorised the NCTE as the "academic authority' to prescribe the minimum qualifications which notification is as follows:-

"NOTIFICATION

New Delhi, the 31st March, 2010

S.O. 750(E).--In exercise of the powers conferred by sub-section (1) of Section 23 of the Right of Children to Free and Compulsory Education Act, 2009, the Central Government hereby authorises the National Council for Teacher Education as the academic authority to lay down the minimum qualifications for a person to be eligible for appointment as a teacher."

11. The NCTE, accordingly, issued the notification dated 23rd August, 2010 which was published in the Gazette of India dated 25th August, 2010. The said notification lays down the minimum qualification for a person to be eligible for appointment as a teacher in Classes I to VIII in a school referred to in Section 2(n) of the Act with effect from the date of the notification. However, another notification dated 29th July, 2011 was published in the Gazette of India dated 2nd August, 2011. This notification made certain amendments to the notification dated 23rd August, 2010 published in the Gazette of India dated 25th August, 2010. The minimum qualifications prescribed in the notification after the amendment for a person to be eligible for appointment of a teacher are as follows:-

1. Minimum Qualifications.-

(i) Classes I-V

(a) Senior Secondary (or its equivalent) with at least 50% marks and 2-year Diploma in Elementary Education (by whatever name known).

OR

Senior Secondary (or its equivalent) with at least 45% marks and 2-year Diploma in Elementary Education (by whatever name known), in accordance with the NCTE (Recognition Norms and Procedure), Regulations 2002.

OR

Senior Secondary (or its equivalent) with at least 50% marks and 4-year Bachelor of Elementary Education (B.El. Ed.).

OR

Senior Secondary (or its equivalent) with at least 50% marks and 2-year Diploma in Education (Special Education).

OR

Graduation and two year Diploma in Elementary Education (by whatever name known)

AND

(b) Pass in the Teacher Eligibility Test (TET), to be conducted by the appropriate Government in accordance with the Guidelines framed by the NCTE for the purpose.

(ii) **Classes VI-VIII**

(a) Graduation and 2-year Diploma in Elementary Education (by whatever name known)

OR

Graduation with at least 50% marks and 1-year Bachelor in Education (B.Ed.)

OR

Graduation with at least 45% marks and 1-year Bachelor in Education (B.Ed.), in accordance with the NCTE (Recognition Norms and Procedure) Regulations issued from time to time in this regard.

OR

Senior Secondary (or its equivalent) with at least 50% marks and 4-year Bachelor in Elementary Education (B.EI.Ed)

OR

Senior Secondary (or its equivalent) with at least 50% marks and 4-year BA/B.Sc. Ed. or B.A. Ed./B.Sc. Ed.

OR

Graduation with at least 50% marks and 1-year B.Ed. (Special Education)

AND

(b) Pass in the Teacher Eligibility Test (TET), to be conducted by the appropriate Government in accordance with the Guidelines framed by the NCTE for the purpose.

2. Diploma/Degree Course in Teacher Education.- For the purprose of this Notification, a diploma/degree course in teacher education recognised by the National Council for Teacher Education (NCTE) only shall be considered. However, in case of Diploma in Education (Special Education) and B.Ed. (Special Education), a course recognised by the Rehabilitation Council of India (RCI) only shall be considered.

3. Training to be undergone.- A person -

(a) with Graduation with at least 50% marks and B.Ed. qualification or with at least 45% marks and 1-year Bachelor in Education (B.Ed.), in accordance with the NCTE (Recognition Norms and Procedure) Regulations issued from time to time in this regard shall also be eligible for appointment for Class I to V upto 1st January, 2012, provided he/she undergoes, after appointment, an NCTE recognised 6-month Special Programme in Elementary Education.

(b) with D.Ed. (Special Education) or B.Ed. (Special Education) qualification shall undergo, after appointment, an NCTE recognised 6-month Special Programme in Elementary Education.

4. Teacher appointed before the date of this Notification.- The following categories of teachers appointed for classes I to VIII prior to date of this Notification need not acquire the minimum qualifications specified in Para (1) above,

(a) A teacher appointed on or after the 3rd September, 2001, i.e. the date on which the NCTE (Determination of Minimum Qualifications for Recruitment of Teachers in School) Regulation, 2001 (as amended from time to time) came into force, in accordance with that Regulation.

Provided that a teacher of class I to V possessing B.Ed. qualification, or a teacher possessing B.Ed. (Special Education) or D.Ed. (Special Education) qualification shall undergo an NCTE recognised 6-month special programme on elementary education.

(b) A teacher of class I to V with B.Ed. qualification who has completed a 6-month Special Basic Teacher Course (Special BTC) approved by the NCTE;

(c) A teacher appointed before the 3rd September, 2001, in accordance with the prevalent Recruitment Rules.

5.(a) Teacher appointed after the date of this notification in certain cases: Where an appropriate Government or local authority or a school has issued an advertisement to initiate the process of appointment of teachers prior to the date of this Notification such appointments may be made in accordance with the NCTE (Determination of Minimum Qualifications for Recruitment of Teachers in Schools) Regulations, 2001 (as amended from time to time).

(b) The minimum qualification norms referred to in this notification apply to teachers of Languages, Social Studies, Mathematics, Science, etc. In respect of teachers for Physical Education, the minimum qualification norms for Physical Education teachers referred to in NCTE Regulation dated 3rd November, 2001 (as amended from time to time) shall be applicable. For teachers of Art Education, Craft Education, Home Science, Work

Education, etc. the existing eligibility norms prescribed by the State Governments and other school managements shall be applicable till such time the NCTE lays down the minimum qualifications in respect of such teachers.

12. It is stated by learned counsel for the NCTE that 3rd November, 2001 in paragraph 5(b) of the said notification had been wrongly mentioned and the date should be 3rd September, 2001.

13. It is, therefore, clear that it is only those candidates who have obtained the B.Ed. Degree in one year/Two years Diploma in Elementary Education/Diploma in Education (Special Education)/Four Years Bachelor of Elementary Education, who can be considered eligible under the notification and, therefore, can appear at the U.P.-TET.

14. It is pointed out by learned counsel for the respondents that persons who obtain the Diploma in L.T. are not eligible for appointment as Assistant Teacher in the School and, therefore, it is not necessary for them to appear at the U.P.-TET. The contention of the petitioner that Diploma in L.T. should be treated at par with the B.Ed. Degree of one year cannot be accepted.

15. Such being the position, the petitioner is not eligible to appear at the U.P.-TET examination scheduled to commence from 13th November, 2011.

16. The petition is, accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.12.2011

BEFORE
THE HON'BLE SYED RAFAT ALAM, C. J.
THE HON'BLE RAN VIJAI SINGH, J.

Civil misc. Writ Petition No. 70199 of 2011

Rama Shankar ...Petitioner
Versus
State Of U.P. Through its Secretary & others ...Respondents

Counsel for the Petitioner:
Sri R.K. Ojha
Sri Bijendra Kumar Mishra

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 226-Public Interest Litigation-removal of encroachment upon Gaon Sabha land-complete machinery provided in statutory Act itself-under section 122-B L.M.C. Responsible to take appropriate action-and the Lekhpal of concern village under Rule 115-Responsible to report after Rabi and Kharif crops of every year-apart from that word "otherwise" indicate any complaint by any person received by S.D.O. Is duty bound to hold enquiry-petitioner to make comprehensive Representation to Asst. Collector for taking appropriate action-petition disposed of.

Held: Para 14

In view of above legal position, we are of the view that the appropriate remedy for the petitioner herein is to file a comprehensive application/representation giving all details before the Assistant Collector concerned with regard to such encroachment as alleged herein and on receipt of such complaint, the

Assistant Collector is directed to proceed in accordance with the provisions of the Act of 1950 and the Rules framed thereunder, and after making necessary enquiry and affording opportunity of hearing to all concerned, take appropriate decision expeditiously.

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

1. In the instant petition, filed as public interest litigation, the petitioner has invoked the writ jurisdiction of this Court on the allegation that respondent nos. 4 and 5 have encroached upon the Gaon Sabha property and in spite of several efforts made by the petitioner before the administrative authorities including the District Magistrate and the Commissioner of the concerned Division, no steps have been taken to remove the encroachment from the land in dispute. The petitioner, therefore, has made prayer for issuance of a writ of mandamus directing respondent nos. 1 to 4 for removal of the encroachment made over the Gaon Sabha property.

2. Learned counsel for the petitioner vehemently contended that the respondent authorities, despite various complaints made by the petitioner along with the villagers of the village in question, failed to take any steps for removal of the encroachment made over the public property. He pointed out from the petition that detailed representations/complaints were filed by the petitioner along with villagers before the District Magistrate, Mau and the Commissioner, Azamgarh Division, Azamgarh, copies whereof are enclosed as Annexures - 5 and 6 to the writ petition, yet it yielded no result and, thus, he has filed the present PIL. It is submitted that Plot Nos. 177 and 178 belong to Gaon Sabha of village Nagpur, Pargana and Tehsil Mohammadabad, District Mau and are recorded as 'Bheeta' in the revenue records.

3. On the other hand, learned Standing Counsel appearing for the State-respondents has submitted that it is the duty of the Land Management Committee constituted under the U.P. Panchayat Raj Act to maintain the Gaon Sabha property and in case there is some encroachment, a complete mechanism under Section 122-B of the U.P. Zamindari Abolition & Land Reforms Act and the Rules framed thereunder has been provided to remove such encroachment over the Gaon Sabha property which also includes imposition of damages etc. In his submissions, the grievance can be raised before the Land Management Committee itself of which Lekhpal of the circle happens to be the Secretary, who is legally responsible for informing such encroachments over the Gaon Sabha property to the Assistant Collector and the petitioner may raise his grievance before the aforesaid Committee/Local Authority itself, instead of rushing to this Court in its extra-ordinary jurisdiction under Article 226 of the Constitution of India.

4. We have considered the submissions made on both sides.

5. The U.P. Zamindari Abolition & Land Reforms Act, 1950 (hereinafter referred to as 'Act of 1950') is a self-contained Act and it contains a complete mechanism for removal of encroachment over the Gaon Sabha property. It would be useful to reproduce the relevant provisions of the Act of 1950 and the Rules framed thereunder, which prescribe the duties and powers of the Land Management Committee as well as the

revenue authorities. Under the provisions contained in Section 122-A of the Act of 1950, the Land Management Committee of the Gaon Sabha is vested with the power of superintendence, management and control of all land recorded as public utility land. It reads as under:-

"122-A Superintendence, management and control of land etc. by the Land Management Committee.-

(1)Subject to the provisions of this Act, the Land Management Committee shall be charged, for and on behalf of the Gaon Sabha with the general superintendence, management, preservation and control of all the land, forests within village boundaries, trees (other than trees in a holding, grove or abadi), fisheries, tanks, ponds, water channels, pathways, abadi sites and hats, bazars and melas vested in the Gaon Sabha under Section 117.

(2)Without prejudice to the generality of the foregoing provisions, the functions and duties of the Land Management Committee shall include-

(a) the setting and management of land;

(b) the conduct and prosecution of suits and proceedings by or against the Gaon Sabha;

(c) the development and improvement of agriculture;

(d) the preservation, maintenance and development of forests and trees;

(e) the maintenance and development of abadi sites and village communications;

(f) the management of hats, bazars and melas;

(g) the development of co-operative farming;

(h) the development of animal husbandry which includes pisciculture and poultry farming;

(i) the consolidation of holdings;

(j) the development of cottage industries;

(k) the maintenance and development of fisheries and tanks; and

(l) such other matters as may be prescribed.

(3) Subject to such conditions as may be prescribed, the Chairman or any other office-bearer or member of the Land Management Committee shall, for and on behalf of the Land Management Committee, be entitled to sign any document and to do all other things for the conduct and prosecution of suits and other proceedings.

122-B Powers of the Land Management Committee and the Collector.-

(1)Where any property vested under the provisions of this Act in a Gaon Sabha or a local authority is damaged or misappropriated or where any Gaon Sabha or local authority is entitled to take or retain possession of any land under the

provisions of this Act and such land is occupied otherwise than in accordance with the provisions of this Act, the Land Management Committee or Local Authority, as the case may be, shall inform the Assistant Collector concerned in the manner prescribed.

(2) Where from the information received under sub-section (1) or otherwise, the Assistant Collector is satisfied that any property referred to in sub-section (1) has been damaged or misappropriated or any person is in occupation of any land, referred to in that sub-section, in contravention of the provisions of this Act, he shall issue notice to the person concerned to show cause why compensation for damage, misappropriation or wrongful occupation as mentioned in such notice be not recovered from him or, as the case may be, why he should not be evicted from such land.

(3) If the person to whom a notice has been issued under sub-section (2) fails to show cause within the time specified in the notice or within such extended time not exceeding three months from the date of service of such notice on such person, as the Assistant Collector may allow in this behalf, or if the cause shown is found to be insufficient, the Assistant Collector may direct that such person may be evicted from the land and may for that purpose, use, or cause to be used such force as may be necessary and may direct that the amount of compensation for damage, misappropriation or wrongful occupation be recovered from such person as arrears of land revenue.

(4) If the Assistant Collector is of opinion that the person showing cause is not guilty of causing the damage or misappropriation or wrongful occupation referred to in the notice under sub-section (2) he shall discharge the notice.

(4-A) Any person aggrieved by the order of the Assistant Collector under sub-section (3) or sub-section (4) may, within thirty days from the date of such order prefer, a revision before the Collector on the grounds mentioned in clauses (a) to (e) of Section 333.

(4-B) The procedure to be followed in any action taken under this section shall be such as may be prescribed.

(4-C) Notwithstanding anything contained in Section 333 or Section 333-A, but subject to the provisions of this section-

(i) every order of the Assistant Collector under this section shall, subject to the provisions of sub-sections (4-A) and (4-D), be final.

(ii) every order of the Collector under this section shall, subject to the provisions of sub-section (4-D), be final.

(4-D) any person aggrieved by the order of the Assistant Collector or Collector in respect of any property under this section may file a suit in a court of competent jurisdiction to establish the right claimed by him in such property.

(4-E) No such suit as is referred to in sub-section (4-D) shall lie against an order of the Assistant Collector if a revision is preferred to the Collector under sub-section (4-A).

Explanation.- for the purposes of this section, the expression 'Collector' means the officer appointed as Collector under the provision of the U.P. Land Revenue Act, 1901 and includes an Additional Collector.

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

(5) Rules 115-C to 115- H of the U.P. Zamindari Abolition and Land Reforms Rules, 1952, shall be and be always deemed to have been made under the U.P. Zamindari Abolition and Land Reforms Act, 1950 as amended by the Uttar Pradesh Land Laws (Second Amendment) Act, 1961, as if this section has been in force on all material dates and shall accordingly continue in force until altered or repealed or amended in accordance with the provisions of this Act.

6. U.P. Zamindari Abolition and Land Reforms Rules, 1952 (hereinafter referred to as the 'Rules of 1952') framed under the Act of 1950 also prescribe complete procedure regarding maintenance and management of the land meant for public utility by the Land Management Committee of the Gaon Sabha. In order to appreciate the provision, the relevant Rules are reproduced hereinafter:-

***"115-C** (1) It shall be the duty of the Land Management Committee to preserve or protect from damage, misappropriation and wrongful occupation, all properties vested in it under Section 117, including vacant land and land over which it is entitled to take possession under the Act and to manage and maintain all such property and land in its possession.*

(2) The Chairman or any Member or the Secretary of the Land Management Committee shall report all cases of damage to; or misappropriation or wrongful occupation of, the property referred to in sub-rule (1) to the Collector praying for recovery of compensation for damage to or misappropriation of the property or possession of the land together with damages for wrongful occupation thereof.

(3) it shall be the duty of the Lekhpal to report to the Collector through the Tahsildar all cases of wrongful occupation of damage to and misappropriation of property vested in the Gaon Sabha as soon as they come to his notice and in any case after the conclusion of Kharif and Rabi Partal every year.

(4) The Tahsildar shall satisfy himself in the month of May every year that each Lekhpal has submitted all such reports.

(5) The provisions of sub-rules (1) to (3) shall mutatis mutandis apply to a local authority in respect of the properties vested in it, including vacant land and land over which it is entitled to take possession, under the Act:

Provided that the duty in respect of sub-rule (3) above, shall be discharged by such official of the local authority as may be decided upon by the local authority concerned.

***115-D** (1) Where the Land Management Committee or the local authority, as the case may be, fails to take action in accordance with Section 122-B, the Collector shall-*

(a) on an application of the Chairman; Member or Secretary of the Committee; or

(b) on a report made by the Lekhpal under sub-rule (3) of Rule 115-C; or

(c) on the report of the local authority concerned or its official referred to in the proviso to sub-rule (5) of Rule 115-C;

(d) on facts otherwise coming to his notice;

call upon the person concerned through notice in Z.A. Form 49-A to refrain for causing damage or misappropriation, to repair the damage or make good the loss or remove wrongful occupation and to pay damages or to do or refrain from doing any other thing as the exigencies of the situation may demand or to show cause against it in such time not exceeding fifteen days as may be specified in the notice.

(2) Before issuing a notice under sub-rule (1), the Collector may make such inquiry as he deems proper and may obtain information on the following points-

(a) full description of damage or misappropriation caused or the wrongful occupation made, with details of village, mohalla or ward, plot number, area, boundary, property damaged or misappropriated and market value thereof;

(b) full address along with father's name of the person responsible for the damage, misappropriation or wrongful occupation;

(c) period of wrongful occupation, damage or misappropriation, class of soil of the plot numbers involved and hereditary rates applicable to them; and

(d) value of the property damaged or misappropriation calculated at the prevailing market rate in the locality.

***115-E** (1) Where any direction for eviction or recovery of any amount of compensation has been issued by the Collector under sub section (4) of Section 122-B an order in Z.A. Form 49-C shall be sent to the Tahsildar concerned for execution who shall as far as possible follow the procedure laid down in paragraphs 137 and 138 of Revenue Court Manual.*

(2) The order under Z.A. Form 49-C shall also specify the amount which shall be recovered from the person concerned as expenses of execution which shall include the pay and allowances of the staff deputed to be calculated according

to the rates mentioned in paragraphs 405 of the Revenue Court Manual.

***115-F** (1) All damages ordered to be recovered and expenses incurred in the execution of the orders of the Collector shall be realised as arrears of land revenue and credited to the Consolidated Gaon Fund or the Fund of a local authority other than a Gaon Sabha, as the case may be except that the cost on account of pay and travelling allowance of staff deputed shall be deposited in the Tahsil Sub-treasury under the head "029- Land Revenue- E- other receipts (5) Collection of payment for services rendered".*

(2) If the damage or loss caused through misappropriation is of such a nature as is not capable of being repaired or made good, (as in the case of cutting of trees, or grazing of plants or grass) the Collector shall assess the amount of damage or loss in terms of money at the prevailing market rate in the locality. In case of wrongful occupation of land, the damage caused to the Gaon Sabha or the local authority, as the case may be, shall be assessed for each year of such wrongful occupation or any part thereof, at 100 times the amount of rent computed at the sanctioned hereditary rates applicable to the plots concerned. In case the occupant of land continued to remain in such wrongful occupation, he shall be further liable to pay one-eighth of the damages so assessed for every month of the continued occupation after the date of the order.

***115-G** (1) if the persons wrongfully occupying the land has done cultivation therein, he may be allowed to retain possession thereof until he has harvested the crop subject to the payment by him of 100 times the amount of rent computed at the sanctioned hereditary rates applicable which shall be credited to the Consolidated Gaon Fund or the Fund of the local authority other than the Gaon Sabha as the case may be. If the person concerned does not make the payment of the aforesaid amount within the period specified in the notice in Z.A. Form 49-A, possession of the land shall be delivered to the Land Management Committee or the local authority, as the case may be together with the crop:*

Provided that where such person wrongfully occupies the same land or any other land within the jurisdiction of the Gaon Sabha or the local authority, as the case may be, a subsequent time, he shall be ejected therefrom without being permitted to gather his produce and possession of the land together with the crop thereon shall be delivered to the Land Management Committee or the local authority, as the case may be.

(2) Nothing in sub-rule (1) shall debar the Land Management Committee or the local authority, as the case may be, from prosecuting the person who encroaches upon the same land a second time in spite of having been ejected under the Act or rules under Section 447 of the Indian Penal Code."

7. From a plain reading of the provisions contained in Section 122-A of the Act of 1950, it is apparent that the Land Management Committee has been vested, on behalf of the Gaon Sabha, with the power to keep general superintendence, management, preservation and control of all the lands, forests within the village boundaries,

trees, fisheries, tanks, ponds, water channels, pathways, abadi sites and hats, bazars and melas vested in the Gaon Sabha under Section 117. Sub-section (2) (a) of Section 122-A of the Act of 1950 deals with the setting and management of the land.

8. Sub-section 1 of Section 122-B of the Act of 1950 imposes duty upon the Land Management Committee to inform the Assistant Collector of the concerned area with regard to the encroachment or misappropriation over the Gaon Sabha land. The manner for providing the information has been provided under Rule-115(C). Sub-rule (3) of Rule 115-C imposes duty on the Lekhpal to report to the Collector through the Tahsildar all cases of wrongful occupation of damage to and misappropriation of property vested in the Gaon Sabha as soon as they come to his notice and in any case after the conclusion of 'Kharif' and 'Rabi Partal' every year. Sub-rule (4) of Rule 115-C provides that the Tahsildar shall satisfy himself in the month of May every year that each Lekhpal has submitted all such reports. Rule 115-D provides that where the Land Management Committee or the local authority, as the case may be, fails to take action according to Section 122-B (1), the Collector shall, on an application of the Chairman; Member or Secretary of the Committee; or on a report made by the Lekhpal under sub-rule (3) of sub-rule 115-C or 'otherwise' take action. The Collector, after being satisfied, shall call upon the person concerned through notice in Z.A. Form 49-A to refrain from causing damage or misappropriation, to repair the damage or make good the loss or remove wrongful occupation and to pay damages or to do or refrain from doing any other thing as the exigencies of the situation may demand or to show cause against it in such time not exceeding fifteen days as may be specified in the notice. Before issuing such a notice, sub-rule (2) of Rule 115-D casts a duty upon the Collector to make an enquiry in the manner prescribed under sub-rule-(2) (a), (b), (c), and (d), as referred above. Rule 115-E of the Rules of 1952 provides procedure for eviction and Rule 115-F prescribes the manner of assessment of damage over Gaon Sabha/Local Authority property and mode of its realization as arrears of Land Revenue. Further, Rule 115-F provides that if somebody has cultivated the land of Gaon Sabha or Local Authority, he may be allowed to retain the possession till he harvests the same on payment of hundred times land revenue of the occupied land. The proviso to Rule 115-G also provides for action under the Indian Penal Code if the property has been occupied for the second occasion.

9. From going through the provisions as contained in Section 122-B of the Act of 1950 and the Rules framed thereunder, it is apparent that it is the duty of the Land Management Committee and the Lekhpal to inform such encroachment over the Gaon Sabha property. Lekhpal is under legal obligation to make enquiry in each 'Kharif' and 'Rabi' and the Tahsildar is also under an obligation to ensure in the month of May every year that such reports are submitted by the Lekhpals as required under sub rule-(3) of Rule 115-C.

10. The Act of 1950 and the Rules framed thereunder have not only rested on this but also made further provisions under sub-section (2) of Section 122-B read with Rule 115-D(1)(d), that on such

information under sub-section (1) of Section 122-B, which is referable to the Land Management Committee and Lekhpal or 'otherwise', the Assistant Collector if satisfied that any property referred to in sub-section (1) of Section 122-B has been damaged or misappropriated, then he shall issue notice to such person who has caused damage or misappropriated the property. The word 'otherwise' used in this sub-section has wide import. To our mind, on failure of information of such encroachment as provided under Section 122- B (1) read with Rule 115-D (1) (a)(b) and (c) either by the Land Management Committee of Gaon Sabha/Local Authority or by Lekhpal, the Assistant Collector can take action under this Section after the information received from 'other sources', may be any other officer of the State Government or general public. This is the enabling provision which empowers the Collector to take action against the person who has illegally occupied the Gaon Sabha land, on an information other than sources referred to in Section 122- B (1) read with Rule 115- D (1) (a) (b) and (c).

11. The view taken by us finds support from a Division Bench judgment of this Court in **Motilal Vs. District Magistrate, Lalitpur & Ors., 2003 (5) AWC 3849,** wherein the Division Bench considered Rule (4) (1) of the U.P. Panchyat Raj (Removal of Pradhan, Up Pradhan, Members) Enquiry Rules 1997, where the procedure for conducting preliminary enquiry against the Pradhan has been provided. Sub-rule (3) of the Rules of 1997 provides the procedure for filing complaint on an affidavit for holding an enquiry against the Pradhan, Up Pradhan or Members. Under Rule (4) (1), apart from the complaint, the word 'otherwise' has been used which reads as under:-

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

12. In the aforesaid case, the contention of the petitioner was that the complaint was not filed in accordance with Rule (3) of 1997 Rules, as the same was not on an affidavit, therefore, the District Magistrate was not empowered to pass an order for holding a fact finding preliminary enquiry. While interpreting the word 'otherwise', the Division Bench has observed that the word 'otherwise' used under sub-rule (1) of Rule (4) has wide import and if complaint is not filed as envisaged under Rule (3), the State Government does not lack of power to direct holding of preliminary enquiry. It has further observed that the District Magistrate may, after personally coming to know some serious lapse on the part of the Pradhan, may hold preliminary enquiry without there being any complaint or report as required under sub-rule (3).

13. In the case in hand, the grievance of the petitioner is that in spite of various representations/complaints made to the District Magistrate and the Commissioner of the concerned Division, no action has been taken and, therefore, he has been compelled to file this writ petition. As would appear from the foregoing discussions that where the Land Management Committee/Lekhpal fails to inform such encroachment for taking

action, the Assistant Collector may take action, after receipt of such complaints even made by the general public. We are, therefore, of the view that the Assistant Collector cannot wash out his hands from discharging his duties given under the Act for removal of such encroachments which are alleged to have been made over the Gaon Sabha property. For that purpose, we would like to observe that even if the complaint is made before the Collector and not Assistant Collector, as required under the Act, the Collector is also under an obligation to send the complaints to the Assistant Collector of the concerned area from where the complaint has been received and on such receipt of complaint, either transmitted through the office of the District Collector or directly by the general public, the Assistant Collector is under legal obligation under the provisions of the Act and the Rules framed thereunder, to make an enquiry in this regard, and after being satisfied, issue notice to the encroacher along with full details as required under the Rules and proceed in accordance with the provisions contained under Section 122-B of the Act of 1950 and the Rules framed thereunder.

14. In view of above legal position, we are of the view that the appropriate remedy for the petitioner herein is to file a comprehensive application/representation giving all details before the Assistant Collector concerned with regard to such encroachment as alleged herein and on receipt of such complaint, the Assistant Collector is directed to proceed in accordance with the provisions of the Act of 1950 and the Rules framed thereunder, and after making necessary enquiry and affording opportunity of hearing to all concerned, take appropriate decision expeditiously.

15. Subject to above observations, this writ petition is disposed of finally. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.12.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL,J.

Civil Misc. Writ Petition No. 70682 of 2011

Sarita Shukla and others ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Agnihotri Kumar Tripathi

Counsel for the Respondents:
C.S.C.
Sri K.S.Kushwaha
Sri Chandra Narayan Tripathi

U.P. Basic Education (Teachers) Service Rules, 1981-Rule 14 (1)-Selection of training teachers for primary school-by clause 7 of advertisement-restriction to apply only 5 districts-held-arbitrary irrational, violative of Article 14-can not sustain.

Held: Para 38

It is also not discernible as to whether any rational object the respondents intent to achieve by making this restriction. The said condition also fails ex facie to show any nexus with the undisclosed objectives sought to be achieved. It is well settled that any policy decision, which is ex facie arbitrary, irrational or illogical is violative of Article 14 and cannot sustain.

Case law discussed:
(2006) 9 SCC 1; 2010 (5) ESC 630; AIR 1992 SC 1858

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

1. Heard Sri Agnihotri Kumar Tripathi for the petitioner and Sri K.S.Kushwaha, learned Standing Counsel for all the respondents.

2. Since a pure legal submission was advanced, learned Standing Counsel stated that he does not propose to file counter affidavit and matter may be heard on merit. I proceed to decide the matter accordingly.

3. The learned counsel for petitioner submitted that advertisement in question to the extent it provides that a candidate should restrict his application for only five districts in U.P. in his/her choice is illegal and *ultra vires* of the statute.

4. The facts in brief are quite simple. An advertisement has been issued on 29/30.11.2011 with the heading "Selection of Training-Teachers for Primary Schools of U.P. Basic Education Board". While inviting application from eligible and qualified candidates, it provides that one candidate may submit his application for any of the five districts and not more than that. The advertisement contains other details of educational and training qualification, age, nationality and residence, reservation, marital status, character, procedure for submission of the application form, application fee, procedure for selection, six months special training and then clause 10 of the advertisement talks of substantive appointment.

5. Learned counsel for the petitioners contended that aforesaid advertisement in so far as restricts a candidate to submit application only in five districts is per se irrational, illegal and arbitrary, hence violative of Articles 14 and 19 of the Constitution. He contended that there is no logic or reason for confining a candidate to submit application only in five districts and the aforesaid restriction is wholly irrational, has no nexus with the object sought to the achieved and, therefore, is violative of Article 14. He further submitted that it also does not conform with the procedure prescribed in Rule 14(1) of U.P. Basic Education (Teachers) Service Rules, 1981 (hereinafter referred to as "Rules 1981") which talks of district-wise selection and therefore Clause 7 of advertisement as also opening para that one applicant can apply for only five districts is ultra vires of the aforesaid provision of the statute. He lastly submitted that for the purpose of providing six months special training, it is always open to the respondents to adopt any valid procedure but if for the purpose of appointment the said advertisement is to be acted upon, it would be illegal and *ultra vires* being contrary to the relevant statutory provisions namely 'Rules, 1981.

6. Sri Kushwaha on the contrary submitted that the advertisement has been issued in the light of and consequence to Regulations framed by "National Council for Teachers Education Regulations" notified in Government of India Gazette dated 29.7.2011. It is said that no further advertisement is to be made for making appointment on the post of Assistant Teacher in the Primary Schools maintained by Board and in fact the persons selected pursuant to the

impugned advertisement shall be given six months training and on completion thereof shall be issued letters of appointment straightway without any further process of recruitment.

7. In the above backdrop, this Court proceed to examine correctness of advertisement to the extent, impugned in this petition.

8. Before proceeding further it is necessary to clarify some aspect of the matter. One is regarding minimum qualification of teachers and quality of teacher's training constituting essential eligibility for a person before claiming appointment on the post of Assistant Teacher in Primary School; and second, relates to actual process of recruitment and appointment under relevant statutory rules relating to the service concerned.

9. There are three statutes relevant in this matter. One is "Uttar Pradesh Basic Education Act, 1972" (hereinafter referred to as "Act 1972"), Second is "National Council For Teacher Education Act, 1993" (hereinafter referred to "Act 1993") and third is "Right of Children to Free and Compulsory Education Act, 2009" (hereinafter referred to as "Act 2009").

10. Prior to the enactment of Act 1972, primary education in the State was in quite disorganized manner. There were two types of Primary Schools running in the entire State. One owned and managed by local bodies and rests were private institutions. In the rural areas, primary schools of first category were being managed by Zila Parishads and in urban areas they were being run by Municipal Boards and Mahapalikas etc. The funds to these schools were the responsibility of concerned local bodies. Privately managed Primary Schools were also having two types of categories, one which were solely managed by private bodies from their own resources and rest were those which were getting some kind of financial grant/assistance from State Government through Education Department or some other Departments like Harijan and Social Welfare etc.

11. Article 41 in Part IV (Directive Principles of State Policy) provides that the State shall, within the limits of its economic capacity and development, make effective provision for securing right to work, to education etc. but as a matter of fact effective steps in this regard were wanting. Similarly Article 45 provides that State shall endeavour to provide, within a period of ten years from the commencement of Constitution, free and compulsory education for all children until they complete the age of fourteen years but as a matter of fact here also much remain to be done on the part of the State. In early seventies, to bring uniformity in Primary schools run by Local Bodies, considering day to day deteriorating conditions of such schools, a public demand through their representatives was raised requiring State to take immediate steps for improving primary education in the State and hence with an objective of reorganisation, reformation and expanding elementary education, State Government came forward to take over control of such schools, as were being run by Local Bodies into its own hands. It enacted U.P. Basic Education Ordinance 1972 giving effect to its provisions w.e.f. Educational Session 1972-73. The said ordinance was substituted by Act 1972. It

provided for establishment of U.P. Board of Basic Education (in short the 'Board') and by virtue of Section 9, all the employees of Primary Schools maintained by local bodies stood transferred and became employee of the Board. Section 19 confers power upon the State Government to frame rules for the purpose of carrying out Act 1972 in general and in particular the recruitment and conditions of service of the persons appointed to the post of officers, teachers and employees under Section 6 and 9 and also in respect to such staff teaching and non teaching of other basic schools recognized by the Board. The provisions of Act 1972 was given overriding effect over otherwise provisions in U.P. Panchayat Raj Act, 1947, U.P. Municipalities Act, 1916 and U.P. Municipal Corporation Act, 1952 by inserting Section 13A w.e.f. 21st June, 1979.

12. All the basic schools virtually in the State of U.P., now, if recognized by the Board, have to conform to the provisions of Act 1972 and the rules framed thereunder.

13. In respect to teachers of Primary Schools maintained by the Board, Rules 1981 have been framed, published in U.P. Gazette (Extra Ordinary) on 03.01.1981. The application of these rules is provided in Rule 3, as under:

"Extent of application.- These rules shall apply to :

(i) All teachers of local bodies transferred to the Board under Section 9 of the Act; and

(ii) all teachers employed for the Basic and Nursery Schools established by the Board."

14. At this stage, I defer further discussion of the aforesaid Rules and find it appropriate to come to the provisions of Act 1993. This is a Central Act enacted by Parliament and after receiving assent of the President on 29.12.1993 was published in the Gazette of India, (Extra.) Part II, Section 1, dated 30.12.1993. Section 1(3) provides that Act 1993 shall come into force on such date as the Central Government may appoint by notification in initial gazette. Pursuant thereto the Central Government by notification dated 1.07.1995 appointed the same day i.e. 01.7.1995 for enforcement of Act 1993.

15. The Act 1993 was enacted with an objective of achieving planned and coordinated development for teacher education system throughout the country, the regulation and properly maintenance of norms and standards in teacher education system and for matters connected therewith.

16. In **State of Maharashtra Vs. Sant Dnyaneshwar Shikshan Shastra Mahavidyalaya and others (2006) 9 SCC 1,** Apex Court observed that considering the objective and preamble of the Act and various provisions, it is clear that the aforesaid Act of Parliament is referable to Entry 66 of List I of Schedule VII of the Constitution and to the extent the field is occupied by Act 1993 the State Legislature cannot encroach upon the said field.

17. The Act 1993 contemplates establishment of a council called as

"National Council For Teacher Education" (hereinafter referred as "NCTE") and its functions are enumerated in detail in Section 12 of Act 1993. It clearly talks of planned and co-ordinated development of teacher education, and determination and maintenance of standards for teacher education. It is in this regard various subjects and functions of NCTE have been enumerated in Section 12 from Clauses (a) to (n) which reads as under:

"(a) undertake surveys and studies relating to various aspects of teacher education and publish the result thereof;

(b) make recommendations to the Central and State Governments, Universities, University Grants Commission and recognised Institutions in the matter of preparation of suitable plans and programmes in the field of teacher education:

(c) co-ordinate and monitor teacher education and its development in the country;

(d) lay down guidelines in respect of minimum qualifications for a person to be employed as a teacher in schools or in recognised institutions.;

(e) lay down norms for any specified category of courses or training in teacher education, including the minimum eligibility criteria for admission thereof, and the method of selection of candidates, duration of the course, course contents and mode of curriculum;

(f) lay down guidelines for compliance by recognised institution for starting new courses or training, and for providing physical and instructional facilities, staffing pattern and staff qualifications;

(g) lay down standards in respect of examinations leading to teacher education qualifications, criteria for admission to such examinations and schemes of courses or training;

(h) lay down guidelines regarding tuition fee and other fee chargeable by recognised institutions;

(i) promote and conduct innovation and research in various areas of teacher education and disseminate the results thereof;

(j) examine and review periodically the implementation of the norms, guidelines and standards laid down by the Council, and to suitably advise the recognised institutions;

(k) evolve suitable performance appraisal systems, norms and mechanisms for enforcing accountability on recognised institutions;

(l) formulated schemes for various levels of teacher education and identify recognised institutions and set up new institutions for teacher development programmes;

(m) take all necessary steps to prevent commercialisation of teacher education; and

(n) perform such other functions as may be entrusted to it by the Central Government."

18. The Act 1993 contemplates recognition and permission of NCTE for running courses or training in teacher education. Section 17 provides, if course or training in teacher education has been imparted or obtained in violation of the provisions of the Act, such course or training shall not be treated a valid qualification for the purpose of employment under Central Act, State Government, University, any School/College or other educational body aided by Central or the State Government. The restriction imposed by Section 17(4) is only to the extent that a training or course in teacher education which does not conform to the various provisions of Act 1993 shall not be a valid qualification for employment as stated above, and nothing more and nothing less. The entire Act 1993 does not talk of the manner in which appointments of teachers shall be made, the eligibility to be laid down for appointment of teachers in Primary Schools etc. except qualification. It is confined to the standard and quality of teachers education. In this regard NCTE obviously can lay down minimum qualification which may be prescribed for appointment of a teacher but it does not control thereafter the mode, manner and other relevant provisions regarding recruitment and appointment of such teachers.

19. In **State of U.P. and Others Vs. Bhupendra Nath Tripathi and Ors. 2010 (5) ESC 630,** the Apex Court has clearly observed in para 24 that NCTE can lay down minimum qualification for appointment of teacher by competent appointing authority or the authority competent to frame rules and regulations may lay down any qualification over and above the minimum qualification prescribed by NCTE. Para 24 of the judgment in **Bhupendra Nath Tripathi (supra)** reads as under:

"The is no quarrel with the proposition that the State in its discretion is entitled to prescribe such qualifictions as it may consider appropriate for candidates seeking admission into BTC course so long as the qualifications so prescribed are not lower than those prescribed by or under the NCTE Act. The State can always prescribe higher qualification, ..."

20. Meaning thereby requirement for appointment of a teacher, as contemplated by Act 1993, is that the teacher education must be such as is in conformity with Act 1993 and that the teacher must possess minimum qualification before he is considered for appointment and then on, Act 1993, in my view, stops from that stage and onwards.

21. If I take up the case in hand, the matter would thereafter be governed by Act 1972 and the Rules 1981. The qualification required to be possessed by a teacher for appointment in a Primary School is provided in Rule 8 of Rules 1981. This rule has undergone amendments from time to time broadly. Initially it provides for a qualification up to High School and training qualification like Basic Teachers Certificate, Junior Teacher Certificate, Certificate of Teaching etc. Later on amendments were made which basically increase educational qualification of High School to Intermediate and then to Graduation but so far as training qualification is concerned, the same continue to be as

such. For the first time, an amendment was made in 2004 by adding "Special Basic Teachers Certificate Course" as one of the training qualification under Rule 8(1). Subsequently another amendment came to be made by notification dated 25.11.2006 in Rule 8(1). To this extent there is no dispute among the parties.

22. The large scale employment in Primary Schools maintained by Board constitute a major chunk of litigation before this Court in the last 20 years and more. The reason being the large number of schools and quantum of employment generated thereby.

23. The Basic Education authorities, time and against have also contributed a lot, either by their mindless activities or deliberate and otherwise illegal acts. In fact after the judgement of Apex Court in **Mohini Jain Vs. State of Karnataka, AIR 1992 SC 1858** and **Unni Krishnan J.P. Vs. State of A.P., AIR 1993 SC 2178** and the cases followed thereafter observing Primary Education to children from age of 6 to 14 years as a constitutional right, efforts were made by Governments, Central and State both, to expand primary education by establishing primary schools at Village Panchayat level in a major way and this really give a boomerang to number of schools as also corresponding increase in number of teachers requiring to man these institution.

24. The Court has been informed at the Bar that at present the number of primary schools in the State of U.P. are more than one lac and twenty five thousands which obviously mean that number of posts of teachers would also exceed the said figure.

25. It would be appropriate at this stage to remind that Parliament also recognized above right by inserting Article 21A in the Constitution i.e. 'Right to Education', by Constitution (86th Amendment) Act, 2002, and, simultaneously inserting Clause (k) in Article 51A vide Section 4 of Constitution (86th Amendment) Act, 2002. The Parliament also in furtherance of the above constitutional provisions, come forward by enacting Act 2009 published in Gazette of Indian on 27.8.2009. By virtue of Section 1(3) of Act 2009, it has been given effect from 01.4.2010.

26. One of the major change it has brought, besides other, is that no Primary School other than a school established, owned or controlled by the appropriate Government or local body after commencement of 2009 Act shall be established or function without obtaining a certificate of recognition from such authority, as may be prescribed. For the purpose of seeking recognition, the school has to conform the norms and standard specified in Section 19 of Act 2009 read with the schedule appended thereto. The Act 2009, vide Section 23(1), also provides that any person possessing such minimum qualification, as laid down by an academic authority authorised by the Central Government, by notification, shall be eligible for appointment as a teacher. Section 23 (1) therefore also talks of only eligibility for appointment as teacher but does not confer any corresponding right upon a person to claim appointment as teacher merely if he fulfills the qualification

prescribed under Section (1) of Section 23. Simultaneously there is no corresponding obligation for offering appointment to such person as teacher. The power of State Legislature vide Entry 25 List 3 Schedule VII of the Constitution therefore to the extent it make provisions for governing primary schools and providing provisions governing recruitment and conditions of service of teachers in such school is not curtailed in any manner.

27. Now, I come to the basic provision made by NCTE which has been referred to by Sri Kushwaha, learned counsel appearing for respondents. The Department of School Education and Literacy, Ministry of Human Resource Development, Government of India by notification No.S.O. 750 (E) dated 31.3.2010 authorised NCTE as academic authority to prescribe minimum qualification for appointment of a teacher. Consequently, with reference to Section 23(1) NCTE issued notification dated 23.8.2010 laying down minimum qualifications for a person to be eligible for appointment as a teacher in Class 1 to 8 in a school referred to in Clause (n) of Section 2 of 2009 Act.

28. Section 2(n) of 2009 Act defines "School" for the purpose of 2009 Act and reads as under:

"school" means any recognised school imparting elementary education and includes-

(i) a school established, owned or controlled by the appropriate Government or local authority;

(ii) an aided school receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority;

(iii) a school belonging to specified category; and

(iv) an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority;"

29. The minimum qualification prescribed in notification dated 23.8.2010 are in two parts, one for Junior Primary School namely Classes I to V and another is for Senior Primary School i.e. Class VI to VIII. Besides educational qualifications, for the first time, it also introduced eligibility qualification of teacher i.e. Eligibility Test i.e. passing of Teachers Eligibility Test (in short 'T.E.T.') conducted by concerned Government in accordance with the guidelines laid down by NCTE. Para 3 of notification dated 23.8.2010 provides for compulsory training qualification and it reads as under:

"Training to be undergone.- A person-

(a) with BA/B.Sc. with at least 50% marks and B.Ed qualification shall also be eligible for appointment for class I to V upto 1st January, 2012, provided he undergoes, after appointment, and NCTE recognized 6-month special programme in Elementary Education.

(b) with B.Ed (Special Education) or B. Ed (Special Education) qualification shall undergo, after appointment, an

NCTE recognized 6-month special programme in Elementary Education."

30. NCTE issued a notification on 29.7.2011 in purported exercise of powers under Section 23 of 2009 Act. The aforesaid notification has amended notification dated 23.8.2010. Sub-para (i) and (ii) of Para 1; para 3 and para 5 have been substituted in entirety. For ready reference, the amended relevant provisions i.e. para 1(i) and (ii) and para 3 reads as under:

"1. Minimum Qualification :-

(i) Classes I-V

(a) Senior Secondary (or its equivalent) with at least 50% marks and 2-year Diploma in Elementary Education (by whatever name known)

OR

Senior Secondary (or its equivalent) with at least 45% marks and 2-year Diploma in Elementary Education (by whatever name known), in accordance with the NCTE (Recognition Norms and Procedure), Regulations, 2002.

OR

Senior Secondary (or its equivalent) with at least 50% marks and 4-year Bachelor of Elementary Education (B.El.Ed)

OR

Senior Secondary (or its equivalent) with at least 50% marks and 2-year Diploma in Education (Special Education)

OR

Graduation and two year Diploma in Elementary Education (by whatever name known)

AND

(b) Pass in the Teacher Eligibility Test (TET), to be conducted by the appropriate Government in accordance with the Guidelines framed by the NCTE for the purpose.

(ii) Class VI-VIII

(a) Graduation and 2-year Diploma in Elementary Education (by whatever name known)

OR

Graduation with at least 50% marks and 1-year Bachelor in Education (B.Ed.)

OR

Graduation with at least 45% marks and 1-year Bachelor in Education (B.Ed.), in accordance with the NCTE (Recognition Norms and Procedure) Regulations issued from time to time in this regard.

OR

Senior Secondary (or its equivalent) with at least 50% marks and 4-year Bachelor in Elementary Education (B.El.Ed.)

OR

Senior Secondary (or its equivalent) with at least 50% marks and 4-year B.A./B.Sc.Ed. or B.A.Ed./B.Sc.Ed.

OR

Graduation with at least 50% marks and 1-year B.Ed. (Special Education)

AND

(b) Pass in Teacher Eligibility Test (TET), to be conducted by the appropriate Government in accordance with the Guidelines framed by the NCTE for the purpose."

31. Para 5 of notification dated 29.7.2011 is a kind of saving clause and provides that if an advertisement initiating process of appointment of

teachers has already been issued before 29.7.2011, such appointments may be made in accordance with NCTE (Determination of Minimum Qualifications for Recruitment of Teachers in Schools) Regulations, 2001 (as amended from time to time).

32. Sub para (b) of para 5 provides that minimum qualification prescribed by notification dated 29.7.2011 shall apply to all teachers except the teacher for Physical Education, for which NCTE Regulation dated 03.11.2001, as amended from time to time, shall continue to apply. Further regarding teachers of Art Education, Craft Education, Home Science, Work Education, etc. the existing eligibility norms prescribed by the State Government and other school managements shall be applicable till such time the NCTE lays down the minimum qualification in respect of such teachers.

33. The above discussion makes it beyond doubt that the above notifications issued by NCTE lays down minimum qualification, which would make a person eligible for appointment as a teacher in Primary Schools but the manner in which recruitments for appointment on the post of teacher in Primary School shall be made, and, their terms and conditions of service, for the same, aforesaid notification does not provide anything at all and hence in this regard Rules 1981 shall hold the field and would continue to apply.

34. Sri Kushwaha, learned Standing Counsel vehemently contended that advertisement dated 29/30.11.2011 contemplates requisite six months training contemplated in para 3 of Notification dated 29.7.2011 and for that purpose respondents authorities cannot be compelled to go to observe procedure prescribed in Rule 14(1) of Rules 1981 hence scrutiny of advertisement in question cannot be made with reference to Rules 1981. To the extent the argument is limited for making selection of persons for providing six months training contemplated in para 3 of the notification dated 29.7.2011, this court Court finds no hesitation in upholding the contention of Sri Kushwaha. The respondents need not go to follow the procedure prescribed in Rule 14(1) of Rules 1981 for the purpose of selecting persons for six months Special training and there is no difficulty.

35. If that would have been the matter, it could have rest thereat. But then the clause assailed by the petitioners has to be examined in the light of the provisions of the Constitution namely Article 14. NCTE does not lay down the manner in which any person would be selected for undergoing training in six months contemplated in para 3 of the notification dated 29.7.2011 except of providing certain relaxation for reserved category candidates which is not the matter of dispute in the present case. It is the Secretary of the Board under whose authority the advertisement in question has been published containing a condition restricting a candidate from submitting his application in more than five districts.

36. Admittedly, selection is not being made for any individual Primary School or Primary Schools constituted in a particular area namely local area or the district. If this Court treat the advertisement in question that it confine

only for the purpose of selecting candidates to undergo training contemplated in para 3 of NCTE notification dated 29.7.2011, the Court finds no rationality or logic by confining a candidate to apply only for five districts and not more than that. Paras 7 and 8 of the advertisement shows that every candidate has to apply separately in different districts. Meaning therefore the selection is confined to a particular district. The District constitute a unit of selection. The candidate may be resident of any district in the State of U.P. but he may choose the district for submitting his application on his own and submit application for selection for special training pursuant to the said advertisement. However, out of the existing 75 district in the State of U.P. a candidate has been restricted for submitting applications in only five districts. What is the criteria or principle behind the condition of restricting a candidate from applying for more than five districts is not discernible from the entire advertisement. When the selection is to be made on District Level basis, if it is possible for a candidate, why he cannot apply in as much as district as he can is beyond comprehension.

37. One of the possible ground suggested is if the candidate are permitted to apply in all the districts irrespective of any restriction with regard to number of districts, quantity of applications may become unmanageable and therefore for practical convenience, restriction has been made that a candidate should not apply for more than five districts. But the restriction to five districts and not more or less thereto is not understandable. It is not commensurating to the Commissionerates/Divisions or otherwise but appears that just a figure of five districts taken from Hat has been mentioned in the advertisement, impugned in this case. With regard to selecting number of districts as five in the above advertisement no rationality or logic could be provided by the respondents. One can understand if the selection would have been made on Provincial level then there cannot be any restriction on number of districts unless so provided by some Statute. The selection could have been made at State level and thereafter candidates could have been allocated to different district to undergo training in the concerned institutions but the respondents have adopted a totally different procedure by restricting number of applications to only five districts which is wholly irrational, arbitrary and hence violative of Article 14 of the Constitution.

38. It is well settled that in the matter of selection and appointment etc. the policy decisions can be taken by the State and the same are not lightly to be interfered by the Court in judicial review but if such policy decision is ex facie irrational, illogical and arbitrary, it can be axed by the Courts while going for judicial review. The respondents in the absence of the counter affidavit had the opportunity to show deliberation available on record, if any, made while formulating the above policy to show justification or rationality for restricting a candidate in applying in only five districts but that option has not been availed by the respondents though they have opportunity to do so. No such request was made. It appears that on this aspect there is not even deliberation on the part of the respondents. In a sheer momentary flash

this condition has been made part of the process of selection without applying mind to its logic and rationality. It is also not discernible as to whether any rational object the respondents intent to achieve by making this restriction. The said condition also fails *ex facie* to show any nexus with the undisclosed objectives sought to be achieved. It is well settled that any policy decision, which is ex facie arbitrary, irrational or illogical is violative of Article 14 and cannot sustain.

39. I need not burden this judment with catena of authorities on this aspect since the law is now well settled. The aforesaid condition, therefore, is difficult to sustain and has to be struck down accordingly.

40. Sri Kushwaha, learned counsel for the respondents drew my attention to para 10 of the advertisement which provides that those candidates who shall successfully complete training of six months, be appointed on substantive basis on the post of teacher following the procedure prescribed in Rules 1981, as amended by 12th amendment of 2011. To my mind, para 12 of the advertisement nowhere contemplate or empower respondents in issuing straightway, appointment letter as soon as a candidate complete special training of six months but makes it very clear that Rules 1981 thereafter shall be followed for making substantive appointment which include within itself the procedure prescribed in Rule 14(1) of Rules 1981. On a query made, Sri Kushwaha stated as per his instructions no further advertisement as contemplated in Rule 14(1) of Rules 1981 is contemplated and appointments shall be made straightway by issuing letter of appointment by competent appointing authority i.e. District Basic Education Officer. I do not find any reason to go by the above statement made on behalf of the respondents and instead find it sufficient to make it clear and beyond doubt that respondents before issuing letters of appointment, appointing any person as teacher in a Primary School, shall without fail, observe and follow strictly procedure prescribed in Rules 1981 including that of Rule 14(1) so long it continue to operate, and only thereafter appointment shall be made and not otherwise. It is worthy to notice at this stage that repeatedly this Court has observed that an appointment to the post of teacher in a Primary School cannot be made without observing the procedure laid down in Rules 1981.

41. The writ petition, in view of the above discussion, succeed and is allowed. The impugned advertisement dated 30.11.2011 in so far it restricts a candidate in submitting application only for five districts is hereby quashed.

42. Since as a result of quashing of the aforesaid condition, the candidates have necessarily to be given opportunity to make/submit applications for various districts, the respondents shall issue a fresh advertisement consistent with the directions as above. It is also and further directed that after completion of special training of six months, no appointment on the post of teacher in Primary Schools governed by Rules 1981 shall be made without following the procedure prescribed therein including rule 14(1) as amended from time to time so long it is operating.

43. The Court finds that due to unmindful acts of the respondents, the candidates like petitioners aspiring for

appointment in primary schools in large number are running from pillar to post and hence harassed. Hence, the petitioners are also entitled to cost which is quantified to Rs.10,000/-.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.12.2011

BEFORE
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition No. 71377 of 2011

C/M Saltnat Bahadur Post Graduate College and another ...Petitioner
Versus
State of U.P. Thru Secy. and others ...Respondents

Counsel for the Petitioner:
Sri V.D. Shukla
Sri Ashok Khare

Counsel for the Respondents:
C.S.C.
Sri A.K. Singh

Constitution of India, Article 226- Amendment in Scheme of administration- whether can be made retrospectively or prospectively? Held-considering two conflicting view of Division Bench-matter referred to Larger Bench.

Held: Para 11

In view of the two conflicting views of the Division Benches of this Court, I am of the opinion that the matter should be referred to the Larger Bench for decision on the following two questions:-

(1) Whether the amendment will become effective from the date of the amendment?

And

(2) Whether the amendment, extending the term of the committee of management, will apply to the existing committee of management, which has made the amendment or it applies to the committee of management which will be formed after the election being held after the amendment?

Case law discussed:
Special Appeal No. 1709 of 2007, in the case of Committee of Management, Arya Kanya Inter College, Bulandshahr and others vs. State of U.P. and others; 1994 (24) ALR 410; (2000) 2 UPLBEC 1107

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

1. Heard Sri Ashok Khare, learned Senior Advocate, appearing on behalf of the petitioners. Sri G.K. Singh appears on behalf of respondent no.4 and Sri A.K. Singh on behalf of respondent no.2. Learned Standing Counsel appears on behalf of respondent no.1.

2. The brief facts, giving rise to the present petition, are that there is a Society, registered under the Societies Registration Act, 1860, in the name of Saltanat Bahadur Degree College Association, Badlapur, Jaunpur. It has its own bye-laws. The said Society has established a Post Graduate Degree College in the name of Saltanat Bahadur Post Graduate College at Badlapur, Jaunpur. The said College is affiliated with Veer Bahadur Singh Purvanchal University, Jaunpur and is governed by the provisions of the U.P. State Universities Act, 1973. Under the bye-laws of the Society and the College, the term of the committee of management was three years. The last election of the committee of management was held on 3.3.2008. In the said election, Sri Rakesh Kumar Singh was elected as the President and Sri Vinod Kumar Singh as the Manager. The said election has been duly approved by the Vice Chancellor of the University by the order dated 6.5.2008. The approval was accorded to the committee of

management for the period of three years from the date of holding of the election. There is no dispute in this regard.

3. By an agenda notice dated 30.6.2010, a meeting of the general body of the Society was scheduled to be convened on 25.7.2010. The meeting was held on 25.7.2010. In the meeting, it was decided that an amendment in the bye-laws of the Society by specifying the term of the committee of management to five years in place of three years be made. In pursuance thereof, the amendment has been incorporated in the bye-laws and the amended bye-laws has been submitted before the Assistant Registrar. The intimation of the amendment for approval was given to the Vice Chancellor of the University. The Vice Chancellor by his order dated 16.11.2010 directed that the committee of management elected on 2.3.2008 stood recognised for the period of five years, that is, till 1.3.2013.

4. Subsequently, a complaint was filed by one Sri Prakash Singh and Shiv Shanker Singh Om before the Vice Chancellor of the University, disputing the extension of the term of the committee of management from three years to five years. The Registrar of the University issued a notice dated 7.6.2011 to the petitioners. The said notice was followed by a reminder dated 3.8.2011. The petitioners filed the reply dated 8.8.2011.

5. It appears that Shiv Shanker Singh Om and others filed Writ Petition No. 49556 of 2011 before this Court. Said writ petition was disposed of on 30.8.2011 with the direction to the Vice Chancellor to take a final decision in pursuance of the notice. As a consequence thereof, the University issued a notice on 18.10.2011 fixing 31.10.2011 as the date for hearing before the Vice Chancellor. The petitioners filed the objection dated 24.10.2011. After hearing the parties, the Vice Chancellor passed the impugned order dated 16.11.2011/25.11.2011.

6. The Vice Chancellor relying upon the decision of a Division Bench of this Court, passed in the ***Special Appeal No. 1709 of 2007, in the case of Committee of Management, Arya Kanya Inter College, Bulandshahr and others vs. State of U.P. and others,*** has held that the benefit of amendment in Clause 8 of the scheme of administration will not be available to the existing committee of management, which has amended the bye-laws and the amended Clause 8 will be applicable to the newly formed committee of management after the election and observed that the letter dated 16.11.2010 stands amended to this effect. The order of the Vice Chancellor, dated 16.11.2011, is impugned in the present petition.

7. Learned counsel for the petitioners submitted that once the Vice Chancellor has accepted the term of the existing committee of management from three years upto 1.3.2013, he has no power to review its own order. He submitted that the decision of the Division Bench of this Court in the case of ***Committee of Management, Arya Kanya Inter College, Bulandshahr and others vs. State of U.P. and others*** (supra) was on different facts. It was with regard to a dispute under the U.P. Intermediate Education Act, 1971 and in the said decision, the order of the approval of the amendment with the condition that the same would apply to the committee of management, which would be constituted after the election being held after the amendment in the bye-laws, has been held

justified. The decision of the learned Single Judge of this Court in other cases is also of the same effect. He submitted that once the amendment has been made in the bye-laws, it became effective from the date of the amendment and is, therefore, applicable to the existing committee of management also. Reliance is placed on the decision of a Division Bench of this Court in the case of ***Committee of Management, MMI Inter College, Bijnore vs. Deputy Director of Education and others, reported in 1994 (24) ALR 410*** wherein it has been held that the amendment introduced in the existing scheme of administration takes effect immediately. Although it is not retrospective in operation, but the term of the committee has to be calculated in accordance with it. He submitted that till date said decision has not been over-ruled. He also placed reliance on the decision of the learned Single Judge in the case of ***Committee of Management, Baheri Education Society, Baheri, Bareilly and others vs. Director of Education and others, reported in (2000) 2 UPLBEC 1107.***

8. Sri G.K. Singh, learned counsel for the respondent no.4, submitted that the decision of the Division Bench of this Court, in the case of ***Committee of Management, Arya Kanya Inter College, Bulandshahr and others vs. State of U.P. and others*** (supra), has categorically laid down the law in Paragraph 30 of the judgment that the committee of management, which is elected in accordance with the provisions of the scheme of administration must be permitted to continue only for the term, which was applicable at the time of the election. The extension of the term, so provided by seeking permission of its own term and by suggesting amendments in the scheme of administration cannot be approved of by this Court. Therefore, the order of the Vice Chancellor is legally correct. He submitted that in the case of ***Committee of Management, MMI Inter College, Bijnore vs. Deputy Director of Education and others*** (supra), the term of the committee of management has been curtailed, which was against their own interest and on this background, the Division Bench has held that the term of the existing committee of management has to be calculated in accordance to the amendment.

9. I have considered the rival submissions and various decisions referred by both the sides.

10. In my view, there is a conflict of opinion between the two Division Benches. Whether by the amendment, the term is curtailed or enhanced is not relevant. The relevant question is from which date, the amendment becomes effective and whether it applies to the existing committee of management or to the committee of management, which will be formed after the next election. The Division Bench of this Court, in the case of ***Committee of Management, MMI Inter College, Bijnore vs. Deputy Director of Education and others*** (supra), has categorically held that the amendment introduced in the existing scheme takes effect immediately. Although it is not retrospective in operation, but the term of the committee of management has to be calculated in accordance with it. To the contrary, the Division Bench of this Court, in the case of ***Committee of Management, Arya Kanya Inter College, Bulandshahr and others vs. State of U.P. and others*** (supra), has held as follows:-

"Even otherwise, we feel that it is appropriate and it is fitness of things that the

Committee of Management, which is elected in accordance with the provisions of the scheme of administration must be permitted to continue only for the term, which was applicable at the time of the elections. The extension of the term so provided by seeking permission of its own term and by suggesting amendments in the scheme of administration cannot be approved of by this Court..."

11. In view of the two conflicting views of the Division Benches of this Court, I am of the opinion that the matter should be referred to the Larger Bench for decision on the following two questions:-

(1) Whether the amendment will become effective from the date of the amendment?

And

(2) Whether the amendment, extending the term of the committee of management, will apply to the existing committee of management, which has made the amendment or it applies to the committee of management which will be formed after the election being held after the amendment?

12. Let the papers be placed before Hon'ble The Chief Justice for formation of the Larger Bench.
