REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 21.02.2011

BEFORE
THE HON'BLE SHRI NARAYAN SHUKLA,J.

Criminal Revision No. 27 of 2011

Irfan Ahmad ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Gyan Singh Chauhan

Counsel for the Respondents:
G.A.

Code of Criminal Procedure-Section-167 (2)-Magistrate rejected prayer for bail-on ground-chargesheet filed within 90 days from the date of remand-argument the period of 90 days expired on 17.01.2011 as the date of remand is 20.10.2011-held in view of provision of Section 9 of General Clauses Act-if the beginning date excluded-on 18.01.2011 shall be the 90th day-on which chargesheet filed-not entitled to claim the benefit of such beneficiary provision.

Held: Para 10

In light of the aforesaid provision it is obvious that first date in the series of the days shall be excluded for the purpose of calculation of 90 days. Accordingly, in the present case the period of 90 days commenced just from the next date of remand i.e. w.e.f 21.10.2010 and from the said period 90 days completed on 18.1.2011, therefore, till 18.1.2011 the revisionist was not entitled to claim the benefit of the provisions of section 167(2) of the Code .

Case law discussed:
2007 (2) JIC 522 (SC); 2001 (1) JIC 652 (All.); 1995 Supp (3) Supreme Court Cases 221; (1994) 4 SCC 602; 2010 (71) ACC 690

(Delivered by Hon'ble Shri Narayan Shukla,J.)

1. Heard Mr. Gyan Singh Chauhan, learned counsel for the revisionist and Mr. Rajendra Kumar Dwivedi, learned Additional Government Advocate.

2. The revisionist has challenged the order dated 18.1.2011 passed by the Chief Judicial Magistrate, Reabareli in Criminal Case No.2485 of 2010,whereby the revisionist's application for bail has been rejected .

3. Upon perusal of the record, it appears that the revisionist moved an application for bail under the strength of the provisions of section 167(2) of the Code of Criminal Procedure (Hereinafter referred to as to the "Code') stating therein that from the date of remand no charge-sheet was filed within 90 days, therefore he is entitled for bail. He also supported his case with the judgment of the Hon'ble Supreme Court rendered in the cases of of **State of West Bengal Vs. Dinesh Dalmiya, 2007 (2) JIC 522 (SC)** and the judgment of this Court rendered in the case of **Bijendra Singh @ Pintoo Vs. State of U.P., 2001 (1) JIC 652 (All).**

4. On the other hand relying upon the judgment of Hon'ble Supreme Court rendered in the cases of **State of M.P. Vs. Rustam and others, 1995 Supp (3) Supreme Court Cases 221,** Sanjay Dutt Vs. State (1994) 5 SCC 410 and **Hitendra Vishnu Thakur and others Vs. State of Maharastra and others , (1994) 4 SCC 602** and the judgment of this court rendered in the case of **Om Prakash Dwivedi Vs. State of U.P., 2010 (71) ACC 690,** the learned Additional Government Advocate submitted that in these cases the Hon'ble Supreme Court as

well as this court have laid down the correct law which requires appreciation before arriving at the conclusion in the matter.

5. Thus main question for consideration is whether the period of 90 days from the date of remand had expired ?

6. Before dealing with the facts of the case it is pertinent to mention the provisions of section 167(2) of the Code, which is extracted below:-

"167(2). The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that-

[(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding-

(i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;

(ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to an does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;]

[(b) no Magistrate shall authorize detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage.]

(C) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

[Explanation I.- For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail.]

[Explanation II.- If any question arises whether an accused person was produced before the Magistrate as required under clause (b), the production of the accused person may be proved by his signature on the order authorising

detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be:]

Provided further that in case of woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognized social institution.]

[(2-A) Notwithstanding anything contained in sub-section (1) or sub-section(2), the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of a sub-inspector, may, where a judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate or Metropolitan Magistrate have been conferred , a copy of the entry in the diary hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate;and, on the expiry of the period of detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order; and where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub-section, shall be taken into account in computing the period specified in paragraph (a) of the proviso to sub-section (2):

Provided that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the officer in charge of the police station or the police officer making the investigation, as the case may be.)"

7. The facts of the case are that accused was taken or remand on 20.10.2010 and 17.1.2011 no charge-sheet was filed by the investigating agency; whereas; on 18.1.2011 it filed the charge-sheet by including the date of remand i.e. 20.10.2010 within the score of 90 days, The revisionist submitted that 90 days had completed on 17.1.2011 and since no charge-sheet was filed by that date, the accused became entitled for bail just after expiry of 90 days i.e. on 18.1.2011, therefore, according to the revisionist the filing of the charge-sheet on 18.1.2011 be treated as filed after 90 days and thus it does not make any difference for granting him bail .

8. Learned counsel for the revisionist in support of his submissions stated that in the case of **Rustam (Supra)** one of the days on either side has to be excluded in computing the period prescribed of 90 days, accordingly, he submitted that the date of remand has to be included in calculation of 90 days, accordingly, 90 days completed on 17.1.2011. Those period of 90 days for the benefit of bail as above has been provided under the Code of Criminal Procedure, but nowhere it is provided in the Code how the period of 90 days would

be calculated for the purpose of application of the provision of sub section 2 of section 167 of the Code.

9. Section 9 of the General Clauses Act, 1897 speaks regarding method of calculation of the period, which is extracted below:-

"9.Commencement and termination of time.- *(1) In any [General Act] or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word "from", and , for the purpose of including the last in a series of days or any other period of time, to use the word "or".*

(2)This section applies also to all [Central Acts] made after the third days of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887."

10. In light of the aforesaid provision it is obvious that first date in the series of the days shall be excluded for the purpose of calculation of 90 days. Accordingly, in the present case the period of 90 days commenced just from the next date of remand i.e. w.e.f 21.10.2010 and from the said period 90 days completed on 18.1.2011, therefore, till 18.1.2011 the revisionist was not entitled to claim the benefit of the provisions of section 167(2) of the Code .

11. Indisputedly, on 18.1.2011 the charge-sheet was filed, therefore, I am of the view that the charge-sheet was filed within 90 days, therefore, the benefit of provision of section 167(2) of the Code is not available to the revisionist for granting him bail. Thus I do not find error in the order impugned .

12. The revision is dismissed. The revisionist is at liberty to claim for bail on different ground.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.02.2011

BEFORE
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE MRS. JAYASHREE TIWARI, J.

First Appeal From Order No. 379 OF 2011

Sheoraj ...Appellant-Plaintiff
Versus
M/s Accord Infrastructure Pvt. Ltd. and others ...Defendant-Respondents

Counsel for the Appellant:
Sri S.O.P. Agarwal

Counsel for the Respondents:
Sri Anoop Trivedi
Sri Shashi Nandan

<u>Code of Civil Procedure-Order 39 rule 1</u>-Prayer for interim injunction refused by Trail Court with specific finding that inspite of recorded co-tenure holder out of 3, two brother have sold their share to the Defendant-Plaintiff allowed the deceleration for nature of land for non agricultural purposed-never resisted the sanction of map by development authority-from khasra-No agriculture activities found-even in relief no prayer for restraining them to create third party interest-held-Trail Court committed No illegality in rejecting injunction Application.

Held: Para 17

In the present case the plaintiff has neither pleaded nor shown that he was exercising any ownership right on the

land by cultivating it or otherwise. He did not make any efforts inspite of execution of the sale deeds in 2004, to get the share partitioned by meets and bounds. The plaintiff waited and watched the defendants to use the property to file a suit. In between he allowed the land to be declared non-agricultural land and the suit for partition to be dismissed on the ground of jurisdiction of revenue court. He also did not object to measurements and inspections on which the building plans were sanctioned. He was not cared to obtain copies of building plans to show as to whether the entire land or only a part is proposed to be developed. The delay on his part in getting the property partitioned and further in not claiming the relief in partition of suit was rightly accepted as a ground to reject the relief of injunction.

Case law discussed:

(2010) 2 SCC 77, 1890 ILR 12 All 436, AIR (38) 1951 All. 199, Robert Watson Consolidation Officer V. Ram Chand Dutt, (18 Cal. 10 P.C.), AIR (11) 1924 P.C. 144, Tilok V. Ramadin Select Case No. 270, Lalla Bissambur Lal V. Rajaram 13 W.R. 337, 9 All. 661 (1887) A.W.N. 253, 1890 ILR 12 All 436 (1890 AWN 95) FB, AIR 1984 SC 1789, (2008) 11 SCC 1, (2009) 11 SCC 229, 2010 (2) SCC 77.

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

1. We have heard Shri S.O.P. Agarwal for the plaintiff-appellant. Shri Shashi Nandan assisted by Shri Anoop Trivedi appears for the defendant-respondents.

2. This First Appeal From Order arises out of an order passed by the Civil Judge (Senior Division) Ghaziabad dated 24.12.2010 in OS No. 2343 of 2010 Sheoraj vs. M/s Accord Infrastructure Pvt. Ltd. rejecting the application for interim injunction, after hearing the parties.

3. The plaintiff-appellant has filed an Original Suit No. 2343 of 2010, for permanent injunction restraining the defendants-respondents to construct road or building, taking exclusive possession and for interfering in the joint possession and use of the land in Khasra No. 292 area 0.2780 hec. and plot No. 274 area 0.2530 hec. in village Mahrauli Pargana Dasna, Tehsil and District Ghaziabad.

4. It is alleged in the plaint that the plaintiff along with his brothers Bhagwant Singh and Satveer Singh were the joint owners and in possession of the property. His brothers have sold their two-third share to defendant nos. 1 to 3. There has been no partition in the family between the brothers and that the property continues to be in joint possession of the plaintiff and defendants. They have no right to take possession or raise constructions on any part of the property exclusively. The defendant company keeps changing its name from time to time. It is a powerful company with means to raise constructions. On 30.10.2010 they brought and have kept the construction materials on the eastern portion of plot No. 292, and that their labourers started raising constructions of the pucca road and the building. When they were stopped from raising constructions, the defendants threatened the plaintiff. The defendants want to raise constructions and to stop the passage of the drains for irrigation. They are threatening to occupy a specific portion of the land and to make constructions on it.

5. The defendants-respondents filed objections alleging that they are reputed builders engaged in constructions of residential and commercial buildings in

and around Ghaziabad. They have purchased one third portion of 0.2530 hect. in Khata No. 335, Khasra No. 292 by sale deeds dated 29.7.2004 and 4.6.2004 from Bhagwant Singh and are in possession of the land purchased by them. Their name has been mutated in the revenue records and they are in possession thereof. The company has got the building plan sanctioned from the Ghaziabad Development Authority, Ghaziabad after Ghaziabad Development Authority verified the revenue records and the possession of the defendants on the spot. The maps were sanctioned on 1.4.2010, after which the defendants have started constructions on the portion of the land purchased by them in accordance with the law. If the plaintiff alleged that there is no partition, the suit filed by them only for injunction without claiming partition is barred by the provisions of Sections 34, 38 and 41 of the Specific Relief Act. The defendants will suffer irreparable loss and injury, if any injunction is issued restraining them from making constructions.

6. The trial court, while deciding application for interim injunction, has found that it is not denied that the land was own jointly by the three brothers and that two of the brothers have sold the land to the defendants. The plaintiff has not disclosed the dates of the sale deeds. In the objections, it is stated that the sale deeds were executed in the year 2004. The defendant is a builder and has purchased the land for raising the constructions. There is nothing to show that since 2004 the plaintiff has been in joint possession with the defendants or has sown and harvested any crops over the land. The trial court prima facie found that on the spot the brothers had partitioned the land. A suit for partition was also filed by the defendants which was pending in the revenue courts. The Khatauni (record of title) shows that no crops were shown on the land and thus the plaintiff will not suffer any irreparable injury. The trial court also found that the plaintiff has not prayed for relief of partition and has filed the suit only for permanent injunction. The land has been declared as non-agricultural land and for construction the map has been sanctioned by the Ghaziabad Development Authority. In the circumstances the balance of convenience lies in favour of the defendants and that if injunction is granted, the scheme for construction will suffer.

7. Shri S.O.P. Agrawal, learned counsel for the petitioner submits that it was not necessary for the plaintiff to claim a relief for partition. The suit for partition filed by the defendants was dismissed on the ground that the revenue courts after declaration of land as non-agricultural land, did not have jurisdiction to entertain the suit. He submits that so far the land has not been partitioned. It is in joint ownership of plaintiff and defendants. The defendant is not entitled to usurp the land for its own benefits and to make constructions. He submits that unless there is a partition by meets and bounce no co-owner has a right to utilise the land for its benefits. The raising of constructions will cause irreparable loss as third party right may also be created. He relies upon the principles of law for grant of temporary injunction laid down in **Narendra Kante vs. Anuradha Kante & others (2010) 2 SCC 77,** in support of his submission.

8. In the present case the sale deeds were executed by the brothers of the plaintiff in the year 2004. The land was thereafter declared as non-agricultural land and the building's plan were approved by the Ghaziabad Development Authority. There is no pleading or material on record to show that the plaintiff was in physical possession of the land, or had sown any crops. The plaintiff has not pleaded any such facts or produced documents to establish the use of his ownership's rights. There are no pleadings or any proof of any agricultural operations carried out by the plaintiff on the land.

9. Prima facie we do not find any error in the findings of the trial court. The plaintiff was aware of the sale of two-third portion by his brothers in favour of defendants. He did not choose to get the land partitioned or exercise any proprietary rights. He has waited for six years until the defendants got the building plan sanctioned and started making constructions.

10. More than a century ago, it was laid down in **Shadi v. Anup Singh 1890 ILR 12 All 436** that the Court will grant a perpetual injunction to restrain one of the other co-sharers from appropriating to himself land in which each of his co-sharers has an interest and from building upon it; and if he proceeded to build upon it the Court would grant mandatory injunction directing that the building so far as it has proceeded be pulled down. In the later decision no such broad proposition was accepted.

11. In **Chhedi Lal v. Chhotey Lal AIR (38) 1951 All. 199** Justice Ghulam Hasan speaking for the Division Bench after citing **Robert Watson Consolidation Officer. v. Ram Chand Dutt, (18 Cal. 10 P.C.)** by Sir Barues Peacock; **Midnapur Zamindary Consolidation Officer. Ltd. v. Naresh Narayan Roy, AIR (11) 1924 P.C. 144; Tilok v. Ramadhin Select Case No. 270** , by Mr. Spankie, ACJ; **Lalla Bissambur Lal v. Rajaram 13 W.R. 337**, a decision by Mahmood, J in **Paras Ram v. Sherjit 9 All. 661 (1887) A.W.N. 253** and another Full Bench decision of Five-Judges by Mahmood, J in **Shadi v. Anup Singh 1890 ILR 12 All 436 (1890 AWN 95) FB** held as follows:-

"(25). **As a result of the foregoing discussion, it appears to us that the question of the right of co-sharers in respect of joint land should be kept separate and distinct from the question as to what relief should be granted to a co-sharer, whose right in respect of joint land has been invaded by the other co-sharers-either by exclusively appropriating and cultivating land or by raising constructions thereon.** The conflict in some of the decisions has apparently risen from the confusion of the two distinct matters. While therefore a co-sharer is entitled to object to another co-sharer exclusively appropriating land to himself to the detriment of other co-sharers the question as to what relief should be granted to the plaintiff in the event of the invasion of his rights will depend upon the circumstances of each case. The right to the relief for demolition and injunction will be granted or withheld by the Court according as the circumstances established in the case justify. **The Court may feel persuaded to grant both the reliefs if the evidence establishes that the plaintiff cannot be**

adequately compensated at the time of the partition and that greater injury will result to him by the refusal of the relief than by granting it. On the contrary if material and substantial injury will be caused to the defendant by the granting of the relief, the Court will no doubt be exercising proper discretion in withholding such relief. As has been pointed out in some of the cases, each case will be decided upon its own peculiar facts and it will be left to the Court to exercise its discretion upon proof of circumstances showing which side the balance of convenience lies. That the Court in the exercise of its discretion will be guided by considerations of justice, equity and good conscience cannot be overlooked and it is not possible for the Court to lay down an inflexible rule as to the circumstances in which the relief for demolition and injunction should be granted or refused."

12. It would also be relevant here to quote the observations of Mahmood, J in **Paras Ram vs. Sherjit 9 All. 661 (1887 AWN 253)** as follows:-

"(14) The cases of the Allahabad High Court on the point are far more numerous. Paras Ram v. Sherjit, 9 All. 661: (1887 A.W.N. 253) is a decision by Mahmood J. in a case where a co-owner sought demolition of a building constructed by a joint owner in spite of his protest. The learned Judge observed that as a pure question of law as distinguished from the rules of equity the plaintiffs may be entitled to the decree but Courts in India exercise the combined jurisdiction of law and equity and cannot disregard equitable doctrines in enforcing remedies. **He distinguished cases in which a building is erected by a rank trespasser upon a land of another and cases in which the building is erected by a joint proprietor on joint land without the permission of his joint owners or in spite of their protest.** The learned Judge then quotes the well-known judgments of Sir Barnes Peacock in Biswambhar Lal v. Raja Ram, 3 Beng. L.R. (App) 67: (13 W.R. 337) and concludes that when a joint owner of land, without obtaining the permission of his co-owners, builds upon such land, such buildings should not be demolished at the instance of such co-owners, unless they prove that the action of their joint owner in building upon joint land had caused them a material and substantial injury such as cannot be remedied by partition of the joint land. This case was considered by a Full Bench of five Judges including Mahmood J. in Shadi v. Anup Singh, 12 All. 436: (1890 A.W.N. 95 F.B.). The suit was brought for an injunction within three or four days of the defendant commencing a construction upon joint land. The defendant asserted exclusive right to the land. The plaintiff obtained an interim injunction but the District Judge on appeal, in view of the ruling in Paras Ram's case, 9 All. 661: (1887 A.W.N. 253) went into the question as to whether the plaintiff could be compensated by the defendant at partition. He found that the defendant was building upon land which was in excess of the share which would come to him on partition and the plaintiff could not, therefore, be adequately compensated. Sir John Edge C.J. Held that the District Judge was wrong in going into the question whether the excess land had been appropriated and that finding of fact given by him the

injunction should have been granted. It is obvious from a reading of the judgment in Paras Ram's case, 9 All. 661: (1887 A.W.N. 253) that it did not justify an investigation into the question whether more land than belonged to the co-sharer was appropriated. The learned Chief Justice observed that the defendant, instead of going to the partition Court, proceeded to appropriate to himself lands in which each of his co-sharers had an interest and thus he proposed to exclude them from all use and enjoyment of a portion of common land. He went on to say:

"We need not in this case consider what a civil Court should do if the defendant has erected at great expense buildings which a Court of equity might hesitate to order him to pull down."

This observation clearly saves the power of the Court under S. 55, Specific Relief Act, as a Court of equity to regulate its discretion in accordance with the provisions of that section in granting or withholding injunction."

13. In **Ayyaswami Gounder vs. Munnuswami Gounder AIR 1984 SC 1789** the Supreme Court held that where an owner of land obstructs another co-owner from using the land even when the use causes no injury or detriment to him, an injunction can be granted against the obstructing owner. The only restriction could by law on the in user of land by a co-owner is that it should not be so used as to pre-judicially affect or put the other co-owner to a detriment. In paragraph 10, and 11, it was observed:-

"10. We find considerable force in this contention. In the absence of any specific pleading regarding prejudice or detriment to the defendants-respondents the plaintiffs have every right to use the common land and the common channel. The plaintiffs-appellants were claiming their right on the basis of admitted co-ownership rights which includes unrestricted user, unlimited in point of disposition, and the High Court was not justified in holding that that plaintiffs' right to take water was not acquired by any grant from the defendants-respondents or from any other sale deed. The right of co-ownership presupposes a bundle of rights which has been lost sight of by the High Court.

11. The only restriction put by law on the common user of land by a co-owner is that it should not be so used as to prejudicially affect or put the other co-owner to a detriment."

14. In **Mandali Ranganna and others vs. T. Ramachandra and others (2008) 11 SCC 1** the Supreme Court held in paras 21 and 22 as follows:-

21. While considering an application for grant of injunction, the Court will not only take into consideration the basic elements in relation thereto, viz., existence of a prima facie case, balance of convenience and irreparable injury, it must also take into consideration the conduct of the parties.

22. Grant of injunction is an equitable relief. A person who had kept quiet for a long time and allowed another to deal with the properties exclusively, ordinarily would not be entitled to an order of injunction. The Court will not interfere only because the property is a

very valuable one. We are not however, oblivious of the fact that grant or refusal of injunction has serious consequence depending upon the nature thereof. The Courts dealing with such matters must make all endeavours to protect the interest of the parties. For the said purpose, application of mind on the part of the Courts is imperative. Contentions raised by the parties must be determined objectively."

15. The judgement in **Mandali Ranganna** (supra)was followed in **Kishorsinh Ratansinh Jadeja vs. Maruti Corporation and others (2009) 11 SCC 229** and in **Narendra Kante vs. Anuradha Kante and others 2010 (2) SCC 77.** In all these cases the interim injunction was refused. In **Kishorsinh Ratansinh Jadeja** (supra) the Supreme Court did not favour the grant of injunction, affecting rights of third parties. There were 280 transferees to whom some portion of land was already sold. It was held that if the owners of the property remain restrained from developing the same, it is they who will suffer severe prejudice, as they will be deprived of the benefit of the user of their land during the said period. The balance of convenience and inconvenience is against the grant of such an injunction. In Narendra Kant (supra) the High Court had in a Misc. Appeal observed that in case injunction was granted, it would be the defendants who will suffer irreparable loss and injury. It was observed that defendant no. 10 (the transferee from respondent-defendant no. 1 and 2) had acquired a right to the suit property. He was therefore allowed to carry out construction activities over the disputed land but was restrained from alienating or transferring the property in question or from creating any third party rights during the pendency of the civil suit. The trial court was directed to decide the suit expeditiously, and to dispose of the same within six months. The Supreme Court did not interfere with the order except by directing that the co-sharers to the suit property shall not create any third party right or encumber or transfer their respective suit property in any manner and all transactions undertaken in respect thereof shall be subject to the final decision in the suit.

16. Every co-sharer has a right to the property and to develop the property in accordance with the law, subject to the condition that such use of the property will not render the partition impossible. Either the plaintiff may file a suit for partition and injunction, or may bring such facts and circumstances to the notice of the Court that the activities carried out by the defendants will make the partition impossible. In either case the delay in filing the suit will not entitle the plaintiff to seek the relief of injunction.

17. In the present case the plaintiff has neither pleaded nor shown that he was exercising any ownership right on the land by cultivating it or otherwise. He did not make any efforts inspite of execution of the sale deeds in 2004, to get the share partitioned by meets and bounds. The plaintiff waited and watched the defendants to use the property to file a suit. In between he allowed the land to be declared non-agricultural land and the suit for partition to be dismissed on the ground of jurisdiction of revenue court. He also did not object to measurements and inspections on which the building

plans were sanctioned. He was not cared to obtain copies of building plans to show as to whether the entire land or only a part is proposed to be developed. The delay on his part in getting the property partitioned and further in not claiming the relief in partition of suit was rightly accepted as a ground to reject the relief of injunction.

18. The pleadings in the plaint clearly show that the building material has been accumulated on only a part (eastern) of the plot namely Khasra No. 292 and that some labourers had started laying down the road. The activity of the defendants did not amount to usurping the entire land which may defeat the rights of the plaintiffs on partition.

19. The plaintiff did not claim any relief either in the plaint or in the injunction application to restrain the defendants from creating third party rights over the land, nor there was any such contention made by the counsel for plaintiff-appellant.

20. For the aforesaid reasons, we do not find that the trial court committed any error of facts and law in rejecting the injunction application.

21. The First Appeal From Order is **dismissed,** with observations that the suit may be decided expeditiously.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.02.2011

BEFORE
THE HON'BLE RAJIV SHARMA, J.

Misc. Single No. - 510 of 2006

Vidya Sagar and others ...Petitioners
Versus
Additional District Judge, Court No.2, Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri Mohd. Arif Khan
Sri Mohiuddin Khan

Counsel for the Respondents:
Sri M.A.Khan
Sri Rakesh Pandey
C.S.C.

Code of Civil Procedure-order 9 rule-13-Application to recall ex parte Decree-allowed with condition to file written statement by the date fixed-on adjourn date neither defendant nor his counsel appeared nor written statement filed-court decided suit ex parte-application under order 9 rule 13 rejected on premises when suit decided under order VIII Rule 10-application not maintainable held-totally misconceived-neither the petitioner precluded the Trail Court to examine the witnesses, nor the Trail Court followed the procedure prescribed under law-suit decreed outrightly in absence of petitioner-clearly came within the ambit of order 9 rule 13-order Set-a-side-subject to payment of cost.

Held: Para 19

It is also relevant to mention that the impugned judgment dated 3.1.1994 was passed for default of appearance of the petitioners and by not even examining the evidence, if any, on behalf of the respondent. The requirement under

Order 8 Rule 10 of the Code to pronounce a judgment against the party who fails to present a written statement does not permit the court not to examine the evidence on record and pass a mechanical one sided order without applying its mind. Accordingly it cannot be said to be a judgment , on the merits, but only a decree against the petitioners owing to its failure to file a written statement and as such it will be termed an an ex-parte decree.

Case law discussed:

[2000 (18) LCD 336]; [2005 (23) LCD 1250]; [AIR 1991 Patna 60]; [AIR 1975 Allahabad 209]; AIR 1981 Mad. 258; AIR 1991 AP 69; AIR 1988 Kerala 304;

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

1. Heard Mohd. Arif Khan, Senior Advocate, assisted by Sri Mohiuddin Khan, learned Counsel for the petitioners, Sri Rakesh Pandey, Counsel for the opposite party No.3 and Standing Counsel for the State.

2. By means of instant writ petition, the petitioners have assailed the orders dated 16.12.2005 passed by the opposite party No.1-Additional District Judge, Court No.2, Lucknow, upholding the order dated 3.2.1997 (Annexure No.7) and the order dated 3.1.1994 passed by the opposite party No.2-IInd Additional Civil Judge, Lucknow.

3. Brief facts, giving rise to the instant writ petition, are that opposite party No.-3-K.S. Rawat filed a suit for possession by demolition of the constructions, which was registered as Regular Suit No. 289 of 1986, against the petitioners and opposite parties Nos. 4 to 6, *inter-alia* stating therein that he had purchased the plot No. 241, measuring 0.03 biswas through a registered sale deed from one Smt. Punia and was enjoying possession but the petitioners had forcibly took the possession and raised boundary wall thereon. In the suit proceedings, notice was issued but as opposite party No.3 did not give correct address of the petitioners and as such, notice was not served upon the petitioners. Subsequently, service was effected on the petitioners through publication. Ultimately, the said suit was decreed *ex parte* on 23.3.1990.

4. On coming to know about the *ex-parte* decree dated 23.3.1990, petitioners moved an application under Order IX Rule 13 of the Code of the Civil Procedure, which was registered as Misc. Case No. 14-C of 1990, for recalling the aforesaid order dated 23.3.1990. The Additional Civil Judge, Lucknow, on being satisfied with the cause shown in the recall application, vide order dated 5.11.1993, set-aside the *ex-parte* decree dated 23.3.1990 and restored the Regular Suit No. 289 of 1986 to its original number and directed the petitioners/defendants to file their written statement prior to 23.11.1993.

5. Counsel for the petitioners has submitted that petitioners/defendants could not file their written statement prior to 23.11.1993 as their Counsel had gone out of station and as such, the case was fixed for filing written statement for 3.1.1994. On 3.1.1994, the petitioners/defendants filed an application for adjournment but the Additional Civil Judge, Lucknow, while rejecting the adjournment sought by the petitioners, vacated the stay order, proceeded under Order VIII Rule 10 of the Code of the Civil Procedure and further decreed the suit *ex-parte*. Consequently, petitioners were directed to deliver the possession of the land in question to the opposite party

No.3, failing which, possession will be given through the Court.

6. Under these circumstances, petitioners filed another application for recall of the *ex parte* decree dated 3.1.1994 under Order IX Rule 13 of the Code of Civil Procedure. The Additional Civil Judge, Lucknow, rejected the said application for recall by the order dated 3.2.1997 on the ground that the order dated 5.11.1993 was conditional one and the *ex-parte* decree dated 23.3.1990 was set-aside subject to the condition that the petitioners/defendants should file their written statement prior to 23.11.1993, which they had failed to comply.

7. Aggrieved by the aforesaid order dated 3.2.1997, petitioners/defendants filed an appeal, which was registered as Misc. Appeal No. 44 of 1997. In appeal it was urged that the order dated 5.11.1993, was not a conditional one and further a litigant cannot be penalized for the inaction or negligent on the part of his Counsel. The Additional District Judge, Lucknow, vide order dated 16.12.2005, rejected the appeal and held that while decreeing the suit filed by the opposite party No.3, the trial court had proceeded under Order VIII Rule 10 of the Code of Civil Procedure and as such the application made by the petitioners under Order IX Rule 13 of the Code of Civil Procedure was not maintainable.

8. Feeling aggrieved by the orders dated 16.12.2005 and the order dated 3.1.1994, petitioners have filed the instant writ petition inter alia on the ground that the opposite parties Nos. 1 and 2, while rejecting the appeal and the application for setting-aside *ex parte* decree, have relied on the past conduct of a party which cannot be the sole ground as the Court's discretion is to be exercised judicially and as such, the trial court had erred in law in not granting time to the petitioners to file written statement and further proceeded to decide the suit under Order VIII Rule 10 of the Code of Civil Procedure.

9. Relying upon the judgments of the Apex Court rendered in the case of ***Pradeep Narain Sharma and another Versus Satya Prakash Pandey*** [2000 (18) LCD 336 and ***Salem Advocate Bar Association, Tamil Nadu Versus Union of India*** [2005 (23) LCD 1250], learned Counsel for the petitioners submits that Order VIII Rule 10 of the Code of Procedure does not prescribe that whenever there is a failure to file written statement, the Court shall pronounce judgment against the defendant. However, it confers a discretion on the court either to pronounce a judgment or to pass such order as it may think fit. Further, in case an extension of time is asked for, Court has power to extend the time to file written statement within the scope and ambit of Rule 1 of Order VIII, which provides for filing of written statement by the defendant at or before the first hearing or within such time as the Court may permit and such extension of time is also implicit in Rule 10 within the expression *"or make such order in relation to the suit as it think fit"*. Thus it is not mandatory to pronounce the judgment on the failure to file written statement. It is discretionary and the discretion of the Court is always a judicial discretion to be exercised judiciously.

10. Learned Counsel for the petitioners submits that it is a settled law that the Courts while proceeding with the

case under Order VIII Rule 10 of the Code of Civil Procedure for the default of the defendant in filing the written statement should call upon the plaintiff to adduce evidence to prove his case and should apply its mind to the facts and evidence to arrive at a conclusion, whether the plaintiff is entitled to some relief in the suit or not. He submits that the petitioners are still in possession over the premises in dispute.

11. On the other hand, learned Counsel for the opposite party No.3 submits that the Court below had afforded opportunity to the petitioners by passing a conditional order to the effect that prior to 23.11.1993, they should file written statement and the case was listed for 23.11.1993 for framing issues but petitioners did not file any written statement and had sought adjournment by moving an application, wherein no reason was given for not filing any written statement prior to 23.11.1993 as directed by the Court and as such, on 23.11.1993, the case was adjourned for 3.1.1994 but even then, they did not file written statement. Furthermore, no reason was assigned as to why written statement was not prepared and as such, the conduct of the petitioners shows that they were only interested in abusing the process of law and in delaying the proceeding of the suit. He submits that inspite of sufficient opportunity having being provided to the petitioners, they have not filed the written statement for considerable long period and as such, the trial Court proceeded in accordance with the procedure prescribed under the Code and decreed the suit..

12. It has been argued on behalf of the contesting respondent that where the petitioners have sought adjournment by moving an application but did not file written statement after being granted adjournment and the judgment followed by a decree was passed, it cannot be called an *ex parte* decree within the meaning of Order IX Rule 13 of the Code of Civil Procedure in view of the amended provisions of Order VIII Rule 10 and as such, there would be no need to fix any date for *ex-parte* hearing. Thus, the application under Order IX Rule 13 for setting aside the *ex-parte* decree would not be maintainable as the decree passed was not an *ex parte* decree. In support of the aforesaid submission, learned Counsel for the respondent has relied upon the judgment of Apex Court rendered in the case of ***Satya Narayan Sah Vs. Brij Gopal Mundra*** [AIR 1991 Patna 60] and ***Rudra Nath Mishra Versus Kashi Nath Mishra and others*** [AIR 1975 Allahabad 209].

13. Thus the sole question involved in this writ petition is as to whether the decree passed by the court after proceeding under Order 8 Rule 10 of the Code of Civil Procedure is any ex-parte decree and as to whether application udner Order 9 Rule 13 is maintainable or not.

14. First, I would examine *Rudra Nath Mishra's* (supra) case relied upon by the Counsel for the respondent. In this case, the case had been adjourned at the instance of the Court. On the adjourned date counsel for defendant moved the Court for a further adjournment. The application was rejected and the Court proceeded against the defendant and decreed the suit by using the words "*ex-parte*". The court observed that the defendant on whose behalf his counsel moved an application for adjournment,

would be deemed to have been present on that date and it could not be said that the suit was decided in his absence. Therefore, the decree passed against the defendant will be deemed to be a decree passed on merits and cannot be termed as an *ex-parte*. . On the contrary, in the instant case, the time for filing written statement was granted but written statement was not filed and as such Court proceeded under Order VIII Rule 10 of the Code of Civil Procedure. Therefore, this case is distinguishable and cannot be applied.

15. Similarly, the decision rendered by the Patna High Court, on in *Satya Narain Sah v. Brij Gopal Mundra;* AIR 1991 Patna 60 cannot be made applicable in the instant case as in the first part of Rule 13 of Order 9 it is clearly indicated that in any case in which a decree is passed *ex-parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside. The expression "in any case in which a decree is passed *ex-parte* against a defendant" obviously refers to a case in which a decree is infact, passed *ex parte* against a defendant.

16. In my considered opinion on the failure of the defendants and their Counsel to appear in Court on the adjourned date of hearing of the suit, and its disposal under Order 8 Rule 10, it shall be treated as a disposal in accordance with Order 17 Rule 2 and it would be an ex parte decree passed under Order 8 Rule 10 and it shall not be treated differently from any other ex-parte decree and the same is liable to be set-aside under Order 9 Rule 13 of the Code of Civil Procedure.

17. The application of the provisions of Order 8 Rule 10 CPC results in a decree not by admission but owing to the default of a defendant to file a written statement which in its real meaning and substance is only an ex-parte decree. In my considered opinion when the trial court proceeds under Order 8 Rule 10 for defendant's default and passes a decree, it is an ex parte decree covered by Order 9 Rule 13. My above view is fortified with the decision of the Madras High Court in **N.Jayaraman vs M/s Glaxo Laboratories India ltd; AIR 1981 Mad. 258** wherein the Court held in paragraph 6 of the report as under"-

"The use of the words " in any case in which a decree is passed ex parte is wide enough to cover all cases of ex parte decrees, no matter for what reason such an ex-parte decree has been passed. In the absence, therefore, of any restriction with the reference to the applicability of the provisions of Order 9 Rule 13 CPC to cases covered by Order 9 Rule 6 CPC. It is not possible to construe the provisions of O 9 Rule 13 CPC narrowly and to hold that the decree, as in the present case, cannot be termed as an ex parte decree because the procedure under Order 9 Rule 6 CPC has not been followed."

It may be added that Andhra Pradesh High Court in the case of **Innovation Apartments Flat Owners Association vs M/s Innovation Associates;** AIR 1991 AP 69 held as under :-

" The provisions of O.9, R.13 can be invoked in any case in which a decree is passed '*ex-parte'* and the question whether the *ex-parte* decree was passed in view of non-filing of the written statement or otherwise is of no consequence. The objective in doing so is to avoid driving the

parties to file a regular appeal involving a lot of expenditure and waste of time. Where the lower Court disposed of the matter under O.8, R.10, C.P.C. decreeing the suit at the stage when written statement was not filed, the decree would amount to *ex parte* decree and attract provisions of O.9, R.10."

In **A.K.P.Haridas vs. V.A.Madhavi Amma and others;** AIR 1988 Kerala 304, the court observed that the remedy under Order 9 Rule 13 and that by way of appeal are not inconsistent, or mutually exclusive. There is no bar in resorting to both the remedies simultaneously or any of them alone. The relevant paragraph reads as under:-

"There is no bar in resorting to both the remedies simultaneously or any of them alone. Only thing is that when both remedies are attempted and one succeeds the other other becomes infructuous since the object and effect of both is the same. Availability of the remedy by way of appeal is no bar to an application under O.9, R.13, if such a remedy is also available to the party. For example when the defendant is set ex parte under O.9, R. 6 and an ex parte decree passed, though that decree is appealable, an application under O.9, R.13 also will lie. The real question for consideration is only whether an application under O.9, Rule13 will lie.

18. Thus it is imminently clear that a decree passed for defendant's default in filing written statement is an ex parte decree duly comes within the ambit of Order 9 Rule 13 and as such an application to set aside under Order 9 Rule 13 is maintainable.

19. It is also relevant to mention that the impugned judgment dated 3.1.1994 was passed for default of appearance of the petitioners and by not even examining the evidence, if any, on behalf of the respondent. The requirement under Order 8 Rule 10 of the Code to pronounce a judgment against the party who fails to present a written statement does not permit the court not to examine the evidence on record and pass a mechanical one sided order without applying its mind. Accordingly it cannot be said to be a judgment , on the merits, but only a decree against the petitioners owing to its failure to file a written statement and as such it will be termed an an *ex-parte* decree.

20. For the reasons aforesaid, the court below erred in holding that the application Order 9 Rule 13 is not maintainable and rejected the same. The Appellate Court also committed an error in approving the same. Therefore, the impugned orders suffer from infirmities and are liable to be quashed.

21. Accordingly, the writ petition is allowed and the impugned order dated 16.12.2005 passed by Additional District Judge, Lucknow and the order dated 3.2.1997 and 3.1.1994 passed by II Additional Civil Judge, Lucknow are hereby quashed. The Trial Court is directed to decide the suit on merits expeditiously provided the petitioners pay a sum of Rs. 8000/- as costs within a period of three months from the date of issue of certified copy of this order. It is further provided that out of Rs.8000/-, Rs. 5000/- shall be paid to the opposite party No.3 and Rs. 3000/- shall be transmitted to the Mediation and Conciliation Centre, High Court, Lucknow Bench, Lucknow.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.02.2011

BEFORE
THE HON'BLE SHRI NARAYAN SHUKLA, J.

Criminal Misc. Case No.525 of 2011

Shanti Devi ...Petitioner/Informant
Versus
State of U.P. ...Opp.parties.

Code of Criminal Procedure-Section-482-on application U/S 156(3) Magistrate instead of directing the Police to investigate and register the case-treated as complaint case challenged-by treating the application as complaint whether Magistrate committed any illegality-held-'No'-direction for investigation by Police is pre-cognizance and similar investigation under Section 202 is post cognizance-No illegality in order passed by Magistrate-petition dismissed.

Held: Para 5

In the light of the aforesaid observations, I am of the view that the learned Magistrate has not committed any error in taking cognizance in the matter and proceeding for enquiry. Therefore, the petition is dismissed.

Case law discussed:
2010 (71) ACC 446; 2007 (59) ACC 739 (DB) (All); 2001 (Suppl.) ACC 957 (SC); Smt. Mona Panwar versus The Hon'ble High Court of Judicature at Allahabad and others, Criminal Appeal No.298 of 2011, decided on February 02, 2011; 2010 (4) SCC 185

(Delivered by Hon'ble Shri Narayan Shukla, J.)

1. Heard Mr.Murli Manohar Srivastava, learned counsel for the petitioner as well as Mr.Rajendra Kumar Dwivedi, learned Additional Government Advocate for the State.

2. The petitioner has challenged the order dated 18th of May, 2010, passed by the Additional Chief Judicial Magistrate-V, Court No.29, Lucknow on Misc. Application No.58 of 2010, moved under Section 156(3) of the Code of Criminal Procedure, on the ground that the learned Magistrate has wrongly converted the application into complaint as the provisions of Section 156(3) of the Code of Criminal Procedure as well as provisions of Chapter 15 of the Code of Criminal Procedure have no co-relationship to each other, they are different and distinct provisions absolutely providing a different procedure. In support of his submission he placed reliance upon several decisions of this court as well as the Hon'ble Supreme Court, which are referred to hereunder:-

(1) **Dharmeshbhai Vasudevbhai & others versus State of Gujrat and others reported in 2009 Cri. L.J.2969.**

(2) **Chandrika Singh versus State of U.P. And others, reported in 2007 (3) JIC 746 (All).**

(3) **Superintendent of Police, C.B.I. & Ors. Versus Tapan Kumar Singh, reported in 2003(2) JIC 126 (SC).**

(4) **Smt.Santosh Kumari versus State of U.P., reported in 2007 (2) JIC 351 (All).**

3. On the other hand Mr.Rajendra Kumar Dwivedi, learned Additional Government Advocate, appearing on behalf of the State, in support of his argument, has cited the following decisions:-

(1) Rajendra Singh versus State of U.P. And others, reported in 2010 (71) ACC 446.

(2) Sukhwasi son of Hulasi versus State of Uttar Pradesh, reported in 2007 (59) ACC 739 (DB) (All).

(3) Joseph Mathuri alias Vishveshwarananda and another versus Swami Sachidanand Harisakshi and another reported in 2001 (Suppl.) ACC 957 (SC).

(4) Smt. Mona Panwar versus The Hon'ble High Court of Judicature at Allahabad and others, Criminal Appeal No.298 of 2011, decided on February 02, 2011.

4. The controversy raised in the matter has already been settled by the Hon'ble Supreme Court recently in the case of **Rameshbhai Pandurao Hedau versus State of Gujarat reported in 2010 (4) SCC 185,** in which the Hon'ble Supreme Court has expressed the opinion as under:-

"25.The power to direct an investigation to the police authorities is available to the Magistrate both under Section 156(3) Cr.P.C. and under Section 202 Cr.P.C. The only difference is the stage at which the said powers may be invoked. As indicated hereinbefore, the power under Section 156(3) Cr.P.C. to direct an investigation by the police authorities is at the pre-cognizance stage while the power to direct a similar investigation under Section 202 is at the post-cognizance stage.

26. The learned Magistrate has chosen to adopt the latter course and has treated the protest petition filed by the appellant as a complaint under Section 200 of the Code and has thereafter proceeded under Section 202 Cr.P.C. and kept the matter with himself for an inquiry in the facts of the case. There is nothing irregular in the manner in which the learned Magistrate has proceeded and if at the stage of sub-section (2) of Section 202 the learned Magistrate deems it fit, he may either dismiss the complaint under Section 203 or proceed in terms of Section 193 and commit the case to the Court of Session.

5. In the light of the aforesaid observations, I am of the view that the learned Magistrate has not committed any error in taking cognizance in the matter and proceeding for enquiry. Therefore, the petition is dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 22.02.2011

BEFORE
THE HON'BLE SHRI NARAYAN SHUKLA, J.

Criminal Misc. Case No. 654 of 2011 (U/S 482, Cr.P.C.)

Mohd. Arif and another ...Petitioners
Versus
State of U.P. and another ...Opposite parties

<u>Code of Criminal Procedure-Section 319</u>-Power of Magistrate to Summon such person even not charge-sheeted-solely depends upon the satisfaction of Magistrate-likelihood of conviction on basis of material/evidence so collect-for rail alongwith other accused-order impugned perfectly justified.

Held: Para 9

In the present case on the application moved by the complainant, the learned Magistrate has found it proper and in the interest of justice to summon the petitioners for trial, which shall be treated his satisfaction regarding

necessity the trial of the petitioners along with other accused.

Case law discussed:

AIR 2008 Supreme Court 1564; [2007 AIR SCW 6258]; AIR 2010 Supreme Court 518

(Delivered by Hon'ble Shri Narayan Shukla, J.)

1. Heard learned counsel for the petitioners as well as Sri Rajendra Kumar Dwivedi, learned Additional Government Advocate.

2. The petitioners have challenged the order dated 10th of November, 2010 passed by the Additional Sessions Judge, Sitapur in Sessions Trial No. 562 of 2006 on the ground that the order is absolutely without application of mind.

3. By means of order impugned, the petitioners have been summoned for trial in exercise of power provided under Section 319 of the Code of Criminal Procedure. Though they were named along with other two accused, but after investigation police submitted charge-sheet only against other two accused namely Jiyaul son of Shaif Ali and Munnu son of Jiyaul, thus, the petitioners were not charge-sheeted, but now they have been summoned for trial under the order impugned without application of mind.

4. The learned counsel for the petitioners cited a case i.e. **Kailash vs. State of Rajasthan & Anr., AIR 2008 Supreme Court 1564,** in which the Hon'ble Supreme Court held that; for exercise of discretion under Section 319 of the Code of Criminal Procedure all relevant factors have to be kept in view and an order is not required to be made mechanically merely only on the ground that the some evidence had come on record implicating the person sought to be added as an accused." In this case, Hon'ble Supreme Court has relied upon the case of Mohd. Shafi v. Mohd. Rafiq & Anr. [Judgemet tdoay 2007 (5) SC 562], in which the Hon'ble Supreme Court has held that; before a court exercises its discretionary jurisdiction in terms of Section 319 of the Code of Criminal Procedure, it must arrive at the satisfaction that there exists a possibility that the accused so summoned in all likelihood would be convicted. Such satisfaction can be arrived at inter alia upon completion of the cross-examination of the said witness. For the said purpose, the court concerned may also like to consider other evidence.

5. The another case is **Y. Saraba Reddy vs Puthur Rami Reddy & Ors. [2007 AIR SCW 6258]**. The relevant paragraph 13 of which is reproduced hereinunder:-

13. Power under Section 319 of the Code can be exercised by the Court suo motu or on an application by someone including accused already before it. If it is satisfied that any person other than accused has committed an offence he is to be tried together with the accused. The power is discretionary and such discretion must be exercised judicially having regard to the facts and circumstances of the case. Undisputedly, it is an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking action against a person against whom action had not been taken earlier. The word "evidence" in Section 319 contemplates that evidence of witnesses be given in Court. Under sub-section

(4)(1) (b) of the aforesaid provision, it is specfically made clear that it will be presumed that newly added person had been an accused person when the Court took congnizance of the offence upon which the inquiry or trial was commenced. That would show that by virtue of sub-section (4) (1) (b) a legal fiction is created that cognizance would be presumed to have been taken so far as newly added accused is concerned."

6. He also cited a case i.e. **Suman vs State of Rajasthan & Anr AIR 2010 Supreme Court 518,** in which the scope of Section 319 of the Code of Criminal Procedure has been discussed by the Hon'ble Supreme Court. The relevant paragraphs 11 & 14 is reproduced hereinunder:-

11.*"Section 319, Cr.P.C. applies to all the Courts including the Sessions Court. It empowers the Court to add any person, not being the accused before it, but against whom there appears during trial sufficient evidence indicating his involvement in the offence, as an accused and direct him to be tried along with other accused. If such person is not attending the Court, he can be arrested or summoned. If he is attending the Court, although not under arrest or upon a summons, he can be detained by such Court for the purpose of inquiry into, or trial of, the offence which he appears to have committed. Sub-section (4) lays down that where the Court proceeds against any person under Sub-section (1), the proceedings in respect of such person shall be commenced afresh and witnesses are re-heard. A reading of the plain language of sub-section (1) of Section 319, Cr.P.C. makes it clear that a person not already an accused in a case can be proceeded against if in the course of any inquiry into, or trial of an offence, it appears from the evidence that such person has also committed any offence and deserves to be tried with other accused. There is nothing in the language of this sub-section from which it can be inferred that a person who is named in the FIR or complaint but against whom charge-sheet is not filed by the police, cannot be proceeded against even though in the course of any inquiry into or trial of any offence, the Court finds that such person has committed any offence for which he could be tried together with the other accused."*

14. In Lok Ram v. Nihal Singh and another (2006) 10 SCC 192, the Court examined the correctness of the direction given by the High Court for impleading the appellant as an accused in terms of Section 319, Cr.P.C.. The facts of that case were that two daughters of Nihal Singh (the complainant) were married to two sons of the appellant-Lok Ram. One of the daughters of Nihal Singh, namely, Saroj died on 14.09.2001. Soon thereafter, Nihal Singh filed complaint at Police Station Fatehabad (Haryana) alleging commission of offence under Section 406 read with Section 34, IPC. During investigation, the appellant claimed that he was serving in a school at the time of the death of Saroj. His plea was 1 accepted by the Investigating Officer and he was not charge-sheeted. During trial, the complainant filed an application under Section 319, Cr.P.C.. By an order dated 6.9.2002, the learned Sessions Judge rejected the application. That order was reversed by the High Court and a direction was given to the trial court to proceed against the

appellant by summoning him. Before this Court, it was argued that the appellant could not be summoned under Section 319, Cr. P.C. because even though he was named in the FIR as an accused, the police did not find any evidence against him and was not charge-sheeted. While rejecting the argument, the Court referred to the judgments in Joginder Singh and another v. State of Punjab and another (supra), Municipal Corporation of Delhi v. Ram Kishan Rohtagi and others (supra), Michael Machado and another v. Central Bureau of Investigation and another (2003)3 SCC 262, and observed:

"On a careful reading of Section 319 of the Code as well as the aforesaid two decisions, it becomes clear that the trial court has undoubted jurisdiction to add any person not being the accused before it to face the trial along with the other accused persons, if the court is satisfied at any stage of the proceeding on the evidence adduced that the persons who have not been arrayed as accused should face the trial. It is further evident that such person, even though had initially been named in the FIR as an accused, but not charge-sheeted, can also be added to face the trial. The trial court can take such a step to add such persons as accused only on the basis of evidence adduced before it and not on the basis of materials available in the charge-sheet or the case diary, because such materials contained in the charge-sheet or the case diary do not constitute evidence. Of course, as evident from the decision in Sohan Lal v. State of Rajasthan, the position of an accused who has been discharged stands on a different footing."

Power under Section 319 of the Code can be exercised by the court suo motu or on an application by someone including the accused already before it. If it is satisfied that any person other than the accused has committed an offence he is to be tried together with the accused. The power is discretionary and such discretion must be exercised judicially having regard to the facts and circumstances of the case. Undisputedly, it is an extraordinary power which conferred on the court and should be used very sparingly and only if compelling reasons exist for taking action against a person against whom action had not been taken earlier. The word "evidence" in Section 319 contemplates the evidence of witnesses given in court. Under sub-section (4) (b) of the aforesaid provision, it is specifically made clear that it will be presumed that newly added person had been an accused person when the court took cognizance of the offence upon which the inquiry or trial was commenced. That would show that by virtue of sub-section (4)(b) a legal fiction is created that cognizance would be presumed to have been taken so far as newly added accused is concerned." (Emphasis supplied)

7. After going through the decisions referred above, I find that there is no restriction upon the learned Magistrate to summon any person for trial either he was not named in the FIR or was named, but not charge-sheeted, if at any stage of proceeding the trial court is satisfied that on the basis of evidence collected/produced in the course of enquiry into or any trial of the offence that such person has committed any

offence, for which he can be tried with other accused.

8. So far as in terms of evidence is concerned, it is defined under the Indian Evidence Act as under:-

"Evidence" *- "Evidence" means and includes -*

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;

Such statements are called oral evidence;

(2) all documents including electronic record produced for the inspection of the Court."

9. In the present case on the application moved by the complainant, the learned Magistrate has found it proper and in the interest of justice to summon the petitioners for trial, which shall be treated his satisfaction regarding necessity the trial of the petitioners along with other accused.

10. Therefore, I do not find error in the order impugned dated 10th of November, 2010 passed by the Additional Sessions Judge, Sitapur in Sessions Trial No. 562 of 2006.

The petition is dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.02.2011

BEFORE
THE HON'BLE SHRI NARAYAN SHUKLA, J.

Writ Petition No. 1057 (MS) of 2011 (CRL.)

Ikram Husain ...Petitioner
Versus
State of U.P. and others ...Opp. Parties.

<u>Code of Criminal Procedure-Section 173(8)</u>-re-investigation-after considering Final Report-Magistrate directed for investigation-challenge made on ground there can be further investigation but cannot be re-investigation-held misconceived-direction for investigation amounts to further investigation-order passed by Magistrate-held justified.

Held: Para 13

Similarly, in this case also, the court has issued direction for investigation which is a direction for only further investigation and not for re-investigation of the case. Therefore, I am of the view that the impugned order dated 3rd December, 2010, passed by the Judicial Magistrate, Mohammadi, District Kheri does not suffer from any error and the petition is liable to be dismissed.

<u>Case law discussed:</u>
Air 1998 SC 2001; AIR 1968 SC 117; (1985) 2 SCC 537; (2008) 2 SCC (Cri.) 631; (1999) 5 SCC 740; (2009) 6 Supreme Court Cases 346; (2009) 7 Supreme Court Cases 685; (1999) 5 Supreme Court Cases 740; (2009) 9 Supreme Court Cases 129; (2008) 2 Supreme Court Cases 383; 2006 (7) scc 296; AIR 1998 SC ,2001

(Delivered by Hon'ble Shri Narayan Shukla, J.)

1. Heard Mr. K.S.Rastogi, learned counsel for the petitioner as well as Mr. Rajendra Kumar Dwivedi, learned

Additional Government Advocate for the State.

2. This petition under Article 226 of the Constitution of India has been filed by the petitioner challenging the order dated 3rd December, 2010, passed by the Judicial Magistrate, Mohammadi, District Kheri in Case Crime No. 1152 of 2010, under Sections 419, 420 I.P.C., Police Station Mohammadi, District Kheri whereby the Magistrate has permitted allegedly for reinvestigation of the case.

3. Briefly the facts of the case as set out by the petitioner, are that even after submission of final report, the Investigating Officer submitted an application before the learned Judicial Magistrate, Mohammadi, District Kheri seeking permission for reinvestigation of the case. The learned Magistrate by means of order dated 3rd of December, 2010 permitted so.

4. Learned counsel for the petitioner Mr.K.S.Rastogi, invited the attention of this court towards Section 173 of the Code of Criminal Procedure and submitted that the Investigating Officer is empowered only to make further investigation and thus he submits that the direction for reinvestigation is not permissible under law. In support of his submission, he cited several decisions, which are referred hereunder:-

(1) K.Chandrasekhar Vs. State of Kerala and others AIR 1998 SC 2001.

(2) Abhinandan Jha & Ors. Versus Dinesh Mishra, AIR 1968 SC 117.

(3) Bhagwant Singh Vs. Commissioner of Police and another reported in (1985) 2 SCC 537.

(4) Ramachandran versus R.Udhayakumar and others reported in (2008) 2 SCC (Cri.) 631.

(5) Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwanandha Maharaj versus State of A.P.and others reported in (1999) 5 SCC 740.

5. The provisions of investigation are provided under Section 173 of the Code of Criminal Procedure under the different sub-sections. However, in the context of present case, I am very much concerned about sub-Section (8) of Section 173 of the Code of Criminal Procedure, which reads as under:-

"173.(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-section (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)."

6. A mere reading of the above provision makes it clear that irrespective of the report under sub-section (2) forwarded to the Magistrate, if the officer in charge of the police station obtains further evidence, it is incumbent on his part to forward the same to the Magistrate

with a further report with regard to such evidence in the form prescribed. The abovesaid provision also makes it clear that further investigation is permissible, however, reinvestigation is prohibited.

7. The Hon'ble Supreme Court in the case of **Rama Chaudhary Vs. State of Bihar, reported in (2009) 6 Supreme Court Cases 346,** has held that even after submission of police report under Sub-section (2) of Section 173 of the Code of Criminal Procedure on completion of investigation, the police has a right to further investigate the case under Sub-section (8) of Section 173 of the Code of Criminal Procedure. The relevant paragraphs 16, 17, 18 and 22 of the judgment are reproduced herebelow:-

"16. The law does not mandate taking of prior permission from the Magistrate for further investigation. Carrying out a further investigation even after filing of the charge-sheet is a statutory right of the police. Reinvestigation without prior permission is prohibited. On the other hand, further investigation is permissible.

17. From a plain reading of sub-section (2) and sub-section (8) of Section 173, it is evident that even after submission of the police report under sub-section (2) on completion of the investigation, the police has a right to "further" investigation under sub-section (8) of Section 173 but not "fresh investigation" or "reinvestigation". "Further" investigation, therefore, is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started ab initio wiping out the earlier investigation altogether.

18. Sub-section (8) of Section 173 clearly envisages that on completion of further investigation, the investigating agency has to forward to the Magistrate a "further" report and not a fresh report regarding the "further" evidence obtained during such investigation.

22. The law does not mandate taking prior permission from the Magistrate for further investigation. It is settled law that carrying out further investigation even after filing of the charge-sheet is a statutory right of the police (vide K.Chandrasekhar v. State of Kerala). The material collected in further investigation cannot be rejected only because it has been filed at the stage of the trial. The facts and circumstances show that the trial court is fully justified to summon witnesses examined in the course of further investigation. It is also clear from Section 231 Cr.P.C. That the prosecution is entitled to produce any person as witness even though such person is not named in the earlier charge-sheet.

8. Though, the learned counsel for the petitioner has given much emphasis for direction of re-investigation but keeping in view the facts of the case, it is obvious that after coming some new facts in light relating to the offence, the Investigating Officer sought permission for investigation which is incontinuation of the earlier investigation and the report submitted by him shall be an additional report only.

9. In the case of **Kishan Lal Vs. Dharmendra Bafna and another, reported in (2009) 7 Supreme Court Cases 685,** the Hon'ble Supreme Court has expressed the same opinion. The

relevant paragraph 16 of the judgment is extracted herebelow:-

"16. The investigating officer may exercise his statutory power of further investigation in several situations as, for example, when new facts come to his notice; when certain aspects of the matter had not been considered by him and he found that further investigation is necessary to be carried out from a different angle(s) keeping in view the fact that new or further materials came to his notice. Apart from the aforementioned grounds, the learned Magistrate or the superior courts can direct further investigation, if the investigation is found to be tainted and/or otherwise unfair or is otherwise necessary in the ends of justice. The question, however, is as to whether in a cause of this nature a direction for further investigation would be necessary.

10. In the case of **Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwanandha Maharaj Vs. State of A.P. and others, reported in (1999) 5 Supreme Court Cases 740,** the Hon'ble Supreme Court has held in paragraphs 10 and 11 of the judgment which are being extracted herebelow:-

"10. Power of the police to conduct further investigation, after laying final report, is recognized under Section 173 (8) of the Code of Criminal Procedure. Even after the court took cognizance of any offence on the strength of the police report first submitted, it is open to the police to conduct further investigation. This has been so stated by this Court in ***Ram Lal Narang V. State (Delhi Admn.).*** *The only rider provided by the aforesaid decision is that it would be desirable that the police should inform the court and seek formal permission to make further investigation.*

11. In such a situation the power of the court to direct the police to conduct further investigation cannot have any inhibition. There is nothing in Section 173 (8) to suggest that the court is obliged to here the accused before any such direction is made. Casting of any such obligation on the court would only result in encumbering the court with the burden of searching for all the potential accused to be afforded with the opportunity of being heard. As the law does not require it, we would not burden the Magistrate with such an obligation."

11. **In the case of Reeta Nag Vs. State of West Bengal and others, reported in (2009) 9 Supreme Court Cases 129,** the Hon'ble Supreme Court has expressed the opinion in paragraph 25 of the judgment which is being extracted herebelow:-

"25. What emerges from the abovementioned decisions of this Court is that once a charge-sheet is filed under Section 173 (2) CrPC and either charge is framed or the accused are discharged, the Magistrate may, on the basis of a protest petition, take cognizance of the offence complained of or on the application made by the investigating authorities permit further investigation under Section 173 (8). The Magistrate cannot suo motu direct a further investigation under Section 173(8) CrPC or direct a reinvestigation into a case on account of the bar of Section 167(2) of the Code.

The same question has been considered by the Hon'ble Supreme Court in the case of **State of Andhra Pradesh**

Vs. A.S. Peter, reported in (2008) 2 Supreme Court Cases 383. The relevant paragraphs 9 and 18 of the judgment are being reproduced hereunder:-

"9. Indisputably, the law does not mandate taking of prior permission from the Magistrate for further investigation. Carrying out of a further investigation even after filing of the charge-sheet is a statutory right of the police. A distinction also exists between further investigation and reinvestigation. Whereas reinvestigation without prior permission is necessarily forbidden, further investigation is not.

18. Reliance placed by the High Court as also by Mr. Rai on K. Chandrasekhar is misplaced. Therein investigation had been carried out by the Central Bureau of Investigation with the consent of the State. However, the State withdrew the same. The question which arose for consideration therein was as to whether it was permissible for the State to do so. The said issue was answered in the negative stating that the investigating officer must be directed to complete the investigation. In the aforementioned situation it was opined: (SCC p 237, para 24).

" 24. From a plain reading of the above section it is evident that even after submission of police report under Section (2) on completion of investigation, the police has a right of 'further' investigation under sub-section(8) but not 'fresh investigation' or 'reinvestigation.' that the Government of Kerala was also conscious of this position is evident from the fact that though initially it stated in the Explanatory Note of their Notification dated 27.6.1996 that the consent was being withdrawn in public interest to order a 'reinvestigation' of the case by a special team of the State police officers, in the amendatory Notification it made it clear that they wanted in 'further investigation of the case' instead of 'reinvestigation of the case'. The dictionary meaning of 'further' (when used as an adjective) is 'additional; more; supplemental'. Further investigation therefore is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started ab initio wiping out the earlier investigation altogether. In drawing this conclusion we have also drawn inspiration from the fact that sub-section (8) clearly envisages that on completion of further investigation the investigating agency has to forward to the Magistrate a 'further' report or reports- and not fresh report or reports- regarding the 'further' evidence obtained during such investigation. Once it is accepted- and it has got to be accepted in view of the judgment in Kazi Lhendup Dorji- that an investigation undertaken by CBI pursuant to a consent granted under Section 6 of the Act is to be completed, notwithstanding withdrawal of the consent and that 'further investigation' is a continuation of such investigation which culminates in a further police report under sub-section (8) of Section 173, it necessarily means that withdrawal of consent in the instant case would not entitle the State Police, to further investigate into the case. To put it differently, if any further investigation is to be made it is CBI alone which can do so, for it was entrusted to investigate into the case by the Stage government. Resultantly, the Notification issued withdrawing the consent to enable the State Police to further investigate into the case is patently invalid and unsustainable

in law. In view of this finding of ours we need not go into the questions, whether Section 21 of the General Clauses Act applies to the consent given under Section 6 of the Act and whether consent given for investigating into Crime No. 246 of 1994 was redundant in view of the general consent earlier given by the State of Kerala".

12. Mr. Rajendra Kumar Dwivedi, learned Additional Government Advocate reminded that this Court had an occasion to deal with the same question in the case of **Nandan Singh Bora Vs. State of U.P. and another** (Criminal Misc. Case No. 2882 of 2008, under Section 482 Cr.P.C., decided on 18.12.2008), in which the observation of Hon'ble Supreme Court referred in the case of **Popular Muthiah Vs. State, reported in 2006 (7) SCC 296** as well as **K.Chandrasekhar Vs. State of Kerala and others, reported in AIR 1998 SC, 2001,** has been considered and submits that keeping in view the facts of the case, the order for re-investigation issued by the learned Magistrate has been considered as of further investigation.

13. Similarly, in this case also, the court has issued direction for investigation which is a direction for only further investigation and not for re-investigation of the case. Therefore, I am of the view that the impugned order dated 3rd December, 2010, passed by the Judicial Magistrate, Mohammadi, District Kheri does not suffer from any error and the petition is liable to be dismissed.

14. The petition is, therefore, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED LUCKNOW 24.02.2011

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J

Service Single No. - 1225 of 1995

Hardwari Lal ...Petitioner
Versus
State of U.P. Thr. Sec. Sugar Industries, Lucknow and another ...Respondents

Counsel for the Petitioner
Ganga Singh

Counsel for the Respondent
C S C

Constitution of India-Article 21-Right of livelihood-petitioner working as watchman-after 20 years service without opportunity without show cause notice-service terminated on ground of physical disability as suffering from blindness-from perusal of medical certificate by Regional Institute of Opthalmology Sitapur-petitioner suffering from glaucoma in right eye but fit for discharge of duty-cannot be disputed-in view of Narendra Kumar Chawla case-right to livelihood an integral part of life-should not be deprived from livelihood-if the unit closed-entitled for compensation-considering mental and physical agency Rs.2,50000/-ex-gratia compensation be paid within 3 month failing which entitled for 8 % interest.

Held: Para 8

It is evident at the face of record that while passing the impugned order, no prior notice or opportunity of hearing was provided. The General Manager has passed the impugned order without serving any show cause notice on the petitioner. The averments contained in para 4 of the writ petition have not been denied. Accordingly, the certificate

issued by the Regional Institute of Ophthalmology, Sitapur, contained in Annexure No.2 to the writ petition may not be doubted. Undisputedly, the Regional Institute of Ophthalmology of Sitapur is a renowned institution exclusively dealing with eye disease. The certificate granted by such institution cannot be thrown out lightly. The respondents should have given opportunity before passing the impugned order while terminating the petitioner's services, more so when the petitioner has served for about 20 years.

Case law discussed:

AIR 1995 SC 519

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

1. Heard learned counsel for the petitioner and Mr. P.K. Sinha, learned counsel appearing for the respondents.

2. The petitioner, a former Watchman of U.P. State Sugar Corporation Limited, has approached this Court under Art. 226 of the Constitution of India against the impugned order of termination dated 25/26.11.1994(Annexure-11).

3. While assailing the termination order, it has been submitted by the petitioner's counsel that the order of termination has been passed on the ground that the petitioner cannot see from left eye and right eye has been impaired. The impugned order also reveals that the petitioner cannot move freely without assistance of other person. Accordingly, a finding has been recorded that being a blind person, he cannot discharge duties of Watchman. In consequence thereof, the services have been terminated.

4. The petitioner's counsel submits that the petitioner was appointed on 1.12.1973 on the post of Watchman at its unit situated at Maholi and since then, he has been continuously discharging duty. It is also submitted that the order of termination has been passed in utter disregard to principle of natural justice without serving a show cause notice or opportunity of hearing. Attention of this Court has been invited to the certificate issued by the Regional Institute of Ophthalmology, Sitapur, according to which, the petitioner is suffering from Glaucoma in right eye but he is fit to discharge duty.

5. On the other hand, Mr. P.K. Sinha, learned counsel for the respondents submits that Maholi unit of U.P. State Sugar Corporation has been wind up from 8.9.1998, hence all those employees whose services have been retrenched on account of closure of unit have been paid ex gratia amount. Some of the persons who were retrenched have been paid compensation and some of them have been given voluntary retirement.

6. Attention of this Court has been invited by the petitioner's counsel to a case reported in **AIR 1995 SC 519 Narendra Kumar Chandla versus State of Haryana and others** where Hon'ble Supreme Court held that being right to livelihood as an integral facet of right to life, the employees suffering from physical infirmity should not be deprived from his or her livelihood. He or she should be accommodated at appropriate place. Relevant portion from the judgment of Narendra Kumar (supra) is reproduced as under :

"7. Article 21 protects the right to livelihood as an integral facet of right to life. When an employee is afflicted with unfortunate disease due to which, when he is unable to perform the duties of the posts he was holding, the employer must make every endeavour to adjust him in a post in which

the employee would be suitable to discharge the duties as a Carrier Attendant is unjust. Since he is a matriculate, he is eligible for the post of L.D.C. For L.D.C., part from matriculation, passing in typing test either in Hindi or English at the speed of 15/30 words per minute is necessary. For a Clerk, typing generally is not a must. In view of the facts and circumstances of this case, we direct the respondent Board to relax his passing of typing test and to appoint him as a L.D.C. Admittedly on the date when he had unfortunate operation, he was drawing the salary in the pay scale of Rs.1400-2300. Necessarily, therefore, his last drawn pay has to be protected. Since he has been rehabilitated in the post of L.D.C. we direct the respondent to appoint him to the post of L.D.C. Protecting his scale of pay of rs.1400-2300 and direct to pay all the arrears of salary."

7. Apart from above, under The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (Act No. 1 of 1996), provision has been made for reservation of job to the extent of 3% to the physically disabled persons. Accordingly, in view of the said Act, right of the petitioner is protected not only by Part-III of the Constitution of India but under the statutory provisions also.

8. It is evident at the face of record that while passing the impugned order, no prior notice or opportunity of hearing was provided. The General Manager has passed the impugned order without serving any show cause notice on the petitioner. The averments contained in para 4 of the writ petition have not been denied. Accordingly, the certificate issued by the Regional Institute of Ophthalmology, Sitapur, contained in Annexure No.2 to the writ petition may not be doubted. Undisputedly, the Regional Institute of Ophthalmology of Sitapur is a renowned institution exclusively dealing with eye disease. The certificate granted by such institution cannot be thrown out lightly. The respondents should have given opportunity before passing the impugned order while terminating the petitioner's services, more so when the petitioner has served for about 20 years.

9. In view of above, the impugned order suffers from arbitrary exercise of power and does not seem to be sustainable. In case the impugned order would not have been passed, the petitioner would have continued in service up to the age of superannuation, i.e. 2005 as admitted by the parties' counsel. However, since the industry in question has been closed down in the year 1998, the petitioner could have also given voluntary retirement like other employees or could have been paid compensation. The learned counsel for the respondents submits that it may be left open for the respondents to pay compensation or entertain the petitioner's prayer for voluntary retirement since the unit has now been closed. The petitioner is aged about 70 years and in case any decision is taken to shift the burden on the respondents' shoulder, it may take some more time on the part of the respondents or may create a ground for further litigation. Accordingly, it shall be appropriate that some amount in lump sum be paid to the petitioner which is assessed to Rs.2,50,000/- which shall include arrears of salary, compensation, mental pain and agony, cost of litigation etc. which the petitioner suffered because of impugned order.

10. In view of above, the writ petition is allowed. A writ in the nature of certiorari is issued quashing the impugned order dated 25/26.11.1994 (Annexure-11) with all consequential benefits. The consequential

benefit is confined to payment of ex gratia amount in lump sum to the tune of Rs.2,50,000/-(Two Lacs fifty thousand only) which shall be paid to the petitioner within a period of three months from today. In the event of failure in payment of compensation within three months, the petitioner shall be entitled for payment of interest at the rate of 8% with effect from November 1994. The amount shall be paid through cross bank draft.

11. The writ petition is allowed accordingly.

12. Mr. P.K. Sinha, learned counsel for the petitioner shall inform the corporation accordingly.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.02.2011

BEFORE
THE HON'BLE SHRI KANT TRIPATHI, J.

Criminal Revision No. - 1409 of 2001

Ram Vilash Chauhan and others
...Applicants/Revisionist
Versus
State of U.P.and others
...Opposite Parties.

Counsel for the Revisionists:
Sri C.K. Parekh

Counsel for the Opposite Parties:
G.A.

Criminal Revision-Summoning order passed by Magistrate-offence under Section 219, 342 IPC-being satisfied by Advocate Commissioner's report to verify allegations regarding wrongful detention under Police Lock Up-set-a-side by Session Judge taking very technical ground- No such provision in Cr.P.C. To take cognigence can such report-held not proper-by appointing Commission the Magistrate simply collected the materials to verify the truth-view taken by Session Judge-not tenable.

Held: Para 10

It appears that the learned Magistrate while deputing an Advocate Commissioner for verifying truth of the allegations, had merely acted to collect relevant evidence in support of the allegations made by the revisionist No.3. in her applications. As such the decision of the learned Magistrate in appointing the aforesaid Advocate as Commissioner was perfectly correct, therefore, the observations of the learned Sessions Judge are not tenable in law.

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

1. Heard Mr. C.K. Parekh for the revisionists and learned A.G.A. for the respondents and perused the record.

2. The respondent No.3 Ram Bali Yadav, Sub-Inspector, has filed counter affidavit on behalf of all the respondents and is represented through the learned A.G.A. Therefore, it is not necessary to hear respondent No.3 personally.

3. By this revision, the revisionists have challenged the impugned judgment and order dated 10.05.2001 rendered by the Sessions Judge, Chandauli in Criminal Revision NO. 40 of 2001, Ram Bali Yadav Vs. State, whereby the learned Sessions Judge quashed the order dated 27.03.2009 passed by Mr. Manoj Kumar Shukla, Judicial Magistrate/Civil Judge (Jr. Div.), Chandauli on the application dated 26.03.2001 moved on behalf of the revisionist No.3.

4. Mr. C.K. Parekh submitted that rervisionist No.3 Smt. Shakuntala Devi moved an application on 26.03.2001 in Case Crime No. 33/2001 of P.S. Chakia, District Chandauli with the allegations that the revisionist No.1 Ram Vilash Chauhan and one Madhav had been taken into custody from their houses by the police of police station Chakia on 25.03.2001 and had been kept in the lock up of the police station. The Magistrate was requested to call for a report from the concerned police station. In pursuance of the order of the Magistrate, the police of police station Chakia submitted its report dated 27.03.2001 to the effect that the aforesaid Ram Vilash Chauhan and Girdhar Chauhan (revisionist Nos. 1 and 2) were accused in the aforesaid crime no.33/2001 and requested the Court to take them into custody. The revisionist No.3 moved another application dated 27.03.2001 informing the Magistrate that her husband (Ram Vilash Chauhan) and father-in-law (Madhav) had been taken into custody on 25.03.2001 at about 12 noon form their houses and had been detained illegally in the lock up of the police station. Therefore, she requested that an Advocate Commissioner may be appointed to verify the allegations made in the application. Accordingly, the learned Magistrate appointed one Mr. Bachhan Singh, Senior Advocate, and required him to visit to the police station and submit report regarding the allegations made in the application. Mr. Bachhan Singh visited the police station Chakia and after verifying the facts submitted his report dated 27.03.2001 (Annexure No.6). According to the report of Mr. Bachhan Singh, on 27.03.2001 at about 1:10 PM the aforesaid Ram Vilash Chauhan and Girdhar Chauhan were found in the police lock up of the aforesaid police station.

5. Keeping in view the report submitted by Mr. Bachhan Singh, Advocate, the learned Magistrate took the cognizance of the matter in exercise of his power under section190(1)(c) of the Code of Criminal Procedure (hereinafter referred to as the 'Code') and issued process to the respondent No.3 in regard to the offences under sections 219 and 342 I.P.C. as the learned Magistrate was of the view that due to illegal detention of the aforesaid two persons in the police lock up and registration of a false case against them, the offences under sections 219 and 342 I.P.C were made out against the respondent No.3. The respondent No.3 preferred the aforesaid Criminal revision in the Court of the learned Sessions Judge, who allowed the revision and set aside the order of the Magistrate. The learned Sessions Judge was of the view that there was no provision for appointment of an Advocate Commissioner for verifying the facts stated in the application dated 26.03.2001. Therefore, the order passed by the learned Magistrate was not proper.

6. Mr. C.K.Parekh further submitted that when the Magistrate received the information that the revisionist No.1 and his father had been illegally arrested by the police from their houses on 25.03.2001 and had been illegally detained in the police lock up, it was open to the Magistrate to take cognizance of the matter and to appoint an advocate or any other person for verifying the facts stated in the application. Therefore, the learned Sessions Judge was not justified in allowing the revision on that technical ground. Mr. C.K. Parekh further

submitted that in fact the Case Crime No. 33/2001 had been cooked up by the police against the revisionist No. 1 and his father and other accused by way of creating a defence against the illegal detention of the revisionist No.1 and his father. Therefore, the order passed by the learned Magistrate was perfectly correct and the learned Sessions Judge was not justified in quashing the same. Mr. C.K. Parekh lastly submitted that a Single Judge of this Court (Hon'ble R.K. Das, J) took note of the illegal detention of the revisionist No.1 and his father and passed the order dated 24.04.2001 in petition No. 1962 of 2001 (Annexure No.15) and directed the Chief Judicial Magistrate, Chandauli to decide the bail prayer as expeditiously as possible. Therefore, the allegations made by the revisionist No.3 in her application dated 26.03.2001 were not in anyway baseless.

7. Learned A.G.A., instead of supporting the reasoning adopted by the learned Sessions Judge submitted that the summoning order was passed by the learned Magistrate without collecting adequate materials, therefore, the matter has to go back to the learned Magistrate for collecting relevant materials in support of the allegations.

8. Section 190 of the Code provides as to how cognizance of the offences is to taken by the Magistrates. Relevant of portion of Section190 of Code may be reproduced as follows:-

"190. Cognizance of offences by Magistrates.

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, specially empowered in this behalf under sub- section (2), may take cognizance of any offence-

(a) Upon receiving a complaint of facts which constitute such offence;

(b) Upon a police report of such facts;

(c) Upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."

9. A perusal of the aforesaid provisions clearly reveals that the Magistrate may take cognizance of any offence by adopting any of the aforesaid three modes. He has power to take cognizance of any offence on a complaint containing facts constituting the offence. He has power to take cognizance on a police report of such facts. Apart from complaint and police report, the Magistrate has further power to take cognizance of an offence under section 190(1)(c) of the Code upon information received from any person other than a police officer or upon his own knowledge that such offence has been committed. Therefore, the Magistrate has wide power under section 190(1)(c) of the Code to take cognizance of any offence on any information may be written or oral or even on his own knowledge regarding commission of the offence. In this view of the matter, the application dated 26.03.2001 and 27.03.2001 moved by the

revisionist No. 3 were nothing except an information given to the Magistrate regarding commission of the offences under sections 219 and 342 I.P.C by the respondent No. 3. Therefore, the learned Magistrate was fully justified in taking cognizance of the offences under section 219 and 342 I.P.C. on such information under section 190(1)(c) of the Code and to that extent the order of the learned Magistrate was not only perfectly correct but was also within the ambit of section 190(1)(c) of the Code.

10. So far as passing of the summoning order is concerned, the provisions of section 204 of the Code ought to have been kept in mind. Therefore, before passing a summoning order, the Magistrate has to see whether or not there is sufficient ground for proceeding with the matter.. If the Magistrate is of the opinion that there is sufficient ground to proceed with the matter, it is open to him to pass the summoning order under section 204 of the Code. In order to decide the question whether or not there is sufficient ground to proceed with the matter, the Magistrate has to consider the materials (evidence) placed in support of the information received by him. Therefore, before passing the summoning order, it was obligatory on the learned Magistrate to hold an inquiry for finding out truth in the allegations made by the revisionist No.3 and the relevant materials in support of such allegations. Therefore, passing of the summoning order without obtaining relevant materials in support of the information, was not proper. So far as the relevancy of the report of the Advocate Commissioner is concerned it cannot be contended that it had no relevancy. The Advocate Commissioner visited the concerned police station on 27.03.2001 and found that revisionist Nos.1 and 2 and father of the revisionist No.1 were in the police lock up and reported that fact to the Magistrate. In this way, the aforesaid Advocate Commissioner was an important witness of the alleged detention of the aforesaid persons in the police lock up. As such the view of the learned Sessions Judge that the report of the learned Advocate Commissioner was irrelevant, does not appear to be correct. What was required from the learned Magistrate before acting upon the report of the Advocate Commissioner, was to record the statement of the Advocate Commissioner and to find out prima facie truth in such report. Without doing so, the learned Magistrate was not justified in placing reliance on the report of the Advocate Commissioner and passing the summoning order. The report of the Advocate Commissioner being a material piece of evidence of the case could not be discarded on the ground that there was no provision for appointment of an Advocate Commissioner. It appears that the learned Magistrate while deputing an Advocate Commissioner for verifying truth of the allegations, had merely acted to collect relevant evidence in support of the allegations made by the revisionist No.3. in her applications. As such the decision of the learned Magistrate in appointing the aforesaid Advocate as Commissioner was perfectly correct, therefore, the observations of the learned Sessions Judge are not tenable in law.

11. For the reasons discussed above, the revision is allowed and revisional court's order dated 10.05.2001 is quashed. The summoning order passed by the learned Magistrate is also quashed. However, the learned Magistrate is

directed to hold an inquiry and collect relevant materials in support of the applications dated 26.03.2001 and 27.03.2001 moved by the revisionist No.3 and pass appropriate order afresh in accordance with law.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 03.02.2011

BEFORE
THE HON'BLE RAJIV SHARMA, J.
THE HON'BLE VEDPAL, J.

Criminal Misc. Case No. 1788 (C) of 2010

State of U.P. ...Petitioner
Versus.
Resident Editor, Times of India and others. ...Opposite Parties

Counsel for the Petitioner:
Govt. Advocate

Counsel for the Respondents:
Sri Ramji Das
Sri Vishnu Pad Das
Sri Z.Zilani

Contempts of Court Act-Section 2-Criminal Contempt-on suo moto-new item published in Times of India dated 18.08.2010-regarding Babri Masjid Dispute-interview of Mohd. Hasmi the plaintiff-by Ms. Manjari Mishra-Language-*"I want a proof that India is Secular Country (a Jamhuriyat) (Democracy on people's Rule) "Let the Judges proof it now"----------Black Day in History"*-from affidavit of Contemnor's clear beyond doubt whatsoever ever stated by Mohd. Ansari-accurately the same was published-contempt made out-considering growing age as well as unconditional apology in view of law laid down by Apex Court in Harjai Singh case-with warning to be conscious in future-apology accepted-further proceeding dropped.

Held: Para-26

In Re: Harijai Singh & Anr. [(1996) 6 SCC 466] a similar case had come before Hon'ble Supreme Court wherein the Editors, Publisher, and Reporters of newspaper were held guilty of contempt of court but all of them had tendered unconditional apology. The Apex Court had accepted unconditional apology tendered by media personnels. In the present case Mohd. Hashim Ansari, interviewee is an old man and is about 90 years of age and he has also tendered unconditional apology. He should also be treated alike the media personnels. In view of above, the apology tendered by all of them should be accepted with a warning that each of them should be careful in future.

Case law discussed:
AIR 2005 SC 2473; [AIR 1954 SC 10]; [1993 Supp. (4) SCC 446]; [(1996) 6 SCC 510]; [(1996) 6 SCC 466]

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

1. These proceedings for contempt of Court have been initiated by this Court *suo motu* on the basis of the news item, published in the Times of India dated 18.8.2010 with the caption " AYODHYA, MEMORIES OF A DISPUTED LIFTTIME" to which the attention of the Court was invited by certain members of the Bar.

2. Brief facts leading to these proceedings for contempt of Court are that Ram Janma Bhoomi Babri Masjid Title Suit, being O. S. No.4 of 1989 was pending before this Court for adjudication wherein one Sri Mohd. Hashim Ansari was plaintiff No.7. Sri Mohd. Hashim Ansari was interviewed by Ms. Manjari Mishra, Reporter of Times News Network and was photographed by Sri Ajay Singh. The said interview was published in Times of India

Edition no. 194 Vol. 28 dated 18.8.2010 by Sri Dhanush Vir Singh without editing. The said news item was selected by Sri Saurabh Banerjee Editor, who was responsible for selection of news under Press and Registration of Books Act, 1867 in the said newspaper. The Reporter of the said news-item was Ms. Manjari Mishra, which was based on an interview given by Md. Hashim Ansari. The interview as printed in the Times of India dated 18.8.2010 is as under:-

"AYODHYA, MEMORIES OF A DISPUTED LIFETIME"

Manjari Mishra/TNN : Ayodhya : "Last 60 years seem more like a graveyard full of memories." Hashim Ansari, the original plaintiff in the Babri Masjid-Ram Janambhoomi Title Suit and convener of Babri Masjid Reconstruction Committee, when angry, is known to turn poetic.

Sitting at his home, badgered by a "band of hare-brained mediators rooting for an out of court amicable settlement.", Hashim seethed with rage: "Aren't we all 60 years late for a compromise, " he asked. "All witnesses are dead, litigants are dead, even lawyers have gone to the other world. Only Hashim Ansari lives to see this tamasha, " he complaints.

Babri dispute today has no 'mazhabi' (religious) character. It is a pure and simple political battle, a multi-crore cottage industry of Ayodhya for those who have made a fortune peddling the image of a deity behind bars, he continues in the same tone. Why will they close shop so easily, " he asks.

The handkerchief size room has space barely for two wooden takhats, Hashim, facing a framed photograph of Babri Masjid, occupied one. "I want the point, but to pray. Pray for sanity to be restored, for communal amity so that everybody lives in peace. This is not asking for much."

Memories of the joint journey to courtroom in company of Ramchandra Paramhans Das (the main defendant, now no more) are still fresh in him mind. " You see there are no Muslim and Hindu issues in Ayodhya, " the old man insists. "Ask me, I know best. A man who has been fighting a court case since 1950....60 long years and till this day no Hindu has every misbehaved with me..... na kisi Hindu ne gaali di, na patthar mara. What proof can be bigger than this?"

The Babri case could well be the reason for his longevity. "How can I go before the case is decided? " Hashim asks. Though ailing, he has been regular about his attendance in the courtroom. The last one logged in on January 11, 2010, he proudly declares. Not bad for a man of 90, he chuckles.

"However, these are stressful times. Dil Bahot dhadakta rahta hia, " he admits.

These eyes have seen so much, what else is to follow, I wonder, Hashim says as he launches into a bitter tirade against politicians. Right from Narsimha Rao, Sonia Gandhi, Mulayam Singh, Azam Khan et al, each one of them has let the Muslims down, " charges he.

"I want a proof that India is a secular country a 'Jamhuriyat' (democracy or people's rule)" he says and challenges. "Let the judges prove it now."

"What if the verdict goes against him?"

His eyes flashing. Hashim's voice goes several decibels higher. " What do you mean? Why are you forcing me to state something which everybody knows anyway? That will be a black day in our history signifying mobocracy has replaced democracy in India. There will of course mayhem, bloodbath and much else. " the excitement proves too exhausting and he is quiet to regain his breath.

" I for one don't want to live through all this, though there are several others who would simply love that. Babri dispute could be my passion but to them it is big money, position and power, " he says."

During the course of interview, Mohd. Hashim Ansari uttered the following sentence:-

" I want a proof that India is a secular country a 'jamhuriyat' (democracy or people's rule), "he says and challenges. "Let the judges prove it now."

Thereafter, Manjari Mishra put a question to Mohd. Hashim Ansari, which reads as under:-

"What if the verdict goes against him?"

Reply to the aforesaid question is as under:-

"His eyes flashing. Hashim's voice goes several decibels higher. "What do you mean? Why are you forcing me to state something which everybody knows anyway? That will be a lack day in our history signifying mobocracy has replaced democracy in India. There will of course mayhem, bloodbath and much else. " the excitement proves too exhausting and he is quiet to regain his breath."

3. When the Court perused the said news item, the Court was of the opinion that it *prima facie* gives an unambiguous message to the readers that if the matter is not decided in a particular way, serious unruly consequences would occur and the uttering made by Mohd. Hashim Ansari in his interview was not a sheer wishful thinking of the result of the suit but there was clear indication that if anyhow the result comes otherwise, which is well known to all, the consequences would be very serious and thus it amounts to an implied threat also to the Court to decide the matter in a particular way as pointed out by the interviewer. The Court was further of the opinion that freedom of speech and expression cannot be acceded to publish any article commenting adversely in sub-judice matter and since it has been published in the newspaper without any reservation in violation to all ethical norms, it affects the administration of justice and the Editor, the Reporter, the Photographer and Interviewer all are liable to be proceeded with for the offence of contempt of court. Thus notices were issued to all concerned through Chief Judicial Magistrate, Lucknow and Faizabad.

4. In pursuance of the notice issued by this Court, Shri Dhanush Vir Singh, Shri Saurabh Banerjee, Shri Ajay Singh and Ms. Manjari Mishra appeared and filed their response seeking unconditional apology and stated that they have highest regard and respect for the judicial system and there was no *mala fide* intention on

their part behind publishing the said news item.

5. Mohd. Hashim Ansari, in his affidavit, stated that he was co-plaintiff in O.S.No. 4 of 1989 and is aged about 90 years,is hard hearing and on account of old age, he is suffering with acute physical pain also and he was even not in a position to understand correctly the question put to him and the answers published. He clarified that there was no intention on his part to interfere with the administration of justice or threat to any judge or to Court or any hindrance in the administration of justice and further submitted that he tenders his unconditional apology and taking into account his old age, his past antecedent that he has always been obedient and respectful to the judiciary and is law abiding citizen, he may be pardoned for the publication in question and his unconditional apology may be accepted.

6. Ms. Manjari Mishra further filed her counter affidavit stating that what was infact stated with full understanding by Mohd. Hashim Ansari in his interview, was published accurately. No further affidavit was filed by Mohd. Hashim Anshari to controvert the averments made in the affidavit filed by Ms. Manjari Mishra.

7. We have heard learned counsel for the alleged contemnors as well as Shri Jaideep Narain Mathur, Additional Advocate General and perused the record of the case.

8. The first question that arises for consideration is as to whether the uttering made by Mohd. Hashim Ansari was accurately published as such in the news item with the caption "AYODHYA MEMORIES OF A DISPUTED LIFETIME" in Times of India dated 18.8.2010.

9. It reveals that interview of Mohd. Hashim Ansari taken by Ms. Manjari Mishra has been published in the Times of India dated 18.8. 2010. The question put to Mohd. Hashim Ansari and the answers given by him has been published in " Inverted Comma" as follows.

"I want a proof that India is a secular country a 'Jamhuriyat' (democracy or people's rule)"

He says and challenges. "Let the judges prove it now."

"What if the verdict goes against him?"

His eyes flashing. Hashim's voice goes several decibels higher. " What do you mean? Why are you forcing me to state something which everybody knows anyway? That will be a black day in our history signifying mobocracy has replaced democracy in India. There will of course mayhem, bloodbath and much else. " the excitement proves too exhausting and he is quiet to regain his breath.

10. Mohd. Hashim Ansari made a feign attempt to say that due to old age, he was not in a position to understand correctly the question put to him and he is also not able to say that answers given by him has been translated and published accurately in English in the news item.

11. Ms. Manjari Mishra in her affidavit has deposed that in the interview what was stated by Mohd. Hashim Ansari was correctly translated and published in

the newspaper and no addition or any change was made by her. The answers given by Mohd. Hashim Ansari during the interview have been placed under "Inverted Comma". No affidavit, denying the truthfulness of the contents of affidavit filed by Ms. Manjari Mishra has been filed on behalf of Mohd. Hashim Ansari. Thus, it stands proved that what was stated by Mohd. Hashim Ansari in his interview to Ms. Manjari Mishra was accurately published in the newspaper and thus this question is decided accordingly.

12. Now the next question that arises for consideration is as to whether the utterings made by Mohd. Hashim Ansari in his interview falls within the ambit of Contempt of Court. It reveals from the perusal of the answers given by Mohd. Hashim Ansari that if the matter is not decided in a particular way, serious unruly consequences would follow and thus there was clear indication that if anyhow the result comes otherwise, which is well known to all, the consequences would be very serious and thus it amounts to an implied threat to Court to decide the matter in a particular way as pointed out by interviewer. Thus the utterings made by Mohd. Hashim Ansari in the interview in question falls within the ambit of contempt of court. It affects the administration of justice. Thus, this question is accordingly decided in affirmative.

13. Now the last question that arises for consideration is as to whether the interview of Mohd. Hashim Ansari was taken and published in the newspaper by its Reporter, Editor etc. in violation to the ethical norms and it affects the administration of justice and as such the Editors, Reporter and Photographer are also liable for the contempt of Court.

14. In the instant case, four persons proceeded against belong to the press. The freedom of press in a country is the symbol of the great ideologies of greater men. A free press is the soul of a democracy. Therefore, the framers of our constitution gave a lot of importance to "freedom of speech and expression." It was declared to be a Fundamental Right, and has been granted under Article 19 (1) (a) of our Constitution.

"Article 19***. Protection of certain rights regarding freedom of speech, etc.***

(1)All citizens shall have the right-

(a) To freedom of speech and expression;"

b).....

(c).....

(d).....

(e).....

(f).....

(g).....

15. But, the Constitution under Article 19 (2) has also laid down restrictions to the use of the Fundamental Right, which speaks as follows:

"19.[(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of [the sovereignty and integrity of India], the

security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offense.]"

16. It was the Report submitted by the Press Commission of India in 1954 which stated:-

"Within the limits of this legal tolerance, the control over the press must be subjective or professional. The ethical sense of the individual, the consciousness that abuse of freedom of expression though not legally punishable must tarnish the fair name of the press, and the censure of the fellow journalists should all operate as powerful factors towards the maintenance of the freedom even without any legal restrictions being placed on the freedom."

17. It is true that the media has freedom under our Constitution but the media should avoid tendencies like sensationalism, misleading headlines, twisting of facts, vilification of an individual, an institution, a court of law, a caste, a community or Government, interfering or tending to interfere with course of justice by adopting the role of an investigator, counsel or witness, by usurping the function of a court of law in matters sub-judice by publishing extra-judicial information in a pending trial, by attacking the integrity of judges, etc. If the media fails to avoid these dangers, it comes under scrutiny of the law of libel or slander of defamation or contempt of court, as the case may be. Therefore, the media must set its ideals fairly high. True reporting, fair criticism, impartial purveying of news should be its motto. Else, the Printer and Publisher will also be liable. Absence of knowledge of content of the news sheet is no defence, nor can intention be a valid plea.

18. It is a common feature of the newspaper to publish with fanfare the court proceedings in pending matters and particularly sensational criminal proceedings. If the publication does not purport to prejudge any issue in criminal proceedings, it is not a contempt to report the occurrence of a crime or the fact of an arrest or charge. However, it is a contempt of court to publish comments on pending proceedings which prejudges the merits of the case or which imputes guilt to, or asserts the innocence of a particular accused. Similarly, the publication before trial of what, purports to be the defence to be put forward by an accused person may amount to a contempt of court. It is a serious contempt for a newspaper systematically to conduct an independent investigation into a crime for which a man has been arrested and to publish the results of that investigation or to publish the effect of judgment which is yet to be pronounced.

19. Ram Janam Bhoomi Babri Masjid dispute has always been a volatile issue in the Country and this was the reason that certain guidelines were issued by the Press Council of India on January 21, 1993 for guarding against the commission of the following journalistic improprieties and un-ethicalities:-

1. Distortion or exaggeration of facts or incidents in relation to communal matters or giving currency to unverified rumours, suspicions or inferences as if they were facts and base their comment, on them.

2. Employment of intemperate or unrestrained language in the presentation

of news or views, even as a piece of literary flourish or for the purpose of rhetoric or emphasis.

3. Encouraging or condoning violence even in the face of provocation as a means of obtaining redress of grievance whether the same be genuine or not.

4. While it is the legitimate function of the Press to draw attention to the genuine and legitimate grievance of any community with a view to having the same redressed by all peaceful legal and legitimate means, it is improper and a breach of journalistic ethics to invent grievances, or to exaggerate real grievances, as these tend to promote communal ill-feeling and accentuate discord.

5. Scurrilous and untrue attacks on communities, or individuals, particularly when this is accompanied by charges attributing misconduct to them as due to their being members of a particular community or caste.

6. Falsely giving a communal colour to incidents which might occur in which members of different communities happen to be involved.

7. Emphasizing matters that are apt to produce communal hatred or ill-will, or fostering feelings of distrust between communities.

8. Publishing alarming news which are in substance untrue or make provocative comments on such news or even otherwise calculated to embitter relations between different communities or regional or linguistic groups.

9. Exaggerating actual happenings to achieve sensationalism and publication of news which adversely affect communal harmony with banner headlines or distinctive types.

10. Making disrespectful, derogatory or insulting remarks on or reference to the different religions or faiths or their founders.

20. In the instant case the guidelines issued by the Press Council of India as stated above were also not followed in its letter and spirit. The news item as was published was provocative, calculated to embitter relations between two communities and a message to Court that if the pending matter is not decided in a particular way, serious unruly consequences would occur. It also reveals from the perusal of the news item that an attempt was also made to get the answers of Mohd. Hashim Ansari that in case the pending suit is not decided in his favour serious consequences would occur. In this attempt, a question was put by Ms. Manjari Mishra to Mohd. Hashim Ansari that what will happen if the verdict goes against him, whereupon reply what was given by Mohd. Hashim Ansari as has been narrated in earlier part of judgment. Thus Ms. Manjari Mishra attempted to get such news that may sensationalize matter and may also have an affect communal harmony which affect of yielding pressure on the Court to decide the matter in a particular way.

21. The principles relating to the law of contempt are well settled. The observations made by the Apex Court in *Rajendra Sail vs. M.P.High Court Bar Association and others* AIR 2005 SC 2473 reads as under:-

"The judiciary is the guardian of the rule of law. The confidence, which the people repose in the Courts of justice, cannot be allowed to be tarnished, diminished or wiped out by contemptuous behavior of any person. If the judiciary is to perform its duties and functions effectively and true to the spirit with which they are sacredly entrusted, the dignity and authority of the Courts have to be respected and protected at all costs. The foundation of the judiciary is the trust and the confidence of the people in its ability to deliver fearless and impartial justice. When the foundation itself is shaken by acts which tend to create disaffection and disrespect for the authority of the Court by creating distrust in its working, the edifice of the judicial system gets eroded. It is for this purpose that the courts are entrusted with extraordinary powers of punishing for contempt of Court, those who indulge in acts, which tend to undermine the authority of law and bring it in disrepute and disrespect by scandalizing it."

In Brahma Prakash Sharma & Ors. The State of U.P. [AIR 1954 SC 10] Hon'ble Supreme Court held as under:-

"If the publication of the disparaging statement is calculated to interfere with the due course of justice or proper administration of law by such Court, it can be punished summarily as contempt is a wrong done to the public. It will be injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the Judge or to deter actual and prospective litigants from placing complete reliance upon the Court's administration of justice, or if it is likely to cause embarrassment in the mind of the Judge himself in the discharge of his judicial duties. It is well established that it is not necessary to prove affirmatively that there has been an actual interference with the administration of justice by reason of such defamatory statement; it is enough if it is likely, or tends in any way, to interfere with the proper administration of law."

In Re. Roshan Lal Ahuja [1993 Supp. (4) SCC 446], Hon'ble Supreme Court also held as under:-

"That no litigant can be permitted to overstep the limits of fair, bona fide and reasonable criticism of a judgment and bring the courts generally in disrepute or attribute motives to the Judges rendering the judgment. Perversity, calculated to undermine the judicial system and the prestige of the court, cannot be permitted for otherwise the very foundation of the judicial system is bound to be undermined and weakened and that would be bad not only for the preservation of rule of law but also for the independence of judiciary. Liberty of free expression is not to be confused with a license to make unfounded, unwarranted and irresponsible aspersions against the Judges or the Courts in relation to judicial matters. No system of justice can tolerate such an unbridled license. Of course " Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men", but the members of the public have to abstain from imputing improper motives to those taking part in the administration of justice and exercise their right of free criticism without malice or in any way attempting to impair to administration of justice and refrain from making any comment which

tends to scandalize the Court in relation to judicial matters."

22. In Re. Ajay Kumar Pandey [(1996) 6 SCC 510], it has been held by Hon'ble Supreme Court that in order a Judge may fearlessly and independently act in the discharge of their judicial functions, it is necessary that he should have full liberty to act within the sphere of their activity. If, however, litigants and their counsel start threatening the Judge or launch persecution against him for what he has honestly and bona-fidely done in his Court, the judicial independence would vanish eroding the very edifice on which the institution of justice stands.

23. Reverting to the present case, it is imminently clear that the publication of the news item was not fair and an attempt was made to make the news sensational by its Reporter. The photograph of Mohd. Hashim Ansari was also taken when he was in full zeal while giving his interview.

24. The words as were extracted from Mohd. Hashim Ansari in his interview by Ms. Manjari Mishra were published in the news item as such without proper editing, thus in view of what has been stated above the Editors, Reporters and Photographer have also committed contempt of Court.

25. Mohd. Hashim Ansari-the Interviewee, Shri Dhaush Vir Singh-the Editor, Shri Saurabh Banerjee-the Editor, Ms. Manjari Mishra-the Reporter and Shri Ajay Singh-the Photographer of Times of India have very candidly not made any attempt to justify their action in giving the interview and Mohd. Hashim Ansari interviewee, publishing the news report and only prayed for acceptance of their apology. The fact that all above immediately tendered apology after service of the notice shows that that there was no intention on their part to scandalize the judiciary but it was a case of error of misunderstanding on their part that interview was given and news item was published when the case was pending. for determination.

26. In Re: *Harijai Singh & Anr.* [(1996) 6 SCC 466] a similar case had come before Hon'ble Supreme Court wherein the Editors, Publisher, and Reporters of newspaper were held guilty of contempt of court but all of them had tendered unconditional apology. The Apex Court had accepted unconditional apology tendered by media personnels. In the present case Mohd. Hashim Ansari, interviewee is an old man and is about 90 years of age and he has also tendered unconditional apology. He should also be treated alike the media personnels. In view of above, the apology tendered by all of them should be accepted with a warning that each of them should be careful in future.

27. The apology tendered by contemnors Mohammad. Hashim Ansari the Interviewee, Shri Dhaush Vir Singh-the Editor, Shri Saurabh Banerjee- the Editor Ms. Manjari Mishra-the Reporter and Shri Ajay Singh-the Photographer is hereby accepted with a warning that each of them shall be careful in future. Consequently, further proceedings are dropped and the notices issued to them are hereby discharged.

28. The contempt petition is accordingly disposed of.

29. Registrar of this Court is directed to send a copy of this order to the Secretary, Ministry of Information and Broadcasting, Government of India, New Delhi as well as to the Chief Secretary, Government of U.P. for onward transmission to the Press Council of India and other agencies of Media.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.02.2011

BEFORE
THE HON'BLE RAJIV SHARMA, J.

Misc. Single No. - 2373 of 1992

Surya Bhanu Pandey ...Petitioner
Versus
State of U.P. and others ...Respondent

Counsel for the Petitioner:
Sri U.B. Pandey
Sri R.K.Pathak
Sri S.K.Tewari

Counsel for the Respondents:
C.S.C.

Arms Act Section 17 (3)-Cancellation of fire Arm License-on ground of pendency of criminal cases-held-mere involvement or pendency of criminal case cannot be ground for revocation of license.

Held: Para 4

It is well settled in law that mere pendency of criminal case or apprehension of misuse of arms are not sufficient grounds for passing the order of suspension or revocation of licence under Section 17(3) of the Act. The question as to whether mere involvement in a criminal case or pendency of a criminal case can be a aground for revocation of licence under Arms Act, has been dealt with by a Division Bench of this Court in Sheo Prasad Misra Versus The District Magistrate, Basti and others, wherein the Division Bench relying upon the earlier decision of Masiuddin Versus Commissioner, Allahabad, found that mere involvement in criminal case cannot in any way affect the public security or public interest. The law propounded in the said decisions has been subsequently followed in Habib Versus State of U.P. reported in 2002 ACC 783, Ram Sanehi Versus Commissioner, Devi Patan Division, Gonda and another.

Case law discussed:
[2006(24) LCD 114]; [2006(24) LCD 266]; [2006(24) LCD 374]; 2002 ACC 783

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

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

By means of instant writ petition, the petitioner assails the order impugned passed by the Licensing Authority whereby the arms license of the petitioner was cancelled inter-alia on the ground that a criminal case has been registered against him and is still pending adjudication against which an appeal was filed, that too was dismissed.

Aggrieved thereof, the present writ petition has been filed by the petitioner.

2. Pleadings were exchanged between the parties.

3. The learned counsel for the petitioner has submitted that the petitioner's arms-license has been cancelled on account of pendency of the

trial. It has also been submitted by the learned counsel for the petitioner that after trial, the petitioner has been acquitted of the charges levelled against him and as such the petitioner's arms' license may be restored.

Learned counsel for the petitioner has placed reliance on the cases of *Ram Kripal Singh Versus Commissioner, Devi Patan Mandal, Gonda and others [2006(24) LCD 114], Virendra Pal Singh Versus State of U.P. and others [reported in 2006(24) LCD 266] and Sahab Singh Versus Commissioner, Agra Region, Agra and others [2006(24) LCD 374]* in which it has been held that merely because of pendency of a criminal case, the licence cannot be cancelled nor the licence can be placed under suspension pending enquiry and the orders impugned deserve to be quashed.

4. It is well settled in law that mere pendency of criminal case or apprehension of misuse of arms are not sufficient grounds for passing the order of suspension or revocation of licence under Section 17(3) of the Act. The question as to whether mere involvement in a criminal case or pendency of a criminal case can be a aground for revocation of licence under Arms Act, has been dealt with by a Division Bench of this Court in *Sheo Prasad Misra Versus The District Magistrate, Basti and others,* wherein the Division Bench relying upon the earlier decision of *Masiuddin Versus Commissioner, Allahabad,* found that mere involvement in criminal case cannot in any way affect the public security or public interest. The law propounded in the said decisions has been subsequently followed in *Habib Versus State of U.P. reported in 2002 ACC 783, Ram Sanehi Versus Commissioner, Devi Patan Division, Gonda and another.*

5. Having considered the submissions made by the learned counsel for the parties and the case laws, referred to above, I am of the view that the appellate Court has committed an error in not considering the facts in correct prospective and has also failed to appreciate the grounds mentioned in Section 17(3) of the Arms Act regarding revocation or for suspending a licence. The order passed by the Appellate Authority cannot be legally sustained.

6. For the reasons stated hereinabove, the writ petition is allowed and the orders dated 16.06.1992 (Annexure no.4) and 18.01.1991 (Annexure no.3) passed by the Commissioner Faizabad Division, Faizabad and the District Magistrate, Sultanpur, the opposite party nos. 2 and 3 respectively are hereby quashed.

Accordingly, the Licensing Authority, the District Magistrate, Sultanpur, the opposite party no.3 is directed to consider the matter and pass a fresh order after taking into account all relevant aspects and prescription provided under Section 17 of the Arms Act and if, there is no legal impediment, the arms licence of the petitioner is directed to be restored back, at the earliest.

ORIGINAL JURISDICION

CIVIL SIDE
DATED: ALLAHABAD 22.02.2011

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 3320 of 2004

Smt. Vandana Gangwar ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Preet Pal Singh Rathore

Counsel for the Respondents:
C.S.C.
Sri J.P. Rai
Sri R.K.Mishra,
Sri S.R. Pandey

U.P. Secondary Education Service Selection Board Act, 1982-Reservation in Promotion-out of 7 Post three occupied by direct recruitment-four under 50% promotion Quota-petitioner being Senior most L.T. Grade teacher rightly promoted-authority refused to grant approval raising objection the post in Question be fulfilled by S.C./S.T. Candidate held-misconceived-in view of Full Bench decision of Heera Lal case if vacancy less than 5-No reservation for S.C./S.T. Available-order impugned refusing approval-not sustainable Quashed with all consequential benefits.

Held: Para 6

In view of the said Full Bench judgment, it has to be held that since there are only four posts within the promotion quota in the cadre of Lecturer in the institution, no reservation for Scheduled Caste category candidate can be provided. Consequently the reasons assigned in the impugned order fall to ground. The order impugned is therefore, quashed. Let the respondent no. 3 (Joint Director of Education, Bareilly Region, Bareilly) reconsider the claim of the petitioner for regular promotion in accordance with the Act, 1982 preferably within eight weeks from the date a certified copy of this order is filed before him. All consequential action be taken accordingly.

Case law discussed:
(2010) 3 UPLBEC, 1761

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

1. Petitioner before this Court seeks quashing of the order dated 24.11.2003 whereunder the papers transmitted qua regular promotion of the petitioner as Lecturer (History) have been returned after recording a finding that the vacancy is required to be filled from a Scheduled Caste category candidate. The petitioner not being a member of such category is not entitled for regular promotion against the same.

2. Facts in short giving rise to the present writ petition are as follows :

Raja Ram Mahila Inter College, Badaun is an aided and recognized institution under the provisions of the Intermediate Education Act, 1921. The provisions of U.P. Secondary Education Services Selection Board Act, 1982 (herein after referred to as the Act, 1982) and rules framed thereunder are fully applicable to the teachers of the said institution. As per the records made available to the Court, eight posts of Lecturer were created in the institution. One Shyama Devi Sharma who was working as Lecturer (History) in the institution expired on 15.06.1995 causing a vacancy on the post of Lecturer (History).

3. The petitioner was appointed as C.T.Grade teacher in the said institution on 14.11.1979. On completing 10 years of service she was granted L.T. Grade w.e.f. 13.11.1989. In view of Section 33-D of the Act, 1982 the petitioner is to be treated as L.T. Grade teacher. She was granted ad hoc promotion as Lecturer against the said vacancy which appointment was approved by the District Inspector of Schools vide order dated 11.02.1997. The order was made effective w.e.f. 17.08.1995. It appears that the papers in respect of regular promotion of the petitioner were forwarded to the respondent authorities. It is on these papers that the impugned order has been passed recording therein that the vacancy was within the quota for Scheduled Caste, therefore, the petitioner cannot be granted regular promotion.

4. A supplementary counter affidavit has been filed by the District Inspector of Schools dated 18.11.2006. From Annexure-1 to the supplementary counter affidavit as well as the facts on record, it is an admitted position that there are eight sanctioned posts of Clerk, 50% of the same are required to be filled by way of promotion which would work out to four. It is further admitted on record that on the date Shyama Devi Sharma expired i.e. 15.06.1995, there were seven lecturers actually working in the institution including Shyama Devi Sharma. Out of seven persons, three had been appointed by direct recruitment and one post was vacanct, meaning thereby that the vacancy which was occurred due to death of Shyama Devi Sharma, was required to be filled by way of promotion. It is against this vacancy that the petitioner had claimed promotion as Lecturer.

5. A Full Bench of this Court in the case of Heera Lal and others vs. State of U.P. and others reported in (2010) 3 UPLBEC, 1761 has held that for reservation being provided in favour of Scheduled Caste category, there must be at least five posts in the cadre concerned. The Full Bench has further explained that where the vacancies are required to be filled by promotion as well as directed recruitment, such number of posts have to be individually determined for each source of recruitment.

6. In view of the said Full Bench judgment, it has to be held that since there are only four posts within the promotion quota in the cadre of Lecturer in the institution, no reservation for Scheduled Caste category candidate can be provided. Consequently the reasons assigned in the impugned order fall to ground. The order impugned is therefore, quashed. Let the respondent no. 3 (Joint Director of Education, Bareilly Region, Bareilly) reconsider the claim of the petitioner for regular promotion in accordance with the Act, 1982 preferably within eight weeks from the date a certified copy of this order is filed before him. All consequential action be taken accordingly.

7. Writ petition is allowed subject to the observations made herein above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.02.2011

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN, J.

Civil Misc. Writ Petition No. 14489 of 2008

Smt. Sumitra Devi ...Petitioner
Versus
Sushila Devi and others ...Respondent

Counsel for the Petitioner:
B.N. Chaturvedi,
Smt. C.K. Chaturvedi

Counsel for the Respondents:
Sri V.K. Singh
C.S.C.

U.P.Z.A. & L.R. Act-Section-168-A-Purchase of grove land-through Regd. sale deed-challenged by private person-held-except Gaon Sabha or the State-private individual has no locus standi and in earlier civil suit challenging same sale transaction-got finality by dismissal-on same very ground-more over gave land is not within meaning of agricultural holding-considering amendment 2004-provision of Section 168-A itself repeated-after depositing certain amount sale transaction can be validated-which also expired-hence with liberal interpretation in favor of vendor and vendee-order impugned declaring sale deed void hit by Section 168-A-Quashed.

Held: Para 7

Moreover provisions of Section 168-A were quite harsh. The Section has also been deleted. U.P. Act No. 27 of 2004 which deleted section 168-A made the previous transactions hit by the said section voidable (in stead of void) and curable (capable of being validated) on payment of some nominal fees within a particular period which has now expired (Section 11). Accordingly, for these two reasons the section shall be interpreted (for the sake of past transactions) liberally, in favour of vendor and vendee.

(Delivered by Hon'ble Sibghat Ullah Khan, J.)

1. List revised. No one has appeared for the respondents. Heard learned counsel for the petitioner.

2. Petitioner through registered sale deed dated 25.9.1984 purchased land ad-measuring 520 Square Meter out of Plot No. 159 Ka total area 0.73 acres from respondent No. 5 - Sheri Pal. Earlier respondent Nos. 5 to 10 had purchased total Plot No. 159 Ka from its previous bhumidhar Sushila Devi, repondent no. 1 on 27.02.1975. The plot is grove and entered as such in revenue records. Ram Nath, respondent No.2 and others purchased plot no. 159 Kha area 0.09 acre from Sushila Devi in 1985. They first challenged the sale deed dated 25.9.1994 along with two other similar sale deeds through a civil suit only on the ground that the deeds were in violation of and hit by Section 168-A of U.P. Zamindari Abolition & Land Reforms Act (the said Section has been repealed in 2004). The said section prohibited sale of fragment of agricultural land. The suit (Suit No. 621 of 1986) was dismissed on 26.02.1988 by 5th Additional Munsif, Etah. Copy of the said judgment is annexed as Annexure-I to the writ petition. In the said judgement, it was specifically held that in view of the fact that the property in question was grove and not situate in consolidated area, Section 168-A of the Act was not attracted. Against the said judgment, Civil Appeal No. 64 of 1988 was filed, which was dismissed by 7th Additional District Judge, Etah on 4.8.1990. Copy of the said judgment is annexed as Annexure-II to the

writ petition. The appellate Court also held that Section 168-A of the Act was not attracted. It was further held that plaintiffs had no right to challenge the sale deed on the ground of violation of Section 168-A and only Collector or Gram Sabha could do that. Learned counsel for the petitioner states that against the said judgment and decree, no second appeal was filed.

3. Strangely enough in spite of the decision of civil court Ram Nath respondent No.2 filed case/suit under Section 168-A of U.P. Zamindari Abolition and Land Reforms Act, 1950 before the Additional Collector, Etah. The petitioner appeared in the said case and filed the judgment of the civil court and took the plea of *res-judicata.* However, the Additional Collector, Etah even after referring to civil courts' judgments, by his order dated 25.2.1994 declared that the sale deed dated 27.02.1975 through which Sushila Devi had sold whole Plot No. 159 Ka to respondent nos. 5 to 10 was void and hit by Section 168-A of the U.P. Z.A. & L.R. Act. Consequently the sale deed by respondent no. 5 to the petitioner dated 25.09.1984 and the other two sale deeds of 1984 were also held to be void. Against the said judgment and order, revision was filed being Revision No.123 of 1994 before Additional Commissioner, Agra Division, Agra, who dismissed the revision on 12.12.2007, hence this writ petition.

4. I fully agree with the contention of the learned counsel for the petitioner that after dismissal of the civil suit and appeal, it was not permissible for Additional Collector or the revisional authority / Court to take a contrary view and it was an abuse of process of Court by respondent no.2 to approach them. Moreover as held by the Appellate Court/ A.D.J. plea of sale deed being hit by Section 168-A of the Act under the facts and circumstances of the case, could be raised only by the State or Gaon sabha and respondent no.2 had absolutely no *locus standi* to agitate the matter. The sale deed was executed by respondent no. 5 in favour of petitioner and both of them were fully satisfied and the Gaon Sabha or the State Government had not challenged the same. In this scenario, no other person had any authority to agitate the matter.

5. The words 'consolidated area' have not been defined either under U.P. Consolidation of Holdings Act or U.P. Zamindari Abolition & Land Reforms Act. The definition of 'Consolidation area' was irrelevant for the purposes of section 168-A of U.P. Z.A. & L.R. Act. The word 'Consolidation' has been defined under Section 3(2) of U.P. C.H. Act as follows:-

[(2) 'Consolidation' means re-arrangement of holdings in a unit amongst several tenure-holders in such a way as to make their respective holdings more compact];

Explanation- For the purpose of this clause, holding shall not include the following:

(i) Land which was grove in agricultural year immediately preceding the year in which the notification under Section 4 was issued:

(ii) to (vii) - not relevant.

6. Accordingly grove is not included in the 'Consolidated area' which can only mean rearranged chak.

7. Moreover provisions of Section 168-A were quite harsh. The Section has also been deleted. U.P. Act No. 27 of 2004 which deleted section 168-A made the previous transactions hit by the said section voidable (in stead of void) and curable (capable of being validated) on payment of some nominal fees within a particular period which has now expired (Section 11). Accordingly, for these two reasons the section shall be interpreted (for the sake of past transactions) liberally, in favour of vendor and vendee.

8. Writ petition is therefore allowed. Impugned orders are set aside.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.02.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 17102 of 2007

Mohammad Salim Siddiqui ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare
Sri Amit Srivastava
Sri Siddharth Khare

Counsel for the Respondents:
Sri Abhinav Upadhyay
C.S.C.

Constitution of India-Art.226- Practice and Procedure-Petitioner for same incident-facing Criminal as well as disciplinary proceeding for negligence dereliction in duty-grass negligence by driving heavy vehicle without having license dismissal order allowed to finalized as no revision or appeal filed-after acquittal in criminal proceeding it can not be reviewed-view taken by revisional authority held justified.

Held: Para 25

In this case, departmental enquiry was not only concluded but the statutory appeal and revision filed by petitioner also stood rejected. Petitioner did not challenge the same before any Court of law and accepted it. It is only when in criminal proceedings after few years he was acquitted, then for the first time in 2004 he approached revisional authority to review its order. Petitioner did not point out any error or irregularity in the departmental enquiry held against him. The only submission is that since he has been acquitted in the criminal case, therefore order of punishment passed in departmental enquiry after condoning delay should be set aside even though there is no legal infirmity in said proceeding. To my mind, the departmental inquiry have attained finality on the basis of independent proceedings. In my view, on the basis of acquittal in a criminal case where the things were different as discussed above, the authority was not justified to review of the order of punishment passed in departmental proceedings. Revisional Authority has considered these aspects in the impugned order and I do not find any legal infirmity in the approach of revisional authority as also in its reasoning & conclusion.

Case law discussed:

Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. And another (1999)3 SCC 679; G.M. Tank vs. State of Gujarat & others JT 2006(11) SC 36; 2006 (5) SCC 446; The Managing Director State Bank of Hyderabad and Another vs. P. Kata Rao JT 2008(4) SC 577; Ajit Kumar Nag vs. General Manager (P.J.) vs. Indian Oil Corporation Ltd. Haldia & others JT 2005(8) SC 425; JT 2006(1) SC 444;.JT 2003 (5) SC 494; JT 2007 (2) SC 620;1997 (2) SCC 699; JT 1996 (8);JT 1997 (4) SC 541.

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

1. Heard Sri Ashok Khare, learned counsel for the petitioner and the learned Standing Counsel for the respondents.

2. This writ petition is directed against order dated 10.1.2007 (Annexure 20 to the writ petition) passed by the Inspector General of Police, PAC, U.P. Lucknow (respondent no. 2) rejecting the revision of petitioner which was filed against order dated 16.1.1999 dismissing appeal of the petitioner against order of dismissal dated 19.5.1998.

3. Facts giving rise to present dispute are as under:

4. Petitioner was appointed as Constable in Provincial Armed Constabulary (P.A.C.) U.P. in the year 1988 and was posted in 39th Battalion P.A.C., Mirzapur. In year 1994 he was posted at 4th Battalion P.A.C., Allahabad. FIR dated 28.5.1997 was lodged against cleaner of vehicle No. 70-E-8655 of 4th Battalion P.A.C. bearing Case Crime No. 315/97 under Sections 279, 337, 338 IPC. Later on it was converted into Section 279/304-A IPC alleging that on 28.5.1997 one Himmat Singh got injured in his chest due to rash and negligent driving of vehicle. After investigation, police filed charge sheet under Sections 279/304-B IPC. Another report was lodged on 28.5.1997 by driver Gama Yadav, Constable of aforesaid vehicle, against the mob under Section 147, 336, 341, 427 IPC alleging that the aforesaid vehicle was driven by Constable Saleem and he dashed Himmat Singh who sustained injuries, and mob assaulted Gama Yadav and his vehicle and damaged it. The matter was closed pursuant to Final Report submitted by police which was accepted by the Court.

5. Trial No.315/97 proceeded and ultimately the Judicial Magistrate-, Allahabad acquitted the petitioner vide judgment dated 5.8.2002. However, a departmental enquiry was initiated against petitioner placing him under suspension on 2.6.1997 on the allegation that at about 8:30 p.m. on 28.5.1997 petitioner, while driving himself vehicle no. 70-E/8655, dashed a person near Kanhayeepur and ran away from the spot leaving vehicle and when driver reached the spot, public assaulted him and also damaged the vehicle.

6. A Preliminary enquiry was conducted by Sri K.N. Dubey, Assistant Commandant, I 4th Battalion P.A.C. about the said incident who submitted report on 16.9.1997 recommending regular departmental enquiry against petitioner. Charge Sheet was issued on 14.1.1998 which was replied by petitioner on 3.2.1998. After conclusion of oral enquiry, report was submitted by enquiry officer on 16.4.1998 holding petitioner guilty and recommended punishment of dismissal. Disciplinary authority thereafter passed order of dismissal on 19.5.1998. Petitioner's appeal dated 14.6.1998 was rejected by appellate authority i.e. the Deputy Inspector General of Police, P.A.C., Kanpur Section, Kanpur vide order dated 16.1.1999. His revision was rejected by revisional authority i.e respondent no. 2 vide order 7.8.1999.

7. After acquittal in criminal case on 5.8.2002, petitioner filed an application dated 26.10.2002 requesting for his reinstatement in view of acquittal. The aforesaid application was rejected by respondent no. 2 on 14.1.2003 whereafter petitioner filed writ petition no. 15699 of

2003. This Court vide order dated 8.1.2004 disposed of writ petition with observations as under:

"The report of the enquiry officer in the present case has not been brought on record. The order of the Disciplinary Authority does not indicate clearly is that evidence has been relied upon in the departmental proceedings and, therefore, it cannot be decided here whether the evidence in the departmental proceedings and the criminal trial was common without there being a variance.

However, the decision of the Supreme Court is the law of the land and has to be followed not only by this court but also by all administrative authorities. Therefore, the order dated 27.1.2003 rejecting the review application is set aside. The respondent No. 2 will examine the matter again in the light of the aforesaid Supreme Court decision and in the light of the facts available on record within three months of the date on which certified copy of this order is presented before the said order.

This petition is disposed of as above."

8. Since this Court quashed order dated 27.1.2003 only and the matter was remanded to respondent no.2 he examined it again and passed an order dated 10.8.2004 rejecting petitioner's review application. The petitioner came to this Court again in writ petition no. 43546 of 2004 seeking for quashing of the order dated 10.8.2004. This writ petition was allowed. The order dated 10.8.2004 was quashed. The Court remanded the case to Revisional Authority for reconsideration. The order reads as below:

"Heard learned counsel for the petitioner and learned Standing Counsel for the respondents.

The petitioner is impugned the order passed by the Inspector General dated 10th of August 2004. This matter had been admitted by judgment of this Court on 8th of January 2004, which has been passed on the basis of the law laid down by the Hon'ble Apex Court in the case of Capt. M. Paul Anthony Vs. Bharat Gold MInes Ltd. and another reported in (1999) 3 SCC 679.

The learned counsel for the petitioner has argued that the criminal Court passed an order on 5.8.2002 by which a clear cut order of acquittal was passed in favour of the petitioner on the basis of the main evidence as given by one Gama Yadav who was the alleged driver of the Truck which was given out on the date of the accident.

In my opinion it shall be in the interest of justice if the matter is sent back to the Inspector General to re-examine this aspect of the matter, the matter on remand will be heard and decided by the Inspector General within a period of 3 months in accordance with law and after giving the petitioner a proper opportunity of hearing. The impugned order dated 10th of August 2004 is set aside. The matter remand back for re-consideration.

The writ petition is allowed. There will be no order as to costs."

9. The respondent no. 2 has now passed impugned orders.

10. Sri Ashok Khare, learned Senior Advocate assisted by Sri Amit Srivastava vehemently contended that since criminal trial and departmental enquiry are

proceedings on the identical facts and material, hence after acquittal of petitioner, respondents are bound to reinstate him in service. In this regard he placed reliance on the decision of Apex Court in **Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. And another (1999)3 SCC 679.**

11. It is true that trial against petitioner as well as the departmental enquiry relate to the same incident but to arrive at a conclusion that same are in respect of same charges, based on identical evidence, and same set of facts, it would be appropriate to have a perusal of charge levelled against petitioner in departmental enquiry and the charge for which he was tried in Court of law.

12. The charge tried against petitioner was under Section 279-A/304-B based on averment that on 28.5.1997 at 9:00 p.m. petitioner hit brother-in-law of complainant Bal Kishan who was purchasing some goods, by driving the vehicle negligently resulting in serious injuries to victim who ultimately died.

13. Section 279 and 304-A IPC under which he was tried reads as under: -

279. Rash driving or riding on a public way.- Whoever drives any vehicle, or rides, on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

"304-A. Causing death by negligence.- Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment or either description for a term which may extend to two years, or with fine, or with both."

14. Now charge sheet dated 14.1.1998 issued to the petitioner reads as under:

षदिनांक 29.5.97 को सायंकाल दलनायक श्री रामखेलावन सोनकर की धर्मपत्नी का देहान्त हो गया था। उस समय श्री सोनकर वाहिनी मुख्यालय में नहीं थे। मृत शरीर को सुरक्षित रखने के लिए बर्फ की आवश्यकता थी जिसको लाने के लिए उपनिरीक्षक परिवहन शाखा को निर्दिष्ट किया गया था। आप यह जानते हुए कि आपके पास भारी वाहन चलाने का अनुज्ञा पत्र नहीं है और न आप उसके लिए अधिकृत ही हैं। फिर भी अनाधिकृत रूप से वास्तविक चालक के जानकारी के गिना आप वाहन संख्या यू0 पी0 – ई – 70 – 8655 ट्रक लेकर विहिनी परिसर से बाहर लेकर बर्फ लाने के लिए चले गये और कन्धईपुर मोड़ के पास एक नागरिक जिसका नाम हिम्मत सिंह पुत्र अजमेरी निवासी हरवारा इलाहाबाद था, की गाड़ी बैक करते समय दबा दिया और उसकी मृत्यु हो गई। दुर्घटना हो जाने के पश्चात आप घटनास्थल से भागकर वाहिनी परिसर में चले आए। भारी गाड़ी चलाने का अनुज्ञापी न होते हुए भारी वाहन चलाकर वाहिनी परिसर से बाहर वास्तविक चालक की जानकारी के बगैर से जाना आप द्वारा प्रदर्शित घोर अनुशासनहीनता, कर्त्तवय के प्रति अपेक्षा तथा पद के लिए अकर्मण्यता का परिचायक है। आप आनक्षी के कर्त्तव्यों के निर्वहन में असफलता के दोषी हैं।ष

15. Now, I come to the evidence referred to in both the proceedings. In criminal case witnesses produced were Bal Kishan, Ram Asrey, Ashok Kumar, Dilip Kumar, Suhail Ahmad, SI Jai Narain Singh and G.S. Rathor. In the departmental enquiry Gama Yadav (Constable Driver); Kashi Nath Yadav, Devi Prasad Sharma (Sub-Inspector Transport Office); Manoj Kumar (PTI); Surya Bali (Assistant Commandant); Gyanendra Pratap (Assistant Commandant) and K.N. Dubey were the witnesses named.

16. Neither from the above it is evident that charge sheet in criminal trial and disciplinary enquiry was identical nor the oral evidence produced in both the matters were identical or same.

17. The departmental enquiry is basically concerned with gross negligence, dereliction of duty on the part of petitioner and gross negligence by driving a heavy vehicle unauthorisedly without having any valid licence. The criminal charge was concerned with negligent driving by petitioner which resulted in death of Himmat Singh. It is true that trial court acquitted petitioner holding that prosecution failed to prove completely that vehicle was being driven by the petitioner. In departmental enquiry, the enquiry officer has found the charge proved and therefore he was punished. It is well known that in order to convict a person for an offence highest degree of proof is required i.e. one has to prove the charge beyond doubt. If it is less or even slightly unproved, one may not be convicted but in the departmental enquiry degree of proof is much more different. A person of ordinary prudence may come to conclusion what has been arrived at by the disciplinary authority, such decision of the disciplinary authority shall not be disturbed merely for the reason that better view is possible. It is for this reason the findings recorded by criminal court or departmental enquiry have not been found binding on either of the proceedings vice versa since the procedure, proof and all other things are totally different in both these cases.

18. In order to get benefit of acquittal in criminal case in a departmental inquiry the charges, proceedings, witnesses, evidence, etc. must form similar set as has been noticed in **G.M. Tank vs. State of Gujarat & others JT 2006(11) SC 36; 2006 (5) SCC 446**. In para 30, it has been held:

"30. The judgments relied on by the learned counsel appearing for the respondents are not distinguishable on facts and on law. In this case, the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in a Departmental case against the appellant and the charge before the Criminal Court are one and the same. It is true that the nature of charge in the departmental proceedings and in the criminal case is grave. The nature of the case launched against the appellant on the basis of evidence and material collected against him during enquiry and investigation and as reflected in the charge sheet, factors mentioned are one and the same. In other words, charges, evidence, witnesses and circumstances are one and the same. In the present case, criminal and departmental proceedings have already noticed or granted on the same set of facts namely, raid conducted at the appellant's residence, recovery of articles therefrom. The Investigating Officer, Mr. V.B.Raval and other departmental witnesses were the only witnesses examined by the Enquiry Officer who by relying upon their statement came to the conclusion that the charges were established against the appellant. The same witnesses were examined in the criminal case and the criminal court on the examination came to the conclusion that the prosecution has not proved the guilt alleged against the appellant beyond any reasonable doubt and acquitted the appellant by his judicial pronouncement with the finding that the charge has not been proved. It is also to be noticed the judicial pronouncement was made after a regular trial and on hot contest. Under

these circumstances, it would be unjust and unfair and rather oppressive to allow the findings recorded in the departmental proceedings to stand."

19. This has been referred and followed in **The Managing Director State Bank of Hyderabad and Another vs. P. Kata Rao JT 2008(4) SC 577.**

20. In para 12 of the judgment in **Ajit Kumar Nag vs. General Manager (P.J.) vs. Indian Oil Corporation Ltd. Haldia & others JT 2005(8) SC 425**, the court has said:

"12. As far as acquittal of the appellant by a criminal court is concerned, in our opinion, the said order does not preclude the Corporation from taking an action if it is otherwise permissible. In our judgment, the law is fairly well settled. Acquittal by a criminal court would not debar an employer from exercising power in accordance with Rules and Regulations in force. The two proceedings - criminal and departmental are entirely different. They operate in different fields and have different objectives. Whereas the object of criminal trial is to inflict appropriate punishment on offender, the purpose of enquiry proceedings is to deal with the delinquent departmentally and to impose penalty in accordance with service Rules. In a criminal trial, incriminating statement made by the accused in certain circumstances or before certain officers is totally inadmissible in evidence. Such strict rules of evidence and procedure would not apply to departmental proceedings. The degree of proof which is necessary to order a conviction is different from the degree of proof necessary to record the commission of delinquency. The rule relating to appreciation of evidence in the two proceedings is also not similar. In criminal law, burden of proof is on the prosecution and unless the prosecution is able to prove the guilt of the accused 'beyond reasonable doubt', he cannot be convicted by a court of law. In departmental enquiry, on the other hand, penalty can be imposed on the delinquent officer on a finding recorded on the basis of 'preponderance of probability'. Acquittal of the appellant by a Judicial Magistrate, therefore, does not ipso facto absolve him from the liability under the disciplinary jurisdiction of the Corporation. We are, therefore, unable to uphold the contention of the appellant that since he was acquitted by a criminal court, the impugned order dismissing him from service deserves to be quashed and set aside."

21. These observations have been followed in Chairman-cum-M.D., T.N.C.S. Corpn. Ltd. &t others vs. V.K. Meerabai JT 2006(1) SC 444. Besides others, the Court held that procedure with respect to standard of proof in criminal case and departmental enquiry are different in the ultimate result. Referring to earlier decision, in Lalit Popli vs. Canara Bank and others JT 2003 (5) SC 494 the Court also said that approach and objective in criminal proceedings and disciplinary proceedings are altogether different. In disciplinary proceedings the preliminary question is whether the employee is guilty of such conduct as would merit action against him whereas in criminal proceedings the question is whether the offences registered against him are established and if established what sentence should be imposed upon him. The standard of proof, the mode of enquiry, and Rule governing enquiry and trial are conceptually different. In case of departmental enquiry the technical rules of evidence have no application. The doctrine

of "proof beyond doubt" has no application. Preponderance of probabilities and some material on record is necessary to arrive at the conclusion whether or not the delinquent has committed misconduct.

22. Same view has been expressed in NOIDA Entrepreneurs Assn. vs. NOIDA & others JT 2007 (2) SC 620 (para 12) which reads as below:

"12. The purpose of departmental enquiry and of prosecution is two different and distinct aspects. The criminal prosecution is launched for an offence for violation of a duty the offender owes to the society, or for breach of which law has provided that the offender shall make satisfaction to the public. So crime is an act of commission in violation of law or of omission of public duty. The departmental enquiry is to maintain discipline in the service and efficiency of public service. It would, therefore, be expedient that the disciplinary proceedings are conducted and completed as expeditiously as possible. It is not, therefore, desirable to lay down any guidelines as inflexible rules in which the departmental proceedings may or may not be stayed pending trial in criminal case against the delinquent officer. Each case requires to be considered in the backdrop of its own facts and circumstances. There would be no bar to proceed simultaneously with departmental enquiry and trial of a criminal case unless the charge in the criminal trial is of grave nature involving complicated questions of fact and law. Offence generally implies infringement of public duty, as distinguished from mere private rights punishable under criminal law. When trial for criminal offence is conducted it should be in accordance with proof of the offence as per the evidence defined under the provisions of the Indian Evidence Act 1872 (in short the 'Evidence Act'). Converse is the case of departmental enquiry. The enquiry in a departmental proceedings relates to conduct or breach of duty of the delinquent officer to punish him for his misconduct defined under the relevant statutory rules or law. That the strict standard of proof or applicability of the Evidence Act stands excluded is a settled legal position. Under these circumstances, what is required to be seen is whether the department enquiry would seriously prejudice the delinquent in his defence at the trial in a criminal case. It is always a question of fact to be considered in each case depending on its own facts and circumstances."

23. The Court relied on its earlier decisions in **Depot Manager, A.P. State Road Transport Corporation v. Mohd. Yousuf Miya and others 1997 (2) SCC 699, State of Rajasthan v. B.K. Meena and others JT 1996 (8) standing counsel 684** and **Union of India and Another v. Bihari Lal Sidhana JT 1997 (4) SC 541.**

24. In all these cases as discussed above, various other Apex Court decisions have also been referred. As a matter of proposition what has been held in case of **Capt. M. Paul Anthony v. Bharat Gold Mines Ltd** cannot be questioned. But the real issue is that the facts and circumstances of the case are identical in the manner as stated therein, meaning thereby, if the charges in a criminal case and departmental enquiry are identical, the witnesses are identical and the case is decided in such a manner where the same witnesses have been found making same statement and disbelieved in the court of law and then the question of applying it in departmental inquiry may arise & not all these findings may be seen by the disciplinary authority

during the course of enquiry to find out whether these witnesses can be relied on to hold the delinquent guilty in the departmental enquiry. But where incident may be same, but otherwise the texture of charges & the real allegation is different, witnesses are different, different procedure is followed in both the kinds of proceedings, mere acquittal in criminal case will not make an impact on departmental proceedings particularly when same has already been concluded and there is no reason or occasion to review the same.

25. In this case, departmental enquiry was not only concluded but the statutory appeal and revision filed by petitioner also stood rejected. Petitioner did not challenge the same before any Court of law and accepted it. It is only when in criminal proceedings after few years he was acquitted, then for the first time in 2004 he approached revisional authority to review its order. Petitioner did not point out any error or irregularity in the departmental enquiry held against him. The only submission is that since he has been acquitted in the criminal case, therefore order of punishment passed in departmental enquiry after condoning delay should be set aside even though there is no legal infirmity in said proceeding. To my mind, the departmental inquiry have attained finality on the basis of independent proceedings. In my view, on the basis of acquittal in a criminal case where the things were different as discussed above, the authority was not justified to review of the order of punishment passed in departmental proceedings. Revisional Authority has considered these aspects in the impugned order and I do not find any legal infirmity in the approach of revisional authority as also in its reasoning & conclusion.

26. The writ petition is devoid of merit. Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 18.02.2011

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

Misc. (Recall) Application No.20211 of 2010

M/S Passwan Gas Agency Distributor Bharat Gas ...Petitioner
Versus
Union of India and others ...Respondents

Counsel for the Petitioner:
Sri O.P.Srivastava
SriAmar Nath Singh

Counsel for the Respondents:
A.S.G.
Sri M.E. Khan

Arbitration & Reconciliation Act-1996-Section-17-appointment of arbitratioR-review application-on ground Hon'ble Chief Justice rejected application on consideration-during pendency of application the parties have appointed the arbitrator-held-wholly misconceived-if application moved for appointment of arbitrator-it does not mean the arbitrator can not be appointed n terms of arbitral agreement-unless statue provides-power of review can not be exercised.

Held: Para 6

Considering the above, as under the Arbitration and Conciliation Act, 1996, there is no power of review by the Chief Justice or his delegate, considering the question, therefore, exercise of powers of substantive review would not arise.

Case law discussed:
(2005) 8 SCC 618; AIR 1981 SC 606

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

1. This is an application for recall of the order dated 22.01.2010. By that order, the application was dismissed and the learned Chief Justice exercising his powers under Section 11 of the Arbitration & Conciliation Act, 1996 proceeded on the basis that during the pendency of the application, the respondents have appointed an Arbitrator.

2. By the present application, what the petitioner contends is that the arbitration proceedings have been started after filing of the application. It is also pointed out that if the parties to the dispute failed to appoint an Arbitrator within 30 days, on receipt of such request, the Chief Justice can make the appointment of an independent and impartial Arbitrator.

3. The law as now settled is that merely because Section 11 of the Arbitration & Conciliation Act, 1996 is invoked, that does not per se mean that an arbitrator in terms of the arbitral agreement cannot be appointed. It is in the discretion of the Chief Justice or his delegate, who is hearing the matter to decide whether to appoint an arbitrator in terms of the agreement or to appoint an independent arbitrator. In the instant case, the learned Chief Justice noted the fact that an Arbitrator had been appointed and accordingly dismissed the application. Therefore, the application as filed would not be maintainable.

4. The proceedings are not ex parte. This application at the highest would be in the nature of a review application considering the reasons disclosed in the application by the petitioner herein.

5. It is now settled law as declared in **SBP & Co. Vs. Patel Engineering Ltd. And Another,** reported in (2005) 8 SCC 618 that the Chief Justice or his delegate though not a Court but are exercising judicial powers. The law further settled is that insofar as review is concerned, the power of review of substantive relief must be specifically conferred. There is a distinction between procedural review and substantive review which has been enunciated by the Supreme Court in the case of **Grindlays Bank Ltd. Versus The Central Government Industrial Tribunal and others,** reported in AIR 1981 SC 606. I may gainfully refer to the relevant portion of paragraph No.13 of the said judgment, which reads as under :-

"13. ... Furthermore, different considerations arise on review. The expression 'review' is used in two distinct senses, namely, (1) a procedural review which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. It is in the latter sense that the Court in Narshi Thakershi's case held that no review lies on merits unless a statute specifically provides for it, obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected ex debito justitiae to prevent the abuse of its process, and such power inheres in every Court or Tribunal."

6. Considering the above, as under the Arbitration and Conciliation Act, 1996, there is no power of review by the Chief Justice or his delegate, considering

the question, therefore, exercise of powers of substantive review would not arise.

7. For the reasons stated above, the application is not maintainable. It is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.02.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 22315 of 2008

Abdul Kuddus Khan ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petititoner:
Sri Mirza Ali Zulfaquar
Sri Ikram Ahmad

Counsel for the Respondents:
Sri Ajay Singh
Sri Dhananjay Singh
C.S.C.

Constitution of India, Article 21-Delay in payment of gratuity and pension-petitioner bearing pensionable post retired on 31.07.2005-inspite of circular dated 28.10.2006-No action taken-held-withholding pension and other retiral benefits for years together-not only arbitrary and illegal but a sin if not offence-considering extraordinary-and unexplained delay-exumpting cost of two Lacs imposed-recoverable from personal benefits of erring officer-entire amount be paid with 12% interest-detail time schedule given.

Held: Para 36

Now, coming to another aspect of the matter, if retiral benefits are paid with extra ordinary delay, the Court should award suitable interest which is compensatory in nature so as to cause some solace to the harassed employee. No Government official should have the liberty of harassing a hopeless employee by withholding his/her lawful dues for a long time and thereafter to escape from any liability so as to boast that nobody can touch him even if he commits an ex facie illegal, unjust or arbitrary act. Every authority howsoever high must always keep in mind that nobody is above law. The hands of justice are meant not only to catch out such person but it is also the constitutional duty of Court of law to pass suitable orders in such matters so that such illegal acts may not be repeated, not only by him/her but others also. This should be a lesson to everyone committing such unjust act.

Case law discussed:
OOS No. 4 of 1989 (Sunni Central Board of Waqf, U.P. Lucknow & Ors. Vs. Gopal Singh Visharad & Ors.); 1972 AC 1027; 1964 AC 1129; JT 1993 (6) SC 307; JT 2004 (5) SC 17; (1996) 6 SCC 530; (1996) 6 SCC 558; AIR 1996 SC 715; (Writ Petition No. 34804 of 2004); 1985 (1) SLR-750

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

1. Heard Sri Mirza Ali Zulfaquar, Advocate for petitioner, learned Standing Counsel for respondent No.1, Sri Ajay Singh, Advocate for respondents No.2, 3 and 4 and Sri Dhananjay Awasthi, Advocate for respondent No.5. With the consent of learned counsel for the parties, this writ petition is being decided finally under the Rules of the Court at this stage.

2. The perennial complaint of harassment of a retired employee on account of non payment of his retiral dues is again a cause of action in this writ petition. Time and again, this Court has expressed its concern and many a time has taken serious view, imposing penal interest and exemplary cost on the

employer and other authorities responsible for delay in payment of retiral dues which is a fundamental right of employee concerned within the purview of Article 21 of the Constitution, yet has not resulted in improvement. The employer and other authorities, responsible for such payment, are unabatedly going on causing a constant harassment to the poor retired employees taking advantage of their helplessness. This is really unfortunate and shameful.

3. The petitioner, in this case, a Class III employee was initially appointed as Booking Clerk in the erstwhile U.P. Transport in 1971 and was promoted to the post of Office Assistant in 1978. The post of Office Assistant Grade-II is a pensionable post. The petitioner after attaining the age of superannuation retired from the post of Office Assistant Grade-I on 31st July, 2005 when he last performed his duties in the office of Asst.Regional Manager, U.P. State Road Corporation, Basti i.e. respondent No.4 (hereinafter referred to as "Corporation"). Despite the fact that petitioner services as Office Assistant Grade-II was pensionable yet Corporation did not take any step for payment of pension. Lately, on 28th October, 2006 a departmental circular was issued under the signature of Finance Controller of Corporation informing all concerned authorities in the Corporation that vide Government Order dated 20th October, 2004, pension has been allowed to all employees under the Government Rules for employees who were engaged between 01.6.1972 to 19th June, 1981. Besides, the employees holding pensionable service/post were to return employer's contribution after while exercising option, therefore, Regional Commissioner (Pension) proposed that the employees' contribution as well as the employer's contribution towards provident fund be deposited in the Corporation's accounts.

4. The petitioner submitted his requisite documents along with option in the office of Provident Fund Commissioner on 30th August, 2005. All other concerned documents were submitted in the office of Corporation. The respondent No.5 however sent employees' contribution through cheque in September, 2005 but employer's contribution remain unpaid as a result whereof pension was not paid. Accordingly, the petitioner sent a representation dated 1st June, 2006 to respondent No.5 requesting him to furnish employer's contribution to Corporation at the earliest so that he may get his pension.

5. The employees' contribution to the tune of Rs.3,55,000/- was paid to the petitioner but since the employer's contribution was not received by Corporation, the petitioner could not get his pension. In this regard, he sent a representation dated 15.12.2007 to the Corporation also. Reminders also sent on 29th February, 2008, and, 30th March, 2008 and thereafter this writ petition was filed.

6. While entertaining writ petition on 6th May, 2008 this Court permitted the petitioner to implead respondent No.5 and passed the following order:

"Petitioner is permitted to implead Assistant Provident Fund Commissioner, Gorakhpur as respondent no.5.

The petitioner retired from the post of Office Assistant Grade - I from the

office of the Assistant Regional Manager, U.P. State Road Transport Corporation, Basti, respondent no.4 on 31.7.2005. His grievance is that he is not being paid his post retiral dues and pension.

Sri Ajay Singh who has put in appearance on behalf of respondent no.2 to 4 wants to seek instruction in the matter. On his request, put up on 12.5.2008."

7. Thereafter the matter came up on 12th May, 2008 and the Court passed the following order:

"Petitioner retired on 31.7.2005 from the post of Office Assistant Grade-I. The dispute in the present writ petition is with regard to non payment of provident fund and the pension.

Sri Ajay Singh learned counsel appearing for the respondents No.2, 3 and 4 states that the relevant papers for the release of petitioner's provident fund have already been submitted to the respondent No.5 and as soon as the instructions and funds are received from his office, the pension of the petitioner shall be released. The delay is only on the part of respondent No.5.

Learned Standing counsel appearing for respondents No. 1 and 5 and Sri Ajay Singh learned counsel appearing for respondents No. 2,3 and 4 pray for and are allowed a month's time to file counter affidavit. Two weeks thereafter are allowed to the petitioner to file rejoinder affidavit.

List for admission/final disposal in the third week of July 2008."

8. Nothing transpired hence, on 21st July, 2008, the Court has to pass the following order:

"In spite of time being granted to the learned Standing Counsel on 12.5.2008, he has not filed any counter affidavit on behalf of respondent No.5. It has been contended that Sri Ajay Singh learned counsel appearing on behalf of respondents 2,3 and 4, has sent various letters to respondent No.5 for release of the Employees Contribution Fund but no reply has been received from the respondent No.5, the details of which are given in Para-5 of counter affidavit.

Respondent No.5 is directed to pay the Employees Provident Fund to the petitioner within one month or file his counter affidavit and show cause within the same time. If no counter affidavit is filed within the aforesaid time or if payment is not made, the respondent No.5 shall appear in person on the next date fixed."

9. Thereafter when the matter came up on 19th January, 2011, the Court found that respondent No.5 has neither responded nor represented, hence non-bailable warrant was issued. Ultimately, respondent No.5 appeared, filed his affidavit and informed that no notice was served upon him hence he could not respond.

10. From the affidavit of respondent No.5 it transpired that Rs.70,560/- vide cheque No.772758/- dated 30th June, 2008 and Rs.1,06,339/- vide cheque no.64747 dated 27th November, 2009 were forwarded to Regional Manager of the Corporation, Gorakhpur. Out of the aforesaid two amounts Rs.70,560/- was

shown as Benefit Amount and Rs.1,06,339/- was shown as employer's contribution. Thereafter this Court directed respondents No.2, 3 and 4 to file a proper affidavit to show, when the amount relegated by respondent No.5 in 2008 and 2009 was received, why upto January, 2011 pension/retiral benefits were not paid and in what circumstances such delay occurred.

11. A supplementary counter affidavit has been filed today sworn by Sri Ram Briksh, Regional Manager of Corporation at Gorakhpur. It is said, several letters sent by Corporation to respondent No.5 for release and finalization of employer's contribution. These letters are dated 23rd November, 2005, 06th March, 2006, 07th June, 2006, 11th August, 2006, 2nd November 2006, 20th January, 2007, 25th April, 2007, 05th July, 2005, 28th September, 2007, 22nd April, 2008 and 13th May, 2008. Respondents No.2 to 4 also refer to some subsequent letters dated 3rd September, 2008, 17th October, 2008, 26th July, 2008, 26th November, 2008, 5th December, 2009, 8th February, 2010 and 9th April, 2010. It is however admitted that sum of Rs.70,560/- and Rs.1,06,339/- were received and credited in the account of respondents No.2 to 4 on 11th July, 2008 and 7th January, 2010. However, no details were given by respondent No.5 along with these cheques about employer's contribution or pensionary contribution. It is also said that under the Rules without receiving Form-K, which contains certain information, it was not possible for Corporation's Head Quarter to sanction pension. A format of Form K is placed on record (Annexure-3 to the supplementary counter affidavit). Form K information is said to have been received from respondent No.5 on 17th February, 2011. However, in the meantime, on the basis of documents placed on record by respondent No.5 vide his reply filed before this Court, respondent No.3 forwarded requisite papers to Headquarter on 16th February, 2011. It is said that pension and gratuity has now been sanctioned by Headquarter on 19th February, 2011 and arrears of pension will be released shortly. It could not be calculated for want of Form-K duly filled in by respondent No.5.

12. The entire defence of respondents No.2 to 4 therefore is founded on non-availability of duly filled in Form K from the office of respondent No.5 which they claim was a statutory requirement and without this form, pension and gratuity etc. could not have been paid to the petitioner. This Court made a specific query to Sri Ajay Singh, learned Counsel for respondents No.2 to 4 as to which rule refers to preparation of Form-K and its submission by respondent no.5 without which pension or gratuity of an employee shall not be paid. The reply given by Sri Ajay Singh, counsel for Corporation in his own words has been noticed by this Court and is reproduced as under:

Counsel: I am sorry My Lord. There is no any rule.

Court: Under which provision Form - K is necessary?

Counsel: No such provision in the Act.

Court: Under which provision Form-K is issued? You know or don't know.

Counsel: I don't know.

Court: Under which law it is issued?

Counsel: Very shortly I would give reply.

13. However no further details could be given. This Court required Sri Ajay Singh to show as to what information is required to be given by respondent No.5 in Form-K which the Corporation itself did not possess. The details of contribution whether that of employer or employee are available in the account of the Corporation, the service details of the employees concerned is also there and hence what is that peculiar information which the Corporation did not possess and could have gathered only after getting Form-K was the anxiety of the Court but Sri Singh could not point out any such thing. He said repeatedly said that without Form-K, duly filled in by respondent No.5, no responsibility lie on respondents No.2 to 4 to pay pension and gratuity but neither could lay his hand to any rule providing for furnishing of Form-K and authorising the employer i.e. Corporation to pay retiral benefits to the employees unless such form is received nor could show that there was any information given in Form K which otherwise was not in the record and knowledge of respondent No.2 to 4 and in absence of such information, retiral benefits could not have been paid.

14. Apparently, therefore, delay in payment of pension and gratuity to the petitioner by Corporation is without any authority of law. It has caused only due to their own conjunctures and surmises and for non statutory alleged practice and bottleneck created thereby. This kind of practice perhaps observed to harass a poor retired employee. In the absence of any other valid reason shown by learned counsel for the Corporation, this Court is justified to infer as above. Such approach cannot be approved or condoned but deserve to be castigated and condemned in the strongest words.

15. The learned counsel for the respondents-Corporation refers to an internal circular dated 27th June, 2008 issued by Finance Controller which says that matters of pension and other retiral benefits of employees must be attended expeditiously and should be disposed of speedily, but, simultaneously due care be observed to avoid any loss to the Corporation. If therefore required that following information may be verified:

''1- कर्मचारी भविष्य निधि से प्रथम सदस्यता ग्रहण करने का दिनांक।

2- वा निवृत्त के पूर्व के समस्त खातों का एकीकरण करने के उपरान्त कर्मचारी तथा नियोक्ता अंशदान के मद में जमा धनराशि का विवरण।

3. क्या कर्मचारी ई0पी0एफ0 के पेंशन/पारिवारिक पेंशन का सदस्य था। यदि हॉ तो पेंशन फण्ड में जमा धनराशि विभाग को वापस की गयी अथवा नहीं तथा कितनी।

4. क्या ई0पी0एफ0 कार्यालय द्वारा कर्मचारी को पेंशन/पारिवारिक पेंशन स्वीकृत अथवा भुगतान की गयी है अथवा नहीं। यदि हॉ तो कितनी।

5. क्या कर्मचारी को नियोक्ता अंशदान में से कोई अग्रिम दिया गया है यदि हॉ तो किस तिथि में।

6. उक्त के अतिरिक्त जिन कार्मिकों के प्रकरण में पेंशनरी अंशदान विभाग को उनके पेंशन प्रपत्र अग्रसारण करने की तिथि तक वापस नहीं प्राप्त हुआ है तो उनसे शपथ पत्र लेकर अनिवार्य रूप से प्रपत्र के साथ संलग्न करें।''

16. This letter of the Finance Controller is in the nature of precautions needed to be observed by officers of Corporation while dealing with the matters of retiral benefits of an employee so that anything not due to employee, may not be paid causing loss to the Corporation.

17. But this kind of precautionary steps cannot be allowed to be a tool in hand creating embargo or a cloak for not paying retiral benefits to an employee for several years. The apprehension of a possible loss to Corporation, no doubt must be given due care by officials in discharge of their duties in a bona fide manner but simultaneously it cannot be extended of denying what is due in law or otherwise to an employee for years to come. If this stand of Corporation is accepted, it would result in giving a license to officials of Corporation to make retired employees run here and there for decades without there being any corresponding obligation on the Corporation to compensate employees for such harassment. Whatever precaution need be observed as provided in the alleged circular dated 2th June, 2008, therein the retired employee had no role to play. Therefore something over which a retired employee has no role or control, cannot be allowed to be a handy pretext or justification to withhold retiral benefits to an employee which is his right in law as well as in the Constitution.

18. Today, one cannot dispute that pension has attained the status of fundamental right, a facet of right to earn livelihood enshrined under Article 21 of the Constitution. Pension and retiral benefits have been held deferred wages which an employee earn by rendering service for a particular length of time. This is what was held by Apex Court in **D.S.Nakara Vs. Union of India AIR 1983 SC 130.** This proposition is almost settled. To defer this right of an employee for an unreasonably long period, one must have an authority in law which more or the less must be specific and clear. On the mere pretext of caution, such right cannot be made to suffer in any manner. Whenever such an occasion is brought to notice, this Court has risen to protect the poor and helpless retired employee.

19. Besides above, it is also evident from record that from December, 2005 when petitioner submitted his option and completed other documents; till 30th June, 2008 and 27th November, 2009, the respondent No.5 also did not pay employers contribution etc.. This delay on the part of respondent No.5 is also unexplained in the counter affidavit of respondent No.5. Whatever thus observed above for respondents No.2 to 4 above equally apply to respondent No.5 also.

20. A system controlled by bureaucrats can create wrangles to device something which is formulated by policy makers for the benefit of the citizen is writ large from this case. A beneficial scheme made for social welfare of old and retired employees, can be twisted by the system creating a nightmare to retired employees, as is quite evident. The constitutional obligation though pen down to reach the people but Executive, habitual of remaining static or move slow or no movement at all, can render such scheme quite ineffective and inoperative. Something due today may not be available to a person right in time. It is like a person starving today is assured food to be provide after a month or two

by which time he may die of hunger or the foodstuff itself may rot. If this is not unconstitutional then what else can be.

21. Moreso, when this matter remain pending for more than two years before this Court, yet respondents did not woke up to meet grievance of petitioner. The pain and torture faced by retired employee and his family, in such circumstances, can be easily visualised and felt but cannot be assessed in the same way only those who really suffer, know it. This pain and humiliation cannot be compensated in terms of money.

22. Respondents No.2 to 5, in their own way, obviously moved with snail pace adding to the misery of a retired Class III employee without realising how a poor employee and his family would be meeting their two times meal and other necessities during these days of high price escalation when even full salary paid to employees find it difficult to meet his/their necessities. The petitioner probably could not resort to the underhand facility procedure to get his matter expedited and that is how he had to suffer in silence. Instead of resorting to an illegal act which it could have expedited his matter, in his wisdom decided to avail constitutional remedy of judicial review but here also the matter remain pending for almost three years. The petitioner's agony continued on account of repeated adjournments obtained by respondents in responding, which this Court readily permitted. That is how the misfortune of the petitioner continued all through.

23. I am constrained to observe that time has come now when long adjournments should not be frequently and easily be granted. Response of official respondents must to come within a short time. The Court cannot have the luxury of giving several weeks and months' time seeking response where extra ordinary equitable speedy jurisdiction under Article 226 has been invoked by a harassed pinnacle. Half a century ago, time of more than a week to other side for placing its response might have been necessary since system of communication was not so fast. The people also did not have better facilities of travelling and conveyance but now, particularly in the last more than two decades, the situation has gone a sea change. We can communicate across the world within no time. The Government machinery has already consumed a hefty sum from valuable public money in modernising its system of communication etc.. It is inconceivable that a person in the farthest place in the State may not be informed to respond to the Court within a few hours. In order to prepare the case and study record, one may understand of giving a few more days but it is inconceivable that time of weeks and months together be allowed to pass awaiting reply of respondents; in particular where State Government, its officials and instrumentalities are party. If Government's officials are willing and ready to respond to Court cases, they can file their response within a week or even less. Probably, it is the lethargic old system still prevailing in the minds of Government Officials in regard to Court cases, and, that is how, months and years pass but they fail to respond causing extra ordinary delay in disposal of Court cases.

24. Not only this Court but all the Courts throughout the country are reeling under the pressure of mounting arrears. A lot of hue and cry here and there is going

on about extra ordinary delay in dispensation of justice by the Courts of law but one has to be realistic to appreciate the real problem. It lies on the part of Executive in showing response to pending cases. Despite receiving information, for one or the other reason, and mostly without any reason, they continue to ignore showing attitude of non response and that is how the cases are piling up. Small matters, which may be decided then and there, if stand of the Government is immediately informed to Court also remain undisposed of for this very reason. When some Courts, after awaiting for a reasonable time, try to decide the matters without further awaiting for reply, the Government and its authorities raise a hue and cry that without giving opportunity of hearing for reasonable time, cases are being decided ex parte. In their understanding, probably the term "reasonable opportunity" means indefinite period. This Court finds it an opportune moment to refer some observation made in the majority order dated 17.09.2010 of Full Bench in **OOS No.4 of 1989 (Sunni Central Board of Waqf, U.P. Lucknow & Ors. Vs. Gopal Singh Visharad & Ors.)** where the Court observed:

"14. ..... Is it what we have to deliver to our future generation that the courts of law in India are not capable to decide cases for generations and on a mere drop of a hat, an excuse is found to defer the matter or adjourn the case? Are we here to find out ways and means of deferring adjudication or to make adjudication? No case, no dispute and no apprehension can be above the honest discharge of constitutional function by an independent judiciary. The people of India are already having serious complaints in abundance in recent past against the judicial system of this country that it keeps the matter lingering on for generations and attempt to decide cases is minimal.

15. With the increased awareness, the people are getting conscious of their right and do not hesitate in asserting it. If the enforcement of rights get deferred not because of any slackness on their part, but due to extremely slow pace or inaction on the part of judiciary, their complaint cannot be levelled frivolous. In a system of good governance, effective, independent judicial system is not only the requirement but the real crux lies whether it can deliver justice within reasonable time; whether it can decide the issue expeditiously and before the patience of the people exhausts? These are some of the aspects which need be seriously taken up by the Bench and Bar both. This is the high time when not only the Presiding Officers of the Court but also the members of the Bar who are also officers of the Court should ponder over seriously and find out the way in which cases may be decided expeditiously instead of inventing the way for their deferment and adjournments. The courts are meant for adjudication and not for adjournments or deferment."

25. Learned counsel appearing for respondents simply tried to shift responsibility of delayed payment of retiral benefits to petitioner but the fact remain undenied that more than five years delay is wholly unreasonable. The petitioner, a retired employee, had no role whatsoever except of suffering the cause.

26. As already said, pension is not a bounty but a right of employee who has

served the employer for long and is entitled for retiral benefits being his deferred wages. The Apex Court in **D.S. Nakara (supra)** has observed:-

"pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension ***does not depend upon anyone's discretion."*** *(Para 20).*

"In the course of transformation of society from feudal to welfare and as socialistic thinking acquired respectability, State obligation to provide security in old age, an escape from underserved want was recognized and as a first steps pension was treated not only as a reward for past service but with a view to helping the employee to avoid destitution in old age. The quid pro quo was that when the employee was physically and mentally alert, he rendered not master the best, expecting him to look after him in the fall of life. A retirement system therefore exists solely for the purpose of providing benefits. In most of the plans of retirement benefits, everyone who qualifies for normal retirement receives the same amount." (Para 22).

"Pensions to civil employees of the Government and the defence personnel as administered in India appear to be a compensation for service rendered in the past." (Para 28).

"Summing up it can be said with confidence that pension is not only compensation for loyal service rendered in the past, but pension also has a broader significance, in that it is a measure of socio-economic justice which inheres economic security in the fall of life when physical and mental prowess is ebbing corresponding to aging process and, therefore, one is required to fall back on savings. One such saving in kind is when you give your best in the hey-day of life to your employer, in days of invalidity, economic security by way of periodical payment is assured. The term has been judicially defined as a stated allowance or stipend made in consideration of past service or a surrender of rights or emoluments to one retired from service. Thus the pension payable to a government employee is earned by rendering long and efficient service and therefore can be said to be a deferred portion of the compensation or for service rendered." (Para 29)

27. Withholding of pension and other retiral benefits of retired employees for years together is not only illegal and arbitrary but a sin if not an offence since no law has declared so. The officials, who are still in service and are instrumental in such delay causing harassment to the retired employee must however feel afraid of committing such a sin. It is morally and socially obnoxious. It is also against the concept of social and economic justice which is one of the founding pillar of our constitution.

28. In our system, the Constitution is supreme, but the real power vest in the people of India. The Constitution has been enacted "for the people, by the people and of the people". A public functionary cannot be permitted to act like a dictator causing harassment to a common man and in particular when the person subject to harassment is his own employee.

29. Regarding harassment of a common referring to observations of Lord Hailsham in **Cassell & Co. Ltd. Vs. Broome, 1972 AC 1027** and Lord Devlin in **Rooks Vs. Barnard and others 1964 AC 1129,** the Apex Court in **Lucknow Development Authority Vs. M.K. Gupta JT 1993 (6) SC 307** held as under;

"An Ordinary citizen or a common man is hardly equipped to match the might of the State or its instrumentalities. That is provided by the rule of law..... A public functionary if he acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of power but its abuse. No law provides protection against it. He who is responsible for it must suffer it.....Harassment of a common man by public authorities is socially abhorring and legally impermissible. It may harm him personally but the injury to society is far more grievous." (para 10)

30. The above observations as such have been reiterated in **Ghaziabad Development Authorities Vs. Balbir Singh JT 2004 (5) SC 17.**

31. The respondents being "State" under Article 12 of the Constitution of India, its officers are public functionaries. As observed above, under our Constitution, sovereignty vest in the people. Every limb of constitutional machinery therefore is obliged to be people oriented. Public authorities acting in violation of constitutional or statutory provisions oppressively are accountable for their behaviour. It is high time that this Court should remind respondents that they are expected to perform in a more responsible and reasonable manner so as not to cause undue and avoidable harassment to the public at large and in particular their ex-employees like the petitioner. The respondents have the support of entire machinery and various powers of statute. An ordinary citizen or a common man is hardly equipped to match such might of State or its instrumentalities. Harassment of a common man by public authorities is socially abhorring and legally impressible. This may harm the common man personally but the injury to society is far more grievous. Crime and corruption, thrive and prosper in society due to lack of public resistance. An ordinary citizen instead of complaining and fighting mostly succumbs to the pressure of undesirable functioning in offices instead of standing against it. It is on account of, sometimes, lack of resources or unmatched status which give the feeling of helplessness. Nothing is more damaging than the feeling of helplessness. Even in ordinary matters a common man who has neither the political backing nor the financial strength to match inaction in public oriented departments gets frustrated and it erodes the credibility in the system. This is unfortunate that matters which require immediate attention are being allowed to linger on and remain unattended. No authority can allow itself to act in a manner which is arbitrary. Public administration no doubt involves a vast amount of administrative discretion which shields action of administrative authority but where it is found that the exercise of power is capricious or other than bona fide, it is the duty of the Court to take effective steps and rise to occasion otherwise the confidence of the common man would shake. It is the responsibility of Court in such matters to immediately rescue such common man so that he may have the confidence that he is not helpless but a bigger authority is there to take care of him and to restrain arbitrary and arrogant,

unlawful inaction or illegal exercise of power on the part of the public functionaries.

32. In a democratic system governed by rule of law, the Government does not mean a lax Government. The public servants hold their offices in trust and are expected to perform with due diligence particularly so that their action or inaction may not cause any undue hardship and harassment to a common man. Whenever it comes to the notice of this Court that the Government or its officials have acted with gross negligence and unmindful action causing harassment of a common and helpless man, this Court has never been a silent spectator but always reacted to bring the authorities to law.

33. In **Registered Society Vs. Union of India and Others (1996) 6 SCC 530** the Apex court said:

"No public servant can say "you may set aside an order on the ground of mala fide but you can not hold me personally liable" No public servant can arrogate in himself the power to act in a manner which is arbitrary".

34. In **Shivsagar Tiwari Vs. Union of India (1996) 6 SCC 558** the Apex Court has held:

"An arbitrary system indeed must always be a corrupt one. There never was a man who thought he had no law but his own will who did not soon find that he had no end but his own profit."

35 .In **Delhi Development Authority Vs. Skipper Construction and Another AIR 1996 SC 715** has held as follows:

"A democratic Government does not mean a lax Government. The rules of procedure and/or principles of natural justice are not mean to enable the guilty to delay and defeat the just retribution. The wheel of justice may appear to grind slowly but it is duty of all of us to ensure that they do grind steadily and grind well and truly. The justice system cannot be allowed to become soft, supine and spineless."

36. Now, coming to another aspect of the matter, if retiral benefits are paid with extra ordinary delay, the Court should award suitable interest which is compensatory in nature so as to cause some solace to the harassed employee. No Government official should have the liberty of harassing a hopeless employee by withholding his/her lawful dues for a long time and thereafter to escape from any liability so as to boast that nobody can touch him even if he commits an ex facie illegal, unjust or arbitrary act. Every authority howsoever high must always keep in mind that nobody is above law. The hands of justice are meant not only to catch out such person but it is also the constitutional duty of Court of law to pass suitable orders in such matters so that such illegal acts may not be repeated, not only by him/her but others also. This should be a lesson to everyone committing such unjust act.

37. Interest on delayed payment on retiral dues has been upheld time and against in a catena of decision. This Court in **Shamal Chand Tiwari Vs. State of U.P. & Ors. (Writ Petition No.34804 of 2004)** decided on 6.12.2005 held:

"Now the question comes about entitlement of the petitioner for interest on

delayed payment of retiral benefits. Since the date of retirement is known to the respondents well in advance, there is no reason for them not to make arrangement for payment of retiral benefits to the petitioner well in advance so that as soon as the employee retires, his retiral benefits are paid on the date of retirement or within reasonable time thereafter. Inaction and inordinate delay in payment of retiral benefits is nothing but culpable delay warranting liability of interest on such dues. In the case of ***State of Kerala and others Vs. M. Padmnanaban Nair, 1985 (1) SLR-750,*** *the Hon'ble Supreme Court has held as follows:*

"Since the date of retirement of every Government servant is very much known in advance we fail to appreciate why the process of collecting the requisite information and issuance of these two documents should not be completed at least a week before the date of retirement so that the payment of gratuity amount could be made to the Government servant on the date he retires or on the following day and pension at the expiry of the following months. The necessity for prompt payment of the retirement dues to a Government servant immediately after his retirement cannot be over-emphasized and it would not be unreasonable to direct that the liability to pay panel interest on these dues at the current market rate should commence at the expiry of two months from the date of retirement."

In this view of the matter, this Court is of the view that the claim of the petitioner for interest on the delayed payment of retiral benefits has to be sustained."

38. In view of the above, I have no hesitation in holding that non payment of retiral benefits and others to petitioner is arbitrary and unreasonable. There was no justification at all for respondents to delay payment thereof.

39. In the above facts and circumstances, the writ petition is allowed with the following directions:

(1) The entire amount of arrears of pension shall be paid to petitioner within one month from the date of production of a certified copy of this order before the authorities concerned. The current pension shall be paid as and when due.

(2) The petitioner shall be entitled to interest on delayed payment of pension and gratuity @ 12%.

(3) Liability of payment of interest is divided on respondents No.2 to 5 in the following manner:

(i) The respondent No.5 shall pay interest on the amount of pension and gratuity including arrears by paying interest upto 27th November, 2009.

(ii) For period subsequent to 27th November, 2009, interest on the amount of pension and gratuity including arrears shall be paid by respondents no.2 to 4.

(4) For sheer carelessness, negligence and inaction on the part of respondents causing delay and also for misleading this Court in one or the other way, this is a fit case where exemplary cost should be awarded. I quantify the cost to Rs.2 lakhs to be shared 50% by respondents No.2 to 4; and 50% by respondent No.5. It shall be paid to petitioner along with arrears of pension.

(5) Respondent No.1 however shall be at liberty to recover the amount of interest and cost paid to petitioner under this order from the official(s) concerned, who is/are found responsible for extra ordinary delay in payment of retiral benefits to the petitioner, after such inquiry as is required in law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.02.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 22624 of 1993

Prem Chandra and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri K.K. Misra
Sri Prabhakar Singh
Sri Puneet Khare

Counsel for the Respondents:
C.S.C.

Constitution of India Article 226- Principle of merger-explained-Petitioner a Daily wager seeking regularization-working on strength of interim order-in absence of provision or scheme for regularization-No final relief could be granted interim order discharged-No case for Regularization-violation of industrial dispute Act provisions-complete procedure provided in Act itself-not before writ Court-Petition Dismissed.

Held Para 5 and 7

Admittedly the petitioners are daily wage employees and have no right to hold the post or continue in service. On the date when impugned order was passed disengaging the petitioners, there was no provision under which petitioners could have claimed regularisation and none has been shown before this Court.

The question whether termination amounts to retrenchment or not requires investigation into several questions of fact and it is now well settled that if some right is claimed under labour legislation and if the legislation also contain adjudicatory forum, the remedy lie there and not by filing writ petition. In the case of contractual appointment, the remedy lies elsewhere, but no relief of reinstatement can be granted in view of the provisions of Specific Relief Act as also this Court's judgement in Special Appeal No. 1906 of 2008 (Brij Bhushan Singh and another Vs. State of U.P. and others) decided on 19.12.2008.

Case law discussed:
2007 (2) ESC 987, AIR 1968 Allahabad 139, AIR 1975 Allahabad 280, 1986 (4) LCD 196, AIR 1994 Allahabad 273, JT 2009 (2) SC 520, Special Appeal No. 1906 of 2008

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

1. The petitioners are seeking a mandamus commanding the respondents to allow them to continue in service and regularise them.

2. Learned counsel for the petitioners contended that though they have continued pursuant to interim order dated 28.06.1993 passed by this Court yet since subsequently Regularisation Rules have been framed and they are entitled to be considered for regularisation thereunder hence their continuous service till date is liable to be taken into consideration to consider whether they have a right for regularisation or not.

3. The submission is thoroughly misconceived. Admittedly, the petitioners were disengaged from their daily wage

muster role employment by means of the impugned order. Counsel for the petitioners could not make any submission to assail the said order of termination. The order of termination was made ineffective by means of the interim order passed by this Court. Meaning thereby continuance of petitioners in service is not based on their own rights but pursuant to this Court's order. The law is well settled in this regard that act of Court shall prejudice none and anything which has been done pursuant to interim order shall depend on the final result of the writ petition. In case the writ petition fails it will result as if no interim order was ever passed. This issue has been considered by a Division Bench of this Court (in which I was also a member) in **Smt. Vijay Rani Vs. Regional Inspectress of Girls Schools, Region-1, Meerut and others, 2007(2) ESC 987** and the Court held as under:

"An interim order passed by the Court merges with the final order and, therefore, the result brought by dismissal of the writ petition is that the interim order becomes non est. A Division Bench of this court in ***Shyam Lal Vs. State of U.P. AIR 1968 Allahabad 139,*** *while considering the effect of dismissal of writ petition on interim order passed by the court has laid down as under:*

"It is well settled that an interim order merges in the final order and does not exist by itself. So the result brought about by an interim order would be non est in the eye of law if the final order grants no relief. The grant of interim relief when the petition was ultimately dismissed could not have the effect to postponing implementation of the order of compulsory retirement. It must in the circumstances take effect as if there was no interim order."

The same principal has been reiterated in the following cases:

(A)AIR 1975 Allahabad 280 Sri Ram Charan Das V. Pyare Lal.

"In Shyam Lal Vs. State of U.P., AIR 1968 All 139 a Bench of this Court has held that orders of stay of injunction are interim orders that merge in final orders passed in the proceedings. The result brought about by the interim order becomes non est in the eye of law in final order grants no relief. In this view of the matter it seems to us that the interim stay became non est and lost all the efficacy, the commissioner having upheld the permission which became effective from the date it was passed."

(B) 1986 (4) LCD 196 Shyam Manohar Shukla V. State of U.P.

"It is settled law that an interim order passed in a case which is ultimately dismissed is to be treated as not having been passed at all (see Shyam Lal V. State of Uttar Pradesh) Lucknow, AIR 1968 Allahabad 139 and Sri Ram Charan Das v. Pyare Lal, AIR 1975 Allahabad 280 (DB)."

C) AIR 1994 Allahabad 273 Kanoria Chemicals & Industries Ltd. v. U.P. State Electricity Board.

"After the dismissal of the writ petitions wherein notification dated 21.4.1990 was stayed, the result brought about by the interim orders staying the notification, became non est in the eye of law and lost all its efficacy and the notification became effective from the beginning."

4. Recently also in **Raghvendra Rao etc. Vs. State of Karnataka and others, JT 2009 (2) SC 520** the Apex Court has observed:

"It is now a well-settled principle of law that merely because an employee had continued under cover of an order of Court, he would not be entitled to any right to be absorbed or made permanent in the service. ....."

5. Admittedly the petitioners are daily wage employees and have no right to hold the post or continue in service. On the date when impugned order was passed disengaging the petitioners, there was no provision under which petitioners could have claimed regularisation and none has been shown before this Court.

6. Learned counsel for the petitioners however submitted that disengagement amounts to retrenchment and as such has violated the procedure prescribed in U.P. Industrial Disputes Act, 1947, hence the termination is illegal.

7. The question whether termination amounts to retrenchment or not requires investigation into several questions of fact and it is now well settled that if some right is claimed under labour legislation and if the legislation also contain adjudicatory forum, the remedy lie there and not by filing writ petition. In the case of contractual appointment, the remedy lies elsewhere, but no relief of reinstatement can be granted in view of the provisions of Specific Relief Act as also this Court's judgement in **Special Appeal No. 1906 of 2008 (Brij Bhushan Singh and another Vs. State of U.P. and others)** decided on 19.12.2008.

8. In view thereof I find no merit in the writ petition. Dismissed. Interim order, if any, stands vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.02.2011

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

Civil Misc. Writ Petition No. 32436 of 2001

Nagar Panchayat Sahabad,Rampur ...Petitioner

Versus

Chunnu Khan and others ...Respondents

Counsel for the Petitioner:
Sri Anurag Pandey
Sri D.V.Jaiswal

Counsel for the Respondents:
C.S.C.

U.P.Z.A.L.R. Act-Section 142-user of land for Hat-market by Bhumidhar-possessing due license-challenged on ground it falls within Nagar Palika limit-hence private Respondents have no right-from perusal of record plot in question beyond territorial limit of petitioner-no rights or privilege of recorded Bhumidhar can be curtailed-petition dismissed

Held: Para 10

Apart from this, the evidence adduced indicates that the contesting respondents, in accordance with the Zila Parishad Adhiniyam, had obtained licence from the Zila Parishad upon payment of the requisite fee. Thus on all scores the order dated 8.5.92 cannot be said to be suffering from any infirmity.

Case law discussed:
1976 RD 109; AIR 1931 Oudh 110; AIR 1961 SC SC=1969 R.D.288; 1998 (3) AWC 1629;

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

1. Heard Sri Anurag Pandey holding brief of Sri D.V. Jaiswal learned counsel for the petitioner and the learned standing counsel.

2. This petition has been filed assailing the appellate order passed by the Respondent No.12 Collector, Rampur dismissing the appeal on the ground of limitation and it also assails the order dated 8.5.1992 passed by the respondent No.11 Sub Divisional Officer, Sahabad district Rampur whereby the contesting respondent nos. 1 to 10 have been permitted to run a market over their bhumidhari land under Section 142 of the U.P.Z.A. & L.R.Act, 1950.

3. The background of the case is that the order was passed in favour of contesting respondents dated 8.5.1992 and a copy of the said order has been filed along with a supplementary affidavit dated 21.12.2001. A perusal of the said order demonstrates that the contesting respondents have been allowed to hold a market over their bhumidhari land situated in Village Sahabad on every Tuesday and Saturday. This order according to the petitioner has been purportedly passed under Section 142 of the U.P.Z.A.L.R. Act which is being quoted here:

"142. Right of a Bhumidhar to the exclusive possession of all land in his holding -(1) A bhumidhar with transferable rights shall, subject to the provisions of this Act, have the right to exclusive possession of all land of which he is a bhumidhar and **to use it for any purpose whatsoever.**

(2) A bhumidhar with non-transferable rights shall, subject to the provisions of this Act, have the right to exclusive possession of all land of which he is such bhumidhar and **to use such land for any purpose** connected with agriculture, horticulture or animal husbandry which includes pisciculture, poultry farming and social forestry."

4. The contention raised above that the said order is without jurisdiction inasmuch as the petitioner Nagar Panchayat is the authority to regulate the market and fairs within its area and therefore in view of the provisions of the Town Area Act and the provisions of Section 241 read with Section 298 of the U.P. Municipalities Act it is the petitioner who is entitled to grant or refuse any such permission and hence the order passed by the Sub Divisional Officer deserves to be set aside. It has further submitted that even though the appeal was filed as a Misc. Appeal yet it could not have been rejected on the ground of limitation as the delay has been fully explained. Nonetheless the order dated 8.5.92 being without jurisdiction the writ petition deserves to be allowed.

5. No notice had been issued in this petition and the matter remains pending for 11 years.

6. The provisions of Section 142 of the U.P.Z.A.L.R Act authorise a bhumidhar to utilise his land in terms of the said provisions. In the opinion of the Court the order dated 8.5.92 simply acknowledges the said rights and nothing beyond the same. The right of the bhumidhar to enjoy his holdings for the purpose of running a market or holding a Hat came up for consideration before a Division Bench of this Court in the case of **Shivraj Singh Vs. State of U.P. and others reported in 1976 RD 109** and the law was explained in para 21 and 25 of the said decision that such right is a right to

immoveable property and further the Hats, Bazars and Melas held on such bhumidhari plots are within the proprietary rights of the tenure holders. It was held categorically that the right to hold market on their own land is a right to immoveable property and reliance was placed on the earlier decision in the case of **Ganesh Singh and another Vs.Shitla Bux Singh and others reported in AIR 1931 Oudh 110.** The proprietary rights and the nature of the tenure of the bhumidhar was explained with the help of the Apex Court decision in the case of **Rana Sheo Ambar Singh V.Allahabad Bank AIR 1961 SC SC= 1969 R.D.288.**

7. Such rights were also acknowledged by a learned Single Judge of this Court in the case of **Lakshmi Narain Upadhya V. Gram Sabha reported in 1998(3) AWC 1629** wherein paras 8 and 11 the Court observed as follows:

"8. Undoubtedly, every citizen or person has a right to choose his own employment or to take up any trade or calling, subject only to the limits as may be imposed by the State in the interests of the public welfare. This fundamental right has been guaranteed under Article 19(1)(g) of the Constitution of India. The defendant-appellants admittedly are holding cattle hats on their own plots in the village and similarly, Gaon Sabha of the village is holding hat over its own plots. Both the parties, therefore, have an innate right to hold the hats on their own plots without any let or hindrance from any quarter. The fate of present litigation would, however, turn one way or the other on the question as to whether the Gaon Sabha has a right to regulate the holding of the hat or to restrict the right of the defendant-appellants in holding hat on their own plots. The defendant-appellants, therefore, would swim or sink on the validity or otherwise of the resolution dated 14.8.1977 alleged to have been adopted under Section 15 (h) of the Act. Chapter IV of the Act deals with the powers, duties, function and administration of Gaon Panhayat, Section 15, which is entitled as 'Duties and Function' runs as follows:

"it shall be the duty of every Gaon Panchayat so far as its funds may allow to make reasonable provisions within its jurisdiction for:

(a).....to

(g).....

(h) regulation of melas, markets and hats within its area, except those managed by the State Government or the Zila Parishad and without prejudice to the provisions of the U.P.Melas Act, 1938.:

11.....In the instant case, what the Gaon Panchayat has done is that in order to promote its own hat on plot numbers, 832,835,836 and 837. It has restricted/prohibited the holding of hat by the defendant-appellants on their ownplot numbers 830A, 830B, 834, 842 and 843. As said above, the defendant-appellants have a fundamental right can be curtailed or restricted only by putting reasonable restriction by a valid law. Total prohibition is permissible in cases where trade is inherently dangerous, such as, trading in dangerous goods, explosives, tourism or trafficking in women or the like, but where there is a lawful business activity, it cannot in any manner be subjected to any fetters or restrictions in the absence of any law. A regulation, therefore, cannot disobey the constitutional provisions/prohibitions by

employing an indirect method. In order to be reasonable, the restriction must have a reasonableness to the object. In short, a regulation cannot go to the extent of virtually eliminating the right guaranteed, by introducing regulations which are not related to the interest of the private persons holding a hat even though the regulation may be in the interest of general public."

8. The Sub Divisional Officer therefore has simply acknowledged the rights ,which are vested in the contesting respondents as explained in the decisions herein above. It is not the case of the petitioners that the respondents are indulging in any obnoxious trade or are violating some mandate of the constitution.

9. The petitioner's appeal filed against the said order was allowed and remanded and the Sub Divisional Officer again maintained his earlier order. While doing so the Sub Divisional Officer relied on the statements of Town Area Clerk Zaheerual Islam and Abdul Wahid and that in view of the map as produced by another clerk Funnan Khan, the market which was being held was found out side the limits of the Town Area/petitioner Nagar Panchayat. In view of this finding which could not be successfully assailed before this court, the applicability of the provisions of the Town Area Act or any regulations or even otherwise could not have been alleged by the Town Area.

10. Apart from this, the evidence adduced indicates that the contesting respondents, in accordance with the Zila Parishad Adhiniyam, had obtained licence from the Zila Parishad upon payment of the requisite fee. Thus on all scores the order dated 8.5.92 cannot be said to be suffering from any infirmity.

11. The writ petition lacks merit and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.02.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 38204 of 2008

Udai Veer Singh ...Petitioner
Versus
State of U.P. and others ...Respondent

Counsel for the Petitioner:
Sri C.B. Yadav

Counsel for the Respondents:
C.S.C.

U.P. Transport Development Staff (Group 'D') Service Rules 1979-Rule-3-Suspension order passed by higher authority than the appointing authority-No provision shown by the Standing Counsel to justify the order of suspension-by Transport Commissioner-while the appointing authority of a constable is Regional Transport Authority-apart from that more than two and half years gone-No disciplinary proceedings initiated-whether an employees can be placed under suspension for indefinite period? Held-"No".

Held: Para 8

The order of suspension pending in a contemplated inquiry by itself is not a punishment but in case it is prolonged without initiation or completion of inquiry, it may become punitive with the passage of time. Whether such a prolonged suspension can be held valid and justified and whether the respondents can be allowed to keep an employee under suspension for an

indefinite period! The answer is an emphatic no.

Case law discussed:

2009 (1) AWC 691

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

1. Learned Standing Counsel was allowed a month's time to file counter affidavit on 31.07.2008. Almost two and half years since then have passed but respondents have chosen not to file any counter affidavit. In the circumstances, this Court has no option but to proceed to dispose of the writ petition on the basis of material available on record.

2. Sri Nisheeth Yadav, learned counsel for the petitioner contended that the impugned order of suspension has been passed not by the competent authority but by an authority, may be higher in status, but not competent to pass the order of suspension under the Rules. He further submitted that suspension even otherwise is penal in nature inasmuch as no inquiry whatsoever has been initiated till date and, therefore also, it is liable to be set aside.

3. The petitioner was appointed as Class-IV employee on 10.03.1987 by Regional Transport Officer, Agra. Later on he was promoted as Enforcement Constable by Regional Transport Officer as stated in para 5 of supplementary affidavit. The impugned order of suspension has been passed by the Additional Transport Commissioner (Enforcement), U.P., Lucknow. Rule 3(a) of U.P. Transport Department Enforcement Staff (Group D) Service Rules, 1979 (hereinafter referred to as the "1979 Rules") defines appointing authority and reads as under:

"3(a) 'Appointing Authority' means the Assistant Transport Commissioner (Administration) for the posts at the Headquarters of the Transport Commissioner and the Regional Transport Officer for the posts in the Region;"

4. The petitioner has categorically stated that he was appointed as Enforcement Constable by Regional Transport Officer and that is what provided in 1979 Rules.

5. Rule 4(1) of U.P. Government Servant (Discipline and Appeal) Rules, 1999 *(hereinafter referred to as the "1999 Rules")* empowers the appointing authority to place a Government servant under suspension where an inquiry is contemplated or proceeding in the discretion of appointing authority. Second proviso says that the concerned Head of the Department empowered by the Governor by an order in this behalf may also place Government servant or class of Government servant belong to Group 'A' and 'B' posts under suspension. Obviously this proviso has no application to the case of petitioner because he is a Class-IV employee. Third proviso says that a Government servant belong to Group 'C' and 'D' posts may be placed under suspension by an authority subordinate to appointing authority provided such power is delegated to it. There is nothing in Rule 4(1) of 1999 Rules which empower any higher other authority to place a Group 'C' and 'D' Government servant under suspension.

6. I find substance in the submission of learned counsel for the petitioner that the Additional Transport Commissioner (Enforcement), U.P.,

Lucknow does not come within any of the above category prescribed under Rule 4(1) of 1999 Rules so as to assume jurisdiction to place petitioner under suspension. The Additional Transport Commissioner (Enforcement) U.P., Lucknow is admittedly higher in hierarchy to Regional Transport Officer. In respect to Group 'C' and 'D' employees the rule provides that suspension can be made by appointing authority or by an authority who is next lower in rank to whom the power of suspension is delegated. It thus makes it clear that rule does not permit a higher authority to pass an order of suspension so far as Group 'C' and 'D' employees is concerned. An authority lower in rank and that too next lower in rank to appointing authority if delegated power of suspension it can be exercised by it otherwise only by appointing authority. No provision has been shown by learned Standing Counsel to show that a higher authority has been empowered to place suspension a Group 'C' or 'D' Government servant or that there is any amendment in the rules empowering Additional Transport Commissioner (Enforcement) U.P., Lucknow to place an Enforcement Constable under suspension who is appointed by Regional Transport officer. This results in making the impugned order of suspension wholly illegal and without jurisdiction.

7. Besides, the petitioner, as it is said, has not even been issued a charge sheet so far. It is thus evident that petitioner has been kept for more than 2 and half years under suspension without even initiating departmental proceeding.

8. The order of suspension pending in a contemplated inquiry by itself is not a punishment but in case it is prolonged without initiation or completion of inquiry, it may become punitive with the passage of time. Whether such a prolonged suspension can be held valid and justified and whether the respondents can be allowed to keep an employee under suspension for an indefinite period! The answer is an emphatic no.

9 In fact this question is no more res integra. In **Smt. Anshu Bharti Vs. State of U.P. and others, 2009(1) AWC 691,** (paras 9, 10, 11, 12 and 13), this Court has observed:

"9. . . . . The prolonged suspension of the petitioner is clearly unjust and unwarranted. The question deals with the prolonged agony and mental torture of a suspended employee where inquiry either has not commenced or proceed with snail pace. Though suspension in a contemplated or pending inquiry is not a punishment but this is a different angle of the matter, which is equally important and needs careful consideration. A suspension during contemplation of departmental inquiry or pendency thereof by itself is not a punishment if resorted to by the competent authority to enquire into the allegations levelled against the employee giving him an opportunity of participation to find out whether the allegations are correct or not with due diligence and within a reasonable time. In case, allegations are not found correct, the employee is reinstated without any loss towards salary, etc., and in case the charges are proved, the disciplinary authority passes such order as provided under law. However, keeping an employee under suspension, either without holding any enquiry, or in a prolonged enquiry is

unreasonable. It is neither just nor in larger public interest. A prolonged suspension by itself is penal. Similarly an order of suspension at the initial stage may be valid fulfilling all the requirements of law but may become penal or unlawful with the passage of time, if the disciplinary inquiry is unreasonably prolonged or no inquiry is initiated at all without there being any fault or obstruction on the part of the delinquent employee. No person can be kept under suspension for indefinite period since during the period of suspension he is not paid full salary. He is also denied the enjoyment of status and therefore admittedly it has some adverse effect in respect of his status, life style and reputation in society. A person under suspension is looked with suspicion in the society by the persons with whom he meets in his normal discharge of function.

10. A Division Bench of this Court in Gajendra Singh Vs. High Court of Judicature at Allahabad 2004 (3) UPLBEC 2934 observed as under :

"We need not forget that when a Government officer is placed under suspension, he is looked with suspicious eyes not only by his collogues and friends but by public at large too."

11. Disapproving unreasonable prolonged suspension, the Apex Court in Public Service Tribunal Bar Association Vs. State of U.P. & others 2003 (1) UPLBEC 780 (SC) observed as under :

"If a suspension continues for indefinite period or the order of suspension passed is malafide, then it would be open to the employee to challenge the same by approaching the High Court under Article 226 of the Constitution.....(Para 26)

12. The statutory power conferred upon the disciplinary authority to keep an employee under suspension during contemplated or pending disciplinary enquiry cannot thus be interpreted in a manner so as to confer an arbitrary, unguided an absolute power to keep an employee under suspension without enquiry for unlimited period or by prolonging enquiry unreasonably, particularly when the delinquent employee is not responsible for such delay. Therefore, I am clearly of the opinion that a suspension, if prolonged unreasonably without holding any enquiry or by prolonging the enquiry itself, is penal in nature and cannot be sustained.

13. The view I have taken is supported from another Judgment of this Court in Ayodhya Rai & others Vs. State of U.P. & others 2006 (3) ESC 1755."

10. In view of above discussion, the writ petition is allowed. The impugned order of suspension dated 27.06.2008 (Annexure-9 to the writ petition) is hereby quashed. However, this judgment shall not preclude respondents from proceeding with departmental enquiry, if any. No cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.02.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 39779 of 2006

C/M Madarsa Arabia Ataurrasool Thru' Manager A.A. Raini ...Petitioner
Versus
State oF U.P. Thru' Prin. Min. of Welfare and others ...Respondents

Counsel for the Petitioner:
Sri H.C. Singh
Sri A.P. Singh
Sri Krishan Ji Khare

Counsel for the Respondents:
Sri Mansoor Ahmad
Sri Rizwan Ahmed
C.S.C.

Constitution of India, Art. 30-Termination order against a teacher-working under minority institution-Director Arbi Farsi Madarasa-set-a-side-the order for non compliance of principle of natural justice-whether the director can exercise power of Inspector despite of the provision of Para 34 of Madarasa Niyamawali? held-'No' except suggestions by Inspector, Executive Officer has no jurisdiction to interfere with disciplinary action of the management of minority institution.

Held: Para 11 and 12

In the circumstances para 34 of the aforesaid rules, in my view, does not confer any power or authority to the Inspector to nullify the order of termination.

Once it is an admitted case of the parties that the executive authorities had no statutory power to interfere with the disciplinary proceedings initiated by the employer, I find no justification to sustain the orders passed by the executive authorities having no jurisdiction to intervene in such matters.

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

1. Heard Sri Krishnaji Khare for the petitioner and learned Standing Counsel for respondents No.1 to 4. Respondent No.5 is represented by Mrs. Swati Agrawal but she is not present though the case has been called out in revised list and besides her, names of Sri Rizwan Ahmad and Mansoor Ahmad are also shown in the cause list.

2. It is contended that the petitioner-institution, namely, Madarsa Arabia Ataurrasool, Siswa Bazar, District Maharajganj is a minority institution wherein the respondent no. 5 was working as Assistant Teacher. It appears that a charge sheet was issued to the respondent no. 5 and inquiry officer was also appointed. After inquiry, the committee of management passed an order on 22.01.2006 terminating him whereagainst the respondent no. 5 made a complaint before the Registrar/Inspector, Arabi and Farsi Madarsas, U.P., Lucknow who has passed the impugned order dated 16.03.2006 observing that the order of termination appears to have been passed without properly considering reply of the respondent no. 5 and, therefore, is in violation of the principle of natural justice hence the appropriate action be taken. The said order passed by the Registrar is addressed to District Minority Welfare Officer, Maharajganj who pursuant to said order has passed the second impugned order dated 17.03.2006 directing the petitioner-institution to treat the respondent no. 5 in continuous service and pay salary in accordance with law.

3. Sri Khare, learned counsel for the petitioner submitted that both the impugned orders passed by the Registrar/Inspector, Arabi and Farsi Madarsas, U.P., Lucknow and District Minority Welfare Officer, Maharajganj are wholly without jurisdiction. They have no such power under any provision to interfere in the management of the minority institution including disciplinary action taken against teaching staff of such institution.

4. Learned counsel appearing for respondent no.5 through his counter affidavit could not show that the respondents no. 2 and 3 had any power under statute to interfere with the order passed by the management of petitioners-institution in respect to disciplinary action of its teaching staff.

5. Uttar Pradesh Ashashkiya Arbi Tatha Farsi Madarson Ki Manyata Niyamawali has been placed before this Court. Apparently the rules are not statutory as also declared by the covering letter dated 22nd August, 1987 reads as under:

''अरबी तथा फारसी मदरसों की मान्यता के सम्बन्ध में समय समय पर जारी किये गये आदेशों को निरस्त करते हुये राज्यपाल महोदय अरेबिक तथा फारसी मदरसों की मान्यता के लिए संलग्न नियमावली (नान–स्टेंटयुटरी) को अनुमोदित करते हैं।''

6. Further para 34 thereof reads as under:

''यदि प्रबन्धाधिकरण द्वारा किसी अध्यापक / कर्मचारी को सेवा से पृथक करने का निर्णय लिया जाता है तो निष्कासन से पूर्व विधिक कार्यवाही आवश्यक होगी। पूरी कार्यवाही के विवरण निरीक्षक, अरबी मदरसा, उ0प्र0, इलाहाबाद को प्रेषित करने होंगे। यदि कार्यवाही में कोई अनियमितता पायी गयी तो निरीक्षक को यह अधिकार होगा कि वह अपने सुझाव प्रबन्ध समिति को भेजें।''

7. From perusal of aforesaid rule it appears that though it entitle an employee of an institution to approach the Inspector, Arbi Madarsa against any order of termination passed by the Management, but the Inspector Madarsa has not been conferred any authority or power to interfere with such order, if he finds the same to be otherwise contrary to the recognized procedure of law. It only says that if any irregularly is noticed by the Inspector, he shall have right to send his suggestions to the Committee of Management. The provision is much short of empowering the Inspector to interfere with the order of the Management against which the concerned employee of the institution approaches him. There is nothing in the aforesaid rules to show that suggestions of the Inspector shall or may have the impact of making order of termination illegal or nullified in any manner. What would be status of the suggestion, is not clear from the said rules but at the best it may be construed as to advice the management to remain careful in future but so far as the order of termination, whereagainst the incumbent had approached the Inspector concerned, the same shall stand invalidated as such, is not prescribed in the rules.

8. The rule framing authority was not short of the words. If it chose not to make any provision empowering the Inspector to cause any interference in an order of termination passed by the Management, it would not be for this Court to add certain words in the statutes so as to have such a result. It cannot be treated to be a casus omissus. Even otherwise, normally a *casus omissus s*hould not be read by the Court in

the statute and should not be easily supplied unless it is found that by implication that it was the intention of the legislature and hence in the scheme of the statute, it is necessary. This would amount to adding something in para 34. This Court is aware that the rules of the interpretation are not rules of laws and are not to be followed like rules enacted by legislature in Interpretation Act as observed by the Hon'ble Apex Court in **Superintendent and Remembrance of Legal Affairs, West Bengal Vs. Corporation of Calcutta, AIR 1967 SC 997.** The principles of interpretation serve only as a guide. A casus omissus cannot be supplied by the Court. There is no presumption that a casus omissus exists and language permitting the Court should avoid creating a casus Omissus where there is none. It would be appropriate to recollect the observations of Devlin, L.J. in **Gladstone Vs. Bower,(1960) 3 All ER 353 (CA):-**

"The Court will always allow the intention of a statute to override the defects of working but the Court's ability to do so is limited by recognized canons of interpretation. The Court may, for example, prefer an alternative construction, which is less well fitted to the words but better fitted to the intention of the Act. But here, there is no alternative construction; it is simply a case of something being overlooked. We cannot legislate for casus omissus."

9. The Hon'ble Apex Court in **Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and others 1978 (36) FLR 266** quoted with approval the following observation of Lord Simonds in the case of **Magor & St. Mellons R.D.C. Vs. Newport Corporation, (1951) 2 All ER 839 (841):-**

"The duty of the Court is to interpret the words that the Legislature has used. Those words may be ambiguous, but, even if they are, the power and duty of the Court to travel outside them on a voyage of discovery are strictly limited."

10. It would be appropriate at this stage to remind another principle that though a Court cannot supply a real casus omissus, it is equally evident that it should not so interpret a statute as to create casus omissus when there is really none. Recently in **Vemareddy Kumaraswamy Reddy and another Vs. State of Andhra Pradesh 2006(2) SCC 670** the Court reiterated that while interpreting a provision the Court only interprets the law and cannot legislate. If a provision of law is misused and subject to the abuse of process of law, it is for the legislature to amend, modify or repeal it if deemed necessary. The legislative *casus omissus* cannot be supplied by judicial interpretative process.

11. In the circumstances para 34 of the aforesaid rules, in my view, does not confer any power or authority to the Inspector to nullify the order of termination.

12. Once it is an admitted case of the parties that the executive authorities had no statutory power to interfere with the disciplinary proceedings initiated by the employer, I find no justification to sustain the orders passed by the executive authorities having no jurisdiction to intervene in such matters.

13. The writ petition is accordingly allowed. The impugned orders dated 16.03.2006 and 17.03.2006 (Annexures-9 and 10 to the writ petition respectively) are hereby set aside. However, it is open to respondent no. 5 to take such recourse

against the order of termination passed by the petitioner-institution as is permissible and available in law.

14. No costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.02.2011

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

Civil Misc. Writ Petition No. 44314 of 2010

Shiksha Prasar Samiti and another ..Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Radha Kant Ojha
Sri Ajay Kumar Pathak

Counsel for the Respondents:
C.S.C.

Right of Children to free and Education Act No. 35 of 2009-Petitioner's Society running number of Primary Schools-since last 50 years-when the U.P. Distt Boards Primary Education Act 1926 as well Basic Education Act 1972 not seen the light of day-receiving lump sum grant from time to time-contributing in fulfillment of poise obligation of Govt.-impugned order to shut down and close such institution in absence of recognition amounts to negating the object of compulsory Education-on pure technical plea-cannot sustain-opportunity to get recognition and the Govt. to Frame scheme to protect such institutions given.

Held: Para 24

The concept of not allowing unrecognised institutions to flourish is to check mushrooming of institutions and prevent lowering of standards of education. It is to not allow the benchmark to sink further in order to maintain the quality of education. This does not mean that institutions should be compelled to shut down. The idea is to compel institutions to improve their standards upto the required level. To close an institution on a pure technical plea of recognition without assessing the actual potential of the institution would be negating the object of compulsory education.

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

1. The petitioner - society runs several institutions of the primary and middle level that came to be registered in the year 1942, inspired by the preachings of the Father of the Nation Mahatma Gandhi and also encouraged by the local population of district Aligarh, Agra and the surrounding areas. The society was set up with the object of removing illiteracy and propagating education on Gandhian lines.

2. The institutions run by the petitioner - society are now called upon to shut down and closed under the orders of the Basic Educational Authorities on the ground that the institutions established and run by the petitioner - society does not have any recognition and, therefore, in view of the provisions of Right of Children to Free and Compulsory Education Act, 2009 running of such institutions is prohibited.

3. The petitioner had earlier come up before this court questioning the said action taken by the Assistant Basic Education Officer, Khair Aligarh whereupon this court proceeded to dispose of the writ petition with a direction to consider the grievance of the

petitioners on their representation and pass an order within two weeks. The said Officer has now passed the impugned order on 3rd July, 2010, and aggrieved the present writ petition has been moved.

4. This court granted an interim order on 31st August, 2010 restraining the authorities from taking any further action pursuant to the impugned order and called upon the learned Standing Counsel to file a counter affidavit on behalf of the respondents. An affidavit sworn by Dr. Mukesh Kumar Singh the District Basic Education Officer, Aligarh has been filed supporting the impugned order alleging that the petitioner - institution has no recognition by the Uttar Pradesh, Basic Education Board and no documents have been filed to indicate the extension of the benefit of grant by the Director of Public Instructions. Accordingly, in the absence of any recognition as required under the 2009 Act, the institution has to shut down and the impugned order does not suffer from any infirmity.

5. This issue relates to Basic Education within the State of U.P. Entry 25 of List III (Concurrent list) of the Seventh Schedule to the Constitution provides for legislation on such subjects. Prior to the advent of the Constitution, the District Boards which are Local Bodies were In-charge of such Education and was governed by the provisions of the United Provinces, District Boards Primary Education Act, 1926. The Education Code was also framed to regulate the running of such institutions but the same did not have a statutory force. However, they regulated the business of recognition, maintenance and running of such institutions and later on the U.P. Basic Education Act was framed by the Legislature in the year 1972 that holds the field. All Basic Schools whether of the Primary grade or of the Junior High School grade governed by the provisions of the said Act.

6. The system of education as prevailing in the State, and even throughout the country was not found to be satisfactory, and in order to gear up the level of basic education, the Central Government took up the matter in order to fulfil the constitutional aspirations of the founding fathers a constitutional amendment was brought about by the Parliament introducing Article 21-A endeavouring to confer fundamental rights on all children between the age of 6-14 years to receive free and compulsory education. This was in furtherance of the extension of directive principles of State policy as contained in Article 39(f), Article 41 and Article 45 of the Constitution of India. Article 21-A is quoted below:-

"Article 21-A. Right to education.- The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

7. The said amendment which was brought about way back in the year 2002 remained a dead letter and having progressively discovered that we are lacking in education, it took 63 years for the Parliament to enforce the said basic right which was introduced through Article 21-A by enacting the Right of Children to Free and Compulsory Education (Act No. 35 of 2009).

8. The petitioners contend that the Act has been framed without rules having been prescribed and the institutions which were already running like those established by the petitioner - society are now being shut down under the provisions of the 2009 Act for want of recognition.

9. Sri Ojha learned counsel for the petitioner submits that the society was established in the year 1942 and it has been running the institution from the Pre-Independence era. He has also relied on several documents indicating that the grant-in-aid in one shape or the other was extended from State funds and the examinations of the students of such institutions have been conducted by the Board. He has placed reliance on the documents filed along with the writ petition to contend that the manner in which recommendations have been made for extending certain grants to the petitioner, leaves no room for doubt that the institutions were acknowledged as basic institutions, entitled to disseminate education at the Primary and the Junior High School Level. It is for this reason, that the communications which have been brought on record demonstrate that the petitioner was recognised by the respondent - State Government in one form or the other.

10. On the aforesaid foundation, Sri Ojha submits that on facts it was established that the institutions run by the petitioner - society had a State recognition and in such a situation without there being any rules prescribed under the 2009 Act, no such action could have been taken for closing the institution on the pretext of want of recognition. In short his submission is that the institutions are recognised and even otherwise assuming for the sake of arguments that there is no formal recognition by the Board yet in the absence of any specific rules prescribed for the manner of processing recognition under the 2009 Act, no action could be taken.

11. Learned Standing Counsel on the other hand submits that the grant or financial aid as relied upon by the petitioner was in the shape of an aid given by the then District Boards as an incentive grant and which was not either a recurring or non-recurring grant to the petitioner - institution. Learned Standing Counsel submits that the such periodical extension of financial aid does not in any way conclude that the institution had a recognition by the competent authority either under the 1926 Act or the 1972 Act. It is submitted by the learned Standing Counsel that the rejection order does not suffer from any infirmity and such institutions have to be closed if they do not obtain recognition under the 2009 Act. It is further contended that the statutory provision which has been enforced compels the authorities to take action against such institutions and therefore there being no error this court need not interfere with the action taken by the respondents.

12. Having heard learned counsel for the parties, there is nothing in the counter affidavit to indicate that specific rules relating to grant or otherwise for recognition under the 2009 Act have been prescribed or enforced. Nonetheless, the issue relating to the recognition of the petitioner - institution is to be assessed on the basis of the claim that the Director of Public Instructions

which authority was in existence in the Pre- Independence era, had acknowledged the establishment of the institution or not.

13. From a perusal of the records which have been filed along with the writ petition it appears that financial assistance had been extended to the institutions on instructions from the Director of Public Instructions. Not only this, the then Secretary to the Government of the United Provinces wrote a letter to the Commissioner of Agra Division, Agra indicating that the recommendations of the Director of Public Instructions has been received and a grant, which would be non-recurring, should be given to the society in that current financial year to the tune of Rs. 5,000/- through the District Board to the petitioner - society as it was contributing substantially towards the cause of education.

14. The Director of Public Instructions in response to the aforesaid orders issued a letter to the Chairman of the District Board at Aligarh to extend the said benefit to the petitioner - society. Several other communications have been brought on record to indicate that the financial assistance of a non-recurring nature was given to the petitioner - society time and again to sustain itself. This has continued for a fairly long time till 2001.

15. The counter affidavit of the respondents also acknowledges the fact that the students of such institutions, are allowed to appear in the examinations of the Board and the certificates issued by the institution run by the petitioner - society are valid. The counter affidavit, however, refuses to acknowledge the petitioner - society and its institutions to be recognised either under the 1926 Act or the 1972.

16. The question is as to the status of such institutions which are fairly large in number. In order to ascertain the status of such institutions one will have to fall back upon the definition of the word recognised institution. A reference has been made to the provisions of the U.P. District Boards Primary Education Code, 1926. The said Act defined a recognised Primary School under Section 2(5) as a school which for the time being was recognised by the Director of Public Instructions. To further understand the said definition, one may also referred to the Educational Code of Uttar Pradesh Part VII which also defines in Chapter-V thereof a recognised Junior Basic and Senior Basic Schools. A school means recognised institution which follows the curriculum prescribed by the department or by the Board. The Educational institutions are defined in Chapter - I of the aforesaid Educational Code they include under private management aided institutions and also unaided institutions which do not receive any regular grant-in-aid from public funds. However, under the Education Code, the power to recognise such schools has been given to the District Inspector of Schools.

17. The first issue is as to whether the claim of the petitioner that it was recognised by the Education Department can be accepted or not. The documents which have been relied upon by the petitioner prima facie indicate the involvement of the Director of Public Instructions who has been defined to be

the authority competent to recognise a primary school under the 1926 Act.

18. The respondents in their counter affidavit have alleged that the petitioner had failed to provide any document evidencing release of token grant to the petitioner by the Director of Public Instructions. This could have been ascertained from the own records of the State Government as their Government records petitioner has brought on record. The communications issued by the Director of Public Instructions recommending release of aid to the petitioner and which has been acknowledged by the Secretary of the Department in the letters as brought on record. Consequently, this aspect will have to be proved further as to whether the Director of Public Instructions will be presumed to have recognised the schools run by the petitioner - society by virtue of extending the benefit of token grant. The nature of the aid has also to be examined which can be a pointer for the purpose of such investigation.

19. Coming to the second part of the submissions, it is not disputed by the petitioner that no formal recognition has been granted after the enforcement of the Basic Education Code, 1972. It is to be seen that when the Act was originally enforced, Section 4(2(c) defined the functions of the Basic Education Board to include the recognition of institutions. However, an amendment was brought about in the year 1975 being U.P. Act No. 21 of 1975 whereby the said definition was omitted and substituted by the present Section 4 of the 1972 Act. Nonetheless, the control over Basic Education Schools as defined under Section 12 continued which also included the power to withdraw the recognition of a school on account of defaults mentioned therein. The Basic Education Act, however, does not indicate anything about the recognitions granted by other authorities prior to the enforcement of the said Act. It is Under Section 18(1) of the Right of Children to Free and Compulsory Education Act, 2009 that requires a recognition in order to enable a school to function as a Basic School. The question is as to whether the petitioner by virtue of the documents relied upon by it, is entitled to be treated as a recognised institution or not.

20. In the opinion of the Court, the Assistant Basic Education Officer has not delved into in depth in this matter. For this, reference can be had to the queries raised by the District Basic Education Officer in his letter dated 16th July, 1985 and the letter of communications in this regard. Apart from this, in the opinion of the court, such an issue should be decided by an authority at least of the rank of the Secretary Basic Education, inasmuch as, the Director of Education has now substituted the Director of Public Instructions. Not only this, the issue as to whether appropriate rules have been framed in exercise of the powers under Section 38 of the 2009 Act has also to be examined. This is necessary in order to assess the impact of the enforceability of the 2009 Act with the aid of such rules. Section 38(2)(g) of the 2009 Act provides for framing of rules prescribing forms for grant of recognition. The Assistant Basic Education Officer has not gone into this issue to find out as to whether such rules exists in order to enforce the provisions of the Act and has

called upon the petitioner - institution to obtain recognition.

21. On account of the aforesaid grey areas of investigation, in the opinion of the court, it would be appropriate that the matter is investigated and decided by the respondent no. 1 in the light of the observations made hereinabove and also after examining the impact of the relevant Act and Rules applicable to the controversy. The impugned order being deficient in the manner indicated hereinabove therefore deserves to be quashed.

22. Accordingly, the order dated 3rd July, 2010 is set aside with a direction to the respondent no. 2 to decide the claim of the petitioner including all aspects of recognition or otherwise and pass an appropriate order in accordance with law.

23. If it is ultimately found that the petitioner will have to seek a formal recognition under the Basic Education Act, 1972 then the petitioner - institution shall be given an opportunity to do so before proceeding against it under the provisions of the 2009 Act. For this the authorities will have to remember that such institutions were set up in order to cherish the ideals of Mahatma Gandhi - the object for which these schools were set up half a century ago - let them be not throttled at the altar of State Sponsored unbridled laws. The endeavour should be to make them survive which would be in tune with Article 21-A of the Constitution. For this the institutions should be encouraged to resurrect themselves by giving them a helping hand to overcome their shortfalls. They should not be driven to a wall or to the edge of cliff to a point of no return. These institutions are not money - spinning devices of modern day commercialisation. They were set up in an atmosphere of patriotism and nationalistic fervour when the country was yet to achieve freedom. It was a pre-independence creation and therefore such institutions should not be viewed with suspect. Rather they should be looked up with respect.

24. The concept of not allowing unrecognised institutions to flourish is to check mushrooming of institutions and prevent lowering of standards of education. It is to not allow the benchmark to sink further in order to maintain the quality of education. This does not mean that institutions should be compelled to shut down. The idea is to compel institutions to improve their standards upto the required level. To close an institution on a pure technical plea of recognition without assessing the actual potential of the institution would be negating the object of compulsory education.

25. It is also expected that if the authority comes to the conclusion that something more is required to be done, then the State Government should be persuaded to frame a scheme for such institutions as a matter of policy to be adopted to protect such institutions.

26. The writ petition is accordingly, allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.02.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 48666 of 2008

Subash Tiwari ...Petitioner
Versus
State of U. P. and others ...Respondent

Counsel for the Petitioner:
Sri D.K. Tripathi
Sri A.D. Dubey

Counsel for the Respondents:
C.S.C

Constitution of India-Art. 226-Annual increment-withheld due to pendency of criminal case-fair acquittal-even than increments not released for the last 25 years-held-wholly arbitrary and illegal-even on pendency of criminal proceedings annual increment cannot be withheld-direction to pay entire amount with 10% interest with cost of Rs.20,000.

Held: para 8

In view of the above, denial of annual increments to the petitioner for the last more than 25 years and more merely on one or the other pretext firstly; suspension and secondly; pendency of criminal case is wholly arbitrary and illegal.
Case law discussed:
AIR 1971 Allahabad 214

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

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

2. The petitioner has sought a mandamus commanding the respondents to grant annual increments to him which have not been allowed since 1986.

3. The petitioner was placed under suspension on 28.11.1986 in a contemplated departmental enquiry. It is said that no departmental enquiry was initiated at all but by order dated 16th July, 1992, Senior Superintendent of Police, Azamgarh reinstated the petitioner observing that he was placed under suspension being implicated in a criminal case. It is interesting to notice that order of suspension nowhere mention the pendency of criminal case but clearly says that departmental enquiry is contemplated hence the petitioner is placed under suspension. Thereafter the petitioner appears to have made several representations to the authorities concerned about his increments and the matter remains pending between authorities hence this writ petition.

4. In the counter affidavit, respondents have taken stand that since petitioner was involved in a Criminal Case No.303 of 1986 (S.T. No.3807 of 1991) under Sections 467, 468, 420 I.P.C. read with Section 82/83 Registry Act in the Court of Chief Judicial Magistrate, Deoria hence no decision was taken with respect to grant of increment in his matter and the same would be decided after decision in the aforesaid criminal case.

5. Mere pendency of a criminal case cannot justify withholding of increments unless specific order is passed in accordance with law to this effect.

6. Learned Standing Counsel failed to point out any provision under which annual increments can be denied to a Government servant on account of mere

pendency of criminal case. Even during the pendency of suspension, increment could not have been withheld. This question has been decided by this Court in **Mritunjai Singh Vs. State of U.P., AIR 1971 Allahabad 214** and in para 14 of the judgment this Court has said as under:

"Rule 24 of the Financial Hand Book Volume II issued under the authority of the Government of the Uttar Pradesh in Chapter IV Part II provides that an increment shall ordinarily be drawn as a matter of course unless it is withheld. An increment may be withheld from a government servant by the Government or by any authority to whom the Government may delegate this power under rule 6, if his conduct has not been good or his work has not been satisfactory. In ordering the withholding of an increment, the withholding authority shall state the period for which it is withheld, and whether the postponement shall have the effect of postponing future increments. As the contract of the service of the petitioner continued even though he was under suspension, the increment should be allowed ordinarily to be drawn unless it is withheld in the manner provided under Rule 25. As it is not the case of the opposite parties that it has been so withheld, the petitioner is entitled to the increments during the pendency of his suspension and the subsistence allowance shall be calculated accordingly, it being 1/3rd of the pay plus dearness allowance."

7. Moreover, the aforesaid criminal case has already resulted in acquittal of petitioner vide judgment dated 23rd November, 2010.

8. In view of the above, denial of annual increments to the petitioner for the last more than 25 years and more merely on one or the other pretext firstly; suspension and secondly; pendency of criminal case is wholly arbitrary and illegal.

9. The writ petition is allowed. Respondents are directed to allow annual increments to the petitioner since fell due and to pays arrears of salary accordingly within two months from the date of production of a certified copy of this order. The petitioner shall also be paid interest on arrears of salary @ 10% from the date of filing of writ petition till the amount is actually paid. The petitioner shall also be entitled to cost which is quantified to Rs.20,000/-.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.02.2011

BEFORE
THE HON'BLE SATYA POOT MEHROTRA, J.
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 56149 of 2010

M/S Vindhya Oil Traders ...Petitioner
Versus
State of U.P. and another ... Respondent

Counsel for the Petitioner:
Sri Rakesh Kumar

Counsel for the Respondents:
C.S.C.

Constitution of India Art. 226-Alternative Remedy-Cancellation of license of Light Diesel Oil-Such order applicable under Para 9 of the Control Order 1981 itself-without availing statuary remedy-directly writ Petition not maintainable-if appeal filed within one month-same be decided within 2 month thereafter.

Held: Para 5

Having regard to the nature of controversy in the present writ petition, we are not inclined to exercise our jurisdiction under Article 226 of the Constitution of India in view of availability of alternative remedy to the petitioner of filing appeal before the Divisional Commissioner concerned.

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

1. The present writ petition has been filed by the petitioner under Article 226 of the Constitution of India, inter alia, praying for quashing the order dated 30th July, 2010 (Annexure - 7 to the writ petition) passed by the respondent no.2 whereby the licence of the petitioner in respect of Light Diesel Oil issued under the Uttar Pradesh High Speed Diesel Oil and Light Diesel Oil (Maintenance of Supplies and Distribution) Order, 1981 has been cancelled.

2. We have heard Sri Rakesh Kumar, learned counsel for the petitioner and the learned Standing Counsel appearing for the respondents No.1 and 2 and perused the record.

3. As noted above, the writ petition is directed against the order dated 30th July, 2010 whereby the licence issued to the petitioner in respect of Light Diesel Oil under the Uttar Pradesh High Speed Diesel Oil and Light Diesel Oil (Maintenance of Supplies and Distribution) Order, 1981 has been cancelled. Paragraph 9 of the Uttar Pradesh High Speed Diesel Oil and Light Diesel Oil (Maintenance of Supplies and Distribution) Order, 1981 provides as follows:

"Appeal. - (1) Any person, aggrieved by an order of the Licensing Authority refusing to grant or renew a licence, cancelling or suspending a licence or forfeiting the security deposited by the dealer under the provisions of this Order may, within a period of 30 days from the date of receipt of order by him, appeal to the Divisional Commissioner concerned:

Provided that the Divisional Commissioner may entertain an appeal after the expiry of the said period of thirty days but within a period of sixty days of the receipt of the order by such person if he is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(2) No such appeal shall be disposed of unless the aggrieved person has been given a reasonable opportunity of stating his case.

(3) Pending the disposal of the appeal, the Divisional Commissioner may stay the operation of the order appealed against.

(4) Subject to decision in the appeal, the order of the Licensing Authority or the Collector, as the case may be, shall be final."

4. In view of above quoted provisions of paragraph 9 of the Uttar Pradesh High Speed Diesel Oil and Light Diesel Oil (Maintenance of Supplies and Distribution) Order, 1981, it is evident that the petitioner has an alternative remedy of filing an appeal before the Divisional Commissioner concerned against the aforesaid impugned order dated 30th July, 2010.

5. Having regard to the nature of controversy in the present writ petition, we are not inclined to exercise our jurisdiction under Article 226 of the Constitution of India in view of availability of alternative remedy to the petitioner of filing appeal before the Divisional Commissioner concerned.

6. We accordingly dismiss the writ petition on the ground of availability of alternative remedy of filing appeal before the Divisional Commissioner under paragraph 9 of Uttar Pradesh High Speed Diesel Oil and Light Diesel Oil (Maintenance of Supplies and Distribution) Order, 1981.

7. We may observe that in case the petitioner files any such appeal within 30 days from today along with a certified copy of this order, the appeal will be entertained by the Divisional Commissioner concerned without raising any objection on the ground of limitation.

8. In case such an appeal is filed within the aforesaid period, the Divisional Commissioner concerned will proceed to decide the appeal expeditiously, preferably within a period of two months of the filing of such appeal.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.02.2011

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN, J.

Civil Misc. Writ Petition No. 60573 of 2005

Purvanchal Vidyut Vitran Nigam Ltd. Thru' M.D. and another. ...Petitioners
Versus
State of U.P. Thru' Min. of Labour and others ...Respondents

Counsel for the Petitioners:
Sri Rajesh D. Khare

Counsel for the Respondent:
Sri M.K. Kushwaha
Sri Mahima Kushwaha
C.S.C.

U.P. Industrial Dispute Act 1997-Section 6 N-Termination without giving retrenchment compensation even workman success to prove the working more than 240 days-there cannot be reinstatement automatically-if there is no substantive post-instate of reinstatement damage can be awarded - pursuance of interim order working and drawing salary-Rs.50,000/-towards back wages-be treated compensation-without refundable of salary-working during these period on basis of interim order-direction of reinstatement not proper.

Held: Para 8

Moreover, it has been held by the Supreme Court in several authorities including the following that if the only defect in the termination order of a workman is non compliance of Section 25-F of Industrial Disputes Act (or 6-N of U.P.I.D. Act), then it is not always necessary to direct reinstatement and in such situation award of consolidated damages would be more appropriate relief particularly when the employer is

Government or Governmental agency and relevant rules have not been followed before appointment and workman was daily wager or muster roll employee.

Case law discussed:

AIR 2002 SC 1147; AIR 2006 SC 2113; AIR 2006 SC 2427; AIR 2008 SC 1955; AIR 2009 SC 3004; AIR 2010 SC 2140; 2010 (9) JT 262; JT 2010 (1) SC 598; Krishan Singh Vs. executive Engineer, Haryana, State Agricultural Marketing Board, Rohtak (Haryana), decided on 12.03.2010 in Civil Appeal No.2335 of 2010; (2009) 8 SCC 556; AIR 1950 SC 37; 2006 (4) SCC 1

(Delivered by Hon'ble S.U. Khan , J.)

1. Heard learned counsel for the parties. Order dated 16.11.2010 on which date arguments were heard and judgment was reserved is quoted below:

"Heard learned counsel for the parties.

Judgment reserved.

Learned counsel for the petitioner has argued that under different orders passed in this writ petition petitioner has paid Rs. 50,000/- as back wages to the workman respondent and workman respondent has been reinstated on 01.05.2008. These two facts are admitted by the learned counsel of workman respondent."

2. Order dated 01.05.2009 passed on the application filed by the employer is also quoted below:

"The case has been nominated to me by order of Hon. Senior Judge through order dated 24.04.2009.

Learned counsel for the applicant states that there is some delay in reinstatement of respondent no.2 in pursuance of stay order dated 13.09.2005. According to the learned counsel for the petitioner petitioners have taken back respondent no.2 in service on 01.05.2008.

Delay in reinstatement of respondent no.2 in pursuance of interim order dated 13.09.2005 is condoned on the condition that petitioner shall pay Rs. 50,000/- to respondent no.2 within six weeks.

If ultimately while deciding this writ petition finally it is held that respondent no.2 is entitled to any wages prior to 01.05.2008 then this amount of Rs. 50,000/- will be adjusted in the said wages.

Application is disposed of."

3. This writ petition is directed against award dated 16.03.2005 given by Presiding Officer, Industrial Tribunal (I) U.P. Allahabad in Adjudication Case No.14 of 1990. The matter which was referred to the labour court as to whether the action of the petitioner employer terminating the services of its workman respondent No.2, Nanhe Lal Yadav w.e.f. 01.03.1989 was just and valid or not. Earlier the matter was decided against the workman and it was held that he was not entitled to any relief. The said award was passed on 20.06.1991 against which workman filed Writ Petition No.30231 of 1991. The said writ petition was allowed on 12.04.2004 and mater was remanded to the Industrial Tribunal. Copy of the said judgment of the High Court is Annexure-I to the writ petition. In the remand order, it was observed that the Industrial Tribunal shall specifically decide as to whether the

workman had completed 240 days of continuous service in any of the calendar years continuously or not? After remand the Industrial Tribunal decided the matter in favour of the workman holding that he had worked for more than 240 days in a year, hence termination of his services without payment of retrenchment compensation in accordance with Section 6-N of U.P. Industrial Disputes Act was bad in law. In Para-14 of the award, it was held that the workman had worked from 01.12.1987 to 31.07.1988 which comes to 243 days. This finding was recorded on the basis of muster rolls filed by the workman. Ultimately reinstatement with full back wages was directed. Through interim order passed in this writ petition dated 18.09.2005 operation of the impugned award was directed to be kept in abeyance until next date of listing provided that the petitioner reinstated the respondent No.2.

4. In Para-3 of the earlier judgment of this Court (Annexure-I to the writ petition) it is mentioned that the workman Nanhe Lal, respondent No.2 claimed that he was appointed in the year 1980. Same fact has been stated in Para-2 of the impugned award. However, in the counter affidavit filed by respondent No.2 himself along with stay vacation application sworn on 06.12.2009 his age is shown to be 37 years meaning thereby that he was born in the year 1972 and therefore in the year 1980 he was only eight years old. Even in December, 1987 he must have been only 16 years of age and not entitled to be appointed. In the year 1989 when his services were terminated on 01.03.1989, he must be 17 years of age. The Court wonders what to do in such situation.

5. During pendency of the reference before the Industrial Tribunal at the initial stage workman had filed some application for summoning some records. Against the said application petitioner employer had filed objections stating therein that appointment of the workman was time bound and he was appointed periodically every year in Magh Mela (January & February) and after closure of Magh Mela his services were terminated automatically. The Industrial Tribunal held that this aspect could not be taken into consideration as no such thing was stated in the written statement of the employer where the employer had categorically stated that the workman was not its employee in any capacity. This High Court in its remand order dated 12.04.2004 had directed that the document filed by the workman and marked as Ex.W-14 should specifically be considered by the Industrial Tribunal. Ex.W-14 is a sort of certificate issued by Sri J.P. Singh, an officer of the employer that Nanhe Lal had worked from 02.12.1987 to 28.02.1989 under muster roll as *chaukidar mazdoor*.

6. It is mentioned in Para-11 of the impugned award that when the proceedings were pending at the earlier stage, the workman had filed an application for summoning muster roll, pay register from January, 1988 to July, 1988, February, 1989 and December, 1987 in original and original copy of letter dated 01.12.1987 written by store keeper J.P. Singh, Magh Mela. (J.P. Singh being Store Keeper Magh Mela could not certify working period of any workman beyond Magh Mela period which ends on 28/29 February very year.) It is strange that muster roll for continuous period was not sought to be summoned. It is further

mentioned in Para-11 of the impugned award that through order dated 06.07.1990 employer was directed to file the document on the next date, however the said order was not complied with. Thereafter, in Para-14, it is mentioned that muster rolls filed by the workman were perused by the Presiding Officer of the Industrial Tribunal. It is not mentioned that how the workman obtained the muster rolls, which were taken on record as secondary evidence. Labour court further concluded that the muster rolls proved that since 01.12.1987 till 31.07.1988, the workman had worked continuously without a single break and the period came to 243 days. Thereafter, in Para-15, Ex.W-14 is mentioned which states that petitioner had worked since 02.12.1987 to 28.02.1989.

7. In view of the above the labour court held that the workman had worked for more than 240 days and provisions of Section 6-N of U.P.I.D. Act were not complied with. The Supreme Court in **Range Forest Officer Vs. S.T. Hadimani AIR 2002 SC 1147** has held that the burden to prove that the workman had worked for 240 days lies upon the workman.

8. Moreover, it has been held by the Supreme Court in several authorities including the following that if the only defect in the termination order of a workman is non compliance of Section 25-F of Industrial Disputes Act (or 6-N of U.P.I.D. Act), then it is not always necessary to direct reinstatement and in such situation award of consolidated damages would be more appropriate relief particularly when the employer is Government or Governmental agency and relevant rules have not been followed before appointment and workman was daily wager or muster roll employee.

"Nagar Mahapalika v. State of U. P." AIR 2006 SC 2113

"Haryana State Electronics Devpt Corpn v. Mamni" AIR 2006 SC 2427

"Sita Ram v. Moti Lal Nehru Farmers Training Institute" AIR 2008 SC 1955

"Jagbir Singh Vs. Haryana State Agriculture Marketing Board and another" AIR 2009 SC 3004

9. In **Senior Superintendent, Telegraph (Traffic) Bhopal Vs. Santosh Kumar Seal and others, AIR 2010 SC 2140** it has been held that if daily wagers had worked for 2 or 3 years and their services were terminated without payment of retrenchment compensation then consolidated damages should be awarded to them. It has also been held that daily wager does not hold a post and can not be equated with permanent employee. This view has been reiterated in **Incharge Officer Vs. Shankar Shetty 2010 (9) JT 262.**

10. Learned counsel for the workman has cited the following authorities:

(i) **Harjinder Singh Vs. Punjab State Warehousing Corporation, JT 2010 (1) SC 598**

(ii) **Krishan Singh Vs. executive Engineer, Haryana, State Agricultural Marketing Board, Rohtak (Haryana), decided on 12.03.2010 in Civil Appeal No. 2335 of 2010**

(iii) **Maharashtra State Road Transport Corporation and another VS. Casteribe Rajya Parivahan Karmchari Sanghatana, (2009) 8 SCC 556**

(iv) **Bhart Bank Ltd. Delhi Vs. Employees of Bhard Bank Ltd. Delhi, AIR 1950 SC 37**

11. In the first two authorities, the authorities mentioned above were not brought to the notice of the Bench which decided the said cases. In the third authority, it was held that in spite of Constitution Bench judgment of **State of Karnataka vs. Uma Devi 2006 (4) SCC 1,** labour court can direct regularisation/ permanence. In the instant case no such question is involved. In the last case it was held that labour court/ industrial tribunal even though technically not a Court still it discharges judicial functions and that labour court while deciding industrial disputes has to override contracts and can create rights, which are opposed to contractual rights.

12. Accordingly, writ petition is allowed. Impugned award is set aside. The amount of Rs.50,000/- paid to the workman respondent No.2 is treated to be consolidated damages/ compensation. The salary which the workman must have received since 01.05.2008 till date shall also not be refundable.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.02.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 63506 of 2008

Beni Prasad ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri J.P. Gupta
Sri Deepak Kr. Srivastava

Counsel for the Respondents:
Sri Vimal Chandra Mohan
C.S.C.

Constitution of India-Article 226-Post retiral benefits-petitioner initially appointed on 08.10.64 in Junior High School-on fixed pay-on 28.02.1997 regular pay scale given-retired on 01.07.99-refusal on ground of lack of minimum qualifying service-held-misconceived-from service book-substantial appointment is clear-salary in different mode cannot be basis of discrimination-direction issued to treat the initial date of appointment as substantive one and taking into account-petitioner possess qualifying period of service for pension-direction issued accordingly.

Held: Para 12

Learned counsel for the respondents at this stage attempted to argue that the period during which the petitioner received fixed pay was in fact part time appointment and, therefore, this period would not qualify for pension. This averment is wholly beyond the pleadings and no such a case has been taken in the entire counter affidavit. The service book placed on record, which is not disputed by respondents, clearly shows

appointment of the petitioner on substantive post. Though only extract of service book has been placed and not entire one but whatever has been placed shows his appointment substantive. In the entire counter affidavit there is not even a whisper or suggestion that appointment of the petitioner on fixed pay was a part time appointment. The only thing mentioned is that he was appointed and paid salary on fixed pay basis. Later on given time scale of pay. This by itself would not mean that the earlier appointment of petitioner was not substantive, regular or full time.

This submission is thus deserved to be rejected.

Case law discussed:

JT (1996) 10 Sc 679

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

1. Heard Sri Deepak Kumar Srivastava, learned counsel for the petitioner and Sri Vimal Chandra Mishra, Advocate who has put in appearance on behalf of respondents no. 2 to 5 and has filed counter affidavit. Learned counsel for the petitioner states that he does not propose to file rejoinder affidavit and the matter may be heard on the basis of record of the writ petition and averments made in the counter affidavit.

2. The grievance of the petitioner is that of non-payment of retiral benefits by the respondents. The respondents are denying retiral benefits to the petitioner on the ground that he did not complete minimum qualifying service attracting the provisions of pension etc. The petitioner claims to have been appointed as Peon on 8.10.1964 in the office of respondent no. 2 by the Additional Basic Education Officer, Banda and on attaining the age of superannuation he retired on 31.1.1999 but the retiral benefits have not been paid to him. Hence he made representations, copies whereof are annexed as annexure 3 to the writ petition.

3. Respondents have stated in the counter affidavit that the petitioner was initially appointed in Junior High School on 8.10.1964 on a fixed pay of Rs.40/- per month and he worked as such till 28.2.1997, whereafter he was placed in the regular pay scale of Rs.750-940 with effect from 1.3.1997 and on attaining the age of superannuation he retired on 31.1.1999. It is said that since the petitioner was regularised only on 1.3.1997 and his earlier service was on fixed pay he did not qualify for pension in view of the decision taken by the State Government as communicated by Special Secretary, of the U.P. Government on 13.6.2007.

4. The service book shows that in column 9 the date of substantive appointment of the petitioner is mentioned as 1.7.1990. Thus the petitioner worked on substantive post from 1.7.90 to 1.7.1999. The pay was revised with effect from 1.1.1986 to 750/- and entry has been made accordingly. The entry in the service book clearly shows that the petitioner was paid salary on fixed pay basis but the post was substantive one.

5. Moreover, this court also finds that though the service book was prepared on 2.1.1980 but in photocopy of first page, his the date of joining is shown as 1.7.1990.

6. The term 'post', 'pay' and 'pay scale' have different connotations. The post refers to a unit and office. The pay refers to the amount drawn by an

employee. Pay scale broadly refers to the concept of a graded limit having minima and maxima i.e minimum pay and maximum pay running for a period of time with self contained rate of increased pay every year etc.. There is no fixed concept that for every post there shall be pay/pay scale of a particular nature; pay shall be of a particular nature or that a pay scale be of a particular nature. It may vary. Its structure or constituent may depend on the policy of the employer. This distinction has been noticed in as much as different terms relating to post, pay and pay scale have been defined in Fundamental Rules. The relevant provisions defining 'Pay', "Personal Pay" "Presumptive Pay" "Special Pay" "Oversea Pay", Technical Pay", "Substantive Pay", "Time Scale Pay", "Permanent post", "Temporary Post, "Tenure Post" are as under:

***"Pay**:- Pay means amount drawn monthly by a Government servant as-*

(i) the pay, other than special pay or pay granting in view of his personal qualifications, which has been sanctioned for a post held by him substantively or in an officiating capacity, or to which he is entitled by reason of his position in a cadre; and

(ii) overseas pay, technical pay, special pay and personal pay; and

(iii) any other emoluments which may be specially classed as pay by the Governor."

***"Personal Pay:**- Personal pay means additional pay granted to a Government servant-*

(a) to save him from a loss of substantive pay in respect of a permanent post other than a tenure post due to a revision of pay or to any reduction of such substantive pay otherwise than as a disciplinary measure; or

(b) in exceptional circumstances, on other personal considerations."

***"Presumptive Pay**:- Presumptive pay of a post, when used with reference to any particular Government servant, means the pay to which he would be entitled if he held the post substantively and were performing its duties; but it does not include special pay unless the Government servant performs or discharges the work or responsibility, or is exposed to the unhealthy conditions in consideration of which the special pay was sanctioned."*

***"Special Pay:**- Special pay, means an addition, of the nature of pay, to the emoluments of a past or of a Government servant, granted in consideration of-*

(a) the specially arduous nature of the duties; or

(b) a specific addition to the work or responsibility."

***"Overseas Pay:**- 1. Where it is provided in the rules regulating conditions of appointment to the service or post, that the pay of the service or post shall include overseas pay. Such overseas pay shall, unless it be otherwise expressly provided in such rules, be drawn only by a member of the service or an incumbent of the post whose domicile at the date of his first substantive appointment to such service or post was elsewhere than in*

Asia. Provided that no such Government servant shall be entitled to overseas pay who, prior to such appointment, has, for the purpose of his appointment to a post under the Government or of the conferment upon him by the government of any scholarship, emoluments or other privilege, claimed and been deemed to be of Indian domicile.

2. (i) The domicile of a person shall be determined in accordance with the provisions set out in the Schedule to these rules.

(ii) No Government servant who after his appointment to a service or post acquires a new domicile shall thereby lose his right to or become entitled to overseas pay.

(iii) A Government servant who has been drawing overseas pay in good faith and whose domicile is challenged should receive a personal allowance equal to the amount of overseas pay hitherto drawn the allowance to be absorbed in increments, from the date when his domicile is questioned, and should continue to enjoy such allowance in the event of an eventual adverse decision."

***"Technical Pay:**- Technical pay means pay granted to a Government servant in consideration of the fact that he has received technical training in Europe."*

***"Substantive Pay:**- Substantive pay means the pay other than special pay, personal pay or emoluments classed as pay by the Governor under Rule 9 (21) (ii), to which a Government servant is entitled on account of a post to which he has been appointed substantively or by reasons of his substantive position in a cadre."*

***"Time Scale Pay:**- (a) Time-scale pay means pay which, subject to any conditions prescribed in these rules, rises by periodical increments from a minimum to a maximum. It includes the class of pay formerly known as progressive.*

(b) Time-scales are said to be identical if the minimum, the maximum the period of increment and the rate of increment of the time-scale are identical.

(c) A post is said to be on the same time-scale as another post on a time-scale if the two time-scales are identical and the posts fall within a cadre, or a class in a cadre, such cadre or class having created in order to fill all post involving duties of approximately the same character or degree of responsibility, in a service or establishment or group of establishments so that the pay of the holder of any particular post is determined by his position in the cadre or class and not by the fact that he holds that post."

***"Permanent post:**- Permanent post means a post carrying a definite rate of pay sanctioned without limit of time."*

***"Temporary Post:**- Temporary post means a post carrying a definite rate of pay sanctioned for a limited time."*

***"Tenure Post:**- Tenure post means a permanent post which an individual Government servant may not hold for more than a limited period."*

7. Fundamental Rule 19 provides that pay of a Government servant shall

not exceed the pay sanctioned by a competent authority for the post held by him. It also provides that no special or personal pay shall be granted to a Government servant without the sanction of the Government. It clearly means that pay in respect of a post may or may not have any reference with time scale of pay but it may be fixed pay provided by the Government. When a time scale of pay is prescribed for a post, the manner in which the pay shall be fixed in that time scale of pay has been prescribed in various provisions Fundamental Rules i.e, Rules 22 to 29 and 31. It is thus evident that, though desirable, but it may not be necessary that every post must have time scale of pay. It is always open to the Government to create post with fixed monthly pay and it is not necessarily inferior in any manner to a post which is created with time scale of pay. The provision relating to pension nowhere contemplate that only such service shall qualify for pension which is in regular time scale of pay. This assumption is unfounded. The learned Standing Counsel could not place before this Court any provision which restrict the application of qualifying service to such a post where the incumbent gets salary in a time scale of pay and not fixed pay.

8. What service would qualify for pension is clear from Article 361 of Civil Services Regulations which reads as under:

"361. The service of an officer does not qualify for pension unless it conforms to the following three conditions:

First- The service must be under Government.

Second- The employment must be substantive and permanent.

Third- The service must be paid by Government."

9. It is not in dispute that in the matter of teachers of a primary school maintained by Basic Education Board, the provisions applicable to the comparable Government Servants are applicable in so far as specific provisions have not been made for such teachers. Article 361 contemplates only three things: firstly, it is service under Government which in the case of teachers of Basic Education Board would be that the service is under the Board; secondly, the employment is substantive and permanent and thirdly it is paid by the Government. Here also the word "Government" will mean Basic Education Board since the primary schools in question are being run by the Basic Education Board. In fact for the purpose of applicability of the provisions of Government pension the learned Standing Counsel did not dispute that certain provision of Civil Services Regulations including Article 361 are attracted & that would determine whether the service rendered by petitioner would qualify for pension or not. He, however, could not place anything before this Court to show that service rendered on a sanctioned substantive post having at the relevant point of time sanctioned fixed monthly pay would not qualify for pension.

10. Though slightly in a different context, in Anuj Kumar Dey & another vs. Union of India & others JT (1996) 10 SC 679 it was contended that the petitioner was not enrolled since he was paid during training a fixed pay. An

attempt to draw force in the submission was made by referring to Section 12 of the Navy Act. The Apex Court in paragraph no. 8 and 12 of the Judgment held as under:

"8. Section 12 lays down that where a person after his enrolment has for a period of three months from the date of such enrolment been in receipt of pay as Sailor, he shall be deemed to have been duly enrolled. Now, there is no dispute that the appellant had received pay regularly after his enrolment. It has been contended on behalf of the respondents that the appellant was allowed an allowance during the term of the training. The case of the appellant is that he used to get a fixed pay during the period of the training. The fact that he used to get a fixed pay does not go to show that he did not receive pay regularly after his enrolment.

12. The qualifying period for earning pension is service of 15 years under the Navy. Having regard to the facts of the case and the documents annexed to the appeal, there is little doubt that the training period as Artificer Apprentice will have to be included in the computation of the qualifying period of service. Regulation 79 lays down that all service from the date of enrolment or advancement to the rank of ordinary seaman or equivalent to the date of discharge shall qualify for pension or gratuity. Therefore, the date of advancement is not the only starting point for computation of the qualifying period of service. In the case of the appellant the date of enrolment should be the material date. He was administered oath as a Sailor even before the date of his advancement to the rank of Electrical Artificer Vth Class. In fact, the Discharge

Certificate issued by the Navy to the appellant is to the following effect and puts the matter beyond any doubt:

This is to certify that ANUJ KUMAR DEY, CHIEF ELECTRICAL ARTIFICER (AIR), NO. 052264-H has served in the Indian Navy from 12 August 1971 to 31ST JANUARY, 1988 as per details overleaf. This is a statutory certificate which has to be given under Sub-section (4) of Section 17 of the Navy Act. The Discharge Certificate must state the full period of service in the Indian Navy. According to the calculation made by the Navy itself, this period of service is more than the qualifying period of 15 years."

11. I may also point out, at this stage that placement of the petitioner in time scale of pay in 1997 did not affect his status qua the post he was holding since 1964. The only distinction it could make after 28.2.1997 is that the mode of payment got changed and from fixed pay it became time scale of pay.

12. Learned counsel for the respondents at this stage attempted to argue that the period during which the petitioner received fixed pay was in fact part time appointment and, therefore, this period would not qualify for pension. This averment is wholly beyond the pleadings and no such a case has been taken in the entire counter affidavit. The service book placed on record, which is not disputed by respondents, clearly shows appointment of the petitioner on substantive post. Though only extract of service book has been placed and not entire one but whatever has been placed shows his

appointment substantive. In the entire counter affidavit there is not even a whisper or suggestion that appointment of the petitioner on fixed pay was a part time appointment. The only thing mentioned is that he was appointed and paid salary on fixed pay basis. Later on given time scale of pay. This by itself would not mean that the earlier appointment of petitioner was not substantive, regular or full time.

This submission is thus deserved to be rejected.

13. Moreover, the question whether petitioner was a part time appointee or not is a question of fact and unless appropriate pleadings would have been there and relevant material is placed on record the counsel for respondents cannot be permitted to create a doubt on the nature of appointment of the petitioner by mere oral submissions in respect of factual aspect which is not pleaded as such. The respondents had to adhere and confine to their pleadings. In my view, the entire earlier service rendered by petitioner even though he was paid salary on monthly fixed pay basis would qualify for pension, in the absence of any provision otherwise.

14. In the result the writ petition is allowed. The respondents are allowed to treat service of the petitioner as regular and substantive from 8.10.1964 and determine his retiral benefits in accordance with law within two months and pay arrears within one month thereafter with interest of 10%.

15. Learned counsel for the respondent has misled the Court and made wrong factual argument going beyond the pleadings. The manner in which the learned counsel for the respondents attempted to mislead the Court during arguments and the way in which respondents have denied pension and other retiral benefits to the petitioner, and have harassed the petitioner, in my view, entitle the petitioner cost which I quantify to Rs.25,000/-. This shall also be paid alongwith arrears as directed above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.02.2011

BEFORE
THE HON'BLE RAJIV SHARMA, J.
THE HON'BLE VEDPAL, J.

Review Petition No. 498 of 2010.

Amrit Lal ...Petitioner
Versus
State of U.P. and others ...Respondents

Constitution of India Article 226-Power of Review-if Court by exercising power as Writ Court-committed any mistake-plenary power of review based on equity and fairness-scope of review under writ jurisdiction discussed-but can not consider fresh ground and fresh hearing in garb of review

Held: Para 5

In so far as the power of this court to review its decision given under Article 226 of the Constitution of India is concerned, it is now settled law that High Court has inherent power to review its decision given under Article 226 of the Constitution of India to prevent miscarriage of justice or to correct grave and pulpable errors committed by it. It is settled law that if the court in exercise of its power, has committed any mistake, it has the plenary power to correct its own mistake. Neither rule of procedure nor technicalities can stand in its way. The entire concept of writ jurisdiction

exercised by High Court is founded on equity and fairness. If court finds that the order was passed under a mistake or due to some erroneous assumption which in fact did not exists then the court on any principle cannot be precluded from rectifying error by reviewing its judgment and order. The same view has been expressed by the Hon'ble Supreme Court in Shiv Deo Vs. State of Punjab : AIR 1963 SC 1919, Hari Das Vs. Smt. Usha Rani Banik and Others (2006) 4 SCC 78, M. M. Thomas Vs. State of Kerala and Another (2000) 1 SCC 666 and Food Corporation of India and Another Vs. M. S. Shiel Ltd. and Others AIR 2008 SC 1101.

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

1. This application has been filed by Amrit Lal, applicant/petitioner for review of the judgement and order dated 24.11.2010 passed by this Court in Writ Petition No.11428 (M/B) of 2010 : Amrit Lal Vs. State of U.P. and others whereby the petition for quashing the F.I.R. was dismissed.

2. The review of the judgment and order dated 24.11.2010 has been sought on the ground that subsequent to the date of order dated 24.11.2010, certain new and important facts were discovered which were not within the knowledge of the applicant and could not be argued before the court when the judgment and order dated 24.11.2010 was passed. That the alleged abducted person Shri Prem Shanker Pandey was himself involved in a criminal case and non bailable warrant of arrest and process under Section 82 Cr.P.C. was also issued against him by C.J.M., Sultanpur and the petitioner was falsely implicated in Case Crime No.443 of 2008. The police had failed to trace the abducted persons and a final report was submitted by the police but subsequently in the garb of further investigation, the petitioner was unnecessarily being harassed and as such the applicant has moved the court for quashing the F.I.R. Thus in the facts and circumstances of the, it is necessary to review the judgment and order dated 24.11.2010 passed by this court.

3. Learned A.G.A. opposed the review petition on two grounds firstly that the review petition under Article 226 of the Constitution of India is not maintainable as in the Code of Criminal Procedure, there is no provision for review of the judgment and order and ; secondly that there appears no sufficient ground to review the judgment and order dated 24.11.2010 as the truthness or falsity of the allegations made in the F.I.R. against the petitioner cannot be gone into in the proceedings for quashing the F.I.R. under Article 226 of the Constitution of India and as such the application deserves rejection.

4. We have heard the learned counsel for the parties at considerable length and perused the impugned judgment and order alongwith ruling cited by the parties.

5. In so far as the power of this court to review its decision given under Article 226 of the Constitution of India is concerned, it is now settled law that High Court has inherent power to review its decision given under Article 226 of the Constitution of India to prevent miscarriage of justice or to correct grave and pulpable errors committed by it. It is settled law that if the court in exercise of its power, has committed any mistake, it has the plenary power to correct its own mistake. Neither rule of procedure nor

technicalities can stand in its way. The entire concept of writ jurisdiction exercised by High Court is founded on equity and fairness. If court finds that the order was passed under a mistake or due to some erroneous assumption which in fact did not exists then the court on any principle cannot be precluded from rectifying error by reviewing its judgment and order. The same view has been expressed by the Hon'ble Supreme Court in Shiv Deo Vs. State of Punjab : AIR 1963 SC 1919, Hari Das Vs. Smt. Usha Rani Banik and Others (2006) 4 SCC 78, M. M. Thomas Vs. State of Kerala and Another (2000) 1 SCC 666 and Food Corporation of India and Another Vs. M. S. Shiel Ltd. and Others AIR 2008 SC 1101.

6. In view of the above, we are of the opinion that the review of an order passed under Article 226 of the Constitution of India, is permissible provided the ground for doing so exists.

7. Now the next question that remains for consideration is whether there exists any ground to review the impugned judgment and order dated 24.11.2010 passed in Writ Petition No.11428 (M/B) of 2010.

8. It has been stated in the application for review that the allegations made in the F.I.R. are false and frivolous and even the police had submitted final report in the matter and it is being further investigated by the police and the police is harassing the petitioner. It reveals from the perusal of the impugned order that the allegations contained in the F.I.R. discloses commission of cognizable offence. It is not within the dominance of this court in the proceedings under Section 226 of the Constitution to comment on the truthness or falsity of the allegations made in the F.I.R. It is a matter to be dealt with by the court at the time of the trial. At the stage, when F.I.R. has been sought, to be quashed, the court has to see whether the allegations discloses the commission of the cognizable offence or not. The court cannot enter into the truthness of falsity of the allegations. Thus the ground that the allegations are false against the applicant is not available to the petitioner at this stage. Further more, the Review Application has a very narrow compass . The Court cannot consider fresh grounds and fresh arguments in review. It has been laid down by the Honourable Apex Court in Ajit Kumar Rath Vs. State of Orissa and others, (1999) SCC 596 as under;-

"A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for establishing it",

9. In view of the above, there exists no sufficient ground to review the judgment and order dated 24.11.2010 passed in Writ Petition No.11428 (M/B) of 2010. In the result, the application has no force and is liable to be rejected. It is accordingly rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.02.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 3385 of 2007

Khushi Lal And others ...Petitioners
Versus
F.C.I. and others ...Respondents

Counsel for the Petitioners:
Sri Bhoopendra Nath Singh
Sri D.P. Singh

Counsel for the Respondents:
Sri S.P. Srivastava
Sri R.K. Singh
S.C.

F.C.I. (Staff) Regulation, 1971-Regulation-22-A-Voluntary Retirement-accepted but the claim of appointment of his son refused-considering Nizamuddin Case application can not be treated conditional one-similar order based on wrong assumptions-can not be basis for claiming right of equity-two wrongs will not make one right-held-claim of appointment rightly declined.

Held: Para 9

Suffice it it mention here that application to provide appointment as a result of acceptance of retirement is available only when application is conditional and not otherwise. Merely because in some other matter some error or illegality has been committed by respondents that will not give a cause of action to petitioners to claim parity in the matter of such illegality. If some benefit has been given by the respondents to some persons illegally or contrary to the law, no mandamus can be issued to the respondents to commit same illegality again, inasmuch as, the right of equality is not extended to claim parity in illegal acts since it is well settled legal position that two wrongs will not make one right.

Case law discussed:
2010 (2) UPLBEC 909; Civil Misc. Writ Petition No. 34434 of 2007, Mohit Kumar and another Vs. Senior Regional Manager and another; AIR 2000 SC 2306; AIR 2003 SC 3983; AIR 2004 SC 2303; AIR 2005 SC 565; AIR 2006 SC 1142

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

1. Heard Sri B.N. Singh, learned counsel for the petitioners and learned Standing Counsel as well as Sri R.K. Singh, Advocate for the respondents.

2. The petitioner no. 1 has sought voluntary retirement and appointment for his son (petitioner no. 2) by application dated 08.08.2001 in the light of the Standing Order contained in Regulation 22-A of FCI (Staff) Regulation, 1971 stating that since he is not well the authorities may accept his retirement and give appointment to his son. The respondents have accepted retirement of petitioner no. 1 on medical ground and declined to give appointment to his son. Hence this petition.

3. Placing reliance on a Division Bench decision of this Court in **Ram Gopal and another Vs. Union of India and others, 2006(3) UPLBEC 2268** learned counsel for petitioner contended that it was incumbent upon the respondents to provide appointment to petitioner no. 2.

4. However, this Court find that the matter was examined by the Apex Court in **Food Corporation of India and another Vs. Ram Kesh Yadav and another, JT 2007(4) SC 1** wherein the Apex Court has observed if the letter sent by employee concerned seeking retirement on medical ground is conditional and if the employer has accepted the same then it is incumbent

upon the employer to give appointment. It is not the case that the application submitted by petitioner no. 1 is conditional one. The application reads as under:

"*Sir,*

With due respect I beg to inform you that as per the standing instruction under Regulation 22(A) of FCI (Staff) Regulations, 1971, I am seeking my retirement w.e.f. 30th November, 2001 since at present I am medically unfit to perform my official duties. The medical certificate issued by the CMO, Kanpur in form No. 23 under Rule 38(3) is also enclosed herewith for your further necessary action at your end.

In this connection your goodself is also requested to accept my retirement w.e.f. 30.11.2001 and in my place my son may kindly be appointed on compassionate grounds. His particulars area s under:-

1.Name : Naresh Babu

2.Date of Birth : 15.07.1973

3.Qualification : M.A. (Final) 1996 (Sociology)

You are therefore very kindly requested to look into the matter personally and do the needful at you earliest by accepting my retirement w.e.f. 30.11.2001 and appointment of my son Naresh Babu.

Thanking you for this act of kindness."

5. I need not go in detail in order to find out whether this application of petitioner no. 1 can be construed as conditional or not for the reason that a similar application having already been considered by Apex Court in **Food Corporation of India and another Vs. Nizamuddin and another, 2010(2) UPLBEC 909** wherein considering a similar application the Apex Court held that it is not a conditional one. Para 10 of the judgment reads as under:

"10. In this case the offer of voluntary appointment in the application was neither conditional nor interlinked. The words used are "I therefore request that the management may kindly retire me on medical grounds and at the same time give appointment to my son." It merely contains two requests (that is permission to retire voluntarily on medical grounds and request for appointment for his son), without any interlinking. Nor was the voluntary retirement conditional upon giving employment to his son. Therefore, Ramkesh Yadav will not apply. Each request had to be considered on its own merits with reference to the rules/scheme applicable. When so done it is clear that the first respondent will not be entitled to compassionate appointment."

6. I have also considered a similar matter in **Civil Misc. Writ Petition No. 34434 of 2007, Mohit Kumar and another Vs. Senior Regional Manager and another,** decided on 05.01.2011.

7. In view of above the application of petitioner no. 1 since cannot be held to be a conditional one, it cannot be said that since petitioner's no. 1 retirement on medical ground has been accepted, it is incumbent upon the authorities to provide appointment to his son, i.e., petitioner no. 2.

8. Sri B.N. Singh, learned counsel for the petitioners further referring to para 23 and 24 of the writ petition submitted that in

similar circumstances, where similar applications were submitted, the respondents have given appointment to the wards of retiring employees but the said treatment has been denied to petitioners.

9. Suffice it mention here that application to provide appointment as a result of acceptance of retirement is available only when application is conditional and not otherwise. Merely because in some other matter some error or illegality has been committed by respondents that will not give a cause of action to petitioners to claim parity in the matter of such illegality. If some benefit has been given by the respondents to some persons illegally or contrary to the law, no mandamus can be issued to the respondents to commit same illegality again, inasmuch as, the right of equality is not extended to claim parity in illegal acts since it is well settled legal position that two wrongs will not make one right. The Apex Court in the case of **State of Bihar and others Vs. Kameshwar Prasad Singh and another, AIR 2000 SC 2306; Union of India and another Vs. International Trading Co. and another, AIR 2003 SC 3983; Lalit Mohan Pandey Vs. Pooran Singh and others, AIR 2004 SC 2303; M/s Anand Buttons Ltd. etc. Vs. State of Haryana and others, AIR 2005 SC 565; and Kastha Niwarak G. S. S. Maryadit, Indore Vs. President, Indore Development Authority, AIR 2006 SC 1142** has clearly held that Article 14 has no application in such cases.

10. In view of aforesaid discussion, I find no merit in this petition. It is accordingly dismissed. No costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.02.2011

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 48485 of 2000

Narendra Pratap Singh and others
...Petitioners
Versus
Board Of Revenue U.P. Lkw and others
...Respondents

Counsel for the Petitioners:
Sri Atma Ram Singh

Counsel for the Respondents:
C.S.C.

Lekhpal Service Rule 1956-Rule-6- Petitioner-based his claim on estopple and acquiescence-once admitted by Training School can not be deprived from completing the same-on Query made by court regarding working of 100 days as untrained Lekhpal-No proper response given-voluminous documents placed in counter affidavit-proved that never worked as untrained Lekhpal-claim not based upon statutory provisions or Government Order-can not be accepted-Judgment relied by petitioner-distinguishable.

Held: Para 8

This Court has no hesitation to hold that in the facts of the case it was established beyond doubt that the petitioners were not eligible for admission to the Lekhpal Training Institute either under the statutory rules or under the Government Order dated 15.01.1986. The admission to the Lekhpal Training Institute was obtained by the petitioners on incorrect statement of facts. Therefore, any training obtained by the petitioners on such false statement of fact cannot be perpetuated by this Court by issuing a

direction to the respondent to offer appointment to the petitioners as Lekhpal on the basis of the training so obtained. This Court, therefore, refuses to exercise its discretion under Article 226 of the Constitution of India in the facts of the present case.

Case law discussed:

2003 (2) SCC 111; AIR 2008 SCW 5817

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

1. On a pointed query being made by the Court as to whether the petitioners are in a position to disclose as to in which Halkas he had worked as untrained Lekhpal for a period of 100 days which could entitle them for admission in the Lekhpal Training Institute, counsel for the petitioners refused to answer the query and stated that the petitioners had submitted their application form which was verified by the respondents and therefore it is to be presumed that the petitioners were eligible for admission of Lekhpal training on the relevant date.

2. This petition is directed against an order dated 13.09.2000. Under the order impugned the Prabhari Adhikari Bhoolekh on behalf of the District Magistrate, Varanasi has required the petitioners to submit such documents as they may be advised for establishing that they had worked as untrained Lekhpal for the required period which could entitle them for admission to the Lekhpal Training Institute and on being successful in the said training to be appointed as Lekhpal.

3. The order specifically records that unless such information is disclosed by the petitioners, they cannot be appointed as Lekhpal although their result of Lekhpal Training Institute has been declared.

Counsel for the petitioner with all vehemence at his command contended that since petitioners had been admitted to the Training Institute, it is to be presumed that they had completed requisite number of days for being eligible for such admission and further that the petitioners had completed their training at the Lekhpal Training Institute and they were declared successful. Therefore, at this later point of time the respondents are not justified in interfering in the working of the petitioners as Lekhpal or for not offering appointment to the petitioners as Lekhpal even after declaration of their result of Lekhpal Training. Hence this petition.

4. A detail counter affidavit has been filed in the present writ petition containing as many as 10 documents. It has specifically been stated that admission to Lekhpal Training Institute is regulated by Rule 6 of the Lekhpal Service Rules, 1958. Under the aforesaid statutory rules the process of admission to Lekhpal Training Institutes, established at five centers in the State of Uttar Pradesh, is on the basis of a competitive examination to be held by the District Magistrate. The selected candidates merit-wise are sent for training to the Lekhpal Training Institute.

5. The State Government vide Government Order dated 15.01.1986 took a decision to get certain categories of untrained Lekhpal trained i. e. who satisfied two conditions (a) who had been working between 13.09.1976 to 08th June, 1983, and (b) have actually worked for 100 days as untrained Lekhpal.

I have heard counsel for the petitioners and have examined the records.

Admittedly the petitioners had not appeared in any examination held by the District Magistrate. They claim to be admitted to the Training Institute in terms of the Government Order dated 15.01.1986. From the Government Order dated 15.01.1986 it is apparently clear that not all untrained Lekhpals became entitled to admission to the Lekhpal Training Institute and it is only a particular category of such untrained Lekhpals, who satisfy the aforesaid two conditions, could be admitted under the Government Order. For the purpose the petitioners had made applications claiming that they had worked for 100 days as untrained Lekhpal. It is with reference to the facts so disclosed by the petitioners that they had been admitted to the Training Institute.

6. The facts disclosed in the application form by the petitioners qua their period of working as untrained Lekhpal was specifically verified by the District Magistrate, Varanasi from the records of his subordinate offices and as per the report dated 16.01.2000 it had been found that the petitioners had actually not worked for 100 days as untrained Lekhpal. It is in this background that the impugned notice has been issued to the petitioners to explain as to why they may not be denied appointment as Lekhpal, as admission to the Lekhpal Training Institute had been obtained on incorrect and false statements made in the application form.

7. As already noticed above, despite the specific query of the Court calling upon the petitioners to disclose as to whether they had worked as untrained Lekhpal for a period of 100 days and if so, where, the counsel for the petitioners refused to answer the query. Reliance is placed only on the fact that admission to Lekhpal Training Institute had been granted to the petitioners.

8. This Court has no hesitation to hold that in the facts of the case it was established beyond doubt that the petitioners were not eligible for admission to the Lekhpal Training Institute either under the statutory rules or under the Government Order dated 15.01.1986. The admission to the Lekhpal Training Institute was obtained by the petitioners on incorrect statement of facts. Therefore, any training obtained by the petitioners on such false statement of fact cannot be perpetuated by this Court by issuing a direction to the respondent to offer appointment to the petitioners as Lekhpal on the basis of the training so obtained. This Court, therefore, refuses to exercise its discretion under Article 226 of the Constitution of India in the facts of the present case.

9. So far as the judgment relied upon by the counsel for the petitioners dated 22.03.2005 passed in Writ Petition No. 19555 of 1992 and in the Special Appeal No. 492 (Defective) of 2005 as well as upon the judgment of Apex Court in Special Leave to Appeal No. 4623 of 2008. Suffice is to record that the basic judgment of the Hon'ble Single Judge proceeded on the fact that no document or record has been produced and the orders of this Court has not been complied with.

10. The facts on record of the present writ petition are otherwise. There is voluminous evidence on record by way of counter affidavit, which demonstrate the statement made by the petitioners in the application form, that they actually worked as untrained Lekhpal for 100 days, was false. The judgments relied upon by the counsel for the petitioners are clearly distinguishable.

11. The Hon'ble Supreme Court of India in the case of ***Bhavnagar University***

Vs. Palitana Sugar Mills (Pvt.) Ltd. & Ors., reported in ***2003 (2) SCC 111,*** has held that it is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. The said judgment has been followed in the recent judgment of the Apex Court in the case of ***Dr. Rajbir Singh Dalal vs. Chaudhari Devi Lal University, Sirsa & Anr. Reported in AIR 2008 SCW 5817.***

12. In view of the aforesaid, writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.02.2011

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

Civil Misc. Writ Petition No.51979 of 2005

Vinayendra Nath Upadhyay ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri S.S. Pandey
Sri A.K. Tripathi
Sri Y.D. Dwivedi
Sri Navin Sinha

Counsel for the Respondent:
Sri R.C. Singh
Sri M.C. Chaturvedi
C.S.C.

U.P. Urban Planning and Developmenty Act 1972-Section 39 (1) read with Indian Stamp Act 1899-Section 2(16)-Registration of instrument of lease-regarding realisation of toll tax from Shashtri and Chandra Shekhar Bridge-whether comes within preview of immovable Property?-held-"Yes" case of Bilal Ahmad Shervani-not laid down correct law-overruled.

Held: Para 32 and33

For the reasons aforesaid, we are of the considered view that the instrument which has been registered is an instrument of lease which amounts to an instrument relating to immoveable property with its extended meaning as contained under Section 2(16)(c) of the Indian Stamp Act, 1899 and therefore we would answer questions No. 1 and 2 in the affirmative in favour of the State.

Accordingly, the decision in the case of M/s Bilal Ahmad Sherwani does not lay down the law correctly and stands overruled. Question No. 3 therefore stands answered accordingly.

Case law discussed:
AIR 1992 All. 181; AIR (1992) Allahabad 181

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

1. This reference raises issues involving the power of the State to impose and realise Additional Stamp Duty on an instrument of lease executed for a contract to realise toll in respect of two bridges in the district of Allahabad over the river Ganges, namely Lal Bahadur Shastri Bridge and Chandra Shekhar Azad Bridge. The imposition of this Additional Stamp Duty is under the provisions of Section 39 (1) of the U.P. Urban Planning and Development Act, 1972 read with the Indian Stamp Act 1899.

2. The petitioners in all the writ petitions have assailed the orders of the Addl. Collector (Finance & Revenue), Allahabad, under Section 31 of the 1899 Act as also the revisional orders passed by the Chief Controlling Revenue Authority under Section 56 (2) of the Act, upholding the said imposition.

3. A learned single Judge of this Court, while proceeding to hear the writ petitions, took notice of a Division Bench judgment of this Court relied upon by the petitioners in the case of M/s Bilal Ahmad Sherwani and Kishori Lal Vs. State of U.P. and others, AIR 1992 All. 181, and upon a request made by the learned Standing Counsel for reconsideration of the said judgment, came to the conclusion that the Division Bench appears to have not been apprised of the issue whether a toll is a benefit arising out of land and, therefore, immovable property. The learned single Judge was of the opinion that the contention advanced by the learned Standing Counsel requires a consideration in view of the observations made in the referring order dated 7.2.2006 and accordingly a request was made to Hon'ble the Chief Justice for constituting a larger Bench as the learned single Judge found himself to be bound by the decision of the Division Bench aforesaid.

4. The matter was placed before Hon'ble the Chief Justice, who vide order dated 31.3.2006, constituted a larger Bench of three Hon'ble Judges presided over by Hon'ble the Chief Justice to hear the matter. Accordingly, the reference has been placed before us for answering the doubt expressed by the learned single Judge and for an authoritative pronouncement on the issues raised.

5. Before embarking upon the matter any further, we may clarify that even though the questions to be answered have not been formally framed by the learned single Judge, yet in order to analyse the issue, we propose to frame the questions and answer them accordingly. Upon analysis of the pleadings and the gist of the order of reference dated 7.2.2006 of the learned single Judge, the following questions, to our mind, arise that need to be answered:-

(1) Whether an instrument of lease executed for the right to collect toll on a bridge executed would amount to an instrument conveying or transferring immovable property subject to imposition of Additional Stamp Duty as defined under Section 39 of the U.P. Urban Planning & Development Act, 1973?

(2) Whether the words "immovable property" incorporated in Section 39 of the U.P. Urban Planning and Development Act, 1973 carry the same meaning and connotation as assigned to them in Section 2 (16) of the Indian Stamp Act, 1899 while defining the term "lease" thereunder and consequently includes within its fold any instrument by which tolls of any description are let?

(3) Whether the decision of the Division Bench in the case of M/s Bilal Ahmad Sherwani and Kishori Lal Vs. State of U.P. and others, AIR 1992 All. 181, does not lay down the law correctly and requires any re-consideration as referred to by the learned single Judge?

6. Learned counsels Sri Navin Sinha Senior Advocate on behalf of the petitioners assisted by Sri R.C. Singh and Sri M.C. Chaturvedi learned Chief Standing Counsel for the State have been heard. They have advanced their submissions, the petitioners contending that no such additional Stamp Duty is leviable and the respondent State supporting the said levy. There are however certain undisputed areas which need be mentioned at the very outset.

7. The covenant, on which this additional duty is sought to be levied, is a lease deed recording an agreement relating to the right of the petitioners to collect toll over the bridges in question. The instrument has been registered as such. The petitioners have paid Stamp Duty that was charged on the said instrument including the additional Stamp Duty under dispute.

8. The Stamp Duty about which there is no dispute between the parties is that which has been charged for registering the instrument under Schedule 1-B, Article - 35(b) read with Explanation-4 and Article 23 of the Indian Stamp Act, 1899. Thus there is absolutely no quarrel over the imposition of Stamp Duty on the instrument treating it to be a transaction of lease as defined under Section 2(16)(c) of the 1899, Act. The petitioners do not dispute the imposition of Stamp Duty to the aforesaid extent.

9. The doubt expressed by the learned Single Judge in the reference order arose when the petitioners relying on the judgment of a Division Bench of this Court in the case of M/s Bilal Ahamd Sherwani and Kishori Lal Vs. State of U.P. and others [AIR (1992) Allahabad 181) contended that the imposition of 2% additional Stamp Duty under Section 39 of the U.P. Urban Planning and Development Act, 1973 was illegal and the State had no authority to levy the same. The learned Single Judge felt bound by the judgment of the Division Bench but on first principles expressed his doubt about the correctness of the said Division Bench and accordingly referred the matter to be resolved by a Larger Bench.

10. The petitioners contend that the definition of the word 'lease' as contained in Section 2(16) of the Indian Stamp Act, 1899 does not include within its fold every immoveable property by way of fiction nor does it include every immoveable property as understood generally in terms of the Transfer of Property Act and also the U.P. Urban Planning and Development Act, 1973. They contend that the word 'immoveable property' as contained in Section 39 of the U.P. Urban Planning and Development Act, 1973 is not inclusive of the definition of lease as contained in the Stamp Act, 1899 inasmuch as the word 'includes' as contained in Section 2(16) of the 1899 Act only gives an extended meaning to the word lease, and not to the words immoveable property. It is submitted on their behalf that the word 'lease' is not synonymous with the word 'immoveable property' as contained in the 1973 Act and, therefore, the additional Stamp Duty as sought to be levied under the 1973 Act would not apply to a lease which has been incorporated through an extended meaning in Section 2(16) of the Stamp Act, 1899.

11. Sri Sinha learned counsel for the petitioners has urged that the first part of the definition of the term lease as used in Section 2(16) of the 1899 Act is not a lease defining collection of toll to be immoveable property. It includes the instrument of collection of toll as a lease only under a fiction created thereafter and is by itself not an instrument connoting transfer of immoveable property. He therefore, submits that this definition does not allow the provisions of Section 39 of the 1973 Act to be invoked for such instruments in order to levy additional Stamp Duty @ 2%.

12. Sri Sinha has relied on judgements to contend that even otherwise the right to collect toll to the petitioners is only creating an agency in favour of the petitioners to realise the toll on behalf of the State

Government and nothing more. He submits that it is not a profit arising out of land so as to include it within the meaning of immoveable property and the instrument so executed in favour of the petitioners would not amount to any instrument of transfer of immoveable property.

13. The contention advanced is that it is the right of the public at large to passover the bridge and in lieu thereof the Government is collecting toll. The petitioners are mere agents to collect the said toll on behalf of the Government and are not earning any profit out of land. Even if the bridge is embedded in the earth, the same would not be included within the term immoveable property. He submits that the judgement in the case of M/s Bilal Ahmad Sherwani (supra) lays down the law correctly and therefore, the reference made by the learned Single Judge deserves to be rejected.

14. Sri M.C. Chaturvedi learned Chief Standing Counsel disputing the aforesaid proposition submits that the word 'means' as used in Section 2(16) of the Stamp Act, 1899 includes all transactions of immoveable property and the extended meaning of the said terminology has been explained so as to include other instruments as defined therein. He therefore submits that the word 'includes' gives an extended meaning to the terminology of immoveable property and the same would equally apply while defining immoveable property as contained in Section 39 of the 1973 Act.

15. He submits that the splitting of Section 2(16) of the 1899 Act, as attempted by the petitioners, on the strength of the Division Bench judgment in the case of M/s Bilal Ahmad Sherwani (supra) is misplaced, inasmuch as, the Division Bench judgment has incorrectly restricted the inclusive definition of immoveable property, and even otherwise upon a perusal of the definition of the word 'lease' as contained in Section 105 of the Transfer of Property Act, the word 'immoveable property' as used in Section 2(6) of the Registration Act, 1908 and the meaning assigned to the words immoveable property in Section 3(26) of the General Clauses Act, 1897, leave no room for doubt that the extended meaning of the word immoveable property as contained in the Stamp Act, 1899 would be the same as understood in Section 39 of the 1973 Act.

16. His contention is that the distinction sought to be made by way of interpretation on behalf of the petitioners by taking aid of the decision in M/s Bilal Ahamd Sherwani's case is misplaced which proceeds on an incorrect assumption that admittedly there was no transfer of immoveable property under the instrument. He contends that by virtue of the extended meaning, there is no requirement of actual transfer of immoveable property as understood generally and by fiction the additional duty is leviable on such instruments. Sri Chaturvedi has also relied on certain decisions in support of his argument.

17. In order to appreciate the rival submissions and the doubt expressed by the learned Single Judge it would be appropriate to begin with quoting Section 39 (1) of the 1973 Act which is essential for the understanding of the controversy.

"Section 39(1). Additional Stamp duty on certain transfer of property.-

(1) The duty imposed by the Indian Stamp Act, 1899, on ***any deed of transfer of***

immoveable property shall, in the case of an immoveable property *situated within a development area,* ***be increased by two per cent*** *on the amount or value of the consideration with reference to which the duty is calculated under the said Act:*

Provided that the State Government may, by notification in the Gazette, enhance, the aforementioned percentage of the increase in Stamp duty up to five."

18. The aforesaid provision therefore categorically provides that the duty imposed under the Indian Stamp Act on any deed of transfer of immoveable property shall stand increased by 2% in the manner provided therein. The aforesaid definition therefore requires that any deed of transfer of immoveable property shall be subjected to the additional duty imposed payable at the time of registration.

19. The word 'immoveable property' has not been defined under the Indian Stamp Act. The same is the position under the U.P. Urban Planning and Development Act, 1973. The instrument in relation whereto this dispute has arisen, defines the agreement as a lease (Patta). The term lease has been defined under the Indian Stamp Act to mean a lease of immoveable property and to also include certain other instruments as defined therein. Section 2(16) of the 1899 Act is quoted below:

Section 2(16) "Lease". - "Lease means a lease of immoveable property, and also includes:

(a) a patta;

(b) a kabuliyat or other undertaking in writing, not being a counterpart of a lease, to cultivate, occupy or pay or deliver rent for immoveable property;

(c) ***any instrument by which tolls of any description are let;***

(d) any writing on an application for lease intended to signify that the application is granted;

[(e) any instrument by which mining lease is granted in respect of minor minerals as defied in clause (e) of Section 3 of the Mines and Minerals (Regulation and Development) Act, 1957;"]

20. The definition leaves no room for doubt that any instrument by which tolls of any description are let, as presently involved is also a lease. The argument of the petitioners have to be understood in the light of the above definition as they contend that the instrument falls within the inclusive definition of the word 'lease' which is an extended meaning of the word lease that does not amount to immoveable property.

21. The term immoveable property used in Section 39 of the 1973 Act does not include within itself expressly an instrument by which tolls of any description are let. It however, indicates that it applies to any instrument of immoveable property. The question is as to whether such instruments which have been included by virtue of an extended definition under the Stamp Act would also amount to immoveable property as understood in Section 39 of the 1973 Act. To put it differently, would an instrument of a right to collect toll amount to a deed of transfer of immoveable property for the purposes of levying additional duty under the 1973 Act.

22. The definition under Section 39 of the 1973 Act contains the words "any deed of transfer of immoveable property". Every lease of immoveable property would therefore, also amount to a transaction as understood under the Indian Stamp Act, 1899. The purpose and intent of Section 39 of the 1973 Act to our mind is to read the terminology of immoveable property to include lease in order to levy Stamp Duty under the Stamp Act 1899. The additional duty is being imposed on the instruments presented for registration even as a lease as defined under Section 2(16) of the Act. The petitioners also do not dispute the levy of Stamp Duty on the instrument as a lease. In such a situation, the instrument which has been presented to be registered as a lease means an instrument of a transaction relating to immoveable property by fiction of the provisions of Section 2(16)(c) of the 1899 Act. The instrument by itself may not amount to a transfer of immoveable property as understood under the Transfer of Property Act or as suggested by the State, yet by virtue of the fiction created in relation to instruments as included under the extended definition, the additional duty as leviable under Section 39 would also be applicable as involved in the present context.

23. The Division Bench in the case of Bilal Ahmad (supra) in our opinion, proceeded on an assumption of admittedly treating the instrument not to be a transfer of immoveable property. This in our view, was an erroneous approach by splitting the definition clause of the term lease in two parts. The word lease as defined under the Stamp Act 1899 cannot be segregated from the meaning of the word immoveable property so as to exclude the instruments which have been included by way of fiction.

24. It is settled proposition of law that if a statute is sought to be applied by creating a fiction, then such a fiction has to be given full effect to by the Courts. Any attempt to exclude would therefore render the very purpose of a fiction redundant. The legislature will be presumed to be aware of the meaning that it sought to assign to the terminology of immoveable property while enacting Section 39 of the 1973 Act to give it a meaning so as to levy duty under the Indian Stamp Act 1899. The term immoveable property therefore utilized in the 1973 Act is clearly relatable to all the instruments as defined in relation to immoveable property including the definition of the word lease as contained under Section 2(16) of the 1899 Act. Any departure from the aforesaid meaning would therefore do violation to the statute and we would accordingly approve of the view expressed by the learned Single Judge while proceeding to make the reference.

25. The law laid down by the Division Bench in the case of Bilal Ahmad (supra) does not define the aforesaid provisions correctly and the same deserves to be overruled.

26. In our opinion, when the terminology used in Section 39 of the 1973 Act directly requires it to be understood in relation to the imposition of duty under the Stamp Act, it is not necessary for this Court to borrow the meaning of the word immoveable property as utilized in any other Act and contended on behalf of the State. The Stamp Duty is leviable under the Stamp Act and therefore the meaning assigned to the words contained therein have to be understood for the purpose of additional Stamp Duty under Section 39 of the 1973 Act.

27. It is not necessary to borrow any meaning of immoveable property from any other Act for the reason that the levy of Stamp Duty is an exercise under the fiscal powers of the State. The pecuniary liability of Stamp Duty is therefore in the nature of compulsory exaction which has to be construed strictly within the parameters of the meaning assigned in the Act itself. In our opinion, there is no ambiguity as explained above nor is it necessary to take aid of the provisions contained in any other Act.

28. The contention raised on behalf of the petitioners is that a grant of lease to collect toll cannot be equated with the grant of mining lease and fisheries rights and collection of market dues, is founded on the premise that the provisions of Section 3 (6) of the General Clauses Act read with the provisions of Sections 3, 4, 5, 105 and 107 of the Transfer of Property Act indicate that the benefits arising out of land is a necessary ingredient in order to bring it within the definition of immovable property.

29. This, in our opinion, would be attempting to read into the definition of immovable property which is not the intendment of the definition contained in the Stamp Act, 1899 as the term lease defined therein gives an extended meaning so as to include an instrument relating to letting of toll as indicated above. We do not find it necessary to import the meaning of the words 'immovable property' by deploying the definition of the words 'immovable property' as suggested on behalf of the petitioners.

30. The decisions which have been relied upon for the said purpose, are therefore clearly distinguishable and this aspect of the matter in Bilal Ahmad's case, in our opinion, has not been appreciated. The entire purpose of imposing additional stamp duty under Section 39 of the 1973 Act is to generate revenue through levy of a stamp duty on instruments which in our opinion would also include an instrument registered for letting of toll as defined under the Stamp Act, 1899. When the rights of the parties are governed by a written document, it is essential to study and to follow the terms of such document, just as it is necessary, when a Court is administering the sections of a Code, that it should study the exact language of the section before troubling itself about decided cases or general considerations.

31. If by virtue of the said fiction, the duty is leviable then the issue relating to profits arising out of land may not be relevant inasmuch as the collection of toll through an agent is not a realisation of profit arising out of land. It is a distinct contractual right to collect a fee from the public at large on behalf of the Government. Such an Agent does not exercise any control over the passage of public at large over the bridge. That right continues to be regulated by the State Government and not by the Agent appointed by the State Government. The petitioners only collect toll from those who passover the bridge in the manner and to the extent as required by the State Government under the terms of the covenant which has been registered and on which Stamp Duty has been paid. There is no right created in favour of the petitioners to receive profit out of land. It is only the profits or losses that accrue from collection of toll that is the subject matter of the instrument.

32. For the reasons aforesaid, we are of the considered view that the instrument

which has been registered is an instrument of lease which amounts to an instrument relating to immoveable property with its extended meaning as contained under Section 2(16)(c) of the Indian Stamp Act, 1899 and therefore we would answer questions No. 1 and 2 in the affirmative in favour of the State.

33. Accordingly, the decision in the case of M/s Bilal Ahmad Sherwani does not lay down the law correctly and stands overruled. Question No. 3 therefore stands answered accordingly.

34. The reference having been answered, let the papers be placed before the concerned Bench for disposal of the writ petitions.
