ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.11.2011

BEFORE
THE HON'BLE PRAKASH KRISHNA,J

Civil Misc. Writ Petition No. 208 of 1977

Sonkali W/o Sri Rajjan Lal and another ...Petitioners

Versus

Gaon Sabha, Village Barisal, Pargana Derapur, Kanpur through its Pradhan and another ...Respondents

Counsel for the Petitioner:
Sri P.N. Saksena

Counsel for the Respondents:
Sri D.D. Chuhan
S.C.

U.P.Z.A. & L.R. Act 1958-Section 198 (3)- grant of lease exceeding of outer limit prescribed-illegal-as per interpretation of general clauses Act-singular includes plural also-lease may be more than one-but outer limit should not exceed 1.26 Hectare-apart from that plots were reserved for public utility land-lease of such plot itself illegal.

Held: Para 7

On a plain and simple reading of the aforesaid provisions would show that a limit has been prescribed with regard to area of the land to be allotted. The keywords are "the land that may be allotted" with respect thereof, prescribed outer limit of area is 1.26 hectares (3.125 acres).

(Delivered by Hon'ble Prakash Krishna,J)

1. Raising a short controversy with regard to interpretation of Section 198(3) of the U.P. Zamindari Abolition & Land Reforms Act, 1950 (hereinafter referred to as "the Act'), the present writ petition is at the instance of allottees, who claimed allotment of four plot nos. 35, 46, 211 and 560 in their favour by the Gaon Sabha. Total area of these plots is 8 Bigha and 10 Biswa. Admittedly, these plots belong to Gaon Sabha.

2. Two petitioners claim that they are lessees of the aforesaid plots in view of the lease-deed dated 3rd July, 1970 executed by respondent no. 1, namely, Gaon Sabha in their favour. Their names were not recorded in basic year when the consolidation operation commenced in the village. An objection under Section 9(a)(2) of the U.P. Consolidation of Holdings Act, claiming sirdari right over the aforesaid plots in pursuance of the lease-deed referred to above was filed. The claim was contested by the Gaon Sabha on the ground that these plots are public utility land and therefore, could not be subject matter of allotment. It was pleaded by the Gaon Sabha that plot no. 35 is being used as playground of children of the adjoining school. Plot no. 46 is a part of abadi and manure pits. Consolidation Officer allowed the claim in part. The matter was carried in appeals both at the instance of the petitioners as well as Gaon Sabha. Settlement Officer, Consolidation vide the order dated 9th December, 1974 allowed the appeal filed by the petitioners and dismissed the appeal of Gaon Sabha. The matter was carried in revision being Revision No. 570 by Gaon Sabha before Deputy Director of Consolidation who vide impugned order dated 31st July, 1976 allowed the revision and set aside the patta on the limited ground that patta being in excess of permissible limit as provided under Section 198(3) of the Act, is invalid. Other aspects of the case was not examined and left open.

3. Shri P.N. Saksena, learned Senior Counsel for the petitioners has not disputed that the patta in question is not excess of the area, as mentioned in Section 198(3) of the Act. His stand is that the patta is valid as it is in respect of two petitioners. The area of the land under the lease-deed if is divided between these two petitioners, the land in the share of each person would be within prescribed limit.

4. Shri D.D. Chauhan, learned counsel for Gaon Sabha, on the other hand, supports the impugned order.

5. Considered the respective submissions of the learned counsel for the parties and perused the record.

6. The total area of four plots which have been leased out to the petitioners, as mentioned in the order of Deputy Director of Consolidation and not disputed in the writ petition is 5 Biswa; 3 Bigha and 6 Biswa; 2 Bigha and 18 Biswa; and 2 Bigha and 1 Biswa, which comes out of 8 Bigha and 10 Biswa. Section 198 of the Act provides order of preference in admitting persons to land under Sections 198. The sub-section (3) of Section 198 reads as follows:

"(3) [The land that may be allotted under sub-section (1) shall not exceed:

(i)in the case of a person falling under Clause (c) such areas together with the land held by him as bhumidhar or asami immediately before the allotment would aggregate to 1.26 hectares (3.125 acres);

(ii)in any other case, an area of 1.26 hectares (3.125 acres).]"

7. On a plain and simple reading of the aforesaid provisions would show that a limit has been prescribed with regard to area of the land to be allotted. The keywords are "the land that may be allotted" with respect thereof, prescribed outer limit of area is 1.26 hectares (3.125 acres).

8. Learned counsel for the petitioners reads the above provisions in the manner that area of each allottee (person) should not exceed to 1.26 hectares. He has laid emphasis on the word "person' which occurs in Section 198(3)(i) of the Act. The argument is not convincing and is against the object and purpose of the aforesaid section. Section talks about allotment of land by lease. Herein, the lease is only one lease which is dated 17th October, 1972. The opening words of sub-section "land may be allotted" and "shall not exceed" are the key words to interpret the said sub-section. They undoubtedly, provide that the land that may be allotted shall not exceed the prescribed maximum limit. The lessees may be more than one person. Under the U.P. General Clause Act, singular includes plural also. The lease being singular lease, the argument that it will be spllited up, is misconceived. The prohibition as prescribed is qua a lease. The lease is one and singular, the petitioners are co-lessees. Therefore, sub-section (3) on its plain interpretation does not support the petitioners' contention. In addition to above, the case in hand falls under sub-section (ii) wherein the word "person' has not been used. This is additional reason for not accepting the petitioners' contention. It talks about lease to be allotted and the maximum leased area which can be let out under a lease.

9. There is no merit in the writ petition the writ petition is dismissed with cost of Rs.5000/- (Rupees Five Thousand only).

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 11.11.2011

BEFORE
THE HON'BLE SURENDRA VIKRAM SINGH RATHORE,J.

Criminal Revision No. - 421 of 2001

Ram Pal ...Petitioner
Versus
State of U.P.and others.(2) ...Respondent

Counsel for the Petitioner:
Smt. Sarojini Bala

Counsel for the Respondents:
Govt.Advocate

Criminal Revision-application U/S/ 156 (1) allowed-revision against that by prospective accused-held- not maintainable.

Held: Para 5

Law is settled on the point that a revision on behalf of the prospective accused against an order passed on application under section 156 (3) Cr.P.C. is not maintainable.It has been so held in the case of Pawan Kumar Gupta Vs. State of U.P. 2010 (69) ACC 1003.
Case law discussed:
2010 (69) ACC 1003

(Delivered by Hon'ble Surendra Vikram Singh Rathore,J.)

1. Heard learned counsel for the revisionist, learned counsel for opposite party and the learned A.G.A.

2. The revisionist has moved an application under section 156 (3) Cr.P.C before the Judicial Magistrate which was allowed by the court on13.7.2001 and the concerned police station was directed to register and investigate the case in accordance with law. Feeling aggrieved by the said order, Crl. Revision No. 208 of 2001 was filed in the court of Session which was allowed by the 3rd Additional District & Sessions Judge on 15.9.2001 setting aside the order 13.7.2001 passed by the Judicial Magistrate.

3. The only argument of the learned counsel for revisionist is that a revision on behalf of the prospective accused was not maintainable.

4. Learned counsel for opposite party has submitted that proceedings of complaint with regard to the same incident are pending and in case the revision is allowed then a case shall be registered and they might have to go to jail. Learned counsel for opposite party was inquired about the legal position then he was unable to bring to the notice of the court any law which mandates the maintainability of the revision on behalf of the prospective accused against the order passed against them on an application under section 156 (3) Cr.P.C.

5. Law is settled on the point that a revision on behalf of the prospective accused against an order passed on application under section 156 (3) Cr.P.C. is not maintainable.It has been so held in the case of Pawan Kumar Gupta Vs. State of U.P. 2010 (69) ACC 1003.

6. In view of the settled legal position, this revision is hereby allowed and the order dated 15.9.2001 passed in

Crl. Revision No. 208 of 2001 is hereby set aside.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.11.2011

BEFORE
THE HON'BLE RAJIV SHARMA,J.

Misc. Single No. - 1645 of 2008

Bahori Lal Gupta ...Petitioner
Versus
Commissioner Lko. and others ...Respondents

Counsel for the Petitioner:
Sri Pankaj Kumar Srivastava

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 226-writ petition-maintainability-cancellation of agreement to run Fair Price Shop-performing Public Distribution System duty validity of cancellation dealt by Public Officer-Appeal denied by commissioner-subject to judicial review by writ court-held-petition maintainable.

Held: Para 11

In view of the above discussion, I am of the considered opinion that the order passed by the Sub Divisional Magistrate/District Magistrate cancelling the licence and the Commissioner, who rejected the appeal preferred against the order of cancellation are public servant and decision taken by them in the garb of a legislation cannot escape judicial review under Article 226 of the Constitution and, therefore, a writ against such an order would lie at the behest of the person aggrieved, irrespective of the nature of his service rendered by him. Moreover, by entering into an agreement, a civil right exists in favour of the petitioners which cannot be taken away on the whims of the authorities.

Case law discussed:
1993 (1) ALR 121; AIR 1964 SC 72; (1999) 1 SCC 741; 2009 (1) ADJ 379 (DB); (1993) 3 SCC 259; JT 1996 (3) SC 722; 2001 (19) LCD 513; 2006 (24) LCD 1521; 2008 (16) LCD 891; [2011 (29) LCD 626]

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

1. By means of this writ petition, the petitioner has prayed for quashing the impugned orders dated 04.03.2008 passed by the respondent no.1 and order dated :January,2007 passed by the respondent no.2 contained in Annexure nos. 1 and 2 in the writ petition and also for issuing a writ in the nature of mandamus commanding the respondents not to give effect the aforesaid impugned orders as well as not to initiate the process for fresh allotment of shop.

2. Heard learned Counsel for the parties.

3. The petitioner is a Fair Price Shop licensee and the question involved in this case is as to whether non-furnishing the copy of the complaint or preliminary enquiry report or the inspection report or any other document, which has been utilized against the Fair Price Shop licensee while cancelling the licence, amounts to violation of principle of natural justice or not. The assertion of the petitioner is that the plea of opportunity of hearing and non-supply of relevant documents, which were taken into consideration by the Licensing Authority, was raised before the appellate authority but the same has not been dealt with in its correct perspective.

4. According to State Counsel, to ensure proper distribution of essential commodities, which are bare need of the

public they are to be distributed through the public distribution system for which Essential Commodities Act, 1955 was enacted by the Central Government. Pursuant to the powers conferred by the Public Distribution System (Control) Order, the State Government for maintaining the supplies of the food grains and other essential commodities and to secure equitable distribution and availability at fair price vide notification dated 20.12.2004, notified U.P. Schedule Commodities Distribution Order, 2004. This Distribution Order was notified by the State Government in exercise of the powers conferred under Section 3 of the Act of 1955 read with provisions contained in Public Distribution System (Control) Order, 2001. Apart from the U.P. Schedule Commodities Distribution Order, 2004 (in short referred to as the Distribution Order of 2004) which is w.e.f. 30.12.2004, the State Government issued a Government Order dated 29.7.2004 on the subject of monitoring/regulating various kind of procedures. Elaborating his arguments, State Counsel submitted that Clause-4 of the Distribution Order provides that a person granted fair price shop is to sign an agreement under sub-clause(3) for running the fair price shop before the competent authority prior to the coming into effect of the said appointment. Clause 25 provides observance of the conditions as the State Government stipulates whereas Clause 28(3) of the Order provides filing of appeal against the order of suspension or cancellation of the agreement. Thus a person appointed to run a fair price shop acts as an agent of the State Government, who is under an obligation to sign an agreement. The agent so appointed is under an obligation to maintain records of supply and distribution of scheduled commodities, maintenance of accounts, keeping of the registers filing returns and issue of receipt to Identity Card holder and other matters. In some of the writ petitions, it has been indicated in the counter affidavit that the cancellation of agreement relating to fair price shop is a non-statutory agreement and the orders regarding cancellation of non-statutory agreement are not amenable to writ jurisdiction before this Court. In this regard reliance has been placed on Gopal Das Sahu and another vs. State of U.P. and others; 1991 All.L.J.498 and Kallu Khan vs. State of U.P. and another [2008(6) ADJ 443 (DB)] and other cases. Sri Rakesh Srivastava, Standing Counsel also contended that when a fair price shop licence holder commits irregularities or is found to have indulged in the activities in contravention to the licence of Fair Price shop dealer, his agreement/licence is suspended. Before passing order of suspension of the licence, there is no contemplation of any notice and opportunity. Adverting to the present cases, he submitted that the order of cancellation was passed after providing the licence holder an opportunity of hearing which would tantamount to passing the order after observing the principles of natural justice and as such it cannot be said that there was any infirmity. He further submitted that the appeal has also been dealt with by the Appellate Authority in a proper manner and after recording cogent and plausible findings and only then, it was dismissed. Therefore, the writ petitions are liable to be dismissed on the aforesaid grounds. In Sri Pappu vs. State of U.P. and others [2000(18) LCD 321] the question for consideration before the Division Bench was as to whether the writ petition is maintainable against the order of cancellation of fair price shop in view of the Full Bench decision of the Court in the U.P. Sasta Galla Vikreta Parishad vs. State of U.P. and others 1993(1) ALR 121. The

Division Bench presided over by Hon'ble N.K.Mitra, Chief Justice (as he then was) while examining the amended provisions of U.P. Panchayat Raj Act in view of the Article 243-G of the Constitution under which Gram Panchayat has been entrusted with the function of performing public distribution system, the Court while holding that writ petition is maintainable and observed in paragraph 9 of the report as under:-

"...Allotment of fair price shop or its cancellation is now a statutory function of the Gram Panchayat Exercise of statutory power by Gram Panchayat for collateral purposes is interdicted by Article 14 of the Constitution. Arbitrary grant or cancellation of fair price shop is open to judicial review under Article 226. The Full Bench decision, reliance on which has been placed by the learned Single Judge in dismissing the writ petition as not maintainable, in our opinion, has been rendered obsolete in view of the constitutional and statutory amendments referred to above."

5. After issuance of various other Government Orders, the matter again gained attention of this Court inre:Kallu Khan vs. State of U.P. and another [supra] before the Division Bench of this Court an objection was raised by the Standing Counsel placing reliance on the Full Bench judgement in U.P. Sasta Galla Vikreta parishad (supra) that the right of petitioner being contractual in nature and not statutory, the remedy, if any lies, either by filing appeal before the appropriate authority as provided under the relevant Government Orders and for alleged breach of contract, the writ petition under Article 226 of the Constitution is not maintainable. The Division Bench after considering the Full Bench decision in U.P. Sasta Galla Vikreta Parishad, Sri Pappu vs. State of U.P. [supra], Harpal vs. State of U.P. and others 2008(3) ADJ 36 and various other cases, which has been relied by the State Counsel, observed in para 59 of the report as under:-

" In view of the above discussion even if we come to the conclusion that as such the petitioner may not be non-suited on the ground that the writ petition is not maintainable yet it cannot be said that the Writ Court must entertain the writ petition whenever there is any complaint of breach of certain contractual rights. The legal position is otherwise. As observed by the Apex Court in Swapan Kumar Pal (supra) the scope of judicial review is only limited to interfere when there is any error in decision-making process and not otherwise. Even if the writ petition, as such , may not be dismissed on the ground that it is not maintainable yet we are of the view that in such matters exercise of discretion under Article 226 of the Constitution by entertaining writ petition would not be prudent unless it is shown that there is any violation of statutory provisions particularly when alternative remedy is available to the petitioner."

6. From the legal proposition reproduced herein above, it is evident that there is no blanket ban in entertaining the writ petitions. It is true that ordinarily the remedy for breach of contract is a suit for damages or for specific performance and not a writ petition under Article 226 of the Constitution. However, where the contractual dispute has a public law element, the power of judicial review under Article 226 may be invoked. In civil suit, emphasis is on the contractual right whereas the emphasis in writ petition is only the

validity of the exercise of power by the authority.

7. It is pertinent to add that issue whether the writ petition is maintainable or the person aggrieved is entitled to invoke the writ jurisdiction was considered by the Apex Court in following cases:-

In Pratap Singh Keron v. State of Punjab AIR 1964 SC 72, the Supreme Court observed as under:-

" The Rule of law and Article 226 is designed to ensure that each and every authority in the State including Government of India acts bonafide and within the limits of its power and we consider that when the Court is satisfied that there is an abuse and misuse of power and its jurisdiction is invoked, it is incumbent on the Court to afford justice to the individual."

8. In the case of U.P.State Co-operative Bank Limited v. Chandra Bhan Dubey (1999) 1 SCC 741, the Supreme Court has laid down the following proposition:-

"... The Constitution is not a statute. It is a fountainhead of all statutes. When the language of Article 226 is clear, we cannot put shackles on the High Courts to limit their jurisdiction by putting an interpretation on the words which would limit their jurisdiction. When any citizen or person is wronged, the High Court will step into to protect him, be that wrong be done by the State, an instrumentality of the State, a company or a co-operative society or association or body of individuals, whether incorporated or not, or even an individual. Right that is infringed may be under part Part III of the Constitution or any other right which the law validly made might confer upon him."

9. A Division Bench of this Court in the case of Meena Srivastava v. State of U.P. 2009(1)ADJ 379(DB) held as under:-

" In the facts of the present case writ petition has been filed against an action of a Government Officer, who is public authority. The writ petition under Article 226 of the Constitution of India is maintainable against a public authority. The public authorities, who are State authorities and instrumentalities are not to act arbitrarily, irrationally or unreasonably. Any action of public authority can always be impugned in the writ petition and it cannot be said that the writ petition is not maintainable in such case."

10. Thus the consistent view of the court is that actions and the orders of public officers are amenable to judicial review even if they may arise out of a contract or any scheme of the Government, and therefore, the writ petition cannot be thrown out simply on the technical ground that it is not maintainable.

11. In view of the above discussion, I am of the considered opinion that the order passed by the Sub Divisional Magistrate/District Magistrate cancelling the licence and the Commissioner, who rejected the appeal preferred against the order of cancellation are public servant and decision taken by them in the garb of a legislation cannot escape judicial review under Article 226 of the Constitution and, therefore, a writ against such an order would lie at the behest of the person aggrieved, irrespective of the nature of his service rendered by him. Moreover, by

entering into an agreement, a civil right exists in favour of the petitioners which cannot be taken away on the whims of the authorities.

12. At this juncture, it would be relevant to point out that in Rajendra Prasad vs. State of U.P. and others [decided on 9th February, 2009 by the Apex Court] the grievance of the appellant before the High Court was that allotment of Fair Price shop at village Kanakpur, district Bhadohi was cancelled by the authority without giving him opportunity of hearing. The High Court summarily dismissed the writ petition. Hence, the appeal by Special leave was preferred by the appellant. The Apex Court after examining the matter and finding that the opportunity of hearing was not afforded, allowed the appeal and quashed the order cancelling the allotment of Fair Price Shop of the appellant and the order passed by the High Court in the writ petition.

13. This case has been referred to show that the Apex Court did not decline to interfere in the matter on the ground that allotment of fair price shop is a contractual agreement or said that it is not amenable to writ jurisdiction. On the other hand, from this judgement of the Apex Court, it clearly emanates that when there is violation of principles of natural justice, the court can very well interfere in exercise of its discretionary power under Article 226 of the Constitution.

14. Here, it is not in dispute that in all the aforesaid writ petitions, petitioners have complained that the order of cancellation has been passed in blatant disregard of the principles of natural justice as the copies of the documents utilized against them were not furnished.

15. Against the order of cancellation, the petitioner has approached the Commissioner by filing an appeal but the appellate authority also dismissed his appeal. Petitioner, after rejection of his appeal, has no other statutory remedy except to invoke the jurisdiction of this Court under Article 226 of the Constitution questioning the validity of the appellate order including the order of cancellation. It may be clarified that the appeal against the cancellation of allotment of fair price shop is creation of the statute. The order of Appellate Authority has also been assailed on various grounds. Therefore, the proceedings of an authority adjudicating upon question affecting the rights , are amenable to writ jurisdiction of the High Court under Article 226 of the Constitution.

16. To clarify further, it may be mentioned that it is a well recognised law that any authority or body of persons constituted by law or having legal authority to adjudicate upon question affecting the rights of a subject and enjoined with a duty to act judicially or quasi-judicially is amenable to the certiorari jurisdiction of the High Court.

17. In the backdrop of the aforesaid facts, the order of cancellation of license to run fair price shop under the public distribution system subject to appeal, is ultimately amenable to writ jurisdiction as statutory authority cannot claim immunity from judicial review in respect of its functions vis-a-vis public distribution system. Thus the argument advanced by the State Counsel regarding maintainability of writ petition is wholly misconceived and it is held that the writ petitions are maintainable.

18. Next, the precise ground though not taken in the counter affidavit but argued by the State Counsel is that it is not mandatory to furnish copy of the preliminary inquiry report or other material relied upon by the licensing authority for cancelling the licence of the fair price shop agreement/licence of the petitioner. Rules of natural justice are not applicable in the matter of cancellation of fair price shop agreement/licence as is required under the service jurisprudence and other matters. The authority concerned under law is not required to furnish copy of the preliminary enquiry report or other documents, therefore, as asserted by the petitioners, there is no violation of principles of natural justice. He clarified that the proceedings in question regarding inquiry, suspension and cancellation of fair price shop allotment of the petitioner have been conducted in consonance with the provisions contained in G.O. dated 29.7.2004, which is self contained and as such there was no question of providing copy of enquiry report to the petitioner.

19. Natural justice has a prime role to play in the matter where the justice has to be secured. Natural justice is another name for commonsense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common sense/ liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form.

20. The expressions ?natural justice? and ?legal justice? do not present a watertight classification. It is the substance of justice, which is to be secured by both, and whenever legal justice fails to achieve this solemn purpose, natural justice is called in aid of legal justice. Natural justice relieves legal justice from unnecessary technicality, grammatical pedantry or logical prevarication. It supplies the omissions of a formulated law. As Lord Buckmaster said, no form or procedure should ever be permitted to exclude the presentation of a litigant?s defence.

21. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue. These principles are well settled. The first and foremost principle is what is commonly known as audi alteram partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle.

22. It must be precise and unambiguous. It should apprise the party determinatively of the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. After all, it is an approved rule of fair play. The concept has gained significance and shades with time. When the historic document was made at Runnymede in 1215, the first statutory

recognition of this principle found its way into the "Magna Carta". The classic exposition of Sir Edward Coke of natural justice requires to "vocate, interrogate and adjudicate". In the celebrated case of Cooper V. Wandsworth Board of Works (1863) 143 ER 414 the principle was thus stated: (ER p.420) "[E]ven God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam' (says God), 'where art thou' Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat?"

23. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice. Inquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than decision in a quasi-judicial enquiry. [emphasis supplied]

24. Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statue or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute.

25. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the fact and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. The expression ?civil rights but of civil liberties, material deprivations and non-pecuniary damages in its wide umbrella comes everything that affects a citizen in his civil life.

26. In D.K. Yadav Vs. J.M.A. Industries; (1993) 3 SCC 259 the Apex Court while laying emphasis on affording opportunity by the authority which has the power to take punitive or damaging action held that orders affecting the civil rights or resulting civil consequences would have to answer the requirement of Article 14. The Hon'ble Apex Court concluded as under: -

"The procedure prescribed for depriving a person of livelihood would be liable to be tested on the anvil of Article 14. The procedure prescribed by a statute or statutory rule or rules or orders affecting the civil rights or resulting in civil consequences would have to answer the requirement of Article 14. Article 14 has a pervasive procedural potency and versatile quality, equalitarian in its soul and principles of natural justice are part of Article 14 and the procedure prescribed by law must be just, fair and reasonable, and not arbitrary, fanciful or oppressive."

27. In National Building Construction Corporation v. S. Raghunathan; (1998) 7 SCC 66, the Apex Court in unequivocal words held that a person is entitled to judicial review, if he is able to show that the decision of the public authority affected him of some benefit or advantage which in the

past he had been permitted to enjoy and which he legitimately expected to be permitted to continue to enjoy either until he is informed the reasons for withdrawal and the opportunity to comment on such reasons.

28. At this juncture, it would be relevant to produce relevant portion of paragraph 34 of the judgment rendered in State Bank of Patiala and others v. S.K.Sharma, JT 1996(3) SC 722. Though this decision was given in a service matter but the Hon'ble Apex Court has dealt with the principles of natural justice and the result, if it is not followed:-

(1) Where the enquiry is not governed by any rules/regulations/ statutory provisions and the only obligation is to observe the principles of natural justice-or, for that matter, wherever such principles are held to be implied by the very nature and impact of the order/action-the Court or the Tribunal should make a distinction between a total violation of natural justice (rule of audi alteram partem) and violation of a facet of the said rule, as explained in the body of the judgment. In other words, a distinction must be made between "no opportunity" and no adequate opportunity, i.e. between "no notice"/ "no hearing" and "no fair hearing". (a) In the case of former, the order passed would undoubtedly be invalid (one may call it "void" or a nullity if one chooses to). In such cases, normally, liberty will be reserved for the Authority to take proceedings afresh according to law, i.e. in accordance with the said rule (audi alteram partem). (b) But in the latter case, the effect of violation (of a facet of the rule of audi alteram partem) has to be examined from the standpoint of prejudice, in other words, what the Court or Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/employee did or did not have a fair hearing and the orders to be made shall depend upon the answer to the said query. (It is made clear that this principle (No.5) does not apply in the case of rule against bias, the test in which behalf are laid down elsewhere.) (2) While applying the rule of audi alteram partem (the primary principle of natural justice) the Court/Tribunal/Authority must always bear in mind the ultimate and over-riding objective underlying the said rule, viz., to ensure a fair hearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them.

29. In M/s Mahatma Gandhi Upbhokta Sahkari Samiti vs. State of U.P. and others 2001(19)LCD 513 the controversy involved was that the order of cancellation was passed on the basis of inquiry conducted by Sub Divisional Magistrate but the copy of the inquiry report on which reliance was placed was not furnished to the petitioner.

30. A Division Bench of this Court held that when report of inquiry has been relied upon, that report has to be furnished to the person, who is affected by the same.

31. The said legal position has been reiterated and followed in a number of decisions rendered by this Court in the case of Dori Lal vs. State of U.P. and others 2006(24)LCD 1521, it has been held that the order cancelling the licence passed without the petitioner being provided the copy of the resolution of the village Panchayat as well as the enquiry report, if any and without being afforded opportunity of submitting explanation and hearing amounts to gross violation of principle of

natural justice and hence the order is liable to be quashed.

32. In Rajpal Singh vs. State of U.P. and others 2008(16) LCD 891, it has been held by this Court that non-furnishing of the inspection report of the Supply Inspector, which was relied upon for cancellation of the licence, amounts to violation of principle of natural justice, hence, the order of cancellation as well as the appellate order was not sustainable in the eyes of law.

33. Recently, a co-ordinate bench of this Court in Sita Devi vs. Commissioner, Lucknow & others [2011(29) LCD 626] held that the action of the authority in passing the order of cancellation without supplying the copy of the preliminary enquiry report while proving the charges against the petitioner on the basis of said enquiry report is hit by the grave legal infirmity and whole action of the authority is in great disregard of the principles of natural justice.

34. After peeping into the contentions of both the parties and the series of case laws, referred to above, I am of the considered opinion that the cancellation of a agreement/licence of a party is a serious business and cannot be taken lightly. In order to justify the action taken to cancel such an agreement/licence, the authority concerned has to act fairly and in complete adherence to the rules/guidelines framed for the said purposes including the principles of natural justice. The non-supply of a document utilized against the aggrieved person before the cancellation of his allotment of fair price shop licence/agreement offends the well-established principle that no person should be condemned unheard.

35. Thus from the series of decisions, referred to herein-above, it clearly comes out that the preliminary enquiry report, inspection report or complaint or any other document which is utilized by the authority while cancelling the licence of a fair price shop licence, same has to be supplied to the licence holder and personal hearing is also to be afforded otherwise the proceedings would be in blatant disregard of the principles of natural justice.

36. In view of the above, the impugned orders passed by the appellate authority and the order of cancellation are hereby quashed. Needless to say that this order shall not preclude the competent authority from passing appropriate order in accordance with law.

37. Accordingly, the writ petition stands allowed .

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.11.2011

BEFORE
THE HON'BLE SYED RAFAT ALAM,C.J.
THE HON'BLE KRISHNA MURARI,J.

Special Appeal No. 1712 of 2010

Ashwani Kumar Gautam ...Appellant
Versus
State of U.P. and others ...Respondents

Counsel for the Appellant:
Sri Alok Kumar Yadav

Counsel for the Respondents:
Sri M.C. Singh
Sri Dushyant Singh
C.S.C.

U.P. Intermediate Education Act 1921, Chapter III Regulate 103-Section 16G-Compassionate Appointment-petitioner's

father working on Class III Post-died in harness on 01.05.1983-on 27.01.1994 offered of class 4th post-not joined-but subsequently joined on class III post under protest-approved by DIOS-on consideration of claim for arrears of salary-appointment on class III post cancelled-Single Judge rightly declined to interfere-once the appellant joined class 4th post-can not claim benefit of amended provision through notification dated 02.02.1995-having no force of retrospective effect.

Held: Para 18

In view of the aforesaid observations of the Division Bench with which we are in respectful agreement, the submission advanced by learned counsel for the appellant based upon the note to Regulation 103 has no force.

Case law discussed:

1994 Supp. (3) SCC 661; AIR 1994 SC 845; 2006 (6) ALJ 449

(Delivered by Hon'ble Syed Rafat Alam,C.J.)

1. This is an intra-court appeal under the Rules of the Court arising from the judgment and order dated 16th September, 2010 of the learned Single Judge dismissing the appellant's Writ Petition No. 42106 of 2008.

2. The short facts giving rise to this appeal is that the father of the appellant was a Class-III employee of S.K. Inter College, Maharara in the district of Hathras/Mahamaya Nagar (hereinafter referred to as the "institution'), which is a recognized institution governed by the provisions of the U.P. Intermediate Education Act, 1921 (for short "the Act') and the regulations framed thereunder. Appellant's father died in harness on 01.05.1993. He, therefore, made an application for giving compassionate appointment. He was, however, offered appointment against Class-IV post on 27.01.1994, but he did not join and made a request to appoint him on a post commensurate to his qualification. Thereafter, he was offered appointment against a Class-III post, which he claims to have joined under protest and the same was also approved by the District Inspector of Schools on 18.02.1994. The appellant, however, started making request to appoint him as Assistant Teacher keeping in view the fact that he possessed the requisite qualification for the said post. He approached this Court by filing Civil Misc. Writ Petition No. 54385 of 2003, which was disposed of vide order dated 11.12.2003 with the direction to the District Inspector of Schools, Hathras to consider the case of the petitioner-appellant and decide the same in accordance with law within a period of two months.

3. The District Inspector of Schools, Hathras, pursuant to order dated 11.12.2003, considered the case of the petitioner-appellant and vide order dated 13.01.2004 decided the representation holding that he was entitled for being appointed as Assistant Teacher. Further case set up by the appellant is that he was given appointment on the post of Assistant Teacher vide appointment order dated 31.01.2004 issued by the Manager of the institution and in pursuance thereof, he joined the post on 03.02.2004. His salary bills were regularly being forwarded, but the payment of salary was not made. He again approached this Court by filing Writ Petition No. 31905 of 2004 seeking a writ of mandamus to command the respondents to make payment of his salary.

4. It appears that the controversy regarding claim of the appellant for payment of salary on the post of Assistant

Teacher remained pending. The then District Inspector of Schools vide letter dated 30th June, 2004, sought clarification from the Joint Director of Education whether the petitioner-appellant was entitled for payment of salary on the post of Assistant Teacher. Vide order dated 17.07.2008, the District Inspector of Schools rejected the claim of the petitioner-appellant for payment of salary and the approval accorded to his compassionate appointment as Assistant Teacher was cancelled. Aggrieved, the appellant approached this Court. Learned Single Judge finding that the petitioner-appellant having once availed the benefit of compassionate appointment in the year 1994, the right to such appointment stood exhausted and he does not have indefeasible right to claim appointment on compassionate basis as Assistant Teacher, dismissed the writ petition.

5. Learned counsel for the appellant vehemently contended that since the appellant holds requisite qualification for being appointed as Assistant Teacher, the same could not have been cancelled after giving him such appointment. He further sought to argue that under Regulation 103 of Chapter III, the dependent has to be given compassionate appointment keeping in view his qualification and since the appellant holds the requisite qualification prescribed for Assistant Teacher, he is liable to be given compassionate appointment on said post. Relying on the note appended to Regulation 103, it has been urged that since the said regulation has been made applicable in relation to those employees, who have died on or after 1st January, 1981, the petitioner-appellant having requisite qualification, ought to have been given compassionate appointment on the post of Assistant teacher.

6. Learned Standing Counsel refuting the submissions advanced on behalf of the appellant contended that once having accepted the appointment offered to him on a Class III post on compassionate grounds in the year 1994, he has no right to claim appointment on the teaching post subsequently.

7. In order to appreciate the rival contention and controversy involved, it would be relevant to examine the provisions contained in Regulation 103 of Chapter III. Regulation 101 to 107 of Chapter III provides the procedure for appointment on the post of Principal, Teachers as well as Class III and Class IV posts. Regulation 103 of Chapter III framed under Section 16G of the Intermediate Education Act deals with the appointment on compassionate ground. Regulations 101 to 107 were inserted in Chapter III vide Government Notification dated 30.07.1992.

8. The relevant Regulation 103, as it originally stood at the time of insertion, reads as under:-

"103. Notwithstanding anything contained in these regulations, where any teacher or employee of ministerial grade of any recognised, aided institution, who is appointed accordingly with prescribed procedure, dies during service period, then one member of his family, who is not less than eighteen years in age, can be appointed on the post of teacher in trained graduate grade or on any ministerial post, if he possesses prescribed requisite academic qualifications, training eligibilities, if any, and he is otherwise fit for appointment :

Explanation.- For the purpose of this regulation "member of the family" means widow or widower, son, unmarried or

widowed daughter of the deceased employee.

Note.- This regulation and Regulations 104 to 107 would apply in relation to those employees who have died on or after 1 January, 1981."

9. Thus, initially the Regulation made a provision for making compassionate appointment only on a non-teaching post. Regulation 101 and 103 to 107 were again substituted vide notification dated 02.02.1995. The substituted Regulation 103 reads as under:-

"103. Notwithstanding anything contained in these regulations, where any teacher or employee of ministerial grade of any recognised, aided institution, who is appointed accordingly with prescribed procedure, dies during service period, then one member of his family, who is not less than eighteen years in age, can be appointed on the post of teacher in trained graduate grade or on any ministerial post, if he possesses prescribed requisite academic qualifications, training eligibilities, if any, and he is otherwise fit for appointment:

Provided that anything contained in this regulation would not apply to any recognised aided institution established and administered by any minority class.

Explanation.- For the purpose of this regulation "member of the family" means widow or widower, son, unmarried or widowed daughter of the deceased employee.

Note.- This regulation and Regulations 104 to 107 would apply in relation to those employees who have died on or after 1 January, 1981."

10. It is for the first time, vide notification dated 02.02.1995, provision was made for making compassionate appointment on a teaching post as well, provided the incumbent was having requisite qualification prescribed for the post. Thus in 1994, when the petitioner was offered appointment against a Class III post, which he claims to have joined under protest and was duly approved by the District Inspector of Schools on 18.02.1994, unamended Regulation 103 was in force under which a compassionate appointment could only have been made on a non-teaching post, inasmuch as the amended Regulation 103 making a provision of compassionate appointment on a teaching post, was enforced vide notification dated 02.02.1995.

11. The question which arises in this appeal for consideration is whether once compassionate appointment is accepted, can there be a second consideration on a higher post under the same right.

12. It is an admitted fact that the appellant accepted the offer of appointment against a Class-III post and pursuant thereto, he joined the service on 18th February, 1994. We are, therefore, of the considered view that the appellant, having accepted the compassionate appointment against a Class-III post, his right to be considered under the Act/Regulations is exhausted. The appellant, at the most, was entitled to be considered for giving compassionate appointment. It does not give him indefeasible right to claim appointment against his choicest post. Therefore, we are of the considered view that the appellant cannot now apply or pursue to reconsider him claim under the same provision for giving a higher position keeping in view his qualification. Our view

finds support from the enunciation of law made by the Apex Court in **State of Rajasthan Vs. Umrao Singh, 1994 Supp. (3) SCC 661 wherein it has been held as under:-**

"Admittedly, the respondent's father died in harness while working as Sub-Inspector, C.I.D. (Special Branch) on 16.03.1988. The respondent filed an application on 08.04.1988 for his appointment on compassionate ground as Sub-Inspector or LDC according to the availability of vacancy. On a consideration of his plea, he was appointed to the post of LDC by order dated 14.12.1989. He accepted the appointment as LDC. Therefore, the right to be considered for appointment on a compassionate ground was consummated. No further consideration on compassionate ground would ever arise. Otherwise, it would be a case of "endless compassion". Eligibility to be appointed as Sub-Inspector of Police is one thing, the process of selection is yet another thing. Merely because of the so-called eligibility, the learned Single Judge of the High Court was persuaded to the view that direction be issued under proviso to Rule 5 of Rules which has no application to the facts of this case."

13. Again in the case of **State of M.P. Vs. Ramesh Kumar Sharma, AIR 1994 SC 845,** the Apex court has held that a person claiming compassionate appointment has no right to any particular post of his choice.

14. In view of the exposition of law by the Apex Court, it stands concluded that once an incumbent accepts the post offered to him under the Rules or Regulations governing compassionate appointment, the right extended to him under the said Rules or Regulations, stands exhausted and there cannot be any second consideration for the said right.

15. There is yet another aspect of the matter. In 1994, when the appellant exercised the right given to him by Regulation 103 for being considered for compassionate appointment, there was no provision for making such an appointment on a teaching post. The amended Regulation providing consideration for compassionate appointment on a teaching post was enforced by substituting Regulation 103 on 02.02.1995. Thus, in the absence of any provision, at the time of consideration of the appellant's case for making compassionate appointment on a teaching post, he could not have been considered for being offered appointment on the said post.

16. Learned counsel for the appellant referring to the note appended to Regulation 103 providing that this Regulation and Regulations 104 to 107 shall be made applicable in respect of those employees who have died on or after January 1981, urged that the effect of the note is that any person, who has received compassionate appointment prior to 02.02.1995 can claim appointment on another post after the amendment in the Regulation.

17. This issue stands answered by a Division Bench of this Court in the case of **Shardanand Tiwari Vs. State of U.P. & Ors., 2006 (6) ALJ 449.** In paragraph 13 of the said judgment, it has been held as under.

"13. Learned counsel for the appellant has also referred to Regulation 103 of Chapter III in which a note has been made that this regulation and Regulations 104 to 107 would apply in relation to those

employees who have died on or after 1st January, 1981. The regulations 101 to 107 were inserted in Chapter III on 30th July, 1992. Prior to 30th July, 1992 there was no provision in the U.P. Intermediate Education Act, 1992 or the regulations framed thereunder with regard to giving of appointment to dependent of deceased employee on compassionate ground. However, the appointments on compassionate ground were being given to dependent of deceased employees by virtue of Government order which permitted appointment on compassionate ground with effect from 1st January, 1981. This is the reason why the note has been made in Regulation 103 of Chapter III that this regulation and Regulations 104 to 107 would apply in relation to employees who have died on or after 1.1.1981. Thus the appointment on compassionate ground to the employees who died on or after 1.1.1981 has been protected but the effect of the note is not that any person who has received compassionate appointment prior to 2.2.1995 can claim appointment on another post after the amendment in the regulations."

18. In view of the aforesaid observations of the Division Bench with which we are in respectful agreement, the submission advanced by learned counsel for the appellant based upon the note to Regulation 103 has no force.

19. The idea or the purpose for providing compassionate appointment, which is contrary to the general rule of appointment, is to mitigate the hardship of the dependents of the deceased employee who died leaving behind his dependents in penury. Such appointment is to be given immediately within the shortest possible time after the death of the deceased so that his family may not be ruined. In the case in hand, the appellant's father died in the month of May, 1993, as noticed above, and he was given compassionate appointment, pursuant to which he joined in the month of February, 1994 and, thus, the right to be considered under Regulation 103 stands exhausted. Regulation 103 does not confer or give right to give second consideration for giving appointment on the basis of qualification as it would be against the basic idea of giving compassionate appointment.

20. Thus, we do not find any error in the order of the learned Single Judge. The appeal, accordingly, fails and stands dismissed.

21. However, the appellant would be entitled to continue as Class III employee in terms of the order of the learned Single Judge.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.11.2011

BEFORE
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE PANKAJ MITHAL, J.

Special Appeal No.1731 of 2010

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

Counsel for the Appellant:
Sri B.N. Singh
Sri Satyaveer Singh

Counsel for the Respondents:
C.S.C.

Constitution of India-Article 226-Compassionate appointment-petitioner being Madhyama from Hindi Sahitya Sammelan-offered appointment on post

of Junior clerk-under Dying in Harness Rules-provided she produce typing certificate within 6 month-failed to do so-in mean time during verification found that she was not qualified-as Madhyama is not equivalent to Intermediate-as Sahitya Sammellan a society having no educational Institutions-no statutory power to award such certificate-Single Judge rightly declined to interfere but directed appointment on class 4th post-need no interference.

Held: Para 16

In the aforesaid circumstances, we fully agree with the reasoning given by the learned Single Judge in the judgment cited as above and reiterate that the Prathama and Madhyama (Visharad) examination conducted by the Hindi Sahitya Sammelan are not equivalent to the High School and Intermediate Examination conducted by the Board of High School and Intermediate Education U.P. The petitioner's qualification of Madhyama (Vishrad) is thus not equivalent to Intermediate Examination, and thus the petitioner was not qualified and eligible to be appointed as a clerk.

Case law discussed:

2006 (1) UPLBEC 719; Purshottam Das Agrawal v. DIOS, Allahabad (Writ Petition No.18772 of 1993) decided on 5.7.1999; (2003) 2 UPLBEC 1129; MANU/UP/1890/2005; MANU/UP/0348/2008; JT 2010 (6) SC 306

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

1. We have heard Shri B.N. Singh, learned counsel for the appellant. Shri J.K. Tiwari, learned Standing Counsel appears for the State respondents.

2. This intra court special appeal is directed against the short judgment of learned Single Judge dated 23.9.2010 by which he dismissed the writ petition filed by the petitioner-appellant against the order of the District Magistrate, Etah dated 25th September, 2008 cancelling the letter of her appointment dated 16th December, 1996, on the post of clerk on compassionate ground on the death of her husband, who died in harness, serving as a clerk in the Collectorate.

3. In the order dated 25th September, 2008 passed by the District Magistrate, he has observed that the petitioner-appellant was appointed on compassionate ground with the condition that she will learn typing within six months of her appointment dated 16th December, 1996. She did not produce any certificate of learning typing for a long period of time. Later on it was found that she was not eligible to be appointed as she did not have essential educational qualifications to be appointed on the post of Junior Clerk. She had passed High School examination in 1981 and had declared that she had passed Madhyama First Part (Visharad) and Madhyama Second Part (Visharad) examination conducted by the Hindi Sahitya Sammelan, Prayag, which is not equivalent to the Intermediate Examination.

4. The District Magistrate got her educational qualifications verified from the Secondary Education Board, U.P. through DIOS, Etah. The Secretary, Secondary Education Board by his letter dated 10th July, 2008 informed that the Prathama, Madhyama and any other examination conducted by the Hindi Sahitya Sammelan, Allahabad is not equivalent to the High School or the Intermediate Examination conducted by the Secondary Education Board, U.P. The petitioner-appellant was given a show cause notice by the District Magistrate on 2nd August, 2008 to establish that she holds educational qualifications to be appointed as Junior

Clerk. In her reply dated 5th August, 2008 she requested for one month's time to reply to the notice on which she was allowed a week's time. On 13th August, 2008 she requested to extend time for one more week as her son was not keeping good mental health and that he had put all the documents including her educational certificates to fire. She finally submitted a reply on 2nd August, 2008 stating that she had passed High School examination in 1981; Madhyama Examination in Samvat 2052, which is equivalent to the Intermediate Examination, and annexed the marksheets of the Second Part of Visharad Examination of Samvat 2052. She also filed copy of the judgment of the High Court dated 10th July, 2008 in Writ Petition No.585 of 2008, Ranveer Singh Vs. State of U.P., which actually related to the dismissal of service on the basis of forged caste certificate.

5. The District Magistrate found that the petitioner does not hold educational qualifications of Intermediate conducted by the U.P. Secondary Education Board, Allahabad or any equivalent qualification and thus her appointment was not in accordance with law and was void.

6. Learned Single Judge held that the petitioner was ineligible to be appointed as the certificate produced by her was not equivalent to the Intermediate Examination, upon verification by the Board. He also found that the ineligibility of the petitioner cannot be cured by virtue of her long years of service as held by the Apex Court in Mohd. Sartaz & Ors. v. State of U.P. & Ors., 2006 (1) UPLBEC 719.

7. Learned Single Judge, thereafter, considered the plea that since the petitioner did not make any mis-representation, she was entitled for compassionate appointment against a post commensurate to her qualification. He directed that even though the impugned order dated 25.9.2008 does not required interference, she is entitled to a writ of mandamus directing the District Magistrate to appoint her against any Class-IV post or any post equivalent and commensurate to her qualification; she would also be entitled to relaxation in age, if she has crossed the upper age limit for such employment.

8. Shri B.N. Singh, learned counsel appearing for the petitioner-appellant submits that the examination of Madhyama First Part (Visharad) and Madhyama Second Part (Vishrad) of which marksheets were produced by the petitioner-appellant, are equivalent to the Intermediate Examination conducted by the U.P. Secondary Education Board and thus the District Magistrate was not correct in cancelling her appointment letter. He has relied upon the judgment of this Court in Sompal Singh Vs. Regional Joint Director of Education, Saharanpur Region, Saharanpur & Ors., Writ Petition No.3036 of 2001 dated 25.1.2001 by learned Single Judge of this Court in which it was held relying upon Government Order dated 22.8.1998 that the State Government has recognised the Prathama and Madhyama Examination conducted by the Hindi Sahitya Sammelan, Allahabad as equivalent to the High School and Intermediate Examination.

9. Learned Single Judge has relied upon another judgment of this Court in Purshottam Das Agrawal v. DIOS, Allahabad (Writ Petition No.18772 of 1993) decided on 5.7.1999, in which it was held that Sahitya Ratan degree obtained

from the Hindi Sahitya Sammelan is equivalent to B.A. for Hindi and Sanskrit and approved qualification for being appointed as teacher for High School subjects. Learned Judge had decided the writ petition on a concession made by learned Standing Counsel that the Madhyama Examination conducted by the Hindi Sahitya Sammelan has been recognised as equivalent to Intermediate Examination and allowed the writ petitions with directions to the Joint Director of Education to decide all the grounds mentioned in the memo of appeal filed before him and to verify the genuineness of the certificates produced in respect of Madhyama and Sahitya Ratna degree obtained from Hindi Sahitya Sammelan, Prayag. He observed as follows:-

"The learned Standing Counsel had accepted the fact that the state government recognises the Prathama and Madhyama examinations conducted by the Hindi Sahitya Sammelan as equivalent to High School and Intermediate Examinations and did not dispute the government order dated 22.8.1998 (filed as Annexure-8 to the writ petition)."

10. Shri B.N. Singh submits that the petitioner was appointed on compassionate ground on the basis of the same certificates, which have now been held equivalent to Intermediate Examination and served for more than 10 years, and thus it will extremely unjust and harsh to cancel her appointment.

11. A counter affidavit of Shri J.K. Jain, Addl. District Magistrate, Etah has been filed on behalf of the State respondents enclosing the letter of the Secretary, Secondary Education Board U.P. Allahabad dated 10.7.2008 written to the DIOS, Etah in pursuance to his letter dated 18th June, 2008 and informing that the Prathama, Madhyama or any other examination held by the Hindi Sahitya Sammelan, Allahabad are not equivalent to the High School and Intermediate Examination conducted by the Secondary Education Board, U.P.

12. The question whether the Madhyama examination conducted by the Hindi Sahitya Sammelan Prayag, Allahabad is equivalent to Intermediate Examination conducted by the U.P. Secondary Education Board, Allahabad is no longer res integra. This Court has time and again considered this question and consistently returned the findings that the Madhyama (Visharad) examination of Hindi Sahitya Sammelan, Allahabad is not equivalent to the Intermediate Examination conducted by the U.P. Secondary Education Board, Allahabad. The judgments of this Court considering the question are as follows:-

(1) **In Sarojani Pandey (Smt.) v. State of U.P. & Ors., (2003) 2 UPLBEC 1129** learned Single Judge of this Court relied upon Government Order dated 28th October, 1998, wherein it was clearly stated that examinations of Prathama and Madhyama conducted by the Hindi Sahitya Sammelan, Allahabad are not equivalent to the High School and Intermediate examination conducted by the Board of High School and Intermediate Education U.P. Allahabad. The Court found that this is the latest order will prevail over the Government Order dated 22nd August, 1998 issued by the Joint Secretary U.P. Government addressed to Director of Education, Allahabad as well as order dated 26th July, 2001, of the Government of India.

(2) **In Kunwar Herash Saran Saxena v. State of U.P. & Anr., Writ Petition No.8579 of 1992** decided on 6.12.2005 **(MANU/UP/1890/2005)** learned Single Judge of this Court observed in paras 3 and 6 as follows:-

"3. The controversy in the facts and circumstances of the present case is confined to the issue as to whether the certificate of Madhyma Visharad obtained by the petitioner from Hindi Sahitya Sammelan satisfies the minimum academic qualifications prescribed for appointment on the post of Junior Clerk. As provided for under the Adhinasth Karyalaya Lipik Vargiya Karmcharivarg (Seedhi Bharti) Niyamavali, 1985 or not. Hindi Sahitya Sammelan has been established under the Hindi Sahitya Sammelan Act, 1962 and Section 22 of the University Grants Commission recognises a right in the said Hindi Sahitya Sammelan to award degrees. As a matter of fact University Grants Commission has notified certain degrees awarded by Hindi Sahitya Sammelan vide notification dated 21.8.2003. However, on record there are various government orders issued by the Central Government recognising the certificate for the purposes of appointment in government service, reference (Notification dated 26.7.2001 Annexure-3 to Rejoinder Affidavit and Notification dated 16.9.1990 Annexure-5 to Rejoinder Affidavit). However, it may be noticed that Government of India had appended a note which reads as follows :

The recognition recorded above is not to be treated equivalent to the full fledged certificate/degree for which it has been equated (Annexure-6 to the Writ Petition).

6. The petitioner has not been able to bring on record any document for establishing that the certificate possessed by the petitioner from the Hindi Sahitya Sammelan was ever recognised as equivalent to intermediate examination by the Governor of the State. All the documents brought on record by the petitioner issued by the Central Government or any of the authority are of no consequence for determination of the issue concerned."

(3) In **Pradeep Kumar son of Mukandi Lal v. State of U.P. & Ors., MANU/UP/0348/2008** this Court once again decided the issue on 23.1.2008 and held as follows:-

"8. Learned Counsel for the respondents has placed reliance on judgment of this Court reported in (2004) 2 UPLBEC 1716; Shailendra Kumar Singh v. State of U.P. and Ors. The question which was considered in the above case, was as to whether degree of Shiksha Visharad given by Hindi Sahitya Sammelan is equivalent to be treated as B.Ed, degree. This Court after considering the provisions of the National Council for Teachers Education Act, 1993 came to the conclusion that degree of Shiksha Visharad from Hindi Sahitya Sammelan being not recognised by National Council for Teacher Education, cannot be held to be equivalent to B.Ed.

9. The petitioner has not brought any material on record to establish that degree of Madhyama (Visharad) of Hindi Sahitya Sammelan has been treated to be equivalent to Intermediate by the State of U.P. It is not disputed that for sending a candidate for B.T.C. Correspondence Course training minimum eligibility is

Intermediate. Learned Counsel for the petitioner at the time of hearing produced a booklet issued by Hindi Sahitya Sammelan, Allahabad containing various letters issued by the State of UP., Government of India and several institutions regarding degrees issued by Hindi Sahitya Sammelan. Reliance has been placed by Counsel for the petitioner on a press note dated 18^th February, 1970 issued by the Government of India along with which a list of organisations conducting different examinations have been issued.

10. A perusal of the above press note relied by Counsel for the petitioner, itself indicates that examination from Hindi organisations is recognised for standard of Hindi prescribed in the equivalent examination. The last paragraph of the press note issued by the Government of India, as quoted above, clearly clarifies that the recognition of this examination is in regard to standard of Hindi prescribed in the equivalent Hindi examination and it is not to be treated as equivalent to full fledged certificate of degree of examination. A copy of the Government order issued by the State of UP. dated 5^th December, 1989 has also been relied by Counsel for the petitioner, which was issued in reference to letter dated 12^th August, 1988 of the Government of India regarding examinations conducted by Hindi organisations. The Government order dated 5^th December, 1989 clearly clarifies that degree of Madhyama (Visharad) issued by Hindi Sahitya Sammelan is equivalent only for standard of Hindi up to that examination and not equivalent to degree or certificate. In this context it is also relevant to refer to provisions of Regulations framed under the UP. Intermediate Education Act, 1921. For the Intermediate examination, which is conducted by Madhyamik Shiksha Parishad, UP. several degrees from different organisation and Universities throughout the country have been mentioned in Chapter-XIV of the regulations and none of the degrees or certificate issued by Hindi Sahitya Sammelan, Prayag has been treated to be equivalent to High School so as to make such candidates eligible to take admission in the Intermediate examination whereas the Purva Madhyamik Examination of Sampurnanand Viswavidyalaya, Varanasi and the examination of Visharad from Kashi Vidya Peeth, Varanasi have been mentioned as equivalent to High School. The B.T.C. Correspondence Course training is imparted to untrained teachers so as to make them eligible for entitlement of trained grades of teachers. The qualification of Intermediate required is for purposes of appointment and the petitioner was required to fulfil the Intermediate qualification for purposes of appointment or imparting B.T.C. Correspondence Course training for becoming entitled to trained grade of Assistant Teacher. Thus the qualification required for appointment of Assistant Teacher is full fledged certificate of Intermediate and the degree of Madhyama (Visharad) issued by Hindi Sahitya Sammelan cannot be treated to be equivalent to Intermediate examination.

11. The petitioner, thus, has failed to substantiate that degree of Madhyama (Visharad) granted by Hindi Sahitya Sammelan to the petitioner in the year 1990 is equivalent to Intermediate Examination. One more fact which is relevant to be noticed, is that petitioner himself appeared in the Intermediate examination conducted by U.P.

Madhyamik Shiksha Parishad and has passed the same in the year 1997. Had his degree of Madhyama (Visharad) from Hindi Sahitya Sammelan equivalent to Intermediate, there was no occasion for the petitioner to pass Intermediate examination of U.P. Madhyamik Shiksha Parishad in the year 1997."

In the aforesaid case learned Single Judge after going through all the relevant Government Orders clearly held that the Madhyama (Visharad) examination is equivalent only for standard of Hindi upto that examination and is not equivalent to any degree or certificate.

(4) In **Manish Kumar v. State of U.P. & Ors., Writ Petition No.45866 of 2007 learned Single Judge of this Court by his judgment dated 29.9.2010** considered all the Government Orders and the judgments in this regard and reiterated that the Prathama certificate issued by the Hindi Sahitya Sammelan is not equivalent to High School certificate issued by the Madhyamik Shiksha Parishad, Allahabad. He quoted the letter of the Secretary of the Madhyamik Shiksha Parishad reporting that the Prathama, Madhyama or any other examination conducted by Hindi Sahitya Sammelan was not equivalent to High School/ Intermediate examination at any time in the past or in the present. The Government Orders produced to support the equivalence were found to be false. In the past the examination conducted by the Hindi Sahitya Sammelan were taken to be equivalent to Class-VIII for appearing in the High School examination of the U.P. Secondary Education Board, but now since it is compulsory for all the students appearing in the High School examination either from any institution or on private basis, to pass Class IX examination, the equivalence of the examinations conducted by the Hindi Sahitya Sammelan are not recognised. Learned Single Judge observed that Chapter XIV of the Regulation framed under the U.P. Intermediate Education Act, 1921 mentions as many as 71 certificates recognised by the U.P. Madhyamik Shiksha Parishad as equivalent to the High School examination for the purposes of appearing in the Intermediate Examination. There is no mention of the Prathama certificate issued by the Hindi Sahitya Sammelan in this list. Para 981 of Chapter 136 of Manual of Government Orders (Revised Edition 1981) also does not mention the equivalence given to Prathma or Madhyama examination to the High School and Intermediate examination conducted by the Secondary Education Board U.P. Learned Single Judge distinguished the judgment in Som Pal Singh v. Regional Joint Director of Education (referred as above) on the ground that it was based upon concession given by learned Standing Counsel, did not dispute the factum of Government Order dated 22.8.1998. The Government Order was thereafter superseded by another Government Order dated 28.10.1998. The factum of supercession has been mentioned in Sarojani Pandey (Supra); Shailendra Kumar Singh v. State of U.P. & Ors., (2004) 2 UPLBEC 1716. Learned Single Judge also noticed that in State of Rajasthan & Ors. v. Lata Arun, AIR 2002 SC 2642 it was noticed by the Supreme Court that the educational certificates of Madhyama issued by Hindi Sahitya Sammelan has been deleted from the recognised qualification vide notification dated 28.6.1985.

(5) In **Rajasthan Pradesh V.S. Sardarshahar & Another v. Union of India & Ors., JT 2010 (6) SC 306** it was

held by the Supreme Court in respect of examination conducted by Hindi Sahitya Sammelan as follows:-

"43. At the cost of repetition, it may be pertinent to mention here that in view of the above, we have reached to the following inescapable conclusions:

(I) Hindi Sahitya Sammelan is neither a University/Deemed University nor an Educational Board.

(II) It is a Society registered under the Societies Registration Act.

(III) It is not an educational institution imparting education in any subject inasmuch as the Ayurveda or any other branch of medical field.

(IV) No school/college imparting education in any subject is affiliated to it. Nor Hindi Sahitya Sammelan is affiliated to any University/Board.

(V) Hindi Sahitya Sammelan has got no recognition from the Statutory Authority after 1967. No attempt had ever been made by the Society to get recognition as required under Section 14 of the Act, 1970 and further did not seek modification of entry No.105 in II Schedule to the Act,1970.

(VI) Hindi Sahitya Sammelan only conducts examinations without verifying as to whether the candidate has come elementary/basic education or has attended classes in Ayurveda in any recognized college.

(VII) After commencement of Act,1970, a person not possessing the qualification prescribed in Schedule II, III and IV to the Act, 1970 is not entitled to practice.

(VIII) Mere inclusion of name of a person in the State Register maintained under the State Act is not enough making him eligible to practice.

(IX) The right to practice under Article 19 (1) (g) of the Constitution is not absolute and thus subject to reasonable restrictions as provided under Article 19 (6) of the Constitution.

(X) Restriction on practice without possessing the requisite qualification prescribed in Schedule II, III, & IV to the Act, 1970 is not violative of Article 14 or ultra vires to any of the provisions of the State Act."

13. The equivalence to the examinations can only be allowed by the State Government after consulting experts looking into various factors such as the teaching facilities, syllabus and the other such candidates. The Courts do not have any authority to do the job of experts and grant such equivalence.

14. In the State of U.P., High School and Intermediate examination are conducted by statutory board namely the U.P. High School and Intermediate Board, Allahabad. Wherever the equivalence is granted, the State Government has to notify the same. Any Government Orders, which may have been issued in the past by way of clarification regarding the qualifications in respect to Hindi or Sanskrit language is concerned cannot be treated as examination equivalent to the examination conducted by the statutory Board.

15. There is another aspect to the matter namely that if the qualification conducted by private societies, in respect of language are treated as equivalent to the statutory boards, the candidates passing the examination from the statutory board will be seriously discriminated in appointments in Government Service, which is regulated by the statutory rules. The Court cannot permit the equivalence to be considered so casually. In Rajsthan Pradesh V.S. Sardarshahar & Anr. (Supra) the Supreme Court considered the legal status of Hindi Sahitya Sammelan and found that it is neither university/ deemed university nor an educational board. It is society registered under the Societies Registration Act and is not an educational institutions imparting education in any subject. There is no school/ college imparting education in any subject affiliated to it. It also does not have any recognition from any statutory authority, even in respect of medical qualifications after 1967.

16. In the aforesaid circumstances, we fully agree with the reasoning given by the learned Single Judge in the judgment cited as above and reiterate that the Prathama and Madhyama (Visharad) examination conducted by the Hindi Sahitya Sammelan are not equivalent to the High School and Intermediate Examination conducted by the Board of High School and Intermediate Education U.P. The petitioner's qualification of Madhyama (Vishrad) is thus not equivalent to Intermediate Examination, and thus the petitioner was not qualified and eligible to be appointed as a clerk.

17. In our view learned Single Judge did not commit any error in law in allowing the writ petition only to the extent that the District Magistrate may ensure that the petitioner is appointed on any Class-IV post.

18. The special appeal is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.11.2011

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

Writ Petition No. 2636 (MB) of 2006

Shiv Badan Pandey and others
...Petitioner
Versus
State of U.P. and others ...Respondents

Constitution of India, Article 226- restoration of the shape of Pond-as recorded in 1356 Fasli by placing reliance on Hinch Lal Tiwari case-prior to dated of vesting plot in question was recorded in Zimman-7-for cultivation of Singhara-in 1359 fasli-by passes of time land ceased to be Taalab-being used for public purpose about 36 houses by Awas and Vikash Parishad apart from schools are situated-no right of any individual to get removed all development and to restore the shape of Taalab which had lost its existence and utility-unless pleaded of community pond raised and accepted-no direction to restore the shop of Pond can be given.

Held: Para 28 and 29

In the case of Hinch Lal Tiwari (supra), their Lordships made an observation that the land which has the character of a pond but due to passage of time some portion of it has dried up and rest of the portion is covered with water, cannot be allotted to anybody for construction of house building or any allied purposes.

Of course, the land which requires restoration of water reservoir for the

purpose of community use cannot be allowed for undertaking any other activity but uprooting the existing developed colonies or houses built thereon at a time when the pond was not in use and rather had fallen into disuse because of drying up cannot be the intention of law.

Case law discussed:
(2001) 6 SCC 496

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

1. This petition initially was filed by seven petitioners, out of whom Ashok Diwakar, petitioner no. 1 and Smt. Anita Shukla, petitioner no. 5 expired during pendency of the writ petition and their names have been deleted.

2. At the outset it would be pertinent to mention that this petition though has been filed in individual capacity, raising a grievance regarding allotment of a piece of land in favour of Nav Chetna Public School, but there is nothing on record nor the counsel for the petitioners could substantiate any action which could have given cause of action to the petitioners to be aggrieved by the said allotment, in their individual capacity.

3. We have, however, proceeded to consider the case on the basis of the pleadings in the writ petition and the pleas as urged by the parties' counsel.

4. Sri Shailendra Singh Chauhan representing the petitioners, vehemently urged that Khasra Plot No. 406 situate in Indira Nagar, Lucknow was, in fact, recorded as Talaab prior to the date of vesting and, therefore, this land could not have been allotted in the name of the school by Awas Evam Vikas Parishad and rather, same should be restored in the shape of Talaab (pond) in view of the dictum of the apex court in the case of ***Hinch Lal Tiwari v. Kamala Devi and others, (2001) 6 SCC 496.***

5. Sri K.S. Pawar, appearing for Awas Evam Vikas Parishad, has strongly disputed the claim of the petitioners and has submitted that the land in question was legally and properly allotted to the school but because of successive litigations being brought to the Court by the petitioners and other residents of the locality, the school could not be constructed though allotment was made in the year 1998 and the respondent no. 5 had also deposited the substantial amount. However, it appears that certain formalities could not be completed for the reason of litigations coming in between.

6. Sri Mahesh Chandra appearing for respondent no. 5 submits that successive petitions filed by one person or the other, have caused immense loss to the allottee and that the plea of the petitioners that land in question is a Talaab is not correct.

7. He further submits that even assuming that it was recorded as a Talaab before the date of vesting, yet it is a fact that the Talaab was no more available and there is no water which could be used or which could be termed as water reservoir and the land was allotted because it had lost the character of Talaab and, therefore, it cannot be said that any illegality has been committing in alloting the said land in favour of the school.

8. His further submission is that the case of ***Hinch Lal Tiwari*** does not say that where developments have taken place and pond has lost its character and utility, simply because of entry as Talaab in

revenue records, all the developments cannot be ruined for restoring the land as Talaab again.

9. The record reveals that prior to the filing of the present petition, successive writ petitions were filed. Writ Petition No. 3363 (MB) of 1998 was filed by Jai Prakash Narain Tripathi, who was the Chairman of Jan Kalyan Awasiya Samiti. This writ petition was disposed of with a direction to the Housing Commissioner to decide the representation, which was decided and rejected on 5.7.2000. Being aggrieved by rejection of the representation, Jan Kalyan Awasiya Samiti and Jai Prakash Narain Tripathi who was the President of the Samiti, filed Writ Petition No. 3828 (MB) of 2000.

10. In the earlier writ petition and the present one, as well, a specific plea was taken that the land in question was an open space/park, which could not be let out or allotted for the purpose of school. The said writ petition, namely, Writ Petition No. 3828 (MB) 2000 was dismissed by a Division Bench, of which one of us (Pradeep Kant, J.) was a member on 21.9.05. The Division Bench came to the conclusion that at no point of time the said land was recorded as open place/park, as in all lay out plans of the Parishad, the said land has been shown as the land earmarked for school.

11. Not being satisfied with the dismissal of the aforesaid writ petition, another writ petition, being Writ Petition No. 7038 (MB) of 2005 was filed by one O.P. Mishra and some of the present writ petitioners. In this writ petition, a plea was raised that the plot in question was recorded as pond in Khatauni and was to be preserved as park but it has illegally been allotted to the school. This writ petition was disposed of vide order dated 11.11.05, with a direction that the representation of the petitioners be decided by the Housing Commissioner. The Housing Commissioner, however, did not find any force in the plea and rejected the representation. This order was passed on 25.3.06.

12. Being aggrieved by the aforesaid order dated 25.3.06, the present writ petition has been filed.

13. The series of litigations mentioned above, do indicate that the land in question was allotted to the school on 4.7.98 and in response to which, the school had deposited the requisite amount as per rules but further progress could not be made. The boundary wall has been constructed as per the directions of this Court in this petition itself.

14. The challenge initially was made by a person or group of persons, namely, the Society, to the allotment, taking a specific plea that the land in question was earmarked as an open space/park and, therefore, it cannot be allotted to the school. This plea was rejected as it could not be substantiated before the Court that the land was ever earmarked as open space or park. The master plan was also looked into and the lay out plan was also produced before the Court, as is evident from the judgement and order passed in Writ Petition No. 3828 (MB) of 2009.

15. The plea of open space/park having failed, a new challenge was made by filing Writ Petition No. 7038 (MB) of 2005, raising a plea that the aforesaid plot was recorded as pond in the Khatauni and, therefore, it could not have been allotted to the school.

16. In regard to the aforesaid plea regarding land being recorded as pond, counsel for the petitioners heavily relied upon the counter affidavit and supplementary affidavit filed by Sri Mahendra Singh, the then Sub Divisional Magistrate, Lucknow. This counter affidavit/supplementary affidavit was filed in pursuance of the directions issued by the High Court on impleadment of the Collector, Lucknow.

17. The counter affidavit filed by the Sub Divisional Magistrate does not say anywhere that Khasra Plot No. 406 was ever recorded as Talaab (pond) in the Khatauni prior to the date of vesting or thereafter. What has been stated is that, as per the entry in the Nakal Khatauni of 1356 Fasli, the said Khasra Plot No. 406 measuring 3 bigha 17 biswa, had been recorded in Ziman-5 category to be used by the Asamis for cultivation of Singhara, a crop cultivated in water bodies. The said Khasra is recorded in the name of Bhusan son of Garibe Kahar in Khata Khatauni No. 98. In the year 1359 Fasli, the name of Naumi Lal son of Thakur Deen alongwith Bhusan Kahar finds place in Khata Khatauni No. 88.

18. He has concluded that the aforesaid Khasra fell under Mohal Umrao Singh and the tenure holder was using the same for Singhara cultivation etc. The entry in the Khasra for the year 1359 Fasli in relation to Khasra Plot No.. 406 also reveals the area of the said Khasra as 3 bigha 17 biswa out of which 2 bigha land had been recorded as Tal Majarua. However, in column 19 of the said Khasra, the entire area is recorded as Talaab.

19. In the supplementary affidavit filed by the same officer, a site plan and also a survey report have been given, from where it is established that over plot no. 406, thirty four houses have been constructed and people are living therein, including some of the petitioners, as informed by parties' counsel and that one bigha of land which has been allotted to the school also forms part of the same very Khasra Plot No. 406.

20. Though we are satisfied that in case revenue entry of pond in respect of certain land is recoded, may be since before the date of vesting or thereafter but since the pond has lost its utility and was no more in use as a pond and land so covered or pond so covered has been used for some public purposes or some good cause, namely, for development, it would not give a right to any party to remove all the developments and restore the pond, which, in fact, was no more in existence but even then for considering the plea of the petitioners, we have proceeded to examine the case, as if the said land was recorded as pond before the date of vesting.

21. In ***Hinch Lal Tiwari*** (supra) the apex court while holding that if a pond (talaab) has fallen into disuse because of drying up but some portion is covered by water in rainy season, then no part of it can be allotted to anyone as abadi site for purposes of building houses in paragraph 13, made an observation that *'it is important to note that material resources of the community like forests, tanks, ponds, hillocks, mountain etc. are nature's bounty. they maintain delicate ecological balance. They need to be protected for a proper and health environment which enable people to enjoy a quality life which is essence of the guaranteed right under Articles 21 of the Constitution. The government, including revenue authorities, i.e. respondents 11 to*

13, having noticed that a pond is falling in disuse, should have bestowed their attention to develop the same which would, on one hand, have prevented ecological disaster and on the other provided better environment for the benefit of public at large. Such vigil is the best protection against knavish attempt to seek allotment in non abadi sites'.

22. A plain reading of the aforesaid observation would reveal that reference has been drawn to the ponds and tanks which are community tanks or which vests in Gaon Sabha. If the tenure holder is using the land for Singhara cultivation, the land still would be cultivatory land and would not be given the shape and colour of pond, as mentioned therein.

23. The counter affidavit filed by Sub Divisional Magistrate mentions that the land was recorded in the name of private individuals as Asami and they were cultivating Singhara therein. If the pond is a community pond, it has to be recorded in the name of Gaon Sabha. The entry of an individual i.e. Naumi Lal as tenure holder of the said land defeats the very plea of the petitioners that the land in question was a pond before the date of vesting and, therefore, the same could not have been allotted or converted to any other use.

24. It was open for the tenure holder to stop cultivating Singhara and do any other activity over the said land as a tenure holder, which was permissible under the Act.

25. Counsel for the petitioners could not be able to place before this Court any provision of law which puts a bar or restricts with respect to the use of the land by a tenure holder of his own land.

26. While making these observations, we do not intend to delve upon the rights of Asamis but we are of the view that unless the pond vests with Gaon Sabha i.e. it is a community pond, the plea raised by the petitioners cannot be accepted.

27. We would further like to observe that in a fast changing world, where development is necessary and industrial growth is taking place, sustainable development has to take place and cannot be overlooked.

28. In the case of ***Hinch Lal Tiwari*** (supra), their Lordships made an observation that the land which has the character of a pond but due to passage of time some portion of it has dried up and rest of the portion is covered with water, cannot be allotted to anybody for construction of house building or any allied purposes.

29. Of course, the land which requires restoration of water reservoir for the purpose of community use cannot be allowed for undertaking any other activity but uprooting the existing developed colonies or houses built thereon at a time when the pond was not in use and rather had fallen into disuse because of drying up cannot be the intention of law.

30. Here in the instant case, apart from the fact that one bigha land has been allotted to the school and over rest of the land thirty four residential houses stand and all allotments have been made by Awas Evam Vikas Parishad and some of them belong to some of the petitioners in the present petition, in case we issue a direction for restoration of the pond as pleaded by the petitioners, over plot no. 406, it would mean demolition of all thirty four houses. This Court cannot be selective in passing orders,

if the said plea is applicable to all similarly situated persons.

31. So far the school is concerned, the land has been allotted to it. It is for the Awas Evam Vikas Parishad to proceed and finalise the matter, if it has not yet been finalised.

32. Thus, the allotment cannot be questioned on the ground that the land in question was recorded as pond, at some point of time.

33. In view of the above, the petition has no force, which is hereby dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.11.2011

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

Writ Petition No. 3424 (SB) of 1994

Maidan Singh ...Petitioner
Versus
State Public Services Tribunal, Lucknow and others ...Opposite parties

Constitution of India, Article 226-Principle of Natural Justice-Dismissal order-copy of supported documents-enquiry report not given-State Tribunal inspite of specific Plea in claim petition about personal hearing-ignored this fact-held-approach of Tribunal wholly incorrect as well as against Judicial Discipline-dismissal order quashed without salary during which-petitioner was out of service.

Held: Para 18

It is also pertinent to mention that claim petition of one B.D. Sharma, who was superior officer and was In-charge of the Centre, where the petitioner was posted, against whom disciplinary proceeding was also initiated like the petitioner, his order of dismissal was quashed by the Tribunal on account of irregularities in the inquiry vide judgment and order dated 3.9.1993. It has also come on record that the said B.D. Sharma in compliance of the judicial order was reinstated in service. On the other hand, petitioner's claim petition was rejected by the Tribunal only after scrutinizing charges levelled against him, but the pleas of non-supply of documents, opportunity of personal hearing and defects in enquiry were not dealt with properly in the judgment. This approach of the Tribunal is wholly incorrect, improper and against the judicial discipline. In these circumstances, the impugned order of dismissal cannot be sustained and is liable to be set aside.

Case law discussed:
AIR 1961 SC 1623; (1998) 6 SCC 651; (2008) 8 SCC 236; [2003] (21) LCD 610; AIR 1968 SC 158; AIR 1963 SC 1719; (1986) 3 SCC 229; (1986) 3 SCC 229

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

Heard Sri M.S. Siddiqui, learned Counsel for the petitioner and the State Counsel.

2. Petitioner has filed the instant writ petition being aggrieved by the Judgment and Order dated 13.1.1994, passed by the U.P. Public Services Tribunal, Lucknow (in short, referred to as ***'Tribunal'***), whereby the claim petition preferred by the petitioner against the order of dismissal dated 19.2.1985 was rejected.

3. From the material on record, it comes out that the petitioner was working as *Kamdar*/Clerk in the year 1984 at Danapur Centre, District Bulandshahar. For dereliction in discharge of duties, disciplinary proceeding was initiated against the petitioner and a charge sheet was given to him on 28.7.1984. As the charges against

the petitioner were found proved, the disciplinary proceedings culminated in passing of dismissal order dated 19.2.1985 by the competent authority. Aggrieved by the said dismissal order, the petitioner approached the Tribunal by filing Claim Petition No. 83/F/IV/85 i*nter-alia* on the ground that the enquiry was conducted in breach of the provisions of natural justice and the documents which were utilized against the petitioner were never supplied to him. Further, more serious charges were levelled against B.D. Sharma, who was In-charge of the Danapur Centre and his order of dismissal was quashed on account of defects in the disciplinary proceedings.

4. Learned Counsel for the petitioner has contended that the learned Tribunal committed serious error in not appreciating the vital fact that there were defects and breach of principle of natural justice in conducting the departmental enquiry and as such the order of dismissal cannot be sustained. It has also been argued that the Tribunal fell into error in not considering the fact that the Tribunal itself has allowed the claim petition of Sri B.D. Sharma, Marketing Inspector though he was the In-charge of the Centre and against him serious charges of embezzlement were levelled.

5. On the other hand, Standing Counsel has submitted that there is no illegality or infirmity in the impugned judgment passed by the Tribunal. Whatever pleas have been raised by the petitioner, same were considered by the Tribunal but were not found tenable. As regard the disciplinary proceeding, Standing Counsel has submitted that the order of dismissal was passed after giving reasonable opportunity of hearing and a finding of fact in this regard has also been recorded by the Tribunal.

6. The main thrust of the argument of the learned Counsel for the petitioner is that the disciplinary proceedings and the consequent punishment order are vitiated on account of non observance of the principles of natural justice. At the outset, it may be mentioned that the petitioner has been punished alongwith senior officer, i.e. Marketing Inspector.

7. In ***State of Madhya Pradesh vs. Chintaman Sadashiva Waishampayan;*** AIR 1961 SC 1623; ***State of U.P. vs. Shatrughan Lal and another;*** (1998) 6 SCC 651 and ***State of uttaranchal and others vs. Kharak Singh*** (2008) 8 SCC 236, the Apex Court has emphasized that a proper opportunity must be afforded to a government servant at the stage of the enquiry, after the charge sheet is supplied to the delinquent as well as at the second stage when punishment is about to be imposed on him. In ***State of Uttaranchal & ors. V. Kharak Singh (supra)*** the Apex Court has enumerated some of the basic principles regarding conducting the departmental inquiries and consequences in the event, if these basic principles are not adhered to, the order is to be quashed. The principles enunciated are reproduced herein:

(a) The inquiries must be conducted bona fide and care must be taken to see that the inquiries do not become empty formalities.

(b) If an officer is a witness to any of the incident which is the subject matter of the enquiry or if the enquiry was initiated on the report of an officer, then in all fairness he should not be the Enquiry Officer. If the said position becomes known after the appointment of the Enquiry Officer, during the enquiry, steps should be taken to see

that the task of holding an enquiry is assigned to some other officer.

(C) In an enquiry, the employer/department should take steps first to lead evidence against the workman/delinquent charged, give an opportunity to him to cross-examine the witnesses of the employer. Only thereafter, the workman/delinquent be asked whether he wants to lead any evidence and asked to give any explanation about the evidence led against him. [emphasis supplied]

8. On receipt of the enquiry report, before proceeding further, it is incumbent on the part of the disciplinary/punishing authority to supply a copy of the enquiry report and all connected materials relied on by the enquiry officer to enable him to offer his views, if any.

9. A Division Bench of this Court in ***Radhey Kant Khare vs. U.P. Cooperative Sugar Factories Federation ltd.*** **[2003](21) LCD 610** held that after a charge-sheet is given to the employee an oral enquiry is a must, whether the employee requests for it or not. Hence a notice should be issued to him indicating him the date, time and place of the enquiry. On that date so fixed the oral and documentary evidence against the employee should first be led in his presence. Thereafter the employer must adduce his evidence first. The reason for this principle is that the charge-sheeted employee should not only know the charges against him but should also know the evidence against him so that he can properly reply to the same. The person who is required to answer the charge must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross-examination, as he desires. Then he must be given a chance to rebut the evidence led against him.

10 In ***State of U.P. v. C.S. Sharma***, AIR 1968 SC 158 the Supreme Court held that omission to give opportunity to an employee to produce his witnesses and lead evidence in his defence vitiates the proceedings.

11. In ***Meenglas Tea Estate v. Their Workmen*** AIR 1963 SC 1719 the Supreme Court observed "it is an elementary principle that a person who is required to answer the charge must know not only the accusation but also the testimony by which the accusation is supported. He must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross-examination as he desires. Then he must be given a chance to rebut the evidence led against him. This is the barest requirement of an enquiry of this character and this requirement must be substantially fulfilled, if the result of the enquiry is to be accepted.

12. It would be useful to mention that In ***Kashinath Dikshita versus Union of India and others;*** **(1986)3 SCC 229** the Hon'ble Supreme Court emphasized that no one facing a departmental enquiry can effectively meet the charges unless the copies of the relevant statements and documents to be used against him are made available to him. In the absence of such copies the concerned employee cannot prepare his defence, cross examine the witnesses and point out the inconsistencies with a view to show that the allegations are incredible. Observance of natural justice and due opportunity have been held to be an essential ingredient in disciplinary proceedings and following these principles,

the Apex Court set-aside the order of removal.

13. Fundamental requirement of law is that the doctrine of natural justice should be complied with and has, as a matter of fact, turned out to be an integral part of administrative jurisprudence. It was also held in this case that at an enquiry facts have to be proved and the person proceeded against must have an opportunity to cross-examine witnesses and to give his own version or explanation about the evidence on which he is charged and to lead his defence.

14. In ***Kashinath Dikshita versus Union of India and others*****;** (1986)3 SCC 229 the Hon'ble Supreme Court emphasized that no one facing a departmental enquiry can effectively meet the charges unless the copies of the relevant statements and documents to be used against him are made available to him. In the absence of such copies the concerned employee cannot prepare his defence, cross examine the witnesses and point out the inconsistencies with a view to show that the allegations are incredible. Observance of natural justice and due opportunity has been held to be an essential ingredient in disciplinary proceedings and following this principle, the Hon'ble Supreme Court set-aside the order of removal of the petitioner Bhupinder Pal Singh.

15. I have given my anxious consideration to the facts and circumstances of the case and have also examined the material on record. No document has been brought on record, by the respondents, from which it emerges out that documents demanded by the petitioner were either supplied to him or he was allowed to inspect the same. In other words, Counsel for the respondent has also failed to show that the documents, which were demanded by the petitioner, were supplied to him during the course of enquiry.

16. After minutely examining the materials on record, I have no hesitation in saying that the inquiry was conducted in utter disregard to the principles of natural justice. Since the impugned order has been passed on the basis of the inquiry report, which suffers from substantial illegality and violative of principles of natural justice, the order of punishment vitiates.

17. A perusal of the impugned judgment shows that the Tribunal nowhere has dealt with the pleas raised by the petitioner regarding non-supply of documents and reasonable opportunity of personal hearing. When specific pleas were raised by the petitioner, it was incumbent upon the Tribunal to record specific finding in this regard. Even in the counter affidavit filed in the writ petition, only a cursory statement has been made that the petitioner was given reasonable opportunity, but no document has been proved to show that the documents as demanded by the petitioner were supplied to him during the course of inquiry. It is a definite stand of the petitioner in the writ petition before this Court as well as before the Tribunal in the claim petition that no opportunity of cross-examining the witnesses was given and the documents demanded by him were not supplied to him, which has caused serious prejudice to him. Such lapse would vitiate the departmental proceedings unless it is shown and established as a fact that non-supply of copies of those documents had not caused any prejudice to the delinquent in his defence.

18. It is also pertinent to mention that claim petition of one B.D. Sharma, who was superior officer and was In-charge of the Centre, where the petitioner was posted, against whom disciplinary proceeding was also initiated like the petitioner, his order of dismissal was quashed by the Tribunal on account of irregularities in the inquiry vide judgment and order dated 3.9.1993. It has also come on record that the said B.D. Sharma in compliance of the judicial order was reinstated in service. On the other hand, petitioner's claim petition was rejected by the Tribunal only after scrutinizing charges levelled against him, but the pleas of non-supply of documents, opportunity of personal hearing and defects in enquiry were not dealt with properly in the judgment. This approach of the Tribunal is wholly incorrect, improper and against the judicial discipline. In these circumstances, the impugned order of dismissal cannot be sustained and is liable to be set aside.

19. Accordingly, the writ petition is allowed and the impugned order of dismissal dated 19.2.1985 and impugned Judgment and order dated 13.1.1994, contained as Annexure Nos.1 and 2 to the writ petition, are hereby quashed. The petitioner shall be reinstated in service, but on the principle of 'no work no pay', he shall not be entitled for arrears of salary. However, the period during which he remained out of service shall be treated as period on duty and shall be calculated for all other purposes. Consequences shall follow.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ;LUCKNOW 15.11.2011

BEFORE
THE HON'BLE PRADEEP KANT, J.
THE HON'BLE RITU RAJ AWASTHI, J.

Writ Petition No. 3611 (MB) of 2011 [P.I.L]

Sachchidanand (Sachchey) ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Ms. Kamini Jaiswal, Adv.
Mr. Akhlesh Kalra, Adv.
Mr. Prince Lenin, Adv.
Mr. Gaurav Mehrotra, Adv.
Mr. Nadeem Murtaza, Adv.

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Mr. Vivek Tankha, Sr. Adv., Additional Solicitor General
Mr. I.H. Farooqui, Adv., Assistant Solicitor General
Mr. D.K. Upadhyaya, Adv., Chief Standing Counsel
Mr. Bireshwar Nath, Adv.
Mr. Neerav Chitravanshi, Adv.
Mr. Vishal Verma, Adv.

Constitution of India, Article 226-Public Interest Litigation-seeking direction of enquiry by C.B.I.-gross misappropriation of N.R.H.M. fund by public officer with collusion of society-deliberate act and omission to abuse N.R.H.M. fund-irregular purchase of medicines,

equipments and other material of N.R.H.M. omission in taking prompt action by the state Direction C.B.I. to complete enquiry during four month-state Govt. to handover and make available all record and render ful cooperation as required by C.B.I.-given

Held: Para 85

We, therefore, direct the Director, CBI to conduct a preliminary enquiry in the matter of execution and implementation of the NRHM and utilization of funds at various levels during such implementation in the entire State of U.P. and register regular case in respect of persons against whom prima facie cognizable offence is made out and proceed in accordance with law. The preliminary enquiry shall be conducted from the period commencing year 2005-06 till date. It is directed that the inquiry be completed within four months. The State Government is directed to hand over and make available all the records as may be required by the CBI and render full support and cooperation to CBI. The Central Government is also directed to render full support as may be asked by the CBI.

Case law discussed:

(2011) 6 SCC 706; (2003) 8 SCC 706; (2011) 5 SCC 668; JT 2006(9) SC 603; (2009) 1 SCC 441; (1998) 1 SCC 226; (2007) 10 SCC 69; (2008) 14 SCC 337

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

1. These writ petitions in the nature of public interest litigation with common facts and similar prayer raise common questions of law and therefore are being decided finally by this Order. The third writ petition, namely, W.P. No. 2647 (MB) of 2011 is however specific to district Pilibhit with slightly different prayer.

2. The matter concerns the implementation of the National Rural Health Mission (NRHM) in the State of Uttar Pradesh. Gross abuse and misappropriation of NRHM funds by the State functionaries in a planned and concerted manner is alleged. Inquiry by the Central Bureau of Investigation (CBI) has been prayed for in the affairs of the Department of Health & Family Welfare, Government of Uttar Pradesh. During the course of hearing it was urged that CBI be directed to conduct preliminary enquiry into the matter from the financial year 2005-06.

3. The Central Government has also specifically pleaded and pressed for CBI enquiry.

4. Intervention of CBI to conduct an enquiry in the whole State cannot be directed at the instance of bald allegations or public interest litigations or writ petitions preferred with private vendetta. The law in this regard has been succinctly put by the Apex Court in *Vishwanath Chaturvedi (3) v. Union of India,* (2007) 4 SCC 380 holding that the ultimate test for maintainability of such public interest litigations is whether the allegations have any substance even if made by a political opponent or a person with political differences. In their Lordship's opinion, for such a petition to be maintainable, it is incumbent upon the petitioner to show failure of public duty. Thus, only where after grave consideration of the pleadings in light of the material on record, the Court is satisfied that *prima facie* case is made out can such a direction to CBI for holding enquiry be given. This conclusion of a *prima facie* case is a precondition before such a direction is given to CBI as has been settled by the Constitution Bench in the matter *of State of West Bengal v. Committee for Protection of Democratic Rights,* (2010) 3 SCC 571 endorsing its earlier decision in

Secretary, Minor Irrigation & Rural Engineering Services, U.P. and others v. Sahngoo Ram Arya and Anr., (2002) 5 SCC 521.

5. In light of the law settled by the Apex Court, we proceed to address the instant matter. However, it will be useful to note the background of NRHM before we proceed to examine the allegations levelled.

6. The NRHM was launched on 12.04.2005 with a view to provide accessible, adequate, affordable, accountable and reliable health care to all persons particularly the vulnerable people residing in remote areas. A Memorandum of Understanding (MoU) was entered into between the Government of India and Government of Uttar Pradesh to this effect on 22.11.2006. This MoU governs the implementation of the Mission in the State. Consistent with its objectives it envisages decentralised system of administration fastening on the State the responsibility of administration of the Mission whereas substantial resources were to be provided by the Union Ministry of Health & Family Welfare (MoH&FW) in contribution with the State.

7. The implementation of NRHM in the State is to be under the overall guidance and supervision of the State Health Mission constituted as per G.O. dated 16.11.2006 with Chief Minister as its *ex-officio* Chairperson. The State Health Society registered under the Societies Registration Act was constituted by merging all existing state level health societies on 21.02.2007 to carry out functions of the Mission in an additional managerial capacity to the Department of Health & Family Welfare of the State Government. Since the Departments of Health & Family Welfare were two separate departments in Uttar Pradesh; they were therefore merged under the directives of the Central Government. Merger of the two departments was a precondition contingent to the execution of the MoU.

8. The Society's primary responsibility, *inter alia*, is to receive, manage (including disbursement of funds to implementation agencies such as Directorate, District Societies, NGOs etc.) and account the funds received from the MoH&FW. The Governing Body of the Society is vested with full control of the affairs of the Society whereas the Executive Committee, Programme Committees and such other committees constituted by the Governing Body serve as its implementation agency.

9. The Chief Secretary is the Chairman of the Governing Body. The body is vested with the power to monitor the financial position of the Society to ensure smooth income flow and review the annual audited accounts and is required to convene meeting at least once every six months. Besides considering the annual budget and annual action plan for the Mission, the Governing Body evaluates at its annual meeting (a) the income and expenditure account and the balance sheet for the past year, (b) annual report of the Society, (c) appointments for the executive committee and the various committees, and (d) other business brought forward with permission of the Chairman.

10. The Executive Committee is to act on behalf of the Governing Body and is empowered to take all decisions and exercise all powers vested in the Governing Body except those which the Governing Body may specifically exclude. The

Principal Secretary, Family Welfare is the Chairperson of the Executive Committee while a full time Mission Director appointed by the State for NRHM is the Convenor of the Society. A Secretariat consisting of technical, financial and management professionals has been established in the Society to administer its daily affairs with State Mission Director as its head. The Mission Director is an officer of the rank of Commissioner.

11. The Secretariat known as State Programme Management Support Unit (SPMSU) is responsible for daily management of the Society's activities as set out in Article 5 of the Memorandum of Association of the Society which includes disbursement of NRHM funds to implementation agencies and also acts as a Secretariat of State Health Mission.

12. According to sub-clause I(B) of clause B of the bye-laws of the Society, all powers pertaining to release of funds for implementation of plans/allocations which have been approved by the Governing Body/Executive Committee have been vested in the Mission Director.

13. The bye-laws prescribe that funds are to be released on the basis of written authorization from the Executive Committee of the Society though all cheques to be signed by two authorized signatories of the Society Secretariat. If releases are made through e-banking procedures, the electronic authorization ought to be executed by the same two authorized signatories of the Society Secretariat on the basis of written authorization in this behalf.

14. So far as procurement of goods and articles for NRHM is concerned, clause A of the bye-laws provide that such procurement would be as per (1) rate contracts (R.C.) of the Director-General, Supply and Disposables (DGS&D) failing which, (2) rate contracts of other Government of India agencies failing which, (3) rate contract approved by the Government of U.P. failing which, (4) tender procedure as recommended by the Government of India. Procurement of services is specified to be in accordance with procedure as recommended by the Government of India or Government of U.P.

15. On similar lines, the District Health Mission, District Health Society and Hospital Management Societies known as "Rogi Kalyan Samiti' were contemplated by series of Government Orders dated 16.11.2006 annexed to the MoU. The Minister-in-Charge of the District was the Chairperson of the District Health Mission. The District Magistrate served as Coordinator of the District Health Mission and Chairperson of the District Health Society. Whereas, the Chief Medical Officer of the District held the office of Member Secretary in the District Health Mission, Coordinator in the District Health Society and Chairperson in the "Rogi Kalyan Samiti'.

16. The funds made available for the Mission were subject to audit of the State and District societies organised by the State within six months of the close of every financial year. Thereafter, the State Government would prepare and submit a consolidated statement of expenditure, including the interest that may have accrued. Also such funds routed vide the MoU were liable to statutory audit by the Comptroller and Auditor General of India (CAG).

17. Thus, it is within this institutional setup envisaged by the MoU that the NRHM in the State of U.P. was to be implemented. In light of this background of NRHM, let us now proceed to address the matter.

18. The petitioners while pressing for CBI inquiry have distinguished the instant matter into three parts i.e. (1) deliberate acts of omission and commission with culpable intention of State functionaries to abuse NRHM funds, (2) the irregularities in purchases of medicines, equipment and other material relating to NRHM, and (3) omission of the State to take prompt corrective measures even after being fully acquainted with the irregularities being committed in the utilization of NRHM funds. Briefly, the case of the petitioners is like this.

19. On 22.11.2006, the NRHM was introduced in the State of U.P. pursuant to the execution of the MoU. The erstwhile Departments of Medical & Health and Family Welfare were merged into single department of Health & Family Welfare under the directives of the Central Government in accordance with the MoU.

20. The State Health Mission was constituted by order of the Government dated 16.11.2006. Implementation agencies, such as the State Health Society, the District Health Mission, the District Health Society, and the Rogi Kalyan Samiti were contemplated by series of Government Orders dated 16.11.2006. Meanwhile, fresh elections to the Assembly were held and the present Government came to power in the State on 13.05.2007. Subsequently, the Government annulled the merger of the aforesaid departments and restored the erstwhile bifurcated departments i.e. Department of Medical & Health and Department of Family Welfare. It did not reconstitute the State Health Mission nor nominated the public representatives, such as, Members of Parliament, Members of Legislative Assemblies, Members of other local urban bodies and such other persons required to be nominated by the State Government. Hence it did not convene any meeting to supervise, monitor and guide the implementation of the Mission in the State which it was otherwise required to do i.e. to meet at least once every six months for this purpose. There is also nothing on record to show if any meetings took place even before the year 2007, though it has been said that the previous Government had constituted the State Health Mission.

21. On 18.07.2009, a separate Central Purchase Committee was constituted under the Chairmanship of Director General, Family Welfare by order of the Government without any reasonable basis. The Central Government on 28.07.2010 through its D.O. letter objected to the bifurcation of the Department of Health & Family Welfare stating the action of the State Government not to be in the interest of the Mission and requested the State Government to reconsider the aforesaid bifurcation. By the same letter, the State Government was also apprised of the fact that no full time Mission Director had been appointed which was detrimental to the implementation of the Mission in a big state as U.P.

22. From the period of inception of the program in the State of U.P., it is said that the Central Government has released to the State of U.P. grants amounting to Rs. 8579.38 crore but the Governing Body of the State Health Society has all this time met only twice i.e. on 25.01.2008 and 25.07.2008 until 15.05.2011. All decisions

in its place, administrative or otherwise, were instead taken by the Executive Council of the State Health Society that did meet occasionally in the absence of a full-time Mission Director. No full time Mission Director was appointed for almost five years, since the inception of the NRHM until 22.04.2011 and thereafter on 09.09.2011, Sri Lokesh Kumar, Senior Manager was appointed as acting Mission Director by order of the Government. Meanwhile, the bifurcation of the Department of Health & Family Welfare was also cancelled in the year 2011 after the whole scam came to light through the media after the murders of the two Chief Medical Officers of Family Welfare Department, Dr. V.K. Arya and Dr. B.P. Singh and when petitions were instituted in this Court asking for CBI probe in their murders.

23. On 05.05.2010, District level post of District Project Officer and Deputy District Project Officer was created in Family Welfare Department by order of the Government. These medical officers of PMHS cadre in Family Welfare Directorate General were appointed on the joint approval of Minister, Medical & Health and Minister, Family Welfare. The posting of such officers was done with the approval of Minister, Family Welfare. Following which junior level-4 officers were handpicked and posted arbitrarily which compelled a co-ordinate bench of this Court at Allahabad to observe in its interim order dated 12.01.2011 in un-numbered paragraph 5 of Writ (A) No. 72397 of 2010 *(Dr. Gangaram v. State of U.P.)* that*, "number of writ petitions are being filed in the Court, challenging the arbitrary action of the State Government to pick and choose Level-4 Medical Officers to man [the] post of Chief Medical Officers. Though the State Government may give the important posts in the Medical and Health Department, to Level-4 Medical Officers, the issue of discrimination becomes apparent when [. . .] junior officers are appointed on these posts."* Hence this Court directed that rule of seniority be strictly adhered to while making such appointments.

24. By another Government Order dated 20.08.2010, the responsibilities of Chief Medical Officer and District Project Officer/Deputy District Project Officer were demarcated. By virtue of the aforesaid order of the Government, the responsibility of keeping the accounts of expenditure related to NRHM was vested in District Project Officer alongwith the power to draw funds received for NRHM from Central Government according to budgetary heads of Family Welfare programme in accordance with the D.D.O. code. However, on 14.10.10, the State Government by an Order re-designated District Project Officer/Deputy District Project Officer as Chief Medical Officer/Deputy Chief Medical Officer (Family Welfare). Meanwhile, the MoH&FW vide Order dated 15.09.2011 directed the States to constitute District Vigilance and Monitoring Committee in each district to be headed by the local Member of Parliament and comprising members of local government and local representatives to monitor the program. A reminder was also sent to the State of U.P. vide D.O. letter dated 13.06.2011. However, nothing appears to have been done.

25. Pointing out the irregularities in purchasing the medical kits, medicines, equipment and other articles, the petitioners placed before us that all such work were routed through government corporations like U.P. Project Corporation Ltd. (U.P.P.C.L), U.P. Processing &

Construction Co-operative Federation Ltd. (PACCFED), Construction and Design Services (CDS), U.P. Jal Nigam, Uttar Pradesh Labour and Construction Cooperative Association Ltd. (LACCPED) and U.P. Small Scale Industries Corporation (U.P.S.I.C) mainly to caemoflague the irregularities being committed. It was argued that the Minister, Family Welfare allotted the work of purchase of medical kits and medicines to U.P.S.I.C in order to benefit chosen few. Procurement of such items was done by aforesaid U.P.S.I.C without observing any consistent procedure to the extent that medicines were purchased at highly inflated rates. For example, Rs. 270 was being paid for 500 ml of common iodine solution whereas the approved rate contract was Rs. 39 for 500ml. The sterilised surgical gloves which cost Rs. 8.50 as per the Director-General, Supplies and Disposables (DGS&D) were being procured at the rate of Rs. 34 per pair. The common liquid hand wash, for which the rate contract of the State Government is Rs. 104 for 1000 ml was being procured at the rate of Rs. 450 for 200 ml. Another example is that of iron folic acid tablets that were being procured by other States and Union Health Ministry at the rate of Rs. 10-14 per 100 tablets while the State was paying Rs. 18 per 10 tablets. These instances were reported by the Times of India, Lucknow Edition on 13.01.2011 brought on record by the petitioners. Contracts running into crores of rupees for publicity, medical kits and medicines, modular OTs (by diverting budget for construction) was allotted to firms of one Sri Saurabh Jain, namely, M/s. Siddhi Traders and M/s. Guru Kripa Enterprises. Complete advances were released but no work is alleged to have been done. Similarly, immunization cards were procured at the cost of Rs. 18/- per piece which could not have costed more than Rs. 2.00 per piece. The sample of immunization card is on record.

26. Capricious decisions were said to have been taken in Executive Committee meetings in choosing agencies to get the required work done. Referring to an instance, where in a meeting on 13.07.2010 it was decided to get work done by PACCFED. Whereas, in another meeting on 12.08.2010, it was decided to get the work done from U.P.P.C.L. The reason behind change of agency was that U.P.P.C.L.'s performance was then satisfactory; though this decision was again reversed on 13.10.2010 and the same work was again allotted to PACCFED, which was found earlier to be relatively unsatisfactory. Meanwhile, sum of Rs. 87.16 crore was remitted to U.P.P.C.L.

27. The Minister's involvement in misappropriating funds for particular schemes was also canvassed before us referring to Blindness Control Programme and "Janani Suraksha Yojana'. In the Blindness Control Programme spectacles were supposed to be distributed to children free of cost. But nowhere spectacles have been distributed though full payment has been made to the Minister's close aide. Budgetary sanction of Rs. 400 crore was made for "Janani Suraksha Yojna' wherein payments were made to fictitious people. It was submitted that this fact came to light at the Red Cross Bal Mahila Chikitsalaya but nothing was done due to the involvement of the Minister. Also, none of the eight to ten women and children hospitals in Lucknow have been supplied with caesarean kits and related medical supply needed at the time of child birth.

28. Substantiating their pleading that the Government had knowledge of the

NRHM irregularities and misappropriation of funds but it omitted to act prudently, since its functionaries were party to the gross irregularities and misappropriation of funds, the petitioners placed before us bulky documents including the Press Release by the Chief Minister Information Centre dated 07.04.2011, various orders of the State Government relating to NRHM, copy of FIRs registered in Lucknow alleging financial irregularities committed by officers/officials at Department of Health and Department of Family Welfare, Visit Reports of the NRHM Finance Team involving spot inspection of the implementation of the Mission in districts and blocks and State Health Society, the Audit Report dated 04.07.2011 of the Director of Audit and Accounts, Government of U.P. conducted in the office of Director-General (Family Welfare), Report of Technical Committee appointed by Government of U.P. regarding Strengthening of Drug Control Organization in the State of Uttar Pradesh to Prevent the Manufacture & Sale of Spurious, Substandard and Misbranded Drugs. Some complaints made to the Chief Minister and the Chief Secretary preferred by them and one company Eicher Tractors levelling specific allegations of corruption against State functionaries including Minister, Family Welfare are also on record.

29. The Central Government also urging for CBI inquiry brought on record bulky material including the reports of the annual statutory audit, the response to the audit reports of Government of India including directives issued to the State Government in this context and the reply of State Government to this effect including various reports of the Common Review Mission (CRM), Joint Review Missions (JRM), Report of Regional Evaluation Team, independent studies conducted in the implementation of NRHM in the State of U.P.

30. In addition, the petitioners submitted that murders of two Chief Medical Officers, namely, Dr. V.K. Arya, Dr. B.P. Singh and mysterious death of Dr. Y.S. Sachan in jail, admittedly relating to abuse of NRHM funds shows the gravity of the situation and the attitude of the State functionaries who conspired and took decisions at the highest level clearly to impress themselves with tangible benefits.

31. Further, the aforesaid facts coupled with instances where a person acted as the Chairperson, Co-Chairperson as well as Convenor of the Executive Committee of the State Health Society by virtue of him being a Principal Secretary of Health & Family Welfare and even operated the NRHM funds without any authorisation is nothing but a glaring example of arbitrariness of State action and deliberate designed approach towards public institutions and public money facilitating diversion/siphoning of NRHM funds. The aforesaid omission of not appointing the Mission Director, though obligatory under the MoU has been averred a deliberate act of the State Government so that funds could be misappropriated and misused for personal gains.

32. In nutshell, failure to reconstitute State Health Mission and gross irregularities in purchase of various items and failure on the part of the State Government to take effective measures to monitor the implementation of the NRHM so as to check the misappropriation of funds at various levels according to them makes out a clear case of enquiry by CBI. More so, when neither any FIR has been lodged nor

the State undertook to take any action to identify the guilty persons until cognisance was taken by this Court in various writ petitions showing abuse and misuse of power by the State functionaries in the implementation of NRHM in the State of Uttar Pradesh.

33. Sri J.N. Mathur, learned Additional Advocate General assisted by Sri D.K. Upadhyaya, learned Chief Standing Counsel appearing for the State does not deny the fact that there have been large scale irregularities in the implementation of NRHM so far as the State of U.P. is concerned but according to him it cannot be termed as misappropriation of funds but it is a case of financial mismanagement. He states that corrective measures are being taken by the State to the extent that the affairs of the NRHM in Lucknow District where the murders of two Chief Medical Officers took place and the death of one Dy. CMO while in judicial custody is already being investigated by the CBI. CAG has been requested to conduct special State level audit in U.P. from the financial year 2009-2010 to 2010-2011 and further seven departmental enquiries have been ordered on 11.07.2011 to enquire into the affairs of NRHM wherein according to learned Additional Advocate General many of which are nearing completion and two have submitted the report and have found irregularities in the affairs of the NRHM though the reports have not been placed before us. Also, acting on the basis of one of the enquiry report dated 19.07.2011 departmental action against erring officials have been initiated including initiation of departmental proceedings against the then Director-General, Family Welfare, the then Joint Director, Family Welfare Dr. Rajeev Banswal, Additional Director, Family Welfare Dr. Usha Narayan vide orders dated 29.07.2011 wherein charge-sheet has also been issued.

34. Submitting on behalf of the State, he prayed that pending CAG Report, there is no material on record to indicate *prima facie* commission of any cognisable offence thereof to entrust the matter at this stage to CBI which is an investigation agency to conduct a "roving enquiry' in the whole of the State merely on the basis of Visit Report of the Central Government and certain other material or newspaper reports. His plea is that the Court should consider entrusting the matter to CBI only after receipt of CAG Report. Placing reliance on *Secretary, Minor Irrigation & Rural Engineering Services, U.P.* (supra) he further stated in this regard, that pending CAG Report, it would be difficult for this Court to come to *a "definite conclusion that there is a prima face case established to direct an inquiry"* and accordingly draw terms of reference for the CBI to conduct an enquiry into the affairs of NRHM.

35. An objection has also been raised by the State against the prayer of the petitioners for CBI enquiry on the ground that the CBI does not have the jurisdiction to conduct an enquiry into a department of State Government. Further, it is stated that CBI being an investigation agency is entrusted with the task of investigating cognizable offences and therefore, an enquiry into the alleged irregularities in the functioning of a department of the State Government is outside CBI's mandate and purview. Questioning the competence of CBI to conduct a preliminary enquiry in the matter, learned Additional Advocate General argued that section 6-A of the Delhi Special Police Establishment Act, 1946 (CBI Act) is not the source of power for CBI to conduct an enquiry. In fact, inquiry

is not defined either in the CBI Act or the Central Vigilance Commission Act, 2003 and therefore one can only abide by the expression as defined in the Criminal Procedure Code, 1973 (Cr.P.C.), precisely section 2(g) according to which inquiry means every inquiry, other than a trial conducted under the Cr.P.C by a Magistrate or a Court.

36. In response, leading the arguments Ms. Kamini Jaiswal, learned counsel for one of the petitioners, refuted the aforesaid contention. She submitted that section 6-A of the CBI Act clearly empowers the CBI to conduct an inquiry. Explaining further she stated that Chapter - IX of the CBI Manual provides for preliminary enquiry to be conducted by CBI where paragraph 9.1 of the CBI Manual contemplates preliminary enquiry in such situations where adequate evidence to register a regular case is not available. Replying to the objection of the State she argued that the objection is not sustainable in light of the catena of decisions wherein the Supreme Court and the High Courts acting under Article 32 and 226 respectively have directed enquiry or even preliminary enquiry by the CBI.

37. To substantiate her argument, she placed before us the decisions in the matter of State of West Bengal (supra) wherein the Supreme Court observed that High Court has jurisdiction to direct CBI inquiry in appropriate cases and even affirmed the order of Calcutta High Court directing CBI investigation into the matter*; Secretary, Minor Irrigation & Rural Engineering Services* (supra) wherein the Apex Court held that the High Court may direct CBI inquiry if material on record discloses a *prima facie* case; *NOIDA Entrepreneurs Association v. NOIDA,* (2011) 6 SCC 508 wherein based on the allegations regarding abuse of power in making public appointments, the matter was referred to CBI with direction to hold preliminary inquiry into the matter and register a regular case thereafter in case any cognizable offence is made out*; M.C. Mehta v. Union of India*, (2003) 8 SCC 706 (Taj Heritage Corridor case) wherein after consideration of material on record, the Supreme Court directed enquiry by CBI and subsequently on the basis of the enquiry report directed *inter alia* investigation by CBI; *and Centre for Environment and Food Security v. Union of India,* (2011) 5 SCC 668 where the Apex Court considering grave irregularities in the implementation of the MNREGA in State of Orissa directed complete investigation by CBI.

38. As regards, the competence of CBI to conduct a preliminary enquiry, Sri Akhilesh Kalra, learned counsel for the petitioner and Sri Vivek Tankha, learned Additional Solicitor General also relied on two decisions of the Apex Court *in Shashikant v. CBI*, JT 2006 (9) SC 603 and *Nirmal Singh Kahlon v. State of Punjab*, (2009) 1 SCC 441 wherein it has been categorically observed that the CBI has the power to hold preliminary enquiry and thereafter to register FIR if prima facie case is made out.

39. Learned Additional Advocate General, in response argued that CBI Manual on which the petitioner relies does not have any statutory force and is not binding on the CBI and presented his concerns that if CBI is directed to conduct what he terms as a "roving inquiry' into the affairs of a department of the State Government, if would lead to chaos.

40. In fact, we have noticed throughout the hearing of the matter that the

State is curiously apprehensive about CBI. Learned Additional Advocate General has throughout the hearing of the matter urged only two things. First, that the State Government is doing all it can to instil the public confidence and punish the guilty. Second, the State does not want its functionaries to suffer the rigour of CBI which would otherwise be detrimental to its subjects.

41. There is no reason why the State should be so apprehensive about CBI's conduct. CBI is an independent and autonomous investigation agency. It was for the purpose of maintaining its autonomy to conduct enquiry and investigations in a fair, transparent and competent manner that the Apex Court *in Vineet Narain v. Union of India,* (1998) 1 SCC 226 insulated this institution by issuing comprehensive directions so that it functions in a strong and competent manner without executive interference. Distinction was drawn so far as the expression "superintendence and administration of special police establishment' used in section 4 of the CBI Act is concerned in as much as it was held that executive instructions cannot at any point of time fetter actual investigations being carried out by the CBI which is governed by applicable general law. Their Lordships particularly emphasised in *Vineet Narain* (supra) that once the CBI is entrusted to investigate/enquire into a matter, it is imperative upon it to scrupulously adhere to the CBI Manual in relation to its investigative functions like raids, seizure and arrests. The CBI being a statutory body is supposed to act in fair, transparent and competent manner while discharging its statutory functions.

42. The argument of learned Additional Advocate General that CBI is not statutorily empowered to hold enquiries cannot be appreciated in view of the provisions of section 6-A of the CBI Act, para. 9.1 of the CBI Manual and particularly in the light of the precedents cited above where CBI has held enquiries/preliminary enquiries at the instance of the Supreme Court or the High Courts. The objection is therefore dismissed.

43. At this stage, we deem it appropriate to clarify that the meaning attached to the expression "inquiry' in the Cr.P.C. is only contextual to Cr.P.C. and not universal. In appropriate cases, the police not only have the power to hold inquiry but also a duty to conduct inquiry or even preliminary inquiry. There are several decisions of the Apex Court in this respect. Reference for example may be made to *Rajinder Singh Katoch v. Chandigarh Admn.*, (2007) 10 SCC 69.

44. Dwelling further, three impleadment applications were moved. First by one Sri B.K. Singh Parmar, Advocate alleging close link of one of the petitioner with another political party and for such reason he terms the prayer of the aforesaid petitioner to have been cleverly made so as to exclude the period covered under the regime of the previous Government. He therefore submits that the direction for enquiry be issued from the year 2005-06 instead of the year 2007-08 since funds to the tune of Rs. 873.30 crores and Rs. 985.34 crores were, in fact, sanctioned by the Central Government in the year 2005-06 as is apparent from paragraph 14 of the counter affidavit filed by the Mission Director in another writ petition no. 769 (S/B) of 2011.

45. Sri Sandeep Dixit, learned counsel appearing for Sri B.K. Singh Parmar thus

prayed that inquiry be directed from the year 2005-06 instead of 2007-08. Similar application was moved by Sri Sudhir Kumar, Advocate through Dr. L.P. Mishra, learned counsel appearing for the applicant. The third application was moved by Sri Saurabh Jain, the sole proprietor of M/s. Guru Kripa Enterprises and M/s. Siddhi Traders whose firms are named in the writ petition.

46. Sri S.K. Dholakia, learned senior counsel assisted by Sri Dwijendra Mishra, appearing for Sri Saurabh Jain strenuously argued that false and baseless allegations have been made against them in the writ petition. Learned counsel submitted that, in fact, U.P.S.I.C., awarded contract of Rs. 4,74,82,500 crore to M/s. Guru Kripa Enterprises and Rs. 13.69 crore to M/s. Siddhi Traders for different work which includes the task of fixing hoardings and not contracts worth Rs. 119 crore as averred in one of the writ petitions.

47. Sri S.K. Dholakia urged that CBI must not be ordered to hold an enquiry based on the averments of the instant writ petition which in his view are vague, bald, and baseless and if such an order is to be made, it ought to be made after giving him due opportunity to put his defence since it is his client and his firms against whom averments have primarily been made. Learned senior counsel placed reliance on *Lalita Kumari v. Government of Uttar Pradesh and others,* (2008) 14 SCC 337 *and Secretary, Minor Irrigation & Rural Engineering Services, U.P. and others* (supra).

48. Sri Vishal Verma, learned counsel on behalf of U.P.S.I.C, opposite party no.3 herein, denying the averments made against U.P.S.I.C argued that consistent procedure was followed by O.P. No.3 in awarding contracts. Notice inviting tenders were duly published in leading newspapers pursuant to the offer of Family Welfare Department following which lowest three bids were forwarded to the aforesaid Department. After the aforesaid Department approved the bids, the contracts were awarded. Clarifying further, it was submitted that so far supply of spectacles is concerned, notice inviting tenders was duly published but funds only to the extent of Rs. 54.25 lakhs out of Rs. 2.842 crores could be utilized since lists against which supplies were to be made could not be received from various Chief Medical Officers.

49. We have given each party a patient and considerate hearing and considered the material placed on record. We did not find expedient to grant impleadment to the aforesaid applicants though we have heard them as interveners. So far as Sri Saurabh Jain is concerned, we have already given him due hearing and proceed to consider the matter in accordance with the averments made by him in regard to the amount of the contracts given to him as it would be expedient here to clarify that the actual amount for which the contracts were given to these firms is not very material at this stage but it is the manner and procedure which was adopted in doing so and also their execution, which is the subject matter of consideration.

50. The reports placed before us including the observations in the reports extracted below, as they are, highlight two aspects so far as implementation of NRHM in the State is concerned; **first**, the general administration by the State functionaries and **second**, the financial administration and utilization of NRHM funds.

51. To elaborate on the **first part:** Common Review Missions have been held yearly to monitor the progress and performance of NRHM in the State. The main issues reported in the reports are extracted below as they are:

i. November 16-18, 2007, districts Rai Bareilly and Jhansi:

- *Improvement required in drugs and supplies logistics.*
- *Restrictive clauses on nurse and ANM recruitment excludes qualified nurses and ANMs substantially and thus requires changes.*
- *Miscommunications and misunderstandings are immediate bottlenecks which should be overcomed.*
- *Electricity supply gaps in all sub-centres and additional PHCs to be closed.*

ii .November 25 to December 5, 2008, districts Unnao & Bahraich:

- *Post-delivery stay in the facilities is very short - needs monitoring.*
- *Bio medical waste management needs attention.*
- *Mobile medical units not operationalized.*
- *Shortage of human resources at all levels. Acute shortage of multipurpose worker (male).*
- *Integrated vector control measures and surveillance of diseases is weak.*
- *Poor availability of MTP/MVA (medical termination of pregnancy) services.*
- *PRIs not uniformly involved for VHSC which are recently instituted but not active.*

iii. November 3 to December 13, 2009, districts Allahabad and Kanpur city:

- *In most facilities one or more requirements for providing FRU (First Referral Units) services were not available*
- *The State does not have an emergency transport system and ambulances were mostly used for transport of drugs and supplies.*
- *The State PIP did not have any special plan or budget for reaching vulnerable or tribal groups. No incentives seen in the districts visited.*
- *MTP services and Maternal Death Audits are not carried out at the facilities visited.*

iv. December 15-23, 2010, districts Lakhimpur Kheeri and Sonbhadra:

- *Sub-centres require to be strengthened through provision of regular power and running water supply. Drugs to manage obstetric emergencies should be made available at subcentres.*
- *Time bound completion of civil works need to be ensured.*
- *FRUs need to be operationalized as per guidelines at the earliest with special emphasis on blood storage availability.*
- *Maintenance of infrastructure and equipment need to be improved.*
- *Sustainable long term policy for human resource planning needs to be developed including transfer and recruitment policies.*
- *Emergency referral transport systems must be put in place at the earliest.*
- *Biometrical waste disposal systems to be put in place particularly at*

FRUs.

- *Maternal death audits needs to be intiated.*
- *Village Health Sanitation Committee need to be strengthened.*
- *The State should implement the customised version of Tally ERP 9 at the state and district level within the prescribed timeline.*
- *Regular uploading of financial data on HMIS portal should be done.*
- *Urgent steps required for filling up positions of district and block level account managers and annual training programme of finance personnel should be made.*

52. The Reports of the Joint Review Missions undertaken yearly to review the Reproductive and Child Health (RCH) component of NRHM have been brought on record. Key recommendations are below:

i. First JRM - February 14 to March 1, 2006:

- *Recruitment process of professionals required to be activated.*
- *State level society mechanism still being predominantly used for maintaining bank account outside the government system.*
- *States need to utilize the cap of 6% of approved PIP for Programme Management costs.*
- *With regard to financial reporting the States need to ensure a system of monthly reporting of expenditure from District to State.*

ii. Second JRM

- *Urgently place and train SPMU/DPMU staff included in NRHM PIP 2006-07 and expedite signing of MoU.*

iii. Third JRM - January 16-20, 2007

- *Appointment of full time Mission Director in accordance with Government of India guidelines.*
- *Establishment of the Programme Management Unit structure at the State, division, district and block level.*
- *Completion of the mapping of human resources and physical structures (including equipment) and reallocate staff for optimal utilization of resources;*
- *Ensure that staff at district level and below as well as NGOs and Panchayati Raj institutions are aware of all available guidelines and sanctions.*
- *Sub-optimal utilization of existing resources. The existing specialists were not utilized appropriately as some of the supporting equipment and skills were absence. For example, the Gynaecologist, Anaesthetist and Surgeon at Gola PHC could not function as no anaesthesia or surgical equipment was in place.*
- *The FRUs are not fully functional according to the Government of India guidelines. The staff was not fully aware on the details of operationalization and management of these facilities.*
- *The coverage of key RCH services is inadequate; the quality of RCH services also requires improvement. Poor case management of malnourished children was observed; proper care of new-born was not seen at any level and guidelines for anaesthesia*

were not followed - ether was being used for anaesthesia.

- *The labour rooms in the 24x7 PHCs do not have adequate infrastructure. There is lack of clean toilet, running water, receiving station, etc.*
- *Major area of concern is seemingly total lack of infection prevention and waste management. No segregation of waste was seen, poor storage and disposal of sharps and placenta and lack of mechanism for disposal at all levels.*
- *The district plans do not reflect local needs and the ownership of the plan among stakeholders is variable and is compounded by frequent transfer of personnel.*

iv. Fifth JRM - January 16-19, 2008

- *The State and District Programme Management Units is not in place as yet.*
- *No district FRU currently has functional blood storage facilities and hence does not fulfill all the criteria laid down by Government of India for a functional FRU.*
- *The state is facing acute shortage of ANMs.*
- *The guidelines issued in December 2006 on financial, accounting, auditing, funds flow and banking arrangement at State and district yet to be implemented.*
- *Financial management indicators were not being compiled regularly.*
- *Financial staff is not trained.*

v. Sixth JRM - May 25-29, 2009

- *In general doctors and paramedics were keen on providing services to beneficiaries; however output was not satisfactory.*
- *At some of the facilities it was found that, though new equipment are in place, they are not being used in absence of trained personnel.*
- *Basic equipment for assisted delivery at District Hospital, CHC and 24x7 PHCs and even at Medical College Hospital were very out-dated and not in working condition.*
- *Some labour rooms did not have new-born corner with resuscitation facilities, moreover, available equipment had not been kept inside the labour room.*
- *There appears to be lack of centralised equipment maintenance and management system.*
- *Referral services were mostly not available in the State; moreover, referral had not been seen as key priority.*
- *Ambulances were available at few CHCs, however not frequently used.*
- *District Accounts Managers have been recruited in all 71 districts; 823 posts for block level accountants have been approved.*
- *No proper system of reporting FMRs and books of account to the State by the Districts initiated.*
- *Reportedly the State has been able to get the concurrent audit initiated in 69 out of 71 districts. A few concurrent audit reports received from Sitapur, Balrampur, Kannauj, Lakhimpur, Kushinagar and Gorakhpur during 2008-09 were reviewed and it was noted that*

some important internal control observations pertaining to advances, fixed assets, bearer cheques being issued, bank reconciliation, etc. There has however not been any follow up on these observations from the state and the auditor has also not reported on the compliance of the observations in the audit report for next month (except Balrampur). It is also noted that concurrent audit at the state level is not being done after June 2008.

- *Detailed Guidelines for accounting system and reporting of expenditure by Blocks to Districts should be prepared along with the specified format for reporting of expenditure.*
- *Identify the institution for providing training to Block level Accountants/Clerks.*
- *Proper Guidelines for utilization of funds should be sent along with the funds release letter to Block.*
- *One CA should be appointed at State Level for monitoring the Concurrent Audit Report and sending action taken report to Government of India.*
- *Customised tally software must be looked after by the in-charge of Blocks, Districts and State.*
- *As a part of social audit and a part of BCC/IEC also, as other details of physical progress are given in chart at Block/District Level, it is suggested that details of Expenditures incurred on various heads under RCH Flexible pool, NRHM Additionalities and Immunisation may also be provided for each month alongwith accumulated expenditures.*

53. Turning to the **second part** i.e. financial administration and utilization of NRHM funds, our attention was invited to the reports of the NRHM Finance Team visit in the State in December 2010 and May 2011. In the first visit held on 06-11.12.2010, the Finance teams visited the State headquarters and eight districts, namely, Kanpur Dehat, Unnao, Barabanki, Gonda, Sitapur, Rae Bareilly, Agra and Sultanpur. The major observations of the team were as follows:

- ***State Health Society (SHS):*** *The Position of Director (Finance & Accounts) remains vacant.*
- ***District Health Society (DHS):*** *50 District Accounts Managers (DAM) out of 71 DHS have been positioned and 21 remains vacant. Almost 30% of the DAM's posts at Districts remain vacant.*
- ***Block Level:*** *The State Finance Division needs to monitor and fill up the vacancies of the block accountants on a regilar basis through a concerted effort. Block Accountant positions were vacant in 390 out of total 820 blocks, (nearly 50%).*
- *No Governing Body meeting has been held during the Financial Years 2009-10 and 2010-11.*
- ***Irregularity noticed in payments made for Civil contracts****: As per the MoU ith U.P. Processing & Construction Co-operative Federation Ltd., U.P.C.L., it was been mentioned in the agreement papers that the release of funds would be as per the terms that 75% of the cost of the standard estimate would be released after agreement and remaining 25% of the standard*

estimate only after receipt of UCs [Utilisation Certificates] for 50% of the work completed and details of work wise estimate. However, 100% of the amount was released before comlpetion of the work. The State DG (FW) office was not monitoring fund utilisation.

- ***No documents could be shown wherein the lacunae in the inspection reports [. . .] to the construction agencies and accountability fixed.***
- ***Merely purchasing through a state government PSU does not satisfy the norms of propriety in fund utilisation.***
- *A procurement of kits from the UP Civil Supplies Corporation had been made at double the amounts specified in the PIP and the same had been signed off on by the DG without any tendering or comparison with other agencies being attempted.*
- ***Emergency Referral Transport Services:*** *[. . .] 273 vechiles had been received from Tata Motors (vendor) against 104 vehicles were distributed to the districts. However the vehicles were not operational and till December, 2010 operator selection, procedure for GPRS system linkages etc. had not been implemented. The vehicles have been idle for a long period of time may become non functional.* ***Only mere procurement is not sufficient condition, proper utilisation also needs to be looked into to ensure propriety of expenditure.***
- *The Executive Council (headed by the MD, NRHM) had taken a decision in 2009-10 to place funds for procurement, civil works, IEC and some HQ expenses at the disposal of the DG, Family Welfare.*
- *The Mission Director and Principal Secretary, UP does not monitor the utilisation of these funds or call for utilisation reports.*
- *The Principal Secretary approves the same [fund disbursement]. During the team's visit Principal Secretary & MD, NRHM were held by the same person.*
- *The Executive Council decisions on individual procurement/civil works and IEC cases are used as a basis for spending funds through the DG-FW for these purposes.*
- *Few inspection or monitoring or field visits being undertaken regarding reports and information pertaining to the fund position at district and block level for all 71 districts in the State.*
- *At the district level the joint signatory related to disbursement of funds are the District Family Welfare Officer and the Dy. Ditrict Family Welfare Officer.*
- *The concurrent auditors' reports for the districts indicate issues regarding maintenance of books of accounts and fixed assets registers. The statutory auditor's reports for 2009-10 indicated that the State Health Society would withdraw/lift funds from the districts periodically, which practice should be discontinued and an understanding has been given by Mission Director, NRHM accordingly in the State's reply to the Management letter.*
- *The State is releasing funds to all revenue villages for untied funds. There are VHSCs where the*

numbers of revenue villages associated are five or more. This in effect has meant that funds of Rs. 50,000 (Rs. 10,000x5) are now available as untied funds with some VHSCs annually. This substantial sum coupled with slow utilisation means that large funds are available at village level without sufficient monitoring of their utilisation.

- *Numerous instances of cash books, ledgers, advance registers, fixed assets registers, bank reconciliation statements not being maintained or updated have been noticed during the visit to districts, blocks and sub-centres/villages.*
- *Internal controls governing release of funds, preservation of vouchers and bills there against, and to prevent diversion of funds needs to be strengthened.*

54. In the second visit of the Finance Team during 10-15.05.2011, the inspection was carried out in State Headquarters and districts, namely, Faizabad, Rai Bareilly, Unnao, Hardoi, Mirzapur, Chandouli, Sonbhadra, Sitapur, Kanpur Dehat, Barabanki, Sultanpur and Lucknow. Few observations are as below:

- ***Procurements:*** *In 2009-11, Rs. 334.62 crore was available with DG (FW) office for various procurement activities. However, expenditure for Rs. 178.65 crore (53%) only had been reported till 12.05.2011 and advances of Rs. 93.62 crore were lying with implementation agencies comprising of state agencies of Uttar Pradesh and outside parties as on 12.05.2011, resulting in an estimated loss of interest on amount given to different implementation agencies of Rs. 1.57 crore. Irregularities in procedure were noticed during award of contracts for Mobile Medical Units, Hospital Waste Management, Hospital Cleaning and Gardening, Safe Drinking Water (R.O. System) etc.*
- ***Civil Construction Works:*** *Analysis of civil works under NRHM during 2009-11 revealed that the DG(FW)'s office merely transferred funds for civil works to Project Implementation Agencies (state government agencies viz. U.P. Processing & Construction Co-operative Federation Ltd. (PACCFED), Uttar Pradesh Projects Corporation Ltd. (UPPCL), Construction and Design Services (CDS), UP, Jal Nigam, Uttar Pradesh Labour and Construction Cooperative Association Ltd. (LACCPED) as earmarked in Executive Committee meeting decisions with no open tender system being followed to ensure competitive cost effective bidding. Full payments amounting to Rs. 244.26 crore were made to the Project Implementation Agencies without entering into any formal agreement. Poor monitoring of progress of civil construction and absence of penal action against defaulting firms for delays in completion of works were noticed. Defects in construction noted in District Inspection Reports of Junior Engineers/CNIs were not acted on.*
- ***Emergency Medical Transport Services (EMTS):*** *For*

operationalization of the EMTS, the state procured 779 ambulances from Tata Motors at a cost of Rs. 56.36 crore. Of these, 620 ambulances remained stored at the Tata Warehouse (Regional Supply Office, Lucknow) as the state was unable to take delivery. 159 EMTS vehicles have been stationed in the districts. Moreover, most of the 159 EMTS vehicles were lying idle in the districts. The State should have chalked out a time bound plan in advance, prior to procuring the vehicles under the EMTS.

- ***RKS Funds:*** *The RKS funds were being used to pay mobility advances etc. Funds meant for training, diesel fuels etc. were being credited to the RKS accounts which was an incorrect practice.*

55. In this regard, the Report of the Director of Audit & Account, Government of U.P. dated 04.07.2011 conducted in the office of Director-General, Family Welfare was also placed by Ms. Kamini Jaiswal before us. His findings are as below:

- *Funds amounting to Rs. 1,25,75,78,910.00 were found unutilized;*
- *Advances amounting to Rs. 81,04,41,000.00 being disbursed for supply of medicines and other material without assessing the capacity of the firms to supply the required material which were in fact not supplied;*
- *Financial approval of Rs. 353.71 crore was not given and therefore State could not fulfill its commitment of State share in the Mission.*
- *Utilization certificate of amount of Rs. 25,81,07,380.00 could not be obtained from the districts;*
- *advances of Rs. 2,79,75,95.223 were not adjusted;*
- *Firm was endowed to do work was changed inadvertently without assigning any cogent reason after payment of advances to the tune of Rs. 89 crore.*
- *Contract for supply of furniture and equipment to the tune of Rs. 8.10 crore was given to a firm without inviting tenders which resulted in loss to the State exchequer of the lowest supply rates against which contract could have been floated.*
- *Hoarding work of Rs. 9.75 crore done without floating tender, the State incurred a loss of Rs. 6.16 lakhs;*
- *988 ambulances were ordered for Emergency Medical Transport Services above the R.C. rate (rate contract) and therefore State incurred loss of Rs. 99.73 (unit) lakhs;*
- *The concerned firm that supplied M.B.A.N.S.V kit for the Mission at Rs. 4,42,04,250.00 was over and above the R.C. rate which incurred loss to the Mission;*
- *Rs. 86,995 spent on irregular purchases;*
- *Without taking into account the estimates, the firm was advanced Rs. 4537.26 lakhs and Rs. 8900.00 lakhs all at once.*

56. The Financial Monitoring Reports of State of U.P. or in other words, statutory audit reports for the financial year 2005-06, 2006-07, 2007-08, 2008-09 and 2009-10 indicate proper books of accounts, ledgers

have not been maintained. The main findings are highlighted below:

i. Year 2005-06:

- ***Maintenance of Accounts:*** *Maintenance of books of accounts at districts, Unit and Head Office is not fully satisfactory.*
- ***Concurrent/Internal Audit:*** *No system of Concurrent/Internal Audit to assess/verify the adherence to the laid down system of internal control system commenurate with size and nature of the business exists in the project.*
- ***Heavy Bank Balance****: As per balance sheet of Empowered Committee, a sum of Rs. 181.75 crores is lying as bank balance which is substantially high in commensurate with the aggregate project expenditure of Rs. 225.58 crore.*
- ***Maintenance of sub Centres:*** *Unit cost of maintenance of each sub-centre was taken as Rs.10500000/- instead of Rs. 105000/- which is not in accordance with provision of PIP and hence amount of deviation.*
- ***IEC:*** *The procedure adopted for procurement of parties for printing of prescription slips for Rs. 1.85 crores, is not commensurate with size and nature of the job/supply in as much as the tender documents, contained restrictive clause which discourage competition and also leads to obtain higher price.*

ii. Year 2006-07

- ***Maintenance of Accounts:*** *Maintenance of books of accounts at districts, Unit and Head Office is not fully satisfactory.*
- ***Concurrent/Internal Audit:*** *No system of Concurrent/Internal Audit to assess/verify the adherence to the laid down system of internal control system commenurate with size and nature of the business exists in the project.*
- ***Internal Control Procedure****: The system of internal control procedures in respect of transfer of funds, issuance of guidelines for utilisation of funds by H.O., payments of advances and its adjustments at the districts, submission of timely SOEs by the districts, monitoring of outstanding advances and periodical reconciliation etc. are not in commensurate with size and nature of the business of the organization and needs to be strengthened for effective monitoring and control.*
- ***Management Letter:*** *Frequent change in DDO is made due to transfer of CMO and Dy. CMO (RCH). Charge is handed over and taken over only on cash book, meaning thereby charge of assets viz. stores, furniture etc. are not handed over to the new comer.*
- ***Procurement:*** *Procurement of furniture, equipment, books consumables have done generally by obtaining quotations from at least three suppliers and preparing comparative chart of the solicited quotations.*

iii. Year 2007-08

- ***Minutes books of purchase committee not maintained properly.***
- ***Payment through Cheque*** *- JSY: In case of payments of incentives for Janani Suraksha Yojna, there*

was an instruction from State Project Management Unit to make payment of incentives through bearer cheques but in some cases Primary Health Centres and Community Health Centers payment made in cash. This should be avoided.

- ***Purchase Procedure:*** *A laxity is noted in case of prividing purchase order for supply/services. This should be viewed seriously and purchase rules should be followed.*

iv. Year 2008-09

- ***Pulse Polio-Utilisation Certificate:*** *Funds for IPPI being given in the personal name of the officers and UC's are not received on a timely basis increasing risk of misuse. Parallel fund released from Family Welfare Department is creating confusion.*
- ***Difference in balance of Advance:*** *There is a difference of Rs. 226,42,83,225 between advances as on 31.03.2008 (as per audit report 2007-08) and as on 01.04.2008 (as per audit report 2008-09).*
- ***Advance given to UNOPS:*** *An advance of Rs. 75 crores was given to UNOPS in October-November, 2008 for supplies of medicines/equipments. Out of this, Rs. 3.43 crore were utilized till the year and supplies of medicines/equipment against remaining amount is yet to be done.*

v. Year 2009-10

- ***Advance given to UNOPS:*** *Advance given to UNOPS: An advance of Rs. 75 crores was given to UNOPS in October-November, 2008 for supplies of medicines/equipments. Out of this, Rs. 3.43 crore were utilized till the year and supplies of medicines/equipment against remaining amount is yet to be done.*
- ***Bank Reconciliation:*** *Bank reconciliation statements of various schemes in Districts shows number of pending entries which needs to be given effect in the books of accounts or necessary correction to be done.*

57. The Government of India commenting on the statutory audit report for 2009-10 vide D.O. Letter dated 31.01.2011 indicated the audit report to be not satisfactory in as much as it was not clear if auditor visited all the Districts and 40% of the blocks as required. Further, diversion of funds was reported. The State was also appraised that it was yet to discharge its obligation of State share of 15% towards NRHM.

58. Regional Evaluation Teams from the Regional Directorate of the Ministry visited various districts of Uttar Pradesh regularly in 2005-06, 2006-07, 2007-08, 2008-09, 2009-10 and 2010-11. The Reports are annexed as Annexure R-3 to the aforesaid supplementary counter affidavit of Union of India. The main findings in the report of the year 2009-10 are quoted below:

- *Report of districts - Unnao, Bijnaur, Kannauj, Sultanpur, Auraiya, Ghazipur, Jalaun, Balrampur, Aligarh and Kanpur Nagar:*
  - ***Human Resources:*** *Post of multipurpose worker (male) vacant at most of*

the SCs in Aligarh, Balrampur, Kanpur Nagar districts. Specialists at CHC Chhibramau in Kannauj district. Regular driver at PHC Balrampur district.

- ***RKS & VHSC:*** *Guidance required for smooth functioning of RKS at PHC level in 4 out of 10 visited districts. No VHSC meeting organised after June 2008. Meeting of RKS held irregularly at DH in Ghajipur and was non-functional at CHCs and PHCs.*
- ***Untied Funds:*** *ANM in Ghazipur not properly guided for utilization of untied funds. No expenditure reported by CHCs/PHCs/SCs in time in Jalaun & Aligarh districts. Funds not utilized in a few of the SCs in Aligarh & Kanpur Nagar. Due to non-submission of utilization certificates for last two years, the centres in Ghajipur districts were not given fund in 2008-09. In Jalaun district, 55% of the allocated fund utilized till December 2008.*

- *Report of districts - Etawah, Etah, Ghaziabad, Allahabad, Pratapgarh, Jhansi, Lalitpur, Pilibhit, Mahoba, Shahjahanpur and Kushinagar:*
  - ***Human Resource:*** *Staff position was less than the sanctioned posts in visited SCs, PHCs/CHCs and in many districts. Vacancies existed in the sanctioned strength of medical & paramedical staff in all the districts.*
  - ***RKS & VHSC:*** *Scope to improve RKS functioning in Etawah and Etah districts and in Pratapgarh district by taking follow up action of earlier meeting. Less representation of PRI in executive committee observed. VHSC meetings not held regularly in all the districts.*
  - ***Untied funds:*** *Meeting proceedings at CHC/PHC level were not properly recorded in Shahjahanpur. Joint account of Pradhan and ANMs opened at SC level but lack of cooperation among them in Etawah district. Various districts were utilizing the funds but statement of expenditure was not maintained.*

General observations:

- **Human Resource:** Multipurpose health worker (male) posts are vacant at most of the sub-centres visited.
- **Untied funds:** Various districts are utilizing the funds but statement of expenditure was not maintained. Proper guidance is required for utilization of untied funds amongst ANMs and Pradhans.

- **Infrastructure and drugs:** Sub-centres are lacking essential equipment and drugs. Items like Blood storage unit, resuscitation and anaesthesia equipment, incinerator and vehicle/ambulances were not available at some of the Community Health Centres. Electricity and labour room not available in many sub-centres. AYUSH Medical officer posted but no medicines available in some of the centres visited.
- **Maintenance of record & registers:** Cash book regarding untied fund expenditure was not maintained and passbooks were not updated. No record maintained for number of deliveries conducted in the night in most of the 24x7 facilities.

59. The reports aforesaid, though, do not require any categorical opinion from us primarily because it is not the domain of this Court under Article 226 to investigate into facts and consequently it ought to be left to the fact finding body; yet they do indicate that gross irregularities and discrepancies have been committed, both, in the matter of general administration and financial administration in the implementation of NRHM including utilisation of NRHM funds.

60. The facts reported aforesaid are also supported by the State's own Press Release issued by Chief Minister Information Centre, Information and Public Relations Department, Uttar Pradesh dated 07.04.2011 placed before us by the petitioners. The relevant portion is quoted below:

"पत्र सूचना शाखा
(मुख्यमंत्री सूचना परिसर)
सूचना एवं जन सम्पर्क विभाग, उ०प्र०

डा० बी०पी० सिंह के प्रकरण में परिवार कल्याण विभाग तथा चिकितत्सा एवं स्वस्थ्य विभाग के अधिकारियों/ कर्मचारियों की संलिप्तता पाए जाने पर श्री बाबू सिंह कुशवाहा एवं श्री आनंद कुमार मिश्र ने अपनी नैतिक जिम्मेदारी लेते हुए स्वेच्छा से मंत्री पद से त्यागपत्र दिया

. . .

माननीया मुख्यमंत्री जी कानून-व्यवस्था क बिगाड़ने वालों, किसी भी विभाग में गड़बड़ी करने वालों तथा अक्षम अधिकारियों, मंत्रियों और पार्टी पदाधिकारी क नहीं बख्शतीं, माननीय मुख्यमंत्री जी ने प्रमुख सचिव, परिवार कल्याण क पद से हटाया लखनऊ के मुख्य चिकित्साधिकारी डा० ऐ० के० शुक्ल भी हटाये गए चिकित्सा एवं स्वस्थ्य विभाग के लिपिक श्री संजय आनंद गिरफ्तार, निलंबित करने के आदेश राज्य सरकार ने मुख्य चिकित्सा धिकारी क चिकित्सा, स्वस्थ्य एवं परिवार कल्याण की सभी याजनाओं का नाडल अधिकारी नामित किया

लखनऊ, 07 अप्रैल, 2011

. . .

श्री सिंह ने कहा कि इन हत्याओं की जाँच के दौरान अभी तक यह तथ्य प्रकाश में आये हैं कि मुख्य चिकित्साधिकारी, परिवार कल्याण द्वारा विभिन्न अस्पतालों में राष्ट्रीय

ग्रामीण स्वस्थ्य मिशन के तहत चलाये जा रहे विभिन्न कार्यक्रमों के लिए वाहनों क किराये पर लेकर तथा उनके भुगतान के मामलों में गंभीर वित्तीय अनियमिततायें की गयी हैं। जाँच में यह भी पाया गया की वाहन किराये पर लिए ही नहीं गए और फर्जी बिल तैयार कराकर शासकीय धन का आहरण किया गया। इसी प्रकार दवाओं के खरीद में भी अनियमितायें पायीं गयी हैं। टेंडर प्रक्रियां के माध्यम से अर्बन आर० सी० अच्० प्राजेक्ट २०१०-११ लखनऊ के लिए स्वीकृत मैन पावर के लिए किये गए भुगतान कार्य आदेश में दर्शायी गयी संख्या से अधिक मैन पावर दिखाकर भुगतान किया गया है। ज स्पष्ट रूप से वित्तीय अनियमिततायें तथा शासकीय धन का गबन है।

. . ."

61. None of the parties including the State dispute that siphoning of funds and irregularities have been committed in the implementation of NRHM in Uttar Pradesh. Though the learned Additional Advocate General puts it as financial mismanagement; but he did not throw any light on the context and use of the expression in the present set of facts and circumstances. It is also not disputed that State Health Mission was not reconstituted nor the fact that the Executive Committee took all the decisions concerning implementation of the Mission without any approval being accorded to such decisions by the Governing Body and that no full time Mission Director had been appointed during all such period and that the Principal Secretary and certain other officers/officials acted as the Mission Director and disbursed and operated the NRHM funds from time to time without any due authorisation. It is also not on record whether any meeting of State Health Mission was ever held, even if it was constituted under the aegis of the previous Government.

62. Learned Additional Advocate General reiterating that this Court must consider the prayer of the petitioners in the light of the CAG Report argued that State has little role to play in the implementation of NRHM as the State Health Mission was only to guide the implementation of the Mission. Even the grants by the Central Government were sent directly to the State Health Society. He urged that State functionaries of the level of Ministers and above had no role to play in the implementation of the Mission. Accordingly, he says the State Health Mission was constituted in terms of Para. 8.1 of the MoU; but the need to hold any meeting was not felt.

63. With regard to procurements of goods and articles through U.P.S.I.C., the State clarified that the decision to route supply for articles and goods for NRHM through U.P.S.I.C was taken in view of the G.O. dated 01.07.2000 read with 26.03.2004 and the aforesaid government orders were in vogue when such items were procured. It was a policy decision to promote small scale industries. Consequently, those items for which rate contract by the industries department was not available including the reserved items were procured through U.P.S.I.C.

64. So far as reports on record are concerned, learned Additional Advocate General sifted the report of the Second Finance Team classifying it a "hasty report'. He submitted that the report overlooked certain material facts and pointed out few

clerical mistakes. He termed it a contradictory report where reporting districts were not visited at all and therefore stated that such a report is not an appropropriate material before this Court. But the anomalies pointed out, the irregularities and the discrepancies found in the various reports referred to above will not loose their significance because of the aforesaid policy decision.

65. Learned Additional Solicitor General strongly denied the above submission of learned Additional Advocate General and stated that the visit report is only a sample survey based on the record provided to the Team in the State headquarter and ofcourse during the visit at various districts, blocks and villages. According to him, certain clerical mistakes, even if there are, cannot denounce the status of the report as an important material before this Court to decipher the irregularities and anomalies that have been committed in utilisation of the NRHM funds and implementation of the Mission.

66. We do not find it necessary to enter into the niceties of the visit report aforesaid considering that it is a report on sample survey and also in view of the material brought on record otherwise.

67. Learned Additional Solicitor General also drew our attention to para.11.1 of the MoU which underlines the State Government's commitments. The clause is quoted below:

"11.1 The State Government commits to ensure that the funds made available to support the agreed State Sector PIP under this MoU are:

(a)used for financing the agreed State Sector PIP in accordance with general financing schedule and not used to substitute routine expenditures which is the responsibility of the State Government.

(b)kept intact and not diverted for meeting ways and means crisis."

68. Relying on the above-quoted clause from the MoU, learned Additional Solicitor General stated that (1) the MoU has been entered into between the Government of India and Government of Uttar Pradesh and not the State Health Society or such other entity envisaged in the MoU; (2) the MoU envisages the primary responsibility on the State Government to monitor the funds routed through the MoU which are used for financing the State Sector PIP and are kept intact and not diverted. Clarifying further, Ms. Kamini Jaiswal submitted that the argument of learned Additional Advocate General that state functionaries of the level of Minister and above had no role to play in the implementation of NRHM in the State must be appreciated in light of the fact that the two Ministers resigned taking moral responsibility of the gross irregularities being committed in the implementation of NRHM and also that State has been consistently involved in the affairs of NRHM which can be duly inferred from the fact that several government orders concerning NRHM have been issued from time to time, and also for the facts, referred to in the earlier part of this order.

69. In this context, Sri Akhilesh Kalra stated that the fact that State Health Mission was constituted as submitted by the State is not correct. Learned counsel stated that State Health Mission was constituted by the earlier Government on 16.11.2006.

However, the new Government came to power on 13.05.2007. Thus, the State Health Mission constituted under the regime of previous Government could not be deemed to have continued as it required fresh constitution since various public representatives, such as, Members of Parliament, Members of Legislative Assembly, public representatives of such other local bodies previously nominated by the State Government to hold the office of members of the State Health Mission could not have continued on account of conclusion of fresh elections both at the Centre and State.

70. There is force in the submissions advanced by the learned Additional Solicitor General and the learned counsel for the petitioners. The State has not been able to give any explanation, much less, any satisfactory explanation, as to why the State Health Mission was not reconstituted; why review meetings to monitor the implementation of NRHM in the State and utilisation of funds were not held; why the Departments were bifurcated; and also why full time Mission Director was not appointed.

71. The argument of learned Additional Advocate General that State had limited role to play can be partially appreciated in the light of the decentralised administration envisaged in the MoU. However, it cannot be lost sight of, that the MoU which governs the implementation of NRHM in the State was entered into with the State and not with the State Health Society or any other body which is only an implentation agency of the whole Mission. The Chief Minister was designated the *ex-officio* Chairperson whereas Minister, Health & Family Welfare was the *ex-officio* Co-Chairperson of the State Health Mission only to ensure that the whole system remains under his/her vision and check, so that the objectives sought to be achieved by the introduction of NRHM is not lost due to administrative turbulence. Undoubtedly, paragraph 11.1 puts the duty on the state to monitor the utilization of funds and progress of the Mission in the State. The involvement of the State in the implementation of the Mission so far as the State itself is concerned cannot be ousted. The Reports on record including those extracted above and the Press Release of the State highlight the irregularities and the manner in which affairs of NRHM have been dealt with which has led the two Ministers tender their resignation. The resignation of the Ministers underlines the adverse state of affairs in the implementation of NRHM of which fact the Ministers were conscious.

72. Despite detection of the financial irregularities in the affairs of NRHM which is evident from the documents aforesaid, till date no FIR has been lodged against any person on behalf of the State but for the NRHM affairs of Lucknow, nor any effort has been made to bring the persons guilty to trial. The enquiries that they have setup were setup only when the cognizance was taken up by the Court and curiously only on one and the same day i.e. 11.07.2011 seven enquiries were constituted. In other words, till the Court took cognisance no effort was made by the State Government to take any action either departmentally or criminal against erring persons, which shows their complete reluctance to identify the erring persons/officers/officials.

73. We fail to appreciate that when so many reports were coming forward and one Press Release was issued by the State of U.P. itself taking cognisance of the matter

then why effective steps were not taken till date for dealing with such gross irregularities. The State has not been able to explain its aforesaid inaction. The inaction of the State and omission to take necessary steps has not only resulted in committing financial irregularities which the learned Additional Advocate General terms as financial mismanagement but also has deprived the beneficiaries of the laudable scheme which was sought to be implemented for providing medical facilities.

74. Learned Additional Advocate General, at this juncture stated that if Lucknow district is removed from the picture then there is nothing compelling on record to show gross anomaly in the implementation of NRHM in other districts.

75. We fail to follow his submission. Few reports quoted above and other material on record, including the press release, the statutory audit reports, independent studies in the implementation of NRHM in the State of U.P indicate gross irregularities in the implementation of NRHM including the award of contracts and procurement of goods, articles and others; besides poor monitoring or so to say no monitoring by the State Health Mission or the State Government or the departments concerned of the State Government.

76. The State has also provided a chart outlining all officers who discharged functions of Mission Director, however it admitted that such persons were never appointed as Mission Directors nor such persons could have been appointed. Letting an officer operate NRHM funds which he was not otherwise authorised speaks volumes about the manner in which NRHM was sought to be implemented in the State which establishes that the funds were allowed to be dealt with by unauthorised persons.

77. More so, Sri Jagdish Narain Shukla, petitioner appearing in person in one of the writ petitions submitted that though the State is pressing that CAG Report be obtained before entrusting the matter to CBI but it has not been able even to protect the record relating to NRHM. He brought to our notice instance at Agra where NRHM records were burnt and then again theft of some articles occurred at Godown of Department of Health at Lucknow against which FIR was also registered though we had requested the Chief Secretary in the meanwhile to issue necessary instructions to protect the records.

78. Considering the facts and circumstances of the present case, it is painful to see that a scheme meant for providing quality health services has taken the lives of three CMOs, the affairs of which prima facie appear to have been handled in such a manner which suffers from gross inaction and omissions wherein public money has been seemingly misutilised by the public functionaries apparently in collusion with the private stakeholders.

79. The consequence and effect of such inaction and omission on the part of the State have necessarily to be found out for which an independent enquiry by an independent agency as CBI is necessary. This would also be in consonance with the provision of Section 6-A of the CBI Act and para. 9.1 of the CBI Manual that provides that where sufficient evidence is not available to register a regular case, preliminary enquiry may be conducted.

80. We are *prima facie* convinced that gross irregularities - financial and administrative appear to have been committed in the execution and implementation of NRHM including the matter of award of contracts, procurement of goods, articles and etc. at various levels.

81. In the facts and circumstances of the instant matter, we are not inclined to grant the plea of learned Additional Advocate General that we should wait for the CAG Report before considering to entrust the matter to CBI in light of the fact that CAG is conducting a special state level audit more so when statutory audits by CAG were not got conducted when para. 12.3 of the MoU obliged statutory audits by CAG of the funds routed through the MoU. None of the opposite parties have attempted to explain this inaction. Further, the special audit which has been ordered is only with respect to 24 districts for the financial year 2009-10 and 2010-11.

82. Learned Additional Solicitor General has also rightly pointed out that it is not necessary for this Court to wait for CAG Report as the scope of CAG and CBI being completely different and with the kind of irregularities appear to have been committed in the instant matter coupled with the fact that attempt was made to wash of some evidence, the exigencies of time require that immediate steps be taken to bring to light the persons guilty.

83. Learned Additional Advocate General has also not been able to explain as to why the State would have waited for the outcome of the CAG Report when it was itself competent to take necessary action. His argument that pending CAG Report, there is no material before this Court is untenable. We also take notice of the fact that the murders of two CMOs (Family Welfare), Dr. V.K. Arya and Dr. B.P. Singh, death of Dr. Y.S. Sachan while in judicial custody (jail) and financial irregularities committed in the office of CMO, Lucknow all in relation to irregularities in NRHM are already being investigated by the CBI pursuant to the orders of this Court with the consent of the State Government.

84. The facts and circumstances, aforesaid make out a case for reference to CBI for making a preliminary enquiry in the affairs of NRHM in the entire State of U.P. right from the very inception of the NRHM.

85. We, therefore, direct the Director, CBI to conduct a preliminary enquiry in the matter of execution and implementation of the NRHM and utilization of funds at various levels during such implementation in the entire State of U.P. and register regular case in respect of persons against whom prima facie cognizable offence is made out and proceed in accordance with law. The preliminary enquiry shall be conducted from the period commencing year 2005-06 till date. It is directed that the inquiry be completed within four months. The State Government is directed to hand over and make available all the records as may be required by the CBI and render full support and cooperation to CBI. The Central Government is also directed to render full support as may be asked by the CBI.

86. We may make it clear that the allegations levelled in the instant petitions have been examined only on prima facie scale and therefore CBI may proceed to conduct preliminary enquiry independent of our observations in accordance with law.

87. Before parting, we deem it necessary to mention that the specific prayer of direction to the State for merging the erstwhile departments of health and family welfare has been made in writ petition no. 2647 (M/B) of 2011. The departments have already been merged during the pendency of the instant petitions. No direction is therefore needed.

88. Also, the credentials of Sri Jagdish Narain Shukla were questioned by the State and also U.P.S.I.C. It is not necessary for us to enter into the said issue since we have already entrusted the instant matter to CBI while dealing with other writ petitions.

89. Petitions accordingly stand disposed. No costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 08.11.2011

BEFORE
THE HON'BLE SUDHIR KUMAR SAXENA,J.

U/S 482/378/407 No. - 4565 of 2011

Shiva Kant Mishra and others
...Petitioners
Versus
The State of U.P and another
...Respondents

Counsel for the Petitioner:
Sri Nisar Ahmad

Counsel for the Respondents:
Govt. Advocate

Code of Criminal Procedure-Section-482-Quashing of Criminal Proceeding-offence under Section 147/504/506 IPC 3(i) (x) of SC/ST Act-Parties settled their difference before Mediation Center-on basis of that Petition disposed of in terms of compromise-Magistrate taken view unless case is committed before Session Court-has no authority to pass discharge order-held parties can not be forced to face ordeal of criminal proceeding-when matter settled amicably and accepted bu High Court-by exercising power under 482, proceeding quashed.

Held: Para 15

Since purport of the order dated 27th August, 2009 is that criminal proceedings stood terminated, no useful purpose would be served by committing the case to the court of session. Powers under Section 482 Cr.P.C. can always be utilized for giving effect to the orders passed by the court in the ends of justice. Since, the matter before the Meditation Center has been amicably settled and that has been accepted by this Court, it will be useless to remand the matter and force the parties to face ordeal of the criminal proceedings.

Case law discussed:
Writ Petition No. 1509(M/S) of 2009(Rohit Ahuja Vs. Additional Principal Judge, Family Court, Lucknow and Another); (2008) 9 SCC 677; (2008) 4 SCC 582; (2008) 16 SCC 1

(Delivered by Hon'ble Sudhir Kumar Saxena,J.)

1. Heard Sri I.B. Singh, learned Senior Counsel appearing on behalf of the petitioners and learned AGA as well as learned counsel for the opposite party no. 2.

2. This petition has been filed under Section 482 Cr.P.C. for quashing criminal proceedings in Case no. 6818 of 2002, under Sections 147/504/506 IPC and Section 3(I)(X) of the SC/ST Act. The matter was referred to Mediation and

Conciliation Center by Hon'ble Mr. Justice S.K. Singh vide order dated 28-04-2009. It appears from the report of the Mediation Centre that both the parties have settled the dispute and decided not to proceed with the case any further and both the parties have submitted an application in the above case for termination of the entire proceedings in terms of the compromise. Terms of the settlement are being quoted herein below:-

1) "That on the basis of the first information report lodged by the petitioner no. 3 Sri Shailesh Kumar Rai a case crime no. 1243 of 2001, under Section 384, 353, 504, 506 IPC was registered against the second party in the P.S. Kotwali Lakhimpuri Kheri on 06-12-2001.

2) That on the basis of first information report, lodged by the second party/respondent no. 2 Sri Lekhram Bharti, Case Crime No. 445 of 2002, under Section 147, 504, 506 I.P.C. and Section 3(1)(X) SC/ST Act was registered in P.S. Kotwali Kheri, Distt. Lakhimpur Kheri against the first party/petitioners on 14-05-2002.

3) That first party are the Government servants and the second party is the Sampadak, Hindi Saptahik, Kheri Tiger.

4) That both the parties have settled their case and have decided to not to proceed with the case any further. The cases against each of the party were registered due to some misunderstanding. Both the parties have submitted an application in the above case for termination of the entire proceedings in terms of compromise."

3. It is specified in para-7 of report of the Mediation Centre that all the disputes and differences in respect of Criminal Misc. Case No. 4076 of 2007(under Section 482 Cr.P.C.) have been amicably settled by the parties.

4. In the light of the aforesaid settlement, the petition was disposed of by Hon'ble Mr. Justice Alok Kumar Singh vide order dated 27th August, 2009. The said order is quoted hereinbelow:

"Learned counsel from both the sides are present. Fortunately, the dispute has been settled between the parties in the Mediation and Conciliation center of this Court, as per settlement agreement (annexure-E)

This petition is disposed of accordingly in terms of compromise."

5. It is apparent from the above order that petition was disposed of in terms of the compromise which very categorically intended to terminate the criminal proceedings going on between the parties.

6. Sri I.B. Singh, Senior Advocate, appearing on behalf of the petitioners submits that the dispute having been settled through compromise, the Magistrate was not justified in forcing the presence of petitioners enabling him to commit the case. He has relied upon a decision of this Court in Writ Petition No. ***1509(M/S) of 2009(Rohit Ahuja Vs. Additional Principal Judge, Family Court, Lucknow and Another).***

7. Sri R.K. Dwivedi, learned AGA strongly opposed the argument of learned counsel for the petitioner, by saying that the aforesaid judgment pertains to the civil matter and as such, the judgment which deals with Section 89 of C.P.C. has no application to the present case. He further submits that the Magistrate has no power to pass any order in the matter as the case is triable by Sessions Court, as such, and he had no option but to commit the case to court of session.

8. Argument of AGA has substance. It is true that the offence being exclusive triable by Sessions Court, Magistrate has no authority to discharge the accused persons or pass any order whereby accused would stand acquitted.

9. However, this Court can pass such an order in the interest of justice. The dispute was between Shiv Kant Mishra, Shailesh Kumar Rai and Lakhram Bharti. This dispute was purely personal in nature. Since parties have settled the matter by way of compromise, no useful purpose would be served by requiring the parties to undergo the ordeal of criminal trial where parties may have to be forced to give false statements as well, in order to escape the clutches of law. In the opinion of the Court, matter being purely personal in nature and parties having buried their disputes amicably, it would be futile exercise to direct the parties to appear, go to jail and then press the compromise before the court below. Magistrate may be justified in taking the ground that it has no power to compound the case which is not compoundable. However, in such a situation, this Court cannot not remain silent spectator and perhaps with a view to meet such an eventuality, inherent powers of the Courts have been saved.

10. In the case of ***Nikhil Merchant Vs. Central Bureau of Investigation and Another (2008) 9 SCC 677,*** Hon'ble Apex Court was dealing with the case where the parties have entered into compromise and it was agreed that all the allegations and counter allegations would be withdrawn. In para 31 of the judgment the Apex Court observed that the continuation of the criminal proceedings after compromise would be a futile exercise. Para 31 of the said judgment is quoted herein below:-

On an overall view of the facts as indicated hereinabove and keeping in mind the decision of this Court in B.S. Joshi case and the compromise arrived at between the Company and the Bank as also Clause 11 of the consent terms filed in the suit filed by the Bank, we are satisfied that this is a fit case where technicality should not be allowed to stand in the way in the quashing of the criminal proceedings, since, in our view, the continuance of the same after the compromise arrived at between the parties would be a futile exercise.

11. In the case of **Madan Mohan Abbot Vs. State of Punjab (2008) 4 SCC 582,** Hon'ble Apex court observed in para-6 of the judgment that the disputes which involved the question of purely personal in nature, Court should ordinarily accept the terms of compromise even in the criminal proceedings. This approach has been found to be common sense approach based on ground realities. Para -6 of the judgment is reproduced hereinbelow.:

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

12. In the case of ***Manoj Sharma Vs. State and Ors. (2008) 16 SCC 1,*** Hon'ble Apex Court considering the ***B.S. Joshis' Case 2004(9) SCC 47,*** observed that Section 320 Cr.P.C. does not limit the discretion of the Court under Section 482 Cr.P.C.

In para-8 of the said judgment, Hon'ble Apex Court has observed that *"it is no doubt true that the first information report was the basis of the investigation by the police authorities, but the dispute between the parties remained one of the personal nature. Once the complainant decided not to pursue the matter further, the High Court could have taken a more pragmatic view of the matter. What we do say that the matter could have been considered by the High Court with greater pragmatism in the fact of the case."*

In para-27, Hon'ble Court observed that *" however in some other cases(like those akin to a civil nature), the proceedings can be quashed by the High Court if parties have come to an amicable settlement even though the provisions are not compoundable."*

13. From the above, it is apparent that if dispute is akin to civil nature or is purely personal in nature involving no public policy, Court would be justified in quashing criminal proceedings under Section 482 Cr.P.C. even if offences are non-compoundable. Of course, one relevant consideration could be the probabilities of the conviction, apart from saving the valuable time of the Courts. Of course, no hard and fast rule can be laid down in this respect and each case will have to be considered on the facts of the case; as there may be cases though personal in nature but affecting the society at large, having wide ramifications involving morals, values, national interests etc. Therefore, the common sense or pragmatism as advised by Hon'ble Apex Court could be utilized in the peculiar facts and circumstances of the case with a view to prevent the abuse of the process of the court and in the ends of justice.

14. In view of above, this Court finds that the parties having compromised the dispute, Court having disposed of the writ petition in the light of the compromise, no useful purpose would be served by continuing the prosecution, as such the petition is liable to be allowed.

15. Since purport of the order dated 27th August, 2009 is that criminal proceedings stood terminated, no useful purpose would be served by committing the case to the court of session. Powers under Section 482 Cr.P.C. can always be utilized for giving effect to the orders passed by the court in the ends of justice.

Since, the matter before the Meditation Center has been amicably settled and that has been accepted by this Court, it will be useless to remand the matter and force the parties to face ordeal of the criminal proceedings.

16. In view of above, the petition under Section 482 Cr.P.C. is allowed and criminal proceedings in Case No. 6818 of 2002(State of U.P. Vs. Surendra Mishra and Ors.) arising out of Case Crime No. 445 of 2002, under Sections 147, 504, 506 I.P.C. & Section 3(1)(X) of SC/ST Act, P.S.-Kotwali Sadar, District-Lakhimpur Kheri, are hereby quashed

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.11.2011

BEFORE
THE HON'BLE RAJIV SHARMA,J.

Misc. Single No. - 4735 of 2008

Vijay Kumar Yadav ..Petitioner
Versus
State of U.P.Through Secretary Civil Supply Civil Secretariat ...Respondents

Counsel for the Petitioner:
Sri P.N.Singh Kaushik

Counsel for the Respondents:
C.S.C

Constitution of India, Article 226- Principle of Natural Justice-cancellation of license of Fair Price Shop-without supplying the copy of complaint and the enquiry report-held-entails civil consequences-every authority exercising quashi-judicial duty is bound to follow the principle of Natural Justice-order not sustainable-Petition allowed on this limited ground.

Held: Para 34

Thus from the series of decisions, referred to herein-above, it clearly comes out that the preliminary enquiry report, inspection report or complaint or any other document which is utilized by the authority while cancelling the licence of a fair price shop licence, same has to be supplied to the licence holder and personal hearing is also to be afforded otherwise the proceedings would be in blatant disregard of the principles of natural justice.

Case law discussed:
[2000(18) LCD 321]; 1993 (1) ALR 121; 2008 (3) ADJ 36; AIR 1964 SC 72; (1999) 1 SCC 741; 2009 (1) ADJ 379 (DB); (1993) 3 SCC 259; (1998) 7 SCC 66; JT 1996 (3) SC 722; 2001 (19) LCD 513; 2006 (24) LCD 1521; 2008 (16) LCD 891; [2011 (29) LCD 626]

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

1. By means of this writ petition, the petitioner has prayed for quashing the impugned orders dated 24.07.2008 passed by the respondent no.2 and order dated 08.04.2006/19.04.2006 passed by the respondent no.4 contained in Annexure nos. 1 and 2 in the writ petition and also for issuing a writ in the nature of mandamus commanding the respondents not to give effect the aforesaid impugned orders as well as not to initiate the process for fresh allotment of shop.

2. Heard learned Counsel for the parties.

3. The petitioner is a Fair Price Shop licensee and the question involved in this case is as to whether non-furnishing the copy of the complaint or preliminary enquiry report or the inspection report or any other document, which has been utilized against the Fair Price Shop licensee while cancelling the licence, amounts to

violation of principle of natural justice or not. The assertion of the petitioner is that the plea of opportunity of hearing and non-supply of relevant documents, which were taken into consideration by the Licensing Authority, was raised before the appellate authority but the same has not been dealt with in its correct perspective.

4. According to State Counsel, to ensure proper distribution of essential commodities, which are bare need of the public they are to be distributed through the public distribution system for which Essential Commodities Act, 1955 was enacted by the Central Government. Pursuant to the powers conferred by the Public Distribution System (Control) Order, the State Government for maintaining the supplies of the food grains and other essential commodities and to secure equitable distribution and availability at fair price vide notification dated 20.12.2004, notified U.P. Schedule Commodities Distribution Order, 2004. This Distribution Order was notified by the State Government in exercise of the powers conferred under Section 3 of the Act of 1955 read with provisions contained in Public Distribution System (Control) Order, 2001. Apart from the U.P. Schedule Commodities Distribution Order, 2004 (in short referred to as the Distribution Order of 2004) which is w.e.f. 30.12.2004, the State Government issued a Government Order dated 29.7.2004 on the subject of monitoring/regulating various kind of procedures. Elaborating his arguments, State Counsel submitted that Clause-4 of the Distribution Order provides that a person granted fair price shop is to sign an agreement under sub-clause(3) for running the fair price shop before the competent authority prior to the coming into effect of the said appointment. Clause 25 provides observance of the conditions as the State Government stipulates whereas Clause 28(3) of the Order provides filing of appeal against the order of suspension or cancellation of the agreement. Thus a person appointed to run a fair price shop acts as an agent of the State Government, who is under an obligation to sign an agreement. The agent so appointed is under an obligation to maintain record of supply and distribution of scheduled commodities, maintenance of accounts, keeping of the registers filing returns and issue of receipt to Identity Card holder and other matters. In some of the writ petitions, it has been indicated in the counter affidavit that the cancellation of agreement relating to fair price shop is a non-statutory agreement and the orders regarding cancellation of non-statutory agreement are not amenable to writ jurisdiction before this Court. In this regard reliance has been placed on Gopal Das Sahu and another vs. State of U.P. and others; 1991 All.L.J.498 and Kallu Khan vs. State of U.P. and another [2008(6) ADJ 443 (DB)] and other cases. Sri Rakesh Srivastava, Standing Counsel also contended that when a fair price shop licence holder commits irregularities or is found to have indulged in the activities in contravention to the licence of Fair Price shop dealer, his agreement/licence is suspended. Before passing order of suspension of the licence, there is no contemplation of any notice and opportunity. Adverting to the present cases, he submitted that the order of cancellation was passed after providing the licence holder an opportunity of hearing which would tantamounts to passing the order after observing the principles of natural justice and as such it cannot be said that there was any infirmity. He further submitted that the appeal has also been dealt with by the Appellate Authority in a proper manner and after recording cogent and

plausible findings and only then, it was dismissed. Therefore, the writ petitions are liable to be dismissed on the aforesaid grounds. In Sri Pappu vs. State of U.P. and others [2000(18) LCD 321] the question for consideration before the Division Bench was as to whether the writ petition is maintainable against the order of cancellation of fair price shop in view of the Full Bench decision of the Court in the U.P. Sasta Galla Vikreta Parishad vs. State of U.P. and others 1993(1) ALR 121. The Division Bench presided over by Hon'ble N.K.Mitra, Chief Justice (as he then was) while examining the amended provisions of U.P. Panchayat Raj Act in view of the Article 243-G of the Constitution under which Gram Panchayat has been entrusted with the function of performing public distribution system, the Court while holding that writ petition is maintainable and observed in paragraph 9 of the report as under:-

"...Allotment of fair price shop or its cancellation is now a statutory function of the Gram Panchayat Exercise of statutory power by Gram Panchayat for collateral purposes is interdicted by Article 14 of the Constitution. Arbitrary grant or cancellation of fair price shop is open to judicial review under Article 226. The Full Bench decision, reliance on which has been placed by the learned Single Judge in dismissing the writ petition as not maintainable, in

our opinion, has been rendered obsolete in view of the constitutional and statutory amendments referred to above."

5. After issuance of various other Government Orders, the matter again gaized attention of this Court inre:Kallu Khan vs. State of U.P. and another [supra] before the Division Bench of this Court an objection was raised by the Standing Counsel placing reliance on the Full Bench judgement in U.P. Sasta Galla Vikreta parishad (supra) that the right of petitioner being contractual in nature and not statutory, the remedy, if any lies, either by filing appeal before the appropriate authority as provided under the relevant Government Orders and for alleged breach of contract, the writ petition under Article 226 of the Constitution is not maintainable. The Division Bench after considering the Full Bench decision in U.P. Sasta Galla Vikreta Parishad, Sri Pappu vs. State of U.P. [supra], Harpal vs. State of U.P. and others 2008(3) ADJ 36 and various other cases, which has been relied by the State Counsel, observed in para 59 of the report as under:-

" In view of the above discussion even if we come to the conclusion that as such the petitioner may not be non-suited on the ground that the writ petition is not maintainable yet it cannot be said that the Writ Court must entertain the writ petition whenever there is any complaint of breach of certain contractual rights. The legal position is otherwise. As observed by the Apex Court in Swapan Kumar Pal (supra) the scope of judicial review is only limited to interfere when there is any error in decision-making process and not otherwise. Even if the writ petition, as such , may not be dismissed on the ground that it is not maintainable yet we are of the view that in such matters exercise of discretion under Article 226 of the Constitution by entertaining writ petition would not be prudent unless it is shown that there is any violation of statutory provisions particularly when alternative remedy is available to the petitioner."

6. From the legal proposition reproduced herein above, it is evident that there is no blanket ban in entertaining the writ petitions. It is true that ordinarily the remedy for breach of contract is a suit for damages or for specific performance and not a writ petition under Article 226 of the Constitution. However, where the contractual dispute has a public law element, the power of judicial review under Article 226 may be invoked. In civil suit, emphasis is on the contractual right whereas the emphasis in writ petition is only the validity of the exercise of power by the authority.

7. It is pertinent to add that issue whether the writ petition is maintainable or the person aggrieved is entitled to invoke the writ jurisdiction was considered by the Apex Court in following cases:-

In Pratap Singh Keron v. State of Punjab AIR 1964 SC 72, the Supreme Court observed as under:-

" The Rule of law and Article 226 is designed to ensure that each and every authority in the State including Government of India acts bonafide and within the limits of its power and we consider that when the Court is satisfied that there is an abuse and misuse of power and its jurisdiction is invoked, it is incumbent on the Court to afford justice to the individual."

8. In the case of U.P.State Co-operative Bank Limited v. Chandra Bhan Dubey (1999) 1 SCC 741, the Supreme Court has laid down the following proposition:-

"... The Constitution is not a statute. It is a fountainhead of all statutes. When the language of Article 226 is clear, we cannot put shackles on the High Courts to limit their jurisdiction by putting an interpretation on the words which would limit their jurisdiction. When any citizen or person is wronged, the High Court will step into to protect him, be that wrong be done by the State, an instrumentality of the State, a company or a co-operative society or association or body of individuals, whether incorporated or not, or even an individual. Right that is infringed may be under part Part III of the Constitution or any other right which the law validly made might confer upon him."

9. A Division Bench of this Court in the case of Meena Srivastava v. State of U.P. 2009(1)ADJ 379(DB) held as under:-

" In the facts of the present case writ petition has been filed against an action of a Government Officer, who is public authority. The writ petition under Article 226 of the Constitution of India is maintainable against a public authority. The public authorities, who are State authorities and instrumentalities are not to act arbitrarily, irrationally or unreasonably. Any action of public authority can always be impugned in the writ petition and it cannot be said that the writ petition is not maintainable in such case."

10. Thus the consistent view of the court is that actions and the orders of public officers are amenable to judicial review even if they may arise out of a contract or any scheme of the Government, and therefore, the writ petition cannot be thrown out simply on the technical ground that it is not maintainable.

11. In view of the above discussion, I am of the considered opinion that the order passed by the Sub Divisional Magistrate/District Magistrate cancelling the licence and the Commissioner, who rejected the appeal preferred against the order of cancellation are public servant and decision taken by them in the garb of a legislation cannot escape judicial review under Article 226 of the Constitution and, therefore, a writ against such an order would lie at the behest of the person aggrieved, irrespective of the nature of his service rendered by him. Moreover, by entering into an agreement, a civil right in favour of the petitioners which cannot be taken away on the whims of the authorities.

12. At this juncture, it would be relevant to point out that in Rajendra Prasad vs. State of U.P. and others [decided on 9th February, 2009 by the Apex Court] the grievance of the appellant before the High Court was that allotment of Fair Price shop at village Kanakpur, district Bhadohi was cancelled by the authority without giving him opportunity of hearing. The High Court summarily dismissed the writ petition. Hence, the appeal by Special leave was preferred by the appellant. The Apex Court after examining the matter and finding that the opportunity of hearing was not afforded, allowed the appeal and quashed the order cancelling the allotment of Fair Price Shop of the appellant and the order passed by the High Court in the writ petition.

13. This case has been referred to show that the Apex Court did not decline to interfere in the matter on the ground that allotment of fair price shop is a contractual agreement or said that it is not amenable to writ jurisdiction. On the other hand, from this judgement of the Apex Court, it clearly emanates that when there is violation of principles of natural justice, the court can very well interfere in exercise of its discretionary power under Article 226 of the Constitution.

14. Here, it is not in dispute that in all the aforesaid writ petitions, petitioners have complained that the order of cancellation has been passed in blatant disregard of the principles of natural justice as the copies of the documents utilized against them were not furnished.

15. Against the order of cancellation, the petitioner has approached the Commissioner by filing appeal but the appellate authority also dismissed his appeal. Petitioner, after rejection of his appeal, has no other statutory remedy except to invoke the jurisdiction of this Court under Article 226 of the Constitution questioning the validity of the appellate order including the order of cancellation. It may be clarified that the appeal against the cancellation of allotment of fair price shop is creation of the statute. The order of Appellate Authority has also been assailed on various grounds. Therefore, the proceedings of an authority adjudicating upon question affecting the rights are amenable to writ jurisdiction of the High Court under Article 226 of the Constitution.

16. To clarify further, it may be mentioned that it is well recognised law that any authority or body of persons constituted by law or having legal authority to adjudicate upon question affecting the rights of a subject and enjoined with a duty to act judicially or quasi-judicially is amenable to the certiorari jurisdiction of the High Court.

17. In the backdrop of the aforesaid facts, the order of cancellation of license to run fair price shop under the public

distribution system subject to appeal, is ultimately amenable to writ jurisdiction as statutory authority cannot claim immunity from judicial review in respect of its functions vis-a-vis public distribution system. Thus the argument advanced by the State Counsel regarding maintainability of writ petition is wholly misconceived and it is held that the writ petitions are maintainable.

18. Next, the precise ground though not taken in the counter affidavit but argued by the State Counsel is that it is not mandatory to furnish copy of the preliminary inquiry report or other material relied upon by the licensing authority for cancelling the licence of the fair price shop agreement/licence of the petitioner. Rules of natural justice are not applicable in the matter of cancellation of fair price shop agreement/licence as is required under the service jurisprudence and other matters. The authority concerned under law is not required to furnish copy of the preliminary enquiry report or other documents, therefore, as asserted by the petitioners, there is no violation of principles of natural justice. He clarified that the proceedings in question regarding inquiry, suspension and cancellation of fair price shop allotment of the petitioner have been conducted in consonance with the provisions contained in G.O. dated 29.7.2004, which is self contained and as such there was no question of providing copy of enquiry report to the petitioner.

19. Natural justice has a prime role to play in the matter where the justice has to be secured. Natural justice is another name for commonsense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common sense/ liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form.

20. The expressions "natural justice" and "legal justice" do not present a watertight classification. It is the substance of justice, which is to be secured by both, and whenever legal justice fails to achieve this solemn purpose, natural justice is called in aid of legal justice. Natural justice relieves legal justice from unnecessary technicality, grammatical pedantry or logical prevarication. It supplies the omissions of a formulated law. As Lord Buckmaster said, no form or procedure should ever be permitted to exclude the presentation of a litigant's defence.

21. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance when a quasi-judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue. These principles are well settled. The first and foremost principle is what is commonly known as audi alteram partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle.

22. It must be precise and unambiguous. It should apprise the party determinatively of the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of

the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. After all, it is an approved rule of fair play. The concept has gained significance and shades with time. When the historic document was made at Runnymede in 1215, the first statutory recognition of this principle found its way into the "Magna Carta". The classic exposition of Sir Edward Coke of natural justice requires to "vocate, interrogate and adjudicate". In the celebrated case of Cooper V. Wandsworth Board of Works (1863) 143 ER 414 the principle was thus stated: (ER p.420) "[E]ven God himself did not pass sentence upon Adam before he was called upon to make his defence. 'Adam' (says God), 'where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat?"

23. Principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice. Inquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than decision in a quasi-judicial enquiry. [emphasis supplied]

24. Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statue or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute.

25. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the fact and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. The expression "civil rights but of civil liberties, material deprivations and non-pecuniary damages in its wide umbrella comes everything that affects a citizen in his civil life.

26. In D.K. Yadav Vs. J.M.A. Industries; (1993) 3 SCC 259 the Apex Court while laying emphasis on affording opportunity by the authority which has the power to take punitive or damaging action held that orders affecting the civil rights or resulting civil consequences would have to answer the requirement of Article 14. The Hon'ble Apex Court concluded as under: -

"The procedure prescribed for depriving a person of livelihood would be liable to be tested on the anvil of Article 14. The procedure prescribed by a statute or statutory rule or rules or orders affecting the civil rights or result in civil consequences would have to answer the requirement of Article 14. Article 14 has a pervasive procedural potency and versatile quality, equalitarian in its soul and

principles of natural justice are part of Article 14 and the procedure prescribed by law must be just, fair and reasonable, and not arbitrary, fanciful or oppressive."

27. In National Building Construction Corporation v. S. Raghunathan; (1998) 7 SCC 66, the Apex Court in unequivocal words that a person is entitled to judicial review, if he is able to show that the decision of the public authority affected him of some benefit or advantage which in the past he had been permitted to enjoy and which he legitimately expected to be permitted to continue to enjoy either until he is informed the reasons for withdrawal and the opportunity to comment on such reasons.

28. At this juncture, it would be relevant to produce relevant portion of paragraph 34 of the judgment rendered in State Bank of Patiala and others v. S.K.Sharma, JT 1996(3) SC 722. Though this decision was given in a service matter but the Hon'ble Apex Court has dealt with the principles of natural justice and the result, if it is not followed:-

(1) Where the enquiry is not governed by any rules/regulations/ statutory provisions and the only obligation is to observe the principles of natural justice ? or, for that matter, wherever such principles are held to be implied by the very nature and impact of the order/action ? the Court or the Tribunal should make a distinction between a total violation of natural justice (rule of audi alteram partem) and violation of a facet of the said rule, as explained in the body of the judgment. In other words, a distinction must be made between "no opportunity" and no adequate opportunity, i.e. between "no notice"/"no hearing" and "no fair hearing". (a) In the case of former, the order passed would undoubtedly be invalid (one may call it "void" or a nullity if one chooses to). In such cases, normally, liberty will be reserved for the Authority to take proceedings afresh according to law, i.e. in accordance with the said rule (audi alteram partem). (b) But in the latter case, the effect of violation (of a facet of the rule of audi alteram partem) has to be examined from the standpoint of prejudice, in other words, what the Court or Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/employee did or did not have a fair hearing and the orders to be made shall depend upon the answer to the said query. (It is made clear that this principle (No.5) does not apply in the case of rule against bias, the test in which behalf are laid down elsewhere.) (2) While applying the rule of audi alteram partem (the primary principle of natural justice) the Court/Tribunal/Authority must always bear in mind the ultimate and over-riding objective underlying the said rule, viz., to ensure a fair hearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them.

29. In M/s Mahatma Gandhi Upbhokta Sahkari Samiti vs. State of U.P. and others 2001(19)LCD 513 the controversy involved was that the order of cancellation was passed on the basis of inquiry conducted by Sub Divisional Magistrate but the copy of the inquiry report on which reliance was placed was not furnished to the petitioner.

30. A Division Bench of this Court held that when report of inquiry has been relied upon, that report has to be furnished to the person, who is affected by the same.

31. The said legal position has been reiterated and followed in a number of decisions rendered by this Court in the case of Dori Lal vs. State of U.P. and others 2006(24)LCD 1521, it has been held that the order cancelling the licence passed without the petitioner being provided the copy of the resolution of the village Panchayat as well as the enquiry report, if any and without being afforded opportunity of submitting explanation and hearing amounts to gross violation of principle of natural justice and hence the order is liable to be quashed.

32. In Rajpal Singh vs. State of U.P. and others 2008(16) LCD 891, it has been held by this Court that non-furnishing of the inspection report of the Supply Inspector, which was relied upon for cancellation of the licence, amounts to violation of principle of natural justice, hence, the order of cancellation as well as the appellate order was not sustainable in the eyes of law.

33. Recently, a co-ordinate bench of this Court in Sita Devi vs. Commissioner, Lucknow & others [2011(29) LCD 626] held that the action of the authority in passing the order of cancellation without supplying the copy of the preliminary enquiry report while proving the charges against the petitioner on the basis of said enquiry report is hit by the grave legal infirmity and whole action of the authority is in great disregard of the principles of natural justice.

After peeping into the contentions of both the parties and the series of case laws, referred to above, I am of the considered opinion that the cancellation of a agreement/licence of a party is a serious business and cannot be taken lightly. In order to justify the action taken to cancel such an agreement/licence, the authority concerned has to act fairly and in complete adherence to the rules/guidelines framed for the said purposes including the principles of natural justice. The non-supply of a document utilized against the aggrieved person before the cancellation of his allotment of fair price shop licence/agreement offends the well-established principle that no person should be condemned unheard.

34. Thus from the series of decisions, referred to herein-above, it clearly comes out that the preliminary enquiry report, inspection report or complaint or any other document which is utilized by the authority while cancelling the licence of a fair price shop licence, same has to be supplied to the licence holder and personal hearing is also to be afforded otherwise the proceedings would be in blatant disregard of the principles of natural justice.

35. In view of the above, the impugned orders passed by the appellate authority and the order of cancellation are hereby quashed. Needless to say that this order shall not preclude the competent authority from passing appropriate order in accordance with law.

36. Accordingly, the writ petition stands allowed .

APPELLATE JURISDICTION
CRIMINAL SIDE]
DATED: ALLAHABAD 14.10.2011

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

Criminal Jail Appeal No. - 5463 Of 2007

Phoolan ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Ms Seema Pandey (Amicus Curiae)

Counsel for the Respondents:
A.G.A.

Criminal Appeal-offence under Section 302 I.P.C.-conviction of life imprisonment-challenged on ground-no forensic report to proof the blood sustained 'Balkati'-was human blood-no denial that said "Balkati" sent to forensic laboratory-can be laps on part of prosecution-but can not be ground for denial of prosecution evidence where the appellant in statement under Section 313 has admitted the guilt showing anguish for criticism of his "Guru"-conviction upheld-however after 14 years for premature release under section 433-A be considered sympathetically.

Held: Para 25

Regarding the fact that there is no forensic report on record confirming whether the blood on the "Balkati" was human bhood, but the factum that it was sent to the forensic laboratory cannot be denied. Not obtaining the report from the forensic laboratory appears to be a lapse of the prosecution and only on that count, the prosecution evidence cannot be discarded especially in view of the fact that the appellant himself has admitted in his statement under section 313 Cr.P.C that the "Balkati" has been recovered from him.

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

1. This jail appeal has been filed against a judgement and order dated 10.06.2005 passed by the learned Sessions Judge, Baghpat convicting and sentencing the appellant Phoolan Singh to life imprisonment under section 302 IPC.

2. The case of the prosecution was that the informant Virendra Pal's father Baljor, was smoking a "Hukka" in the *Gher* of the adjoining house of Om Pal and Arvind. At that time appellant-Phoolan Singh, the servant of Arvind and Om Pal, arrived there with a "*Balkati*" in his hand and assaulted Baljor, who was badly injured. This incident was witnessed by Naresh, Om Prakash and Indrapal. The report of this incident was lodged at 4.15 PM on 4.1.2004 at the police station Ramala, district Bagpat under section 307 IPC by Virendra Pal.

3. The injured Baljore was medically examined at CHC, Baraut at 5.00 PM on 4.12004 by PW 6 Dr. Ravindra Kumar, who found the following injuries on his body:

1. Incised wound 5 cm x 1 cm into bone deep over left side forehead 3 cm above outer angle of left eye.

2. Incised wound 4 cm x 5 cm into bone deep over left side skull, 5 cm above middle of left eyebrow.

3. Incised wound 3 cm x 5 cm into bone deep over left side back, 9 cm from left ear.

4. Incised wound 5 cm x 1 cm into bone deep over back of left hand 3 cam below wrist joint.

5. Incised wound 5 cm x 1 cm into bone deep over front of right leg, 9 cm below the right knee joint. "

4. However, during the course of medical examination, Baljor expired. The post-mortem on the corpse of the deceased was conducted by PW 4 Dr. Rakesh Kumar at 3.00 p.m. on 5.1.2004. The time since death was one day. Rigor mortis was present all over the body. The Doctor found the following ante-mortem injuries on the body of the deceased:

1. Incised wound 4 cm x 1 cm x bone deep on the left side of head 9 cm above left pinna.

2. Incised wound 6 cm x 1 cm x bone deep in left side head 8 cm above left pinna.

3. Incised wound 4 cm x 5 cm x bone deep on back of left side head7 cm behind left pinna.

4. Incised wound 3 cm x 0.5 cm x bone deep on back of left side head 9 cm behind left pinna.

5. Incised wound 7 cm x 1 cm on the back of neck, 4 cm behind left pinna.

6. Incised wound 4 cm x 0.5 cm on the left parietal region.

7. Incised wound 2 cm x 0.5 cm x muscle deep in front of sternum 2 cm below medial end of rt. Clavicle

8. Incised wound 5 cm x 1 cm x bone deep in outer part of left forearm 8 cm above wrist.

9. Incised wound 5 cm x 1 cm x bone deep on back of left head.

10. Incised wound 4.0 cm x 1.0 cm x muscle deep in the inner part of right leg, 5 cm below knee.

5. On internal examination, the doctor noted that all the ribs were fractured, both lungs, pericardium, heart, vessel were lacerated. The death had occurred as a result of ante-mortem injuries.

6. The prosecution has examined eight witnesses in this case. PW 1, Virendra, son of the deceased Baljor and PW 2, Km. Asha, the daughter of Virendra and grand-daughter of the deceased are the two eyewitnesses. PW 3, Brahma Pal is the witness of the recovery of "Balkati" from the appellant. PW 4, Dr. Rakesh Kumar, conducted the post-mortem of the deceased as mentioned above. PW 5, Constable Hari Singh prepared the check report. PW 6, Dr. Ravindra Kumar prepared the injury report of Baljor before he died. PW 7, SO Mehar Singh, took the appellant into custody and was the first investigating officer. PW 8, Devendra Kumar was the second investigating officer, who concluded the investigation.

7. PW 1, Virendra has deposed that on the date of incident at about 5.00 p.m., his father Baljor was smoking "Hukka" in the Gher of Ompal. The appellant Phoolan, who was the servant of Ompal arrived there and gave several blows on the head of the deceased with a *"Balkati"*. Other persons also arrived at the spot and surrounded the appellant and caught hold of him. Virendra

took his father to the police station where he lodged the report after dictating it to Jitendra. Thereafter he took his father to the Government Hospital, Baraut where he died during the course of treatment.

8. PW 2, Km. Asha has deposed that on the date of incident at about 4 or 4.15 p.m., her grand-father Baljor was smoking *"Hukka"* in the Gher of Ompal. The appellant struck her grand-father with a *"Balkati"*, who cried out as a result of the assault. She was standing on the roof when the incident took place. On the cries of her grand-father, her father and others arrived at the spot. They tried to catch hold of the appellant, who fled from the spot, but he was surrounded and caught hold of at the "Kudi" of Mahipal Singh. Her grand-father had fallen down from the *"Charpai"* (cot) on which he was sitting as a result of the assault by the appellant. Her father and others took her grand-father to the Government Hospital.

9. PW 3, Brahma Pal was the witness of the recovery memo of *"Balkati"*. He has deposed that he was present in the village on the date of incident. After the assault on Baljor in Ompal's Gher, he also proceeded towards the Gher, where a crowd had gathered. Ompal's servant Baljor ran towards the crowd with a *"Balkati"*, then the crowd threw stones on him, because of which he had fallen down at the "Kudi" of Mahipal. Then this witness and others caught hold of him and put him in a tractor trolley and produced him in the police station Ramala along with his *"Balkati"*, which was bloodstained. The recovery memo of the *'Balkati'* was prepared by the police officials (Ext. Ka-2).

10. PW 4 Rakesh Kumar has conducted the post-mortem on the body of the deceased which has already been described herein above.

11. PW 5, Constable Hari Singh has deposed that after the informant Virendra got a written report (Ext. Ka 1) lodged at the police station Ramala on 4.1.2004 in his presence, this witness registered a case at case crime No. 1 of 2004, under section 307 IPC at 4.45 PM. He also made a General Diary entry. He handed over a letter for medical examination (Ext. Ka 6) to Constable Jagdish Prasad and referred the deceased, who was then injured to CHC, Baraut. He was informed by Constable Jagdish Prasad by telephone that Baljor has died at 6.50 p.m. On the basis thereof he converted the case from one under section 307 IPC to one under section 302 IPC at 7.00 p.m. on the same day, vide GD entry No. 33 (Ext. Ka-7). He also stated that Virendra, Brahma Pal and others, residents of village Kandera brought the appellant Phoolan in an unconscious condition to the police station along with the *"Balkati."* The GD entry No. 31 with regard to this fact was made at 6.45 p.m. On 4.1.04 (Ext. Ka-8).

12. PW 6, Dr. Ravindra Kumar, had examined the deceased at CHC, Baraut, as mentioned above, when he was initially brought to the hospital in an injured condition.

13. PW 7, SO Mehar Singh, has stated that on 6.1.2004 he was posted as S.O. of police station Ramala. He began investigation of this case. The appellant was admitted in the Orthopedic wing of P.L. Sharma Hospital, Meerut due to his injuries. On 13.1.2004 the appellant was discharged from the hospital and taken into custody. His statement was recorded. On 30.1.2004

PW 7 was transferred out of the police station.

14. PW 8, Devendra Kumar, who was the final investigating officer of this case, has stated that on 4.1.2004 he was posted as S.I. at PS Ramala. The investigation was handed over to him. On the pointing out of the informant, he prepared the site plan of the place of occurrence (Ext. Ka 11). He collected the plain and bloodstained earth from the spot and prepared the recovery memos (Ext. Ka- 12). After the deceased died as a result of the injuries received by him at the time of incident, the case was converted to one under section 302 IPC and the inquest was conducted on the corpse of the deceased (Ext. Ka 13). Report RI, *Challan nash, photo nash,* report CMO were prepared (Ext. Ka 14 to 17). On 14.2.2004 the *"Balkati"* was sent to the Forensic Laboratory. After a prima facie was established against the appellant, the charge sheet (Ext. Ka 18) was submitted in the Court by S.O. Om Prakash Singh.

15. In his statement under section 313 Cr.P.C., the appellant has admitted that he had assaulted the deceased because he had made a complaint against his "Guruji." He also admits working with Ompal, son of Tilak Ram at the time of incident. He admits that he was arrested on the same day after being given a beating by the villagers of village Kandera and that he was taken to the police station along with the weapon of assault, which was noted at G.D. No. 31. He either disclaims knowledge or denies the questions such as preparation of the FIR and other procedures carried out during investigation. He claims to have been falsely implicated. He could give no reason why the case was filed against him.

16. We have heard Ms Seema Pandey, learned Amicus Curiae for the appellant and learned Additional Government Advocate.

17. Learned Amicus Curiae submitted that absolutely no motive has been assigned for this offence. The informant has not described himself as an eyewitness and the other eyewitness Km. Asha, PW 2, was also not shown as an eyewitness in the FIR. The FIR does not mention the factum of arrest of the appellant at the spot by the public witnesses. There is no forensic report with for confirming that *"Balkati"* assigned to the appellant contained human blood. There was no signature of the accused on the recovery memo.

18. Learned Additional Government Advocate on the other hand argued that the case against the appellant is clearly established. He was named in the FIR, which was promptly lodged within half an hour of the incident at police station Ramala, which was 5 kms. away. In his statement under section 313 Cr.P.C., the appellant admitted that he was arrested on the spot. He also admits having assaulted the deceased because the deceased had made a complaint about his "Guruji". PW 2, the grand-daughter of the deceased was a natural witness as she saw the incident from the roof where she was standing and it was not very material that her name was not mentioned in the FIR. The medical evidence is clearly consistent with the eyewitness account. All the ten incised wounds on the body of the deceased appear to have been caused by *"Balkati".*

19. We have considered the submissions advanced by the learned counsel for the parties and have examined the record and the judgement of the trial court.

20. The absence of motive in the FIR or in the evidence can provide no good reason for discarding the prosecution case especially when there is a clear and cogent testimony of the witnesses nominating the appellant as the sole assailant in this crime. Furthermore, the appellant was arrested immediately after the incident when he was surrounded by the villagers from the "Kudi" of Mahipal. He was then brought to the police station by Virendra, Brahmpal and others along with the bloodstained "Balkati", which was recovered from him.

21. Most significantly, the appellant himself in his statement under section 313 Cr.P.C. has admitted having assaulted the deceased because the deceased had criticized his *"Guruji."* He also admits having been arrested from the spot and having been taken to the police station by the villagers along with "Balkati".

22. In *State of Maharashtra v Sukhdeo Singh, AIR 1992 SC 2100* it has been held by the Apex Court that in view of section 313(4) Cr.P.C. there is no impediment in taking the confessional statement or admission of the appellant into consideration given in his statement under section 313 Cr.P.C. for recording his conviction, and it can even form the sole basis for conviction. Paragraphs 51 of Sukhdeo (supra) may be usefully extracted here:

"51. That brings us to the question whether such a statement recorded under Section 313 of the Code can constitute the sole basis for conviction. Since no oath is administered to the accused, the statements made by the accused will not be evidence stricto sensu. That is why sub-section (3) says that the accused shall not render himself liable to punishment if he give false answer. Then comes sub-section (4), which reads : "313 (4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed."

Thus, the answers given by the accused, in response to his examination, under Section 313, can be taken into consideration in such inquiry or trial. This much is clear on a plain reading of the above sub-section. Therefore, though not strictly evidence, sub-section (4) permits that it may be taken into consideration in the said inquiry or trial. See State of Maharashtra v. R. B. Chowdhari (1967) 3 SCR 708 : AIR 1968 SC 110 : (1968 Cri LJ 95). This Court, in the case of Hate Singh Bhagat Singh v. State of M. B. (1953 Cri LJ 1933 : AIR 1953 SC 468) held that an answer given by an accused under Section 313 examination can be used for proving his guilt as much as the evidence given by a prosecution witness. In Narain Singh v. State of Punjab (1963) 3 SCR 678 : (1964) 1 Cri 730, this Court held that if the accused confesses to the commission of the offence with which he is charged, the Court may, relying upon that confession, proceed to convict him. To state the exact language in which the three Judge bench answered the question, it would be advantageous to reproduce the relevant observations at pages 684-685 :

"Under Section 342 of the Code of Criminal Procedure by the first sub-section, insofar as it is material, the Court may, at any stage of the enquiry or trial and after the witnesses for the prosecution have been examined and before the accused is called upon for his defence, shall put questions to

the accused person for the purpose of enabling him to explain any circumstance appearing, in the evidence, against him. Examination under Section 342 is primarily to be directed to those matters on which evidence has been led for the prosecution to ascertain from the accused his version or explanation, if any, of the incident, which forms the subject-matter of the charge and his defence. By sub-section (3), the answers given by the accused may 'be taken into consideration' at the enquiry or the trial. If the accused person in his examination under Section 342 confesses to the commission of the offence charged against him, the Court may, relying upon that confession, proceed to convict him; but if he does not confess and, explaining circumstance, appearing in the evidence against him, sets up his own version and seeks to explain his conduct pleading that he has committed no offence, the statement of the accused can only be taken into consideration in its entirety."

23. We also think that non-mentioning of the names of PW 2 Km. Asha in the FIR is not very material. At the time of incident Km. Asha was standing on the roof from where she saw the incident. On hearing the cries, her father and others arrived at the spot and within half an hour, the FIR had been lodged at PS Ramala, which was 5 kms away from the place of incident. It was possible that no conversation took place between the informant and her daughter, as the informant immediately rushed to the police station, and thereafter for getting the deceased medical help, hence non-mentioning of her name in the FIR was not a matter of any consequence .

24. In *Raj Kishore Jha Vs. State of Bihar and others, (2003)11 SCC 519 and Dhiraj Bhai Gorakhbhai Nayak Vs. State of Gujarat, (203) 9 SCC 322,* it has been held that non mention of names of witnesses in the FIR, can provide no reason to discard the presence of the witnesses or to doubt their testimony if the testimony of the witnesses otherwise inspires confidence . It is also well settled that the FIR is not expected to be an encyclopedia and all details are not required to be given in the FIR.

25. Regarding the fact that there is no forensic report on record confirming whether the blood on the "Balkati" was human bhood, but the factum that it was sent to the forensic laboratory cannot be denied. Not obtaining the report from the forensic laboratory appears to be a lapse of the prosecution and only on that count, the prosecution evidence cannot be discarded especially in view of the fact that the appellant himself has admitted in his statement under section 313 Cr.P.C that the *"Balkati"* has been recovered from him.

26. From what has been indicated herein above, we are satisfied that the prosecution was successful in establishing its case beyond reasonable doubt against the appellant. Accordingly the conviction recorded by the learned Additional District Judge is upheld.

27. Before parting we would like to observe that a perusal of the record and evidence shows that the appellant does not appear to be a hardened criminal. He himself seems to have naively admitted of having assaulted the deceased because he had criticized his "Guruji." Therefore, we observe that after actual imprisonment of 14 years, the case of the appellant for premature release under section 433A of the Code of Criminal Procedure and other

provisions may be considered sympathetically.

28. With the aforesaid observations, this jail appeal is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 01.11.2011

BEFORE
THE HON'BLE ANIL KUMAR,J.

Misc. Single No. - 7585 of 2010

Nizamuddin Khan @ Shabbu and another [U/A 227] ...Petitioner
Versus
Additional District Judge Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri M.A.Khan

Counsel for the Respondents:
Sri Manish Kumar

Code of Civil Procedure-Order XXXIX Rule 4-vacation of ex parte injunction order-inspite of service of notice-petitioner failed to appear on date fixed-Trail Court granted ex-parte injunction order-application to vacate such ex-pate interim order-held-maintainable-Trail Court directed to decide said application within 6 month.

Held: Para 14

In view of the said facts, although the notices were issued by the trial court on an application for grant of injunction but thereafter neither petitioners/defendants had put their appearance in the matter in question before the trial court nor they filed objection to the application for grant of injunction order, the same has been granted ex-parte. Hence, I am of the considered opinion that there is no legal impediment or embargo on the part of petitioners/defendants to move an application under Order 39 Rule 4 CPC for vacation of the ex-parte injunction order, as the said provision clearly lays down that if an injunction order is passed, after hearing counsel for the parties, the same cannot be discharged, varied, modified or set aside.

Case law discussed:
AIR 1985 NOC 59 (Orissa); AIR 1976 Mad 350

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

1. Heard Sri Mohd. Arif Khan, learned Senior Counsel assisted by Sri Mohd. Aslam Khan, learned counsel for petitioner, Sri Nripendra Misrha, Advocate holding brief of Sri Manish Kumar, learned counsel for respondent Nos. 1 and 2 and Sri Surendra Pratap Singh, learned counsel appearing on behalf of respondent Nos. 3 and 4.

2. Facts in brief as submitted by Sri Mohd. Arif Khan, Senior Advocate are that respondent Nos. 3 and 4/plaintiffs filed a suit for permanent injunction registered as Regular Suit No. 50 of 2010,(Sri Shashi Kant Bajpayee and another Vs. Sri Nizamuddin and another) in the Court of Civil Judge North (J.D.), Lucknow. In the said suit, an application for grant of temporary injunction has been moved on behalf of plaintiffs/respondents and on 23.04.2010, a temporary injunction was granted in favour of plaintiffs/respondents. Subsequently, modified vide order dated 26.04.2010 (Annexure No. 4) by the trial court.

3. On 02.05.2010, petitioners/defendants moved an application under Order 39 rule 4 read with Section 151 CPC for vacation of the ex-parte injunction order granted in favour of plaintiffs/respondents(Annexure No. 5).

4. Thereafter, an application for amendment of the plaint was moved by the plaintiff under Order VI Rule 17 CPC, rejected by order dated 18.05.2010 (Annexure No. 6). Aggrieved by the same, plaintiffs/respondents filed Civil Revision No. 73 of 2010, (Shashi Kant Bajpai and another Vs. Nizamuuddin and another), in whivh District Judge, Lucknow passed an order dated 26.05.2010 (Annexure No. 12), however, the same was dismissed by order dated 29.01.2011.

5. In the intervening period plaintiffs/respondents approached this Court by filing writ petition No. 3533 of 2010, Shashi Kant Bajpai and another Vs. District Judge, Lucknow and others, allowed partly by order dated 08.06.2010, the operative portion of the same reads as under:-

"It is also clarified that apart from the disputed land with regard to which the injunction order of status quo was granted the opposite parties no.5 and 6 will be at liberty to carry on their finishing work, if at all is needed and the authorities will not create any hindrance in the aforesaid action of the opposite parties no.5 and 6.

Writ petition is party allowed to that extent. "

6. As per the submission made by the learned counsel for petitioner in the said matter this Court has given a finding, the same is as under:-

"The submission is that either the injunction vacation application of the opposite parties no.5 and 6 should be disposed of first and thereafter the amendment application was ordered on 17.5.2010. Against this order an application for recalling the said order was preferred but the said application was rejected by means of order dated 18.5.2010. The order dated 18.5.2010 has been subjected to challenge in revision before the revisional court. During the pendency of the revision, an application was given by the opposite parties no.5 and 6 for remitting the record to the trial court and in the meantime the case was transferred to the court of Additional District Judge-II, Lucknow and it is stated that no notice was given to the petitioners either prior to the transfer or after the transfer and the revisional court proceeded to pass the order on application of the opposite parties no.5 and 6 remitting the record back to the trial court with a view to get the injunction vacation application decided."

7. In addition to the abovesaid facts, plaintiffs/respondents also approached this Court by filling writ petition No. 5821 (MB) of 2010 (Sri Shashi Kant Bajpayee and another Vs. State of U.P. and others), disposed of by order dated 17.06.2010, operative portion of the same is as under:-

"Accordingly, there is no ground to interfere in writ jurisdiction under Article 226. However, it is provided that in case any application is moved under Section 151 C.P.C. within one week from today, that shall be adjudicated by the trial court. In the absence of trial court, concerned Magistrate shall look into the matter as urgent during the course of vacation, nominated by the District Judge. "

8. In view of the abovesaid facts, Sri Mohd. Arif Khan, Senior Advocate in brief has made a submission on behalf of petitioners/defendants that the application dated 02.05.2010 for vacation of the ex-parte interim order, initially granted on 23.04.2010 subsequently modified on

26.04.2010, by the trial court is still pending, not adjudicated on merit, till date without any reasonable justification or reason, rather the same is lingering on one or other pretext with dilatory tactic adopted by the plaintiffs/respondent Nos. 3 and 4 with oblique motive and purpose. Accordingly, he submits that a direction may be issued to the trial court to decide the said application expeditiously.

9. Sri S.P. Singh, learned counsel appearing on behalf of respondents submits that initially when a suit for permanent injunction has been filed by the plaintiffs/respondents, on 01.04.2010 the trial court/Civil Judge North (J.D.), Lucknow has issued a notice to the defendants. Aggrieved by the said facts, plaintiffs approached this Court by filling Writ Petition No. 1938 (MS) of 2010, on 07.04.2010 a direction was issued by this Court, thereby directing the trial court to pass an appropriate order on the application for temporary injunction either on the next date fixed or on another date which shall be fixed within next one month. In view of the abvoesaid facts, the trial court after hearing the plaintiffs/respondents granted temporary injunction on 23.04.2010 subsequently modified on 26.04.2010.

10. Accordingly it is submitted by Sri S.P. Singh, learned counsel for respondents that once a notice has been issued by the trial court to the petitioners/defendants, thereafter in view of the order passed by this Court, temporary injunction granted in favour of the plaintiffs/respondents on 23.04.2010 modified on 26.04.2010, the same is not an ex-parte order, thus the application filed by the petitioners/defendants under Order 39 Rule 4 read with Section 151 CPC is not maintainable, hence present writ petition, liable to be rejected.

11. After hearing learned counsel for the parties and going through the material on record, the core question which is to be considered and decided in the present case is whether any opportunity of hearing is given to the petitioners/defendants to put forward their defence for vacation of the injunction order granted in favour of the plaintiffs/respondents on 23.04.2011/26.04.2011 or not and by merely issuing notice to the defendant prior to the granting temporary injunction by the trial court and thereafter granting the same to the plaintiffs when defendants have not put appearance and filed their objection in that circumstances the application moved by the petitioners for vacation of injunction order is maintainable under the provisions of order 39 Rule 4 CPC or not.

12. In order to decide the controversy which is involved in the present case, it is necessary to have a glance to the provisions as provided under Order 39 Rule 4, from the perusal of the same, it is crystal clear that if a temporary injuction is granted under Order 39 Rule 1 and 2 CPC. After hearing counsel for parties concerned, the same cannot said to be an ex-parte and cannot be discharged, varied or set aside.

13. In the instant case, on an application moved by plaintiffs/respondents for grant of temporary injunction, initially the trial court has issued notice. Aggrieved by the said fact they approached this Court by filing Writ Petition No. 5821 (MB) of 2010 (Sri Shashi Kant Bajpayee and another Vs. State of U.P. and others) disposed of vide order dated 17.06.2010 and in terms of the same, the trial court has considered the application for grant for

temporary injunction granted on 23.04.2011, thereafter modified on 26.04.2010.

14. In view of the said facts, although the notices were issued by the trial court on an application for grant of injunction but thereafter neither petitioners/defendants had put their appearance in the matter in question before the trial court nor they filed objection to the application for grant of injunction order, the same has been granted ex-parte. Hence, I am of the considered opinion that there is no legal impediment or embargo on the part of petitioners/defendants to move an application under Order 39 Rule 4 CPC for vacation of the ex-parte injunction order, as the said provision clearly lays down that if an injunction order is passed, after hearing counsel for the parties, the same cannot be discharged, varied, modified or set aside.

15. In the case of **Purna Chandra Das v. Smt. Bishnu Priya Mahapatra, AIR 1985 NOC 59(Orissa)** ad interim order of injunction was made absolute on the failure of the defendant to appear on date fixed for showing cause, application for recalling was filed. It has been held that application was maintainable.

16. In the case of **Abdul Shakoor Sahib v. Umachander, AIR 1976 Mad 350** the question was where an ex parte interim injunction is granted by court, then appeal is the only remedy or an application under Order 39, Rule 4 will lie. It was held that "no appeal will lie against an ex parte ad interim injunction, but the specific remedy available in Order 39, Rule 4, CPC has to be availed of by the party who is affected by the injunction, so that a final reasoned order could be obtained in the trial Court itself against which the Code has provided an obvious appeal under Order 43, Rule 1(r), C.P.C.

17. For the foregoing reasons, the application moved by petitoiners/defendants dated 02.05.2010 under Order 39 Rule 4 rad with Section 151 C.P.C. for vacation of temporary injunction granted in favour of plaintiffs/respondents is maintainable.

18. Further, Sri Mohd. Arif Khan, learned Senior Advocate, at this stage, submits that as the revisions No. 73 of 2010 filed by plaintiffs/respondents has already been decided, so he does not press the relief for early disposal of the same, as prayed in the instant writ petition.

19. Accordingly, the writ petition is allowed, a direction is issued to Civil Judge North (J.D.), Lucknow to decide the petitioner's application dated 02.05.2010 moved under Order 39 Rule 4 read with Section 151 CPC for vacation of the temporary injunction granted in favour of the plaintiffs/respondent No. 3 and 4 expeditiously preferably within a period of six weeks form the date of receiving a certified copy of this order after hearing counsel for parties in question in accordance with law

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ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.11.2011

BEFORE
THE HON'BLE ANIL KUMAR,J.

SERVICE SINGLE No. - 8239 of 2011

Deo Nath Yadav S/O Bajrangi Yadav
...Petitioner
Versus
Registrar General, High Court of Judicature at Allahabad & others ...Respondents

Counsel for the Petitioner:
Sri Qamrul Hasan

Counsel for the Respondents:
Sri Manish Kumar

Constitution of India-Article 226-Transfer-petitioner working as Chowkidaar in Judgeship Lakhimpur Khiri-Transferred to judgeship Mahoba mala fide allegation against District Judge who being annoyed with personal allegations-dealing with promotion-passed impugned order of transfer held-transfer being exigency of service-can not be interfered unless mala-fide or contravention of rules-found-no interference called for.

Held: Para 8

The law is well settled that transfer being exigency of service can be effected by the employer concerned in accordance with administrative exigency, in the interest of administration and public interest at any point of time and that cannot be monitored and guided by this Court unless it may be shown that transfer order is vitiated on account of the contravention of the statute , or lacks jurisdiction or mala fide.

Case law discussed:
1991 Supp (2) SCC 659; 1993 Supp (1) SCC 04; (1994) 6 SCC 98; (1995) 2 SCC 532; AIR 1993 SC 2444; (1993) 1 SCC 148; 1992 (1) SCC 306; AIR 2001 SC 3309; 2005 (2) ESC 1224; 1996 (1) UPLBEC 347; 2006 (5) AWC 4755; (2009) 3 UPLBEC 2338

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

1. Heard Sri Qamrul Hasan,learned counsel for petitioner and Sri S.P. Srivastava, learned Standing Counsel.

2. By means of the present writ petition, the petitioner has challenged the impugned order of transfer dated 05.11.2011 (Annexure No. 1) passed by O.P. No. 1/Registrar General, High Court of Judicature at Allahabad, Allahabad.

3. Facts of the present case as submitted by learned counsel for petitioner are that the petitioner appoint on the post of Chowkidar/Faras by order dated 01.1.1998 under Judgeship of Lakhimpur Kheri, a Class-IV post, still working and discharging in the said capacity.

4. Learned counsel for petitioner further submits that for redressal of his grievances in respect to the promotion to next higher post, he had filed a Writ Petition No. 7114 of 2010 before this Court impleaded the then District Judge, Kheri/Sri Amar Singh Chauhan (now presently posted as District Judge, Bulandshahar) O.P. No. 2 and also alleged certain allegations against him. When the said fact come to knowledge of the O.P. No. 2, he hurriedly on 27.09.2010 made a complaint against the petitioner to Hon'ble the Chief Justice, Allahabad High Court.

5. Sri Qamrul Hasan,learned counsel for petitioner submits that in view of the said compliant, the order dated 05.11.2011 has been passed by which the petitioner

transferred from Judgeship, Lakhimpur Kheri to Judgeship, Mahoba.

6. While assailing the impugned order of transfer, learned counsel for petitioner submits that the same is illegal and arbitrary in nature as the same is outcome, personal prejudice and bias of the O.P. No. 2, against the transfer policy issued by the government in respect to the transfer of Class-IV employee.

7. Learned counsel for petitioner further challenged the impugned order of transfer on the ground that the same has been passed in a mid-session and as his three children (sons and daughter, namely, Km. Luky Yadava, Lavi Yadav, Aryan Yadav) are studying in Class-IV, II and Nursery in the institution known as Children's Academy, Lakhimpur Kheri , in case if the petitioner is transferred in the mid-session, the study of his children will suffer in the present era of competition. So, the impugned order of transfer is illegal, liable to be set aside.

8. The law is well settled that transfer being exigency of service can be effected by the employer concerned in accordance with administrative exigency, in the interest of administration and public interest at any point of time and that cannot be monitored and guided by this Court unless it may be shown that transfer order is vitiated on account of the contravention of the statute , or lacks jurisdiction or mala fide.

9. The Hon'ble Supreme Court in the case of **Shilpi Bose (Mrs.) and others Vs. State of Bihar and others , 1991 Supp (2) SCC 659**, has held as under:-

" In our opinion , the courts should not interfere with a transfer order which is made in public interest and for administrative reasons unless the transfer order are made in violation of any mandatory statutory rule or on the ground of mala fide . A government servant holding a transferable post has no vested right to remain posted at one place or the other. He is liable to be transferred from one place to the other. Transfer orders issued by the competent authority do not violate any of his legal rights. Even if a transfer order is passed in violation of executive instructions or orders the courts ordinarily should not interfere with the order instead affected party should approach the higher authorities in the department."

10. The aforesaid view has been reiterated by Hon'ble Supreme Court in the case of **Union of India another Vs. N.P. Thomas, 1993 Supp (1) SCC 704 and N.K. Singh Vs. Union of India and others (1994) 6 SCC 98** holding therein if a person holding a transferable post, is transferred, there is no violation of any statutory/ mandatory rules then the same is not subject to judicial review.

11. Further, in the case of **Chief General Manager, (Telecom) N.E. Telecom Circle and another Vs. Rajendra Ch. Bhattacharjee and others, (1995) 2 SCC 532** Hon'ble Supreme Court has held as under:-

"It is needless to emphasise that a government employee or any servant of a public undertaking has no legal right to insist for being posted at any particular place. It cannot be disputed that the respondent holds a transferable post and unless specifically provided in his service conditions, he was no choice in the matter of posting. Since the respondent has no legal or statutory right to claim his posting

at Agartala, therefore, there was no justification for the Tribunal to set aside the respondent's transfer to Dimpur."

12. In view of the above, in the instant case, on the part of petitioner no legal or statutory right to claim his posting at Lakhimpur Kheri when the order of transfer dated 05.11.2011 passed O.P. No. 1 is not in violation of any statutory rules.

13. Now coming to another issue involved in the present case as argued by learned counsel for petitioenr that the impugned order of transfer is in violation of transfer policy is also not correct because in the case of **Union of India Vs. S.L. Abbas , AIR 1993 SC 2444**, Hon'ble Apex Court has held as under :-

" The said guideline, however, does not confer upon the Government employee a legally enforceable right."

14. The said view has been reiterated by Hon'ble Supreme Court in the case of **Rajendra Roy Vs. Union of India another (1993) 1 SCC 148** wherein the Apex Court has held as under:-

"It is true that the order of transfer often causes a lot of difficulties and dislocation in the family set up of the concerned employees but on that score the Oder of transfer is not liable to be struck down. Unless such order is passed mala fide or in violation of the rules of service and guidelines for transfer without any proper justification the Court and the Tribunal should not interfere with the order of transfer."

15. In the case of **Bank of India Vs. Jagjit Singh Mehta, 1992 (1) SCC 306,** the Hon'ble Supreme Court has held as under:-

" The said observations in fact tend to negative the respondent's contentions instead of supporting them. The jdugment also does not support the Respondent's contention that if such an order is questioned in a Court or the Tribunal , the authority is obliged to justify the transfer by adducing the reasons therefor. It does not also say that the Court or Tribunal can quash the order of transfer, if any of the administrative instructions/ guidelines are not followed, much less can be characterized as mala fide for that reason. To reiterate , the oder of transfer can be question in a Court or Tribunal only where it is passed mala fide or where it is made in violation of the statutory provisions."

16. The said view was further reiterated by Hon'ble Supreme Court in the case of National **Hydro-Electric Power Corporation Ltd. Vs. Sri Bhagwan and another, AIR 2001 SC 3309.**

17. Next argument advanced by learned counsel for the petitioner that the transfer order is against the principle of natural justice as the same has been posted during mid-session of the studies of his son/daughter , is also got no force as in the case of **Rajendra Prasad Vs. Union of India 2005 (2) ESC 1224** after considering the judgment of Hon'ble Supreme Court in the case of **Director of School Education Madras and others Vs. O Karuppa Thevan and another , 1996(1) UPLBEC 347** this Court has held as under:-

" The issue of transfer in mid academic session was considered by the Hon'ble Supreme Court and it was held that" the fact that children of the employee are

studying should be given due weight, if the exigencies of the service are not urgent." Therefore, it is for the employer to examine as to whether transfer of an employee can be deferred till the end of the current academic session. The Court has no means to assess as what is the real urgency of administrative exigency. Thus, the Court is not inclined to consider this submission at all."

18. The same view has been reiterated by Division Bench of this Court in the case of **Gulzar Singh Vs. State of U.P. and other, 2006 (5) AWC 4755** and another Division Bench of this Court in the case of **S.P. Jindal Vs. State of U.P. , 2002(1) AWC 306** and also in the case of **Jagendra Singh Vs. State of U.P. and others, (2009) 3 UPLBEC 2338.**

19. For the foregoing reasons, I do not find any infirmity or irregularity in impugned order of transfer dated 05.11.2011 (Annexure No. 1) passed by O.P. No. 1, as such the present writ petition lacks merit and is dismissed.

20. However, petitioner, if so advised, may move an application to the competent authority for redressal of his grievances which he has raised in the present case within two weeks from the receiving a certified copy of this order and after receiving the same said authority may decide the same expeditiously.

21. With the above observations, writ petition is dismissed.

22. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.11.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL,J.

Civil Misc. Writ Petition No. 15338 of 1988

Rama Shanker ...Petitioner
Versus
Additional Commissioner ...Respondents

Counsel for the Petitioner:
Sri V.S. Saxena
Sri K.P. Shukla
Sri N.K.Mishra

Counsel for the Respondent:
Sri D.K. Tiwari
C.S.C.

U.P. Imposition of ceiling on Land Holding Act, 1960-Section 29 (a)-Redetermination of surplus land-earlier about 414.12 acre land was under consideration by subsequent notice dated 05.03.1983-mentioned 596.66 acre-which goes to show same new land added-justifying notice U/S. 29 but after enforcement of amended provision requirement of Section 29 (2) of Act 1972-missing-impugned orders-very crypic, vague based total non application of mind-held not sustainable-matter remitted back for reconsideration.

Held: Para 11

Both the authorities below on this issue have simply referred that earlier the total area under consideration was 414.12 acres while in the notice dated 05.03.1983 it was 596.66 acres, meaning thereby some new land was added in the notice, hence redetermination was justified under Section 29 but have not pointed out whether the alleged new land satisfy requirement of Section 29(a) in addition to land he was already having after the enforcement of U.P. Imposition

of Ceiling on Land Holdings (Amendment) Act, 1972, so as to justify redetermination under Section 29.

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

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

2. This writ petition is directed against the order dated 29.03.1985 passed by Prescribed Authority Maudaha, District Hamirpur declaring 166.05 (Annexure-5 to the writ petition) acre unirrigated land of tenure holder surplus and the appellate order dated 12.08.1988 (Annexure-6 to the writ petition) whereby the appellate authority has dismissed the appeal of tenure holder but has partly allowed the appeal of State modifying the Prescribed Authority's order and declaring 526.91 acres of unirrigated land as surplus. The petitioners have also challenged the notice dated 05.08.1983 issued under Section 10(2) of U.P. Imposition of Ceiling on Land Holdings Act, 1960 (*hereinafter referred to as the "Act, 1960"*).

3. The facts, in brief, giving rise to the present dispute are that a notice under Section 10(2) of Act, 1960 was issued to tenure holder stating that he possess 414.12 acres of land and the entire land being irrigated it was equivalent to 165.65 acres of land (irrigated). The tenure holder was entitled to retain 27.92 acres hence 137.73 acres of irrigated land was surplus and liable to be declared accordingly. This notice was issued in 1976. Objections were filed but Prescribed Authority rejected the objections and declared the proposed land surplus. The matter was taken in Appeal No. 1003 of 1976. Another Appeal No. 1005 of 1976 was filed by some other person who had also filed objections against the aforesaid notice. Both these appeals were decided vide judgement dated 06.10.1977. The District Judge, Hamirpur, the appellate authority, allowed appeal of tenure holder Badari Prasad to the extent of reducing the surplus area to 0.91 acres of irrigated land as surplus. The appeal of objectors was also allowed except of one objector, namely, Guman Singh.

4. The aforesaid appellate order became final since it was not challenged by State in any higher forum. Thereafter another notice dated 05.03.1983 was issued to Sri Badari Prasad, father of petitioner though in the meantime he had already died. Objections were filed by petitioner and others that the earlier ceiling proceedings having attained finality, no fresh proceedings could have been initiated and secondly that Sri Badari Prasad had already died, notice to his legal heirs and others ought to have been issued separately, etc.

5. The Prescribed Authority in the second notice dated 05.03.1983 had proposed 526.91 acres of land surplus. After considering the objections the Prescribed Authority passed impugned order dated 29.03.1985 observing that earlier total land which was taken into consideration was only 414.12 acres while this time 596.66 acres, meaning thereby 182.54 acres new land has been included in the notice, hence earlier proceedings shall not bar the fresh notice. On other aspects of the matter he disallowed the sale deeds of substantial part of land and ultimately declared 166.05 acres of land by giving benefit of reduction of area of land in consolidation proceedings. He held that even by excluding 428.24 acres of land pursuant to earlier proceedings still in respect to different land included in the fresh notice there is 166.05 acres of land surplus with tenure holder.

6. Again two appeals were filed, one by petitioners and another by State. The petitioner's main contention was that a fresh notice could not have been issued and Section 29 has no application in the case in hand while on behalf of State the exclusion of entire land, subject matter of earlier proceedings was questioned. On behalf of petitioner it was also pointed out that inclusion of land on behalf of some other tenure holder is totally illegal. On the contrary, the State relied on the amendment of the Act and Sections 4-A, 29 and 30. It was contended that entire land of tenure holder was unirrigated while in the second notice substantial land has been shown irrigated, therefore, the earlier proceedings shall not bar subsequent one.

7. Section 4-A provides for determination of irrigated land. It does not throw any light on the validity of fresh proceedings after finalization of ceiling proceedings earlier. Section 29 (substituted by U.P. Act No. 18 of 1973) permits redetermination of ceiling area and reads as under:

"29. Subsequent declaration of further land as surplus land.- *Where after the date of enforcement of the Uttar Pradesh imposition of Ceiling on Land Holdings (Amendment) Act, 1972,-*

(a) one land has come to be held by a tenure-holder under a decree or order of any Court, or as a result of succession or transfer, or by prescription in consequence of adverse possession, and such land together with the land already held by him exceeds the ceiling area applicable to him; or

(b) any unirrigated land becomes irrigated land as a result of irrigation from a State irrigation work or any grove-land loses its character as grove-land or any land exempted under this Act ceases to fall under any of the categories exempted,

the ceiling area shall be liable to be redetermined and accordingly the provisions of this Act, except Section 16, shall mutatis mutandis apply."

8. There are only two conditions, one, whether the tenure holder after the date of enforcement of U.P. Imposition of Ceiling on Land Holdings (Amendment) Act, 1972 has got some land under a decree order of the Court or as a result of succession or transfer or by prescription in consequence of adverse possession and such land alongwith land already held by him exceeds the ceiling area applicable to him. The second condition is if earlier unirrigated land becomes irrigated as a result of irrigation facilities from State irrigation work or any grove land looses its character as grove land or any land exempted under the Act, 1960 ceases to be so exempted. If some land stood omitted to be included in the earlier proceedings though already possessed by tenure holder, that itself would not justify redetermination under Section 29 of Act, 1960.

9. Despite repeated query, learned Standing Counsel could not show as to which part of Section 29 would apply in the present case to justify the second notice issued in 1983.

10. The earlier order Annexure-1 to the writ petition passed by appellate authority clearly shows that the entire land of tenure holder, subject matter of appeal, was shown irrigated and that is how it was equivalent to 165.65 acres of land in terms of irrigated area. The aforesaid observation reads as under:

"His entire land was shown to be irrigated equivalent to 165.65 acres of land in terms of irrigated area."

11. Both the authorities below on this issue have simply referred that earlier the total area under consideration was 414.12 acres while in the notice dated 05.03.1983 it was 596.66 acres, meaning thereby some new land was added in the notice, hence redetermination was justified under Section 29 but have not pointed out whether the alleged new land satisfy requirement of Section 29(a) in addition to land he was already having after the enforcement of U.P. Imposition of Ceiling on Land Holdings (Amendment) Act, 1972, so as to justify redetermination under Section 29.

12. All other aspects of the matter would be available to be considered to authorities below only when it could have been shown by them that redetermination of ceiling area was justified having fallen under the specific conditions provided in Section 29 and only then the authorities below would have been justified to proceed further and not otherwise. On this issue the impugned orders are very cryptic, vague and show non-application of mind in correct perspective.

13. In view thereof the impugned orders cannot sustain. The writ petition is allowed. The orders dated 29.03.1985 and 12.08.1988 are hereby set aside. The matter is remanded to Prescribed Authority to reexamine the same and pass a fresh order in the light of observations made above and in accordance with law after giving opportunity of hearing to all concerned parties. The fresh exercise shall be completed by Prescribed Authority within a period of three months from the date of production of a certified copy of this order.

14. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.11.2011

BEFORE
THE HON'BLE AMAR SARAN,J.
THE HON'BLE KALIMULLAH KHAN,J.

Criminal Misc. Writ Petition No. - 19888 of 2011

Dr. Mohd. Javed Khan and another ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Prateek J. Nagar

Counsel for the Respondents:
Sri Devashish Mitra
A.G.A.

Constitution of India, Article 226- Quashing of FIR-offence under Section 269, 308, 328 and 418 IPC-petitioner a doctor-running nursing Home-during course of operation in delivery of patient-due to gross negligence left the bundle of cotton in stomach-on complaint of serious pain-referred to S.G.P.G.I.-where found anus pipe putrefied-case law relied by petitioner not applicable-FIR disclosed prima facie offence against petitioners-no interference called far.

Held: Para 5

In our view, prima facie this appears to be a case of gross negligence as no doctor who takes reasonable care would allow a piece of cotton to remain in the stomach after an operation. In the circumstances, it cannot be said that the FIR does not disclose any prima facie offence against the petitioners.

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

1. Heard learned counsel for the petitioners and the learned A.G.A for the State.

2. This writ petition has been filed for quashing of an FIR dated 2.10.2011 registered at case crime No. 3440 of 2011, under sections 269, 308, 328 and 418 IPC, P.S. Baradari, district Bareilly.

3. Briefly allegations in the FIR were that the informant Smt. Sabiha Hamid had gone to the Nursing Home run by the petitioners for the purpose of her delivery. On 4.11.2011, the informant was discharged but she started complaining of great pain and thereafter the petitioners prescribed some medicines but she was again hospitalized between 16.2.2011 and 23.2.2011. Later on, she was refered to another Centre, where it was discovered that the petitioners had left a cotton bundle in her stomach at the time of operation as a result of which the anus pipe had putrefied which she needs to get operated at S.G.P.G.I. Lucknow.

4. Learned counsel for the petitioners placing reliance on Jacob Mathew Vs. State of Punjab and another; AIR 2005 SC 3180, Martin F. D' Souza Vs. Mohd. Ishfaq AIR 2009 SC 2049, Bolam Vs. Friern Hospital Management Committee; 1957 (2) All. E.R. 118 and Mahadev Prasad Kaushik Vs. State of U.P 2009 AWC-1-453 has argued that gross negligence is not disclosed. It is contended that in the said decisions, it has been held that if the accused are properly qualified and if they act in a manner required to provide medical care on the standards of normal doctors, who exercise reasonable skills and during that act if any mis-happening occurs because of some defect in the equipment, the doctor cannot be put to blame. In the present case, the allegations were that during the course of operation, the petitioners have left a cotton bundle in the stomach of the victim causing her great pain which required a subsequent operation.

5. In our view, prima facie this appears to be a case of gross negligence as no doctor who takes reasonable care would allow a piece of cotton to remain in the stomach after an operation. In the circumstances, it cannot be said that the FIR does not disclose any prima facie offence against the petitioners.

6. The writ petition is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.11.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 21674 of 2011

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

Counsel for the Petitioner:
Sri S.P. Shukla

Counsel for the Respondents:
Sri Pankaj Rai (Addl.C.S.C.)
C.S.C.

Arms Act, cancellation of Fire Arm licence-on ground non-furnishing correct information relating to current address and permanent address-cancellation-held-proper-but can not bar fresh application with correct particulars.

Held: Para 32

In the case in hand, it is not disputed by the petitioner that his forefathers/grandfather belong to village Makdoompur (Doksaha), P.S. and District Kaushambi. In para 14 of the writ petition the petitioner however, says that he has given address where he actually resides. He has not stated that he has severed all connections and relations with the place of his forefathers and has settled permanently at Allahabad. No details have been given to show and to ascertain whether the petitioner has permanently settled at Allahabad. Neither the place of birth nor property details at Allahabad nor any other fact is on record to demonstrate that he has permanently settled at Allahabad. Actual place of address obviously would satisfy the requirement of "current address" but whether it can satisfy the "permanent address" or not would depend on case to case. In the present case, no such material has been brought on record to show that "current address" of the petitioner can be treated to be his "permanent address". It is in these circumstances, I do not find any error apparent on the face of record in the orders impugned in the writ petition passed by the authorities below.

Case law discussed:

(1910) 1 L.R. 32; A.I.R. 1942 Mad. 666; AIR 1940 Lah. 449; 1963 AIR 1521=1964 SCR (2) 73; AIR 1955 SC 36; [1892] 3 Ch. 180; (1875) ILR 1 All 51; AIR 1973 SC 505; AIR 1984 SC 1420; AIR 2000 SC 525=2000(2) SCC 20; 1971 (2) SCC 293; 1981 SCC (4) 517=1981 SCALE (3) 1641; (1959) 2 All ER 787; AIR 1965 Rajasthan 11; 2006 (1) UP Cr.R. 415; 2005 (TLS) 316893 (writ petition no. 32033 of 2004 decided on 19.10.2005)

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

1. This writ petition is directed against order dated 10.08.2009 passed by District Magistrate, Allahabad cancelling firearm licence of petitioner on the ground that he has not given correct information in his application inasmuch as at Item No. 5 and 6 of the application, i.e., information relating to current and permanent address, the petitioner has disclosed same address in both columns, namely, 224/18 C Beniganj, Post G.T.B. Nagar, P.S. Kareli, Allahabad whereas his permanent address is Village Makdoompur (Doksaha), P.S. and District Kaushambi and, therefore, he is guilty of contravening Rule 51 which is punishable under Section 30 of Arms Act for giving wrong information and as such his application is liable to be rejected.

2. The said order has been confirmed in appeal by Commissioner vide order dated 15.02.2011.

3. Learned counsel for the petitioner submitted that he is presently residing at 224/18 C Beniganj, Post G.T.B. Nagar, P.S. Kareli, Allahabad and has been issued a driving licence, ration card as well as domicile certificate and, therefore, address given by him satisfies the requirement of "permanent address" and his application ought not have been rejected for this reason.

4. Learned Standing Counsel on the contrary submitted that petitioner's forefathers belong to Village Makdoompur (Doksaha), P.S. and District Kaushambi and since the petitioner has not broken relations with the place of his forefathers, his permanent address would be that of his forefathers and since this was not disclosed by him, he was guilty of non-disclosure of correct information/or concealment of correct information hence violated Rule l51 and his application has rightly been rejected.

5. The only question up for consideration in this case is what is "permanent address"? Whether it is distinct from current address and if so, in what manner ?

6. The application form is at page 16 (Annexure-1 to the writ petition). Columns 5 and 6 reads as under:

''5. वर्तमान पता: 224/18 सी बेनीगंज पो0 जी0टी0बी0 नगर इलाहाबाद
(अ) निकट का थाना – थाना करेली

6. स्थाई पता: 224/18 सी बेनीगंज पो0 जी0टी0बी0 नगर इलाहाबाद
निकट का थाना – थाना करेली''

7. There is also a caution at the bottom of application form which says that any concealment of information or misstatement would be contrary to Rule 51 and shall be punishable under Section 30 of Arms Act. It is not in dispute that petitioner's ancestors are resident of Village Makdoompur (Doksaha), P.S. and District Kaushambi.

8. The requirement in Clauses 5 and 6 is "current address" and "permanent address". The word 'address' though by itself may have different connotations but in the context in which requirement is to be read in the form prescribed in Rule 51 is the place of residence where the applicant is residing presently and another is place of permanent residence. It has to be seen when a residence can be termed as present place of residence other than permanent residence and when both the terms namely, present residence and permanent residence constitute one and the same thing. A person may be resident of a place presently with a clear intention of shifting therefrom on occurrence of certain events or after a specified time known from very beginning to person concerned or for some other reason. Entire gamut of circumstances cannot be illustrated for the reason that the current address, i.e., the place of present residence though temporary but has to be distinguished from short visit to a particular place for some time i.e., few hours, few days and may be few weeks. For example, if a person has gone to a city for his business or purpose for professional assignment and stays there in a hotel for one, two or more days or even for one or more weeks, it cannot be said to be current address in the context in which it is required in the present case for the reason that it shall not qualify requirement of present residence of the person concerned. The current address, to my mind cannot be read so as to include such an address which has occasioned due to visit of the person concerned outside the place of his residence in connection with some work or otherwise and he had no intention to stay there after completion of the job. In wider sense though even in such a case address of hotel or other place of boarding may constitute and fulfil the requirement of "current address" but looking in the context for which such requirement is provided in the form under Rule 51, it shall not qualify.

9. In **Flowers v. Flowers, (1910) 1. L . R. 32,** the word 'resides' came to be considered by a Full Bench of this Court and it was held that a mere casual residence in a place for a temporary purpose with no intention of remaining is not covered by the word "resides". Similarly in **Balakrishna v. Sakuntala Bai, A.I.R. 1942 Mad. 666** the Court said that the expression "resides" implies something more than "stay" and implies some intention to remain at a place and not merely to pay it a casual visit.

10. In **Charan Das v. Surasti Bai, A1R 1940 Lah. 449,** the Court said that the sole test on the question of residence would be whether a party had *animus manendi*, or an intention to stay for an indefinite period, at one place.

11. In **Jagir Kaur & Another vs Jaswant Singh, 1963 AIR 1521=1964 SCR (2) 73** the Court observed that a person would be said to reside at a place when it is not a flying visit to or a casual stay in a particular place. There shall be animus manendi or an intention to stay for a period, the length of the period depending upon the circumstances of each case. The Apex Court defines the word "resides" as under :

"a person resides in a place if he through choice makes it his abode permanently or even temporarily. Whether a person has chosen to make a particular place his abode depends upon the facts of each case.

12. Some illustrations were also considered which would be useful to refer at his stage. There may be following cases :

(i) A, living in a village, goes to a nearby town B to attend a marriage or to make purchases and stays there in a hotel for a day or two.

(ii) A, a tourist, goes from place to place during his peregrinations and stays for a few days in each of the places he visits,

(iii) A, a resident of a village, who is suffering from a chronic disease, goes along with his wife to a town for medical treatment, takes a house and lives there for about 6 months.

(iv) A, a permanent resident of a town, goes to a city for higher education, takes a house and lives there, alone or with his wife, to complete his studies.

In the first two cases, A makes only a flying visit and he has no intention to live either permanently or temporarily in the places he visits. It cannot, therefore, be said that he "resides" in the places he visits. In the last two illustrations, though A has a permanent house elsewhere, he has a clear intention or animus manendi to make the places where he has gone for medical relief in one and studies in the other, his temporary abode or residence.

13. The difference between current residence or current address and permanent residence or permanent address may exist visibly in some cases but may not exist at all in some other cases. Permanent residence may be place of resident of ancestors but not always. The place of residence of forefathers may or may not satisfy the requirement of permanent residence. This all depend on a particular facts of the case. Sometimes the permanent address or permanent residence both being interchangeable, for the purpose of present case, looking to context in which required it may equate with the term 'domicile' but in different situation it may not also.

14. "Domicile" does not mean always the place of ancestors or place of residence of forefathers of the incumbent concerned. Albeit in a different context the Apex Court in **Central Bank of India Vs. Ram Narain AIR 1955 SC 36** referred to the Writers on "Private International Law" and said that generally they are agreeable that

absolute definition of "domicile" is impossible to day down. The simplest definition of this expression is said to have been given by **Chitty, J. in Cragnish v. Craignish [1892] 3 Ch. 18o**, observing *"that place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom."* This definition, however cannot be said to be absolute one. The term 'domicile' lends itself to illustrations but not to definition. In English Law most of the jurists agrees that two constituent elements for existence of domicile are (1) a residence of a particular kind, and (2) an intention of a particular kind. There must be the factum and there must be the animus. The residence need not be continuous but it must be indefinite, not purely fleeting. The intention must be a present intention to reside for ever in the country where the residence has been taken up. It is also a well established proposition that a person may have no home but he cannot be without a domicile. The law may attribute to him a domicile in a country where in reality he has not. In other words, one of the constituents giving birth to domicile of a person is the place where he was born.

15. A Division Bench of this Court in **Fatima Begam vs Sakina Begam And Another, (1875) ILR 1 All 51** held as under :

*"The words dwelling or residence are synonymous with domicile or home, and mean that place where a person has his fixed permanent home, to which, whenever he is absent, he has the intention of returning. In **Lord v. Colvin 4 Drew 366: 28 L.J. Chanc. 361** it was held "that place is properly the domicile of the person in which he has voluntarily fixed the habitation of himself and family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home unless and until something (which is unexpected or uncertain) shall occur to induce him to adopt some other permanent home."*

16. Following the authority of **Central Bank of India Vs. Ram Narain (Supra)**; in a later decision, the Apex Court in **Abdul Samad v. State of West Bengal, AIR 1973 SC 505** said that a person cannot have two simultaneous domiciles. It denotes connection with the territorial system of law. Every person must have a domicile. Mere residence is not domicile.

17. Recognizing difference in the meaning of word 'domicile' in the context of admission in Medical Colleges in a particular State vis a vis Private international Law, in **Pradeep Jain Vs. Union of India AIR 1984 SC 1420** the Court said that domicile used in the rules regulating admissions to medical colleges framed by some of the States may be interpreted in the loose sense of "permanent residence in the State" in which the medical college is situated and not in the technical sense in which it is used in private international law.

18. In **Union of India Vs. Dudh Nath Prasad AIR 2000 SC 525 =2000 (2) SCC 20** the question of residence and domicile was considered in the context of the question, whether Dudh Nath belong to Scheduled Caste or not. Dudh Nath Prasad was born in State of Bihar (Siwan District) and belong to Nunia community which a scheduled caste in the Presidential Notification for the State of West Bengal but not in the State of Bihar. He was

selected in Indian Administrative and Allied Services against a reserved vacancy of Scheduled Caste and appointed as such based on caste certificate issued by Sub Divisional Officer Howrah, State of West Bengal on the basis of Presidential Notification of State of West Bengal. The question to be considered was, whether for the purpose of caste certificate the petitioner would be treated to be resident of Bihar or West Bengal. The relevant instructions in this regard use the words "District in which the parents of the candidate ordinarily reside." Dudh Nath contended that his parents were not ordinarily residing in District Siwan (Bihar) and therefore, he had rightly been issued caste certificate by the officer at Howrah. It was upheld. In order to construe the words "ordinarily resident" reliance was placed on Section 20 of the Representation of the People Act 1950 which provides the meaning of "ordinarily resident". The Court first of all rejected the meaning of the word "ordinarily resident" as defined in Section 20 of Representation of Peoples Act, observing that the said definition is for a particular purpose and not applicable in general. Referring to various definitions given in **Oxford English Language Dictionary and Black's Law Dictionay** and some other authorities vis a vis the word 'domicile'. It was held that etymologically. "residence" and "domicile" carry the same meaning, inasmuch as both refer to the permanent home, but under Private International law, "domicile" carries a little different sense and exhibits many facets. In spite of having a permanent home, a person may have a commercial, a political or forensic domicile. 'Domicile' may also take many colours; it may be domicile of origin, domicile of choice, domicile by operation of law or domicile of dependence. Domicile and residence are different and yet are related concepts and have to be understood in the context in which they are used having regard to nature and purpose of statute in which these words are used. The Court held that Dudh Nath's parents were residing in State of West Bengal since long and for all intents and purpose, they were entitled to be treated as "ordinarily residing" in the State of West Bengal.

19. Commenting upon the word "residence"' in **D.N. Chanchala Vs. The State of Mysore, 1971(2) SCC 293** with reference to Rule 3 of Mysore Medical Colleges (Selection for Admission) Rules 1970 the Court observed that 'residence' contemplated therein must prima facie have an element of continuity or regularity in residence and would not mean intermittent stay such as during the vacations.

20. In **Smt. Jeewanti Pandey vs Kishan Chandra Pandey, 1981 SCC (4) 517=1981 SCALE (3) 1641** the Court said that in its ordinary sense "residence" is more or less of a permanent character. The word 'resides' means to make an abode for a considerable time; to dwell permanently or for a length of time; to have a settled abode for a time. It is the place where a person has a fixed home or abode. If there is fixed home or such abode at one place the person cannot be said to reside at any other place where he had gone on a casual or temporary visit, e.g. for health or business or for a change. If a person lives with his wife and children, in an established home, his legal and actual place of residence is the same. If a person has no established home and is compelled to live in hotels, boarding houses or houses of others, his actual and physical habitation

is the place where he actually or personally resides. It means the actual place of residence and not legal constructive residence. It certainly does not correlate the place of origin. The word 'resides' is a flexible one and has many shades of meaning, but it must take its colour and content from the context in which it appears and cannot be read in isolation

21. The term address has been defined in **Black's Law Dictionary 5th Edition, at page 36** as under:

"Address. Place where mail or other communications will reach person. . . . . Generally a place of business or residence."

22. The term "domicile" is also defined in **Black's Law Dictionary 5th Edition, at page 435.** Besides others it says, that "Citizenship" "habitancy," and "residence" are severally words which in particular cases may mean precisely the same as "domicile." while in other uses may have different meanings.

23. "Residence", as per **Black's Law Dictionary,** signifies living in particular locality while "domicile" means living in that locality with intent to make it a fixed and permanent home. It also defines different kinds of "domicile" as under:

"Commercial Domicile. *A domicile acquired by the maintenance of a commercial establishment.*

Corporate domicile. *Place considered by law as center of corporate affairs and place where its functions are discharged.*

Domicile of choice. *The essentials of "domicile" of choice are the fact of physical presence at a dwelling place and the intention to make that place home.*

Domicile of origin. *The home of the parents. That which arises from a man's birth and connections. The domicile of the parents at the time of birth, or what is termed the "domicile of origin." constitutes the domicile of an infant, and continues until abandoned, or until the acquisition of a new domicile in a different place.*

Domicile of succession. *As distinguished from a commercial, political, or forensic domicile, means the actual residence of a person within some jurisdiction, of such a character as shall, according to the well-established principles of public law, give direction to the succession of his personal estate.*

Domicile of trustee. *Jurisdiction which appoints trustee is domicile of trustee.*

Elected domicile. *The domicile of parties fixed in a contract between them for the purposes of such contract.*

Foreign domicile. *A domicile established by a citizen or subject of one sovereignty within the territory of another.*

Matrimonial domicile. *The place where a husband and wife have established a home, in which they reside in the relation of husband and wife, and where the matrimonial contract is being performed.*

Municipal Domicile. *One which as distinguished from "national domicile" and "quasi national domicile" (see those titles, infra), has reference to residence in a county, township, or municipality.*

National domicile. *The domicile of a person, considered as being within the territory of a particular nation, and not with reference to a particular locality or subdivision of a nation.*

Natural domicile. *The same as domicile of origin or domicile by birth.*

Necessary domicile. *That kind of domicile which exists by operation of law, as distinguished from voluntary domicile or domicile of choice.*

Quasi national domicile. *One involving residence in a state. See also National domicile, Supra"*

24. Defining the word "address" in the context of purpose and intention in **R. v. Bishop, (1959) 2 All ER 787,** it was said that the word "Address" is not referring to postal address, but refers to a reasonable identification of such a place, not necessarily a postal address but something which describes or identifies the place with reasonable identity.

25. In **State Vs. Abdullah Khan AIR 1965 Rajasthan 11,** with reference to Article 5 of the Constitution, the Court said that the 'domicile' means the permanent place of dwelling, or home of the person concerned.

26. I may also look into the word "permanent" so as to have much wider view of the matter.

27. In **The New Lexicon Webster's Dictionary, Deluxe Encyclopedic Edition (1987)** the word 'permanent' is defined as "continuing and enduring without change."

28. In **P. Ramanatha Aiyar's The Law Lexicon 2nd Edition (2007)** the word 'Permanent' is defined as under:

"Permanent" is defined to mean not temporary, or subject to change : abiding, remaining fixed, or enduring in character, state or place.

The meaning of the word 'permanent' according to lexicographers, is continuing in the same state, or without any change that destroys form or character, remaining unaltered or unremoved, abiding, durable, fixed, lasting, continuing ; as a permanent impression, permanent institution.

29. **Black's Law Dictionary, Fifth Edition** defines the word "permanent" as under:

"Permanent. Continuing or enduring in the same state, status, place or the like, without fundamental or marked change, not subject to fluctuation, or alteration, fixed or intended to be fixed; lasting; abiding; stable; not temporary or transient."

30. From the above discussion, I am inclined to follow the meaning of the words "present address" and "permanent address" looking into the objective and purpose for which the two addresses are required in items 5 and 6 under Rule 51, instead of giving any hypertechnical or or superficial or otherwise meaning thereto. The purpose obviously is to obtain information regarding antecedents of the person concerned. His antecedents can be obtained if he gives information about the place where he resides presently and if his permanent residence is something else, then the present residence must be the address of that place. The term "permanent

address" necessarily cannot always be equated with the address or the place of residence of forefathers or ancestors of the person concerned unless something is found out to show that the place of origin or the place of ancestors or forefather is the place of permanent residence or permanent address of the applicant also. We can understand the things from another angle.

31. Two things are clear. "Permanent address" in common parlance would be address which is not likely to change ordinarily and would remain in-tact identifying the person concerned. "Current address" is the place at which for the time being one is residing. Meaning of the word 'permanent' as above clearly shows that there may or may not be a marked distinction between a "permanent address" and "current address". In a given case, "permanent address" may be current address also but it is difficult to assume vice-versa in all cases. One may not have any confusion with requirement of "current address" and "permanent address" vis a vis place of birth or the place of domicile. The place of birth is where the incumbent is born but it may be his permanent or current address or may not. Word 'domicile' covers within its ambit the place of "current address" inasmuch as if a person is presently residing at a place for certain required period, he may be issued a certificate of domicilation but by itself it may not equate in all cases with "permanent address". The person who has migrated or shifted to a place other than a place of his forefathers for the purpose of job, profession, occupation etc. may say that place where he is presently residing would satisfy requirement of "current address" but may not satisfy the requirement of "permanent address" which would be his place of his forefathers where he has and stakes the property of his father and forefathers, his relations and connection in various manners. It also cannot be disputed that in certain circumstances, one may shift from place of his forefathers to another in a whole hog manner breaking his all connections and in such a case the permanent address would be different. The two are having different shades and nuances and would depend on peculiar facts of particular case. There cannot be any hard and fast rule in such matters.

32. In the case in hand, it is not disputed by the petitioner that his forefathers/grandfather belong to village Makdoompur (Doksaha), P.S. and District Kaushambi. In para 14 of the writ petition the petitioner however, says that he has given address where he actually resides. He has not stated that he has severed all connections and relations with the place of his forefathers and has settled permanently at Allahabad. No details have been given to show and to ascertain whether the petitioner has permanently settled at Allahabad. Neither the place of birth nor property details at Allahabad nor any other fact is on record to demonstrate that he has permanently settled at Allahabad. Actual place of address obviously would satisfy the requirement of "current address" but whether it can satisfy the "permanent address" or not would depend on case to case. In the present case, no such material has been brought on record to show that "current address" of the petitioner can be treated to be his "permanent address". It is in these circumstances, I do not find any error apparent on the face of record in the orders impugned in the writ petition passed by the authorities below.

33. Learned counsel for the petitioner drew my attention to **Arun Kumar Singh** Vs. **State of U.P. and others 2006(1) UP Cr.R. 415** and **Takdeer Singh, Prabhu Dayal** Vs. **Commissioner, Jhansi Division and others 2005 (TLS) 316893 (writ petition no. 32033 of 2004 decided on 19.10.2005).** I have gone through the aforesaid judgments and do not find the same applicable to the facts of the present case. In **Arun Kumar Singh (supra)** the judgment shows that this Court took the view that the petitioner cannot be said to be guilty of misrepresentation which may form basis of cancellation of firearm licence. Same was the view in **Takdeer Singh (supra).** In both the cases, firearm licence was already granted and thereafter proceedings were initiated for cancellation thereof. The circumstances in which the firearm licence was cancelled is specified in Section 17 but here is a case where question of grant of firearm licence under Section 13 has to be considered. In such a case where information is not given in the application form in the manner it is required, the authorities are quite competent to reject application for such lapses. The reason being that in such a case the petitioner would not be deprived of moving fresh application furnishing correct details and information. It is always open to an applicant whose application has once been rejected for one or the other shortcoming or incomplete information, to move another application fulfilling requirements of Form prescribed under Rules.

34. For what has been stated above, I am of the definite opinion that this writ petition is devoid of merits.

35. Dismissed.

36. No costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.11.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL,J.

Civil Misc. Writ Petition No. 37913 of 2009

Bhupendra and another ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri R.K. Dubey
Sri S.K. Pandey

Counsel for the Respondents:
C.S.C.

Arms Act-Section 17 (3)-suspension of five Arm Licence-without pending any proceeding for cancellation-suspension by the licenses authority-without jurisdiction-keeping suspension pending without follow up action inspite of direction of Court-held-sheer harassment of individual having no control over statutory authority-in action on part of D.M. Highly condemned and depreciated-order quashed with cost of Rs. 10,000 recoverable from erring officer.

Held: Para 7

In the case in hand though petitioners' firearm licence was suspended almost four years back but the District Magistrate could not find time or occasion to pass a final order in the matter though it is the ultimate and statutory function he is supposed to discharge. In absence of any explanation whatsoever for not taking final decision for the last four years, inaction on the part of District Magistrate is highly condemnable and depreciated. It is nothing but sheer harassment to an individual who has no control over the

statutory authority like District Magistrate. This is per se arbitrary.

Case law discussed:

Civil Misc. Writ Petition No. 58216 of 2005 (Ajay Kumar Gupta Vs. State of U.P. and others; 1988 A.W.C. 1481; 1985 A.W.C. 493; 1998 All.C.J. 1449; 2009 (1) AWC 691; 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

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

1. The writ petition is directed against the order dated 22.11.2007 passed by the respondent No.2 suspending the petitioners' firearm licence in purported exercise of power under Section 17(3) of Arms Act, 1959 (hereinafter referred to as "Act 1959"). The grievance of the petitioners is that he submitted his reply as long back as on 18.12.2007 but no final order has been passed by District Magistrate so far. He also drew my attention to the fact that raising his grievance against arbitrary and illegal action on the part of District Magistrate, Farrukhabad petitioners approached this Court in Writ Petition No.35112 of 2008 which was disposed of on 22.7.2008 with the following direction:

"Proceedings for cancellation of petitioners' fire-arm licence have been undertaken vide show cause notice dated 22.11.2007. Petitioners submit that they have submitted reply to show cause notice but till date Licensing Authority has not taken any final decision in the matter.

Consequently, in these circumstances and in this background, in case till date no final decision has been taken, then in that event, Licensing Authority is directed to take final decision after taking into consideration the reply so submitted by petitioners, within two months from the date of receipt of a certified copy of this order.

In terms of above order and direction, present writ petition is disposed of."

2. It is said that despite the said order more that three years have now passed but no final order has been passed by the District Magistrate so far. The respondents have filed counter affidavit wherein nothing has been said about final order of District Magistrate, The case of respondents is that petitioners had obtained firearm licence by giving wrong information about original residence and for this reason firearm licence was suspended. However, entire counter affidavit is conspicuously silent on the fact whether any final order has been passed by District Magistrate so far or not.

3. This sheer inaction on the part of District Magistrate failing to discharge its statutory obligation can be examined from two angles. Firstly; this Court has held in catena of decisions that there is no power of suspension of firearm licence under Section 17(3) of Act 1959. In a decision dated 9.9.2005 of this Court in **Civil Misc. Writ Petition No. 58216 of 2005 (Ajay Kumar Gupta Vs. State of U.P. and others),** after considering the Full Bench decision of this Court in the cases of **Balaram Singh Vs. State of U.P. and others 1988 A.W.C. 1481, Kailash Nath Vs. State of U.P. 1985 A.W.C. 493** as well as the Division Bench decision of this Court in the case of **Sadri Ram Vs. District Magistrate, Azamgarh and others 1998 All. C.J. 1449,** it has been held that the licensing authority has no power to suspend the arms licence.

4. Yet ignoring the said exposition of law laid down by this Court the District Magistrate has gone ahead to place the

firearm licence of the petitioners under suspension. It is ex facie contrary to the aforesaid law laid down by this Court and is contemptuous also.

5. The second aspect; assuming that power of suspension exist pending enquiry regarding cancellation of firearm licence, the same would be in the nature of intermediary step in aid and assistance to achieve final objective i.e. decision on the question whether firearm licence granted to an individual require to be cancelled or not. This power of suspension in such circumstances cannot be usurped as a substitute of cancellation. Considering similar kind of power of suspension of an employees in a pending or contemplated departmental enquiry, 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."

(emphasis added)

6. Though the above observations are in the context of a service matter but qua power of suspension in pending enquiry vis a vis final order, the observations are broadly applicable to this case also. Here also one cannot be allowed to make an order of suspension as a tool to deprive the licencee benefit thereof in the garb of suspension by keeping it pending for years together by not passing a final order. Any view otherwise would be discriminatory and shall defeat the very objective and purpose of the power conferred under Section 17 of Act 1959.

7. In the case in hand though petitioners' firearm licence was suspended almost four years back but the District Magistrate could not find time or occasion to pass a final order in the matter though it is the ultimate and statutory function he is supposed to discharge. In absence of any explanation whatsoever for not taking final decision for the last four years, inaction on the part of District Magistrate is highly condemnable and depreciated. It is nothing but sheer harassment to an individual who has no control over the statutory authority like District Magistrate. This is *per se* arbitrary.

8. This Court time and again has commented strongly against such attitude of the State and its authorities. This kind of attitude demean and denigrate individuals respect and honour. 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. 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.

9. 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.

10. Regarding harassment of a common man, 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)

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

12. 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.

13. 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".

14. 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."

15. 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."

16. In view of the above discussion, the impugned order cannot sustain. The writ petition is allowed. The impugned order dated 22.11.2007 is hereby quashed to the extent it suspends the firearm licence of the petitioner.

17. However quashing of order of suspension will not prevent Licensing Authority to proceed and conclude proceeding, if any, for cancellation of firearm licence of the petitioner pursuant to impugned order dated 22.11.2007.

18. The petitioners shall be entitled to cost which I quantify to Rs.10,000/- against respondents 1 and 2. It is made clear that at the first instance costs shall be paid by respondent No.1 but it shall be at liberty to recover the same from concerned District Magistrate held office at Farrukhabad during the relevant period and found responsible for inaction in the matter, after making such enquiry as permissible in law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.11.2011

BEFORE
THE HON'BLE SUNIL HALI,J.

Civil Misc Writ Petition No. 38545 of 1996

Rajjan Singh and another ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri B.D. Mandhyan

Counsel for the Respondents:
C.S.C.

U.P. Imposition of Ceiling on Land Holding Act 1960 Section 5(6)-Sale transaction made and became effective-prior 24.01.71-can not be questioned, Prescribed Authority-No jurisdiction to consider nature of Transaction either bona fide or to defeat the ceiling-finding

regarding of cultivatory possession of original tenure holder based on surmises and conjectures-liable to quashed.

Held: Para 7

The only exception to such a principle is contained in Section 5(1) Explanation II of the Act which contemplates that in case the original transferor continues and is in actual cultivatory possession of the land which he had transferred in the name of any other person or to his relative, in that eventuality it shall be presumed unless proved otherwise that he continues to hold the land in his own name. In the present case, prescribed authority has concluded that the transfer effected by the erstwhile land holders were not in good faith and by implication it has been presumed that erstwhile petitioner continues to be in possession of the land. There is no documentary evidence to suggest that the erstwhile owner continues to remain in possession of the property. In the present case, it be seen that no such enquiry or any finding has been recorded on the basis of any record that the original tenure holder is in actual cultivatory possession of the land even though the finding has been recorded but that is based on only surmises and conjectures. This being the position the impugned order declaring the land of the petitioner to be surplus cannot be sustained and the same is liable to be quashed.

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

1. By means of this writ petition, petitioners have prayed for a writ, order or direction in the nature of certiorari quashing the judgement and orders dated 31.1.1996 and 26.9.1996 passed b y respondent nos. 3 & 2 respectively.

2. The facts shorn of details are that the prescribed authority gave a notice to the petitioner under Section 10(2) of the Ceiling Act. The petitioners in reply to the notice submitted that the land occupied by the petitioners was within the ceiling limit. The prescribed authority, declared 13.4402 hectares of land as surplus land. Aggrieved against the order of the prescribed authority, an appeal was filed which was dismissed vide order dated 26.9.1996 by Addl. Collector, Allahabad Region, Allahabad. Aggrieved against the aforesaid judgement of the appellate authority, present writ petition has been filed.

3. Original tenure holder during his life time had executed three sale deeds and three gift deeds in favour of his daughter-in-laws and daughters and two others namely Kalika Prasad and Kallu. These transfers have been affected prior to 24.1.1971. By virtue of amendment effected in Section 5(6) of the UP Imposition of Ceiling on Land Holdings Act, 1960 by UP Act No. 18 of 1973 any transfer of land effected prior to 24.1.1971 shall not be enquired into for the purpose of finding out as to whether such deed has been executed in good faith or not. While reading Section 5(1) Explanation II which contemplates that if on or before 24.1.1971, any person who was holding the land as owner and is in actual physical possession of the land and the name of any other person is entered in the annual register either in addition to or to the exclusion of the former and whether on the basis of a deed of transfer or license or on the basis of a decree, it shall be presumed unless the contrary is proved to the satisfaction of the prescribed authority, that the first mentioned person continues to hold the land and that it is so held by him ostensibly in the name of the second mentioned person. The explanation contemplates that the genuineness and otherwise of any such transfer deeds can always be examined if it is found on fact that the original owner continues to cultivate the land for and on

behalf of said person. If the case is otherwise then the authenticity of such transfer deeds can not be questioned.

4. Case of the petitioner is that the Prescribed authority while dealing with the issue of such transfer deeds has recorded a finding that all the transfers have not been made in good faith but with intent to defeat the provisions of ceiling Act. In this respect the findings recorded by the Prescribed authority on Issue No. 4, while dealing with this issue, has held that the transaction of the transfers have been made within the family except for the two regarding which it has been said that they are also not in good faith. After having held so, prescribed authority has decided to hold the petitioners to be in cultivatory possession not on the basis of the record but by implication.

5. The short questions involved in this case are that whether the transfer deeds effected by the original land holder in favour of his daughter-in-laws and two other persons can be gone into as the same have been effected prior to 24.1.1971 and secondly whether the transfer deed have been executed in good faith or only to circumvent the provisions of ceiling Act.

6. There is no dispute that all the transfer deeds have been executed prior to 24.1.1971. Prescribed authority has no competence to examine the veracity otherwise of the sale deeds executed prior to 24.1.1971. The enquiry regarding the validity of the sale deeds under sub section 6 of Section 5 of the Act was totally misplaced. Therefore the Prescribed authority has no jurisdiction to put the validity of the sale deed to test as his jurisdiction will arise only when the deed of transfer had been effected on or after the appointed date i.e. 24.1.1971. Section 5 (6) of Act, 1960 also provides that transfers of land made subsequent to 24th January, 1971 are liable to be examined except when it is established to the satisfaction of the authorities that the transfer was in good faith, for adequate consideration and under a irrevocable instrument not being a Benami transaction or for the immediate or deferred benefit of the tenure holder or other members of his family. Transfer effected prior to 24.1.1971 cannot be gone into by the authority.

7. The only exception to such a principle is contained in Section 5(1) Explanation II of the Act which contemplates that in case the original transferor continues and is in actual cultivatory possession of the land which he had transferred in the name of any other person or to his relative, in that eventuality it shall be presumed unless proved otherwise that he continues to hold the land in his own name. In the present case, prescribed authority has concluded that the transfer effected by the erstwhile land holders were not in good faith and by implication it has been presumed that erstwhile petitioner continues to be in possession of the land. There is no documentary evidence to suggest that the erstwhile owner continues to remain in possession of the property. In the present case, it be seen that no such enquiry or any finding has been recorded on the basis of any record that the original tenure holder is in actual cultivatory possession of the land even though the finding has been recorded but that is based on only surmises and conjectures. This being the position the impugned order declaring the land of the petitioner to be surplus cannot be sustained and the same is liable to be quashed.

8. In the circumstances, the writ petition is allowed. The impugned orders dated 31.1.1996 and 26.9.1996 passed by respondent nos. 3 & 2 are hereby quashed.Matter is remanded back to the authorities to consider the question of taking surplus land afresh.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.11.2011

BEFORE
THE HON'BLE DILIP GUPTA, J.

Civil Misc. Writ Petition No. 58165 of 2011

Abhishek Kumar Pandey ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Ashok Khare
Sri Pradeed Kumar Singh
Sri Pradeep Kumar Mishra

Counsel for the Respondents:
Sri R.A. Akhtar
Sri Rajeev Joshi
C.S.C.

Right of Children to free education Act, 2009 Section-23(1) readwith U.P. Basic Education (Teachers) Service Rules, 1981, Rule 4-5-Petitioners diploma holders as B.P. Ed. And D.P.Ed-claiming appointment on Post of Asst. Teacher for Children Education upto class V to VIII-Rule 81 nowhere provides Teachers for Physical Education-relief to quash notification dated 20.08.2010 and to re-advertisements permitting them to appear U.P.T.E.T.-in absence of challenge to validity of Notification-such relief can not be granted nor any direction for creation of post of Asstt. Teachers of –under these categories can be issued.

Held: Para 15 and 17

The relief claimed in these petitions is to quash the Notification dated 23rd August, 2010 and suitably amend the advertisement so as to permit the petitioners to appear at the forthcoming UP-TET to be held on 13th November, 2011. There is no submission that paragraph 5(b) of the notification is bad in law or that the NCTE was not competent to provide the minimum qualifications. As noticed hereinabove, Section 23(1) of the Act confers powers on the academic authority authorised by the Central Government to prescribe the minimum qualification for a person to be eligible for appointment as a teacher and the Central Government has by the Notification dated 31st March, 2010 authorised the NCTE to lay down the minimum qualifications. The NCTE has, accordingly, issued the Notifications dated 23rd August, 2011 and 29th July, 2011 and under paragraph 5(b), the minimum qualifications for Physical Education Teachers are the qualifications contained in 2001 NCTE Regulations. These Regulations do not provide for holding a TET. There is no challenge to the 2001 NCTE Regulations. In such circumstances, the relief claimed for by the petitioners for permitting them to appear at the UP-TET so that they can be considered for appointment cannot be granted. The petitioners cannot, accordingly, be permitted to assail the advertisement to the extent it does not permit them from appearing at the UP-TET.

This apart, a direction cannot be issued to the respondents to create posts of Assistant Teachers (Physical Education) in elementary schools run by the Basic Education Board or recgonised by the Basic Education Board so that the petitioners can be considered for appointment. There is no categorical averment in the petitions that the post of Assistant Teacher (Physical Education) in elementary school exists in the other two categories of Institutions referred to in Section 2(n) of the Act.

Case law discussed:
(2010) 1 SCC 756

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

1. The petitioners, who possess Bachelor of Physical Education Degree (hereinafter referred to as the "B.P.Ed') or the Diploma in Physical Education (hereinafter referred to as the "D.P.Ed') have filed these petitions for quashing the Notification dated 23rd August, 2010 issued by the National Council for Teacher Education (hereinafter referred to as the "NCTE') which lays down the minimum qualifications for a person to be eligible for appointment as a teacher in Class I to VIII. The petitioner have also sought the quashing of the advertisement dated 22nd September, 2011 issued by the Board of High School and Intermediate Education, Uttar Pradesh, Allahabad (hereinafter referred to as the 'Intermediate Education Board') which has been authorised to hold the Teachers' Eligibility Test (hereinafter referred to as the 'TET') to the extent it does not permit the candidates who possess B.P.Ed./D.P.Ed. from appearing at the said test.

2. It is stated that in exercise of the powers conferred by Section 23(1) of the Right of Children to Free and Compulsory Education Act, 2009 (hereinafter referred to as the 'Act') and in pursuance of the Notification dated 31st March, 2010 issued by the Government of India, the NCTE issued the Notification dated 23rd August, 2010 laying down the minimum qualifications for a person to be eligible for appointment as a teacher in Classes I to VIII in a School referred to in Section 2(n) of the Act, which amongst others, provides that the person should pass the TET to be conducted by the appropriate Government in accordance with the Guidelines framed by the NCTE for the purpose. The Intermediate Education Board, which has been authorised by the State Government to hold such a test, issued the advertisement dated 22nd September, 2011 inviting applications from the eligible candidates for appearing in the UP-TET but persons with B.P.Ed./D.P.Ed. have not been included. They cannot, therefore, appear in the test. It is, therefore, asserted that the petitioners, who have obtained B.P.Ed./D.P.Ed., stand excluded from appointment in Classes I to VIII since a person who has cleared the TET is only considered eligible for appointment. In this connection, it is further stated that physical education and games are essential requirements for students and even the State Government recognised this aspect when it issued the Government Order dated 5th April, 2004 by which Physical Education and Sports was made a compulsory subject in the State. Thus, in order to give effect to the aforesaid requirement, it was necessary for the State to have created posts of teachers in Physical Education and Sports in the Schools but the order dated 5th April, 2004 permits appointment of a sports teacher from amongst the teaching staff of the School after he is given the required training.

3. It is submitted by Sri Ashok Khare, learned Senior Counsel appearing for the petitioners that the Notification dated 23rd August, 2010 provides for minimum qualifications for a person to be eligible for appointment as a teacher in Classes I to VIII and passing TET is considered to be an essential requirement but in respect of teachers for physical education, such requirement has been waived under Clause 5(b) of the Notification dated 23rd August, 2010 as amended by the Notification dated 29th July, 2011 and it is provided that the minimum qualification norms for physical education teachers shall be such as provided in National Council for Teacher Education (Determination of Minimum Qualifications for Recruitment of Teachers in Schools)

Regulation, 2001 (hereinafter referred to as the "2001 NCTE Regulations') as amended from time to time. It is his submission that when under the aforesaid 2001 NCTE Regulations, it is provided that for recruitment of teachers of physical education, the minimum academic and professional qualification for elementary schools shall be Senior Secondary School Certificate or Intermediate or its equivalent and Certificate in Physical Education (C.P.Ed.) of a duration of not less than two years or its equivalent, it was incumbent upon the State to have created posts of physical education in the Schools so that the teachers with such qualifications could be appointed but the Government Order dated 5th April, 2004 permits appointment of sports teacher from amongst the teaching staff of the school after he is given training for a certain period. It is also his contention that persons possessing B.P.Ed./D.P.Ed. should be permitted to appear at the forthcoming UP-TET to be held on 13th November, 2011 so that they can be considered for appointment as teachers.

4. Sri K.S. Kushwaha, learned Standing Counsel appearing for the State and the Intermediate Education Board and Sri R.A. Akhtar and Sri Rajiv Joshi, learned counsel appearing for the NCTE have contended that the reliefs claimed in these petitions cannot be granted to the petitioners. It is their submission that in terms of paragraph 5(b) of the Notification dated 23rd August, 2010, the petitioners are not required to appear at the UP-TET and for them the 2001 NCTE Regulations shall apply which prescribe the minimum academic qualification as Senior Secondary School Certificate or Intermediate and Certificate of Physical Education (C.P.Ed.) or its equivalent. It is also pointed out by Sri K.S. Kushwaha that in the Schools run by the Basic Education Board or recognised by the Basic Education Board, post of teacher in physical education has not been created in the State. In this connection he has also placed Regulation I of Chapter II of the U.P. Intermediate Education Act, 1921 which provides that B.P. Ed. Degree holders are eligible for appointment on the post of Assistant Teacher (Physical Education) in Intermediate Colleges (Class XI to XII) and has, therefore, submitted that the petitioners can be considered for appointment on this post. It is also his submission that it is for this reason that Rule 8 of the U.P. Basic Education (Teachers) Service Rules, 1981 and Rules 4 and 5 of the U.P. Recognised Basic Schools (Junior High Schools) (Recruitment and Condition of Service of Teachers) Rules, 1978 do not provide for qualification for the said post of Assistant Teacher in Physical Education in elementary schools. It is also his contention that the petitioners have not assailed the 2001 NCTE Regulations and, therefore, the writ petitions challenging the consequential Notification dated 23rd August, 2010 and the advertisement dated 22nd September, 2011 is not maintainable in view of the decision of the Supreme Court in **Edukanti Kistamma (Dead) through LRs. & Ors. Vs. S. Venkatareddy (Dead) through LRs. & Ors., (2010) 1 SCC 756.**

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

6. The petitioners, who claim to be B.P.Ed./D.P.Ed., are desirous of appearing at the UP-TET conducted by the Intermediate Education Board so that they possess the minimum qualification for a person to be considered eligible for appointment as a teacher in Classes I to VIII in a school referred to in Section 2(n) of the Act.

7. In order to appreciate the controversy involved in these petitions, it will be necessary to refer to various provisions of the Act and the Notifications.

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

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

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

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

.....

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

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

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

(iii) a school belonging to specified ategory; and

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

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

"NOTIFICATION

New Delhi, the 31st March, 2010

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

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

eligible for appointment as a teacher are as follows:-

1. **Minimum Qualifications.-**

(i) Classes I-V

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

OR

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

OR

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

OR

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

OR

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

AND

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

(ii) **Classes VI-VIII**

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

OR

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

OR

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

OR

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

OR

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

OR

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

AND

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

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

3. Training to be undergone.- A person -

(a) with Graduation with at least 50% marks and B.Ed. qualification or with at least 45% marks and 1-year Bachelor in Education (B.Ed.), in accordance with the NCTE (Recognition Norms and Procedure) Regulations issued from time to time in this regard shall also be eligible for appointment

for Class I to V upto 1st January, 2012, provided he/she undergoes, after appointment, an NCTE recognised 6-month Special Programme in Elementary Education.

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

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

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

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

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

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

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

(b) The minimum qualification norms referred to in this notification apply to teachers of Languages, Social Studies, Mathematics, Science, etc. In respect of teachers for Physical Education, the minimum qualification norms for Physical Education teachers referred to in NCTE Regulation dated 3rd November, 2001 (as amended from time to time) shall be applicable. For teachers of Art Education, Craft Education, Home Science, Work Education, etc. the existing eligibility norms prescribed by the State Governments and other school managements shall be applicable till such time the NCTE lays down the minimum qualifications in respect of such teachers.

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

13. It is, therefore, clear that in respect of teachers for physical education, the minimum qualification norms which will be applicable are the 2001 NCTE Regulations dated 3rd September, 2001. These Regulations do not provide for clearing the TET. In fact for elementary schools, all that is provided is that the persons should have

the minimum academic and professional qualification as Senior Secondary School Certificate or Intermediate or its equivalent and Certificate in Physical Education (C.P.Ed.) of a duration of not less than two years or its equivalent. It is, however, stated by Sri Kushwaha, learned counsel appearing for the State that Certificate of C.P.Ed. is not being awarded in the State after 1997.

14. According to Sri Kushwaha, learned Standing Counsel appearing for the State and the Board, not a single post of Assistant Teacher (Physical Education) has been created in the Basic Education Department till date and it is for this reason that 1981 Rules or 1978 Rules do not provide for the qualification of the said post of Assistant Teacher (Physical Education). The petitioners, at best, can be considered for appointment in Intermediate Colleges as they claim to be possessing graduation degree with Bachelor of Physical Education (B.P.Ed.) Degree.

15. The relief claimed in these petitions is to quash the Notification dated 23rd August, 2010 and suitably amend the advertisement so as to permit the petitioners to appear at the forthcoming UP-TET to be held on 13th November, 2011. There is no submission that paragraph 5(b) of the notification is bad in law or that the NCTE was not competent to provide the minimum qualifications. As noticed hereinabove, Section 23(1) of the Act confers powers on the academic authority authorised by the Central Government to prescribe the minimum qualification for a person to be eligible for appointment as a teacher and the Central Government has by the Notification dated 31st March, 2010 authorised the NCTE to lay down the minimum qualifications. The NCTE has, accordingly, issued the Notifications dated 23rd August, 2011 and 29th July, 2011 and under paragraph 5(b), the minimum qualifications for Physical Education Teachers are the qualifications contained in 2001 NCTE Regulations. These Regulations do not provide for holding a TET. There is no challenge to the 2001 NCTE Regulations. In such circumstances, the relief claimed for by the petitioners for permitting them to appear at the UP-TET so that they can be considered for appointment cannot be granted. The petitioners cannot, accordingly, be permitted to assail the advertisement to the extent it does not permit them from appearing at the UP-TET.

16. The NCTE 2001 Regulations may provide for the minimum qualifications for teachers in elementary schools as the post of Physical Education Teacher may be existing in other States but merely because such minimum qualifications have been prescribed by the NCTE does not mean that it is obligatory for the State to create posts of Assistant Teachers (Physical Education) in the Schools run by the Basic Education Board or recognised by the Basic Education Board. The State may have realised the importance of physical education and for that purpose has made it a compulsory subject in Classes I to VIII but as pointed out by Sri K.S. Kushwaha, such training is imparted to candidates undergoing the BTC Training Course so that when they are appointed to teach other subjects, they can also teach this compulsory subject for which the only requirement is to pass and the marks are not added to the final result.

17. This apart, a direction cannot be issued to the respondents to create posts of Assistant Teachers (Physical Education) in elementary schools run by the Basic Education Board or recgonised by the Basic Education Board so that the petitioners can

be considered for appointment. There is no categorical averment in the petitions that the post of Assistant Teacher (Physical Education) in elementary school exists in the other two categories of Institutions referred to in Section 2(n) of the Act.

18. The petitioners are, therefore, not entitled to any relief.

19. The writ petitions are, accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.11.2011

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

Civil Misc. Writ Petition No. 63022 of 2011

Anwar ...Petitioner
Versus
State of U.P. and others ...Respondnets

Counsel for the Petitioner
Sri Shiv Sagar Singh

Counsel for the Respondents:
Sri Anuj Kumar (Addl. S.C.)
C.S.C.

Indian Limitation Act-Section 5-delay in filing Revision-duly explained with medical certificate-rejection on ground of swaring with separate Paragraph-highly technical-all averments of affidavit appears to be on basis of personal knowledge-rejection order-held-not sustainable-matter remitted back for consideration on merit

Held: Para 8 and 9

In my opinion the entire affidavit is only in relation to the personal knowledge of the petitioner. No other factor has been indicated and as such the swearing clause and its verification in paragraph 11 does not appear to be defective. On facts the affidavit therefore being not defective, the Division Bench judgement would not be attracted in the present case. The Collector therefore erred in rejecting the affidavit for no valid reason.

In view of the nature of the dispute and the pendency of the proceedings this court accepts the explanation for delay in filing of the revision and condones the same. The Section 5 application as well as the plea in respect thereof is allowed and the revision shall be treated to be within time.

Case law discussed:
1991 AWC Pg. 238

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

1. Heard Sri Shiv Sagar Singh for the petitioner and the learned Standing Counsel and the learned counsel for the Gaon Sabha for the respondents. Learned counsel for the respondents submit that they do not propose to file any counter affidavit as the material on the basis whereof the impugned order has been passed is already on record and therefore the matter be disposed of finally at this stage.

2. This petition arises out proceedings initiated against the petitioner for an alleged encroachment over Gaon Sabha land under Section 122-B of the U.P. Z.A. & L.R. Act, 1950.

3. The allegation is that the petitioner has encroached partly over Plot No. 554 which is recorded in the name of Gaon Sabha, and as such he was liable to be evicted and also liable to pay the fine imposed.

4. Learned counsel Sri Shiv Sagar Singh for the petitioner submits that the notice which was served on the petitioner did not indicate as to on which side and where

was the encroachment situate. An objection was filed indicating the same. The Lekhpal who had submitted the report against the petitioner was also examined and cross examined and who admitted in his statement that the petitioner has his constructions over the Plot No. 545. Learned counsel submits that the statement of the Lekhpal also indicated in sum and substance that there was no actual encroachment. The cross examination dated 23.11.2010 has been filed as Annexure 9 to the writ petition. Several other objections have also been taken in the statement. The Tehsildar after considering the same came to the conclusion that there was an encroachment of a lesser area, inasmuch as the notice reflected an encroachment of 168 square meters whereas the ultimate finding is that the encroachment is of 68 square meters only.

5. Learned counsel submits that this reduction in area is also an indicator of the incorrect report of the Lekhpal therefore the order is vitiated. He further submits that this was taken as a specific ground before the Collector.

6. It appears that the revision filed against the order of the Tehsildar was time barred and therefore an application under Section 5 along with an affidavit was submitted stating therein that the petitioner had fallen ill due to a slip disc. He also relied on a medical report of one Dr. Neeraj Kumar. The affidavit which runs in 11 paragraphs, and a copy whereof has been filed on record, avers about the details of the delay caused on account of the ailment and also on account of the incorrect information given by the lawyer. The revision of the petitioner has been dismissed only on the ground of no valid explanation having been given for delay, and further the affidavit in support of the delay condonation being defective, the plea for condoning the delay deserved to be rejected. While doing so the learned Collector has relied on a Division Bench judgment of this Court in the case of **Rai Prem Chandra and others Vs. Obeetee Pvt. Ltd., 1991 AWC Pg. 238** paragraph 6 in particular.

7. The delay in filing of the revision has been explained in the affidavit filed in support of Section 5 application. The learned Collector while disposing of the revision has considered the said affidavit to be defective on the ground that each paragraph of the affidavit has not been sworn separately and since the verification clause is defective therefore in view of the Division Bench judgment aforesaid the same did not inspire confidence.

8. In my opinion the entire affidavit is only in relation to the personal knowledge of the petitioner. No other factor has been indicated and as such the swearing clause and its verification in paragraph 11 does not appear to be defective. On facts the affidavit therefore being not defective, the Division Bench judgement would not be attracted in the present case. The Collector therefore erred in rejecting the affidavit for no valid reason.

9. In view of the nature of the dispute and the pendency of the proceedings this court accepts the explanation for delay in filing of the revision and condones the same. The Section 5 application as well as the plea in respect thereof is allowed and the revision shall be treated to be within time.

10. Accordingly, the impugned order of the Collector dated 13.10.2011 is set aside and the matter is remitted back

for decision on merits in accordance with law within a period of three months from the date of presentation of a certified copy of this order before the Collector.

11. The writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.11.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL,J.

Civil Misc. Writ Petition No. 65322 of 2011

Brajesh Chandra Awasthi ...Petitioner
Versus
State of U.P. Thru Chief Secy. and others ...Respondents

Counsel for the Petitioner:
Sri Jyotish Awasthi
Sri Prabhakar Dubey

Counsel for the Respondents:
C.S.C.

Arms Act-Section13-Grant of fire arm license-petitioner a Practicing Advocate-already possess 315 bore rifle-no material placed either before authority or before writ court-justifying need of another fire Arm-and relied-No Prohibition of Second License-but not as a matter of right-case law cited already overruled by Full Bench-really unfortunate.

Held: Para 5

The decisions cited before this Court only stress upon that there is no prohibition under the statute for possessing more than one firearm licence by a person. Lack of prohibition and entitlement of a person to claim more than one firearm licence are two different things. Though there is no prohibition and a person in a given circumstance may be allowed more than one firearm licence but that is not a matter of right and not also as a matter of course.

Case law discussed:
2002(1) SCC 633; AIR 1993 Alld 291; 2010 (1) ACR 417; 2010(1) ACR 1078; 1995 (1) All CJ 200

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

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

2. This writ petition is directed against the order passed by District Magistrate, Etawah rejecting petitioner's application for grant of firearm licence.

3. Learned counsel for the petitioner stressed that petitioner is an Advocate and also a political activist. He does not dispute that he already possess a firearm licence whereupon he possess 315 bore rifle but contends that under law a person can have three firearm licences and, therefore, the authorities below have committed patent error by depriving and denying firearm licence to petitioner only on the ground that petitioner already possessed a firearm licence and weapon with him. He placed reliance on Apex Court's decision in **Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and others, 2002(1) SCC 633** and contended that where a statute vests certain power in an authority to be exercised in a particular manner, the power has to be exercised only in that manner and not otherwise. He also placed reliance on this Court's decisions in **Ganesh Chandra Bhatt Vs. District Magistrate, Almora, AIR 1993 Alld 291; Sunil Shukla, Advocate Vs. State of U.P. and others, 2010(1) ACR 417;** and, **Ram Chandra Yadav Vs. State of U.P. and another, 2010(1) ACR 1078.**

4. In my view none of the aforesaid decisions have application to the facts of

this case. It is no doubt true that a person may have more than one firearm licence under statute but that does not mean that the authorities are under statutory obligation to allow a firearm licence application as and when submitted by a person who already possessed a firearm, to grant the same as a matter of right without considering other relevant circumstances. A firearm licence is not a matter of right but a privilege which can be allowed in the manner provided in statute. When a firearm licence is applied for personal safety and security, it is incumbent upon the applicant to demonstrate that in case of denial of firearm licence his life and liberty would be endangered. In the case in hand, petitioner already possessed a firearm licence and has not placed anything on record to show that the same is not sufficient for his protection and safety. In absence of anything placed on record by petitioner himself to justify his application for second firearm licence, I do not find any illegality on the part of respondents in rejecting petitioner's application.

5. The decisions cited before this Court only stress upon that there is no prohibition under the statute for possessing more than one firearm licence by a person. Lack of prohibition and entitlement of a person to claim more than one firearm licence are two different things. Though there is no prohibition and a person in a given circumstance may be allowed more than one firearm licence but that is not a matter of right and not also as a matter of course.

6. So far as judgment cited before this Court in **Commissioner of Income Tax, Mumbai (supra)** is concerned, nothing has been shown that procedure prescribed in law has not been followed by authorities. The judgment of this Court in **Ganesh Chandra Bhatt (supra)**, cited by learned counsel for the petitioner has been overruled by a Full Bench of this Court in **Rana Pratap Singh Vs. State of U.P., 1995 (1) All CJ 200,** as is evident from following extract of judgment of Full Bench:

"We are thus, again constrained to hold that both Ganesh Chandra Bhatt's case 1993 (30) ACC 204 as also Devendra Pratap Singh's case Civil Misc. Writ Petn. No. 29963 of 1993, D/- 7-10-1993, do not lay down correct law and are consequently hereby over-ruled."

7. It is really strange that learned counsel canvassing case of an Advocate client has cited an authority which has already been overruled. This is really unfortunate.

8. However, in view of the aforesaid discussions, I find no merit in the writ petition. Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.11.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL,J.

Civil Misc. Writ Petition No. 65576 of 2011

Prahlad Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri S.N. Verma
Sri Havaldar Verma

Counsel for the Respondents:
Sri S. Shekhar
C.S.C.

Fundamental Rule-Rule 54-B-Denial of salary during suspension period-without giving show cause notice-Disclipinary authority-itself conducted enquiry-no question of enquiry report-so for supply of the copies of document-in absence of specific pleadings regarding particulars of documents-not fatal-however the procedure provided under Rule 54-B not followed-order of punishment denying salary during suspension period-Quashed-matter remitted back for fresh consideration in light of observations.

Held: Para 11

Admittedly no such procedure has been followed in the instant case and denial of full salary has been made by the impugned order without affording any opportunity to the petitioner by way of issuing a show cause notice, therefore, the impugned order in so far as it denies full salary during the period of suspension without any notice to the petitioner is illegal and liable to be set-aside.

Case law discussed:
1993 (4) SCC 727; 2007 (3) ADJ 64; 2008(8) ADJ 243; 2008 (4) ESC 2679; Uma Shankar Purwar Vs. The Principal Secretary, Food and Civil Supplies, Government of U.P., Lucknow and others (Writ Petition No. 9519 of 2007, decided on 14.9.2009).

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

1. Heard Sri Himanshu, Advocate holding the brief of Sri Havaldar Verma, learned counsel for the petitioner, learned Standing Counsel for the respondent no.1 and Sri S. Shekhar for the respondents no.2 to 4.

2. Considering the pure legal submission advanced by learned counsel for the petitioner, learned Standing Counsel states that he does not propose to file any counter affidavit and the writ petition may be disposed of finally at this stage under the Rules of this Court. I proceed accordingly.

3. Learned counsel for the petitioner submitted that enquiry was conducted by the appointing authority himself and he had not appointed any enquiry officer. However, he could not show any provision or otherwise law that appointing authority is not competent to conduct enquiry himself but has to appoint enquiry officer. He further contended that along with order of punishment of stoppage of two increments with cumulative effect, the respondents have illegally denied the full salary to the petitioner for the period he remain under suspension. Inasmuch as it is not one of the punishment prescribed in the rule and in case it is referable to Fundamental Rule 54-B, such order forfeiting salary during the period of suspension cannot be passed without issuing a show cause notice in this regard and giving an opportunity of hearing to the petitioner.

4. Per contra learned counsel for the respondents stated that in absence of any provision the disciplinary authority himself can conduct enquiry or assign the same to any person lower in rank to the disciplinary authority as an Enquiry Officer and get the enquiry conducted through him. He said that there is no illegality in this regard. He further contended that so far as denial of full salary during the period of suspension is concerned, the application of Fundamental Rule though is admitted but it is contended that in the same order not only the punishment can be imposed but an order regarding full salary during the period of suspension can also be passed and hence the impugned order warrants no interference.

5. So far as the first submission is concerned, I am clearly of the view that a

disciplinary authority himself can conduct the enquiry and there is no bar. The power imposing punishment obviously is vested in the disciplinary authority. He can exercise this power after giving due opportunity of hearing to delinquent employee. The opportunity includes departmental enquiry. No principles of law which precedent bar such an enquiry by the disciplinary authority himself. On the contrary when disciplinary authority himself has conducted enquiry, the disciplinary proceedings can be concluded a little bit expeditiously for the reason that in such a case the disciplinary authority is not supposed to prepare any enquiry report but after concluding the oral enquiry he can record its finding and impose punishment straight with. I am supporting in taking this view from the Apex Court decision in ***Managing Director, ECIL Hyderabad Vs. B. Karunakar, 1993 (4) SCC 727.***

6. This Court in ***Laxmi Narain Tripathi Vs. Deputy Director (Fisheries), Basti and others, 2007 (3) ADJ 64*** referring to Rule 7 of the Government Servant (Discipline and Appeal) Rules, 1999 has observed that disciplinary authority may himself enquire into the charges or appoint an authority subordinate to him as Enquiry Officer to enquire into the charges. The mere fact that disciplinary authority himself has conducted the enquiry, would not vitiate the enquiry unless shown to be prohibited by some Statute which is not the case in hand.

7. The second submission is that documents relied upon, were not supplied along with charge-sheet. The documents relied upon by department can be made available at any stage till the departmental enquiry is completed. It is not the case of petitioner that documents were not available to him at any point of time. There is no pleading in the entire writ petition. Unless it is shown that requisite documents relied upon in support of the charges were not supplied at any point of time nor the delinquent employee was allowed to inspect the same at any stage; it cannot be said that there is any violation of Principles of Natural Justice in the disciplinary proceedings.

8. The last submission is that impugned order imposes, besides punishment of stoppage of two increments with cumulative effect, another punishment of non-payment of full salary for the period of suspension though it is not the punishment prescribed in Rules and has been included in the impugned order of punishment wholly illegally.

9. Learned counsel for the Corporation on the contrary submitted that for this purpose Fundamental Rules have been adopted by the Corporation and Fundamental Rule 54-B provides that competent authority can always deny full salary to the delinquent employee when he is reinstated after suspension and can also impose punishment.

10. The Fundamental Rule 54-B clearly contemplates a show cause notice separately where the disciplinary authority is of the view that the delinquent employee should not be paid full salary for the period he was under suspension. The Fundamental Rule 54-B reads as under:-

"54-B. (1) When a Government servant who has been suspended is reinstated or would have been so reinstated but for his retirement on superannuation while under suspension, the authority competent to

order reinstatement shall consider and make a specific order-

(a) regarding the pay and allowance to be paid to the Government servant or the period of suspension ending with reinstatement or the date of his reinstatement on superannuation as the case may be; and

(b) whether or not the said period shall be treated as a period spent on duty.

(2) Notwithstanding anything contained in Rule 53, where a Government servant under suspension dies before the disciplinary or court proceeding instituted against him are concluded, the period between the date of suspension and the date of death shall be treated as duty for all purposes and his family shall be paid the full pay and allowances for that period to which he would have been entitled had he not been suspended, subject to adjustment in respect of subsistence allowance already paid.

(3) Where the authority competent to order reinstatement is of the opinion that the suspension was wholly unjustified, the Government servant shall, subject to the provisions of sub-rule(8), to be paid the full pay and allowances to which he would have been entitled, had he not been suspended:

Provided that where such authority is of the opinion that the termination of the proceeding instituted against the Government servant had been delayed due to reasons directly attributable to the Government servant, it may, after giving him an opportunity to make his representation within sixty days from the date on which the communication in this regard is served on him and after considering the representation, if any, submitted by him, direct, for reasons to be recorded in writing that the Government servant shall be paid for the period of such delay only such amount (not being the whole) of such pay and allowances as it may determine.

(4) In a case falling under sub-rule (3) the period of suspension shall be treated as a period spent on duty for all purposes.

(5) In cases other than those falling under sub-rules (2) and (3), the Government servant shall subject to the provisions of sub-rules(8) and (9), be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled had he not been suspended, as the competent authority may determine, after giving notice to the Government servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection within such period (which in no case shall exceed sixty days from the date on which the notice has been served) as may be specified in the notice.

(6) Where suspension is revoked pending finalisation of the disciplinary or court proceedings, any order passed under sub-rule(1) before the conclusion of the proceedings against the Government servant, shall be reviewed on its own motion after the conclusion of the proceedings by the authority mentioned in sub-rule(1), who shall make an order according to the provisions of sub-rule(3) or sub-rule (5), as the case may be.

(7) In a case falling under sub-rule(5) the period of suspension shall not be treated as a period spent on duty unless the competent authority specifically directs that

it shall be so treated for any specified purposes:

Provided that if the Government servant desires, such authority may order that the period of suspension shall be converted into leave of any kind due and admissible to the Government servant.

NOTE- The order of the competent authority under the proceeding proviso shall be absolute and no higher sanction shall be necessary for the grant of-

(a) Extraordinary leave in excess of three months in the case of temporary Government servant; and

(b) Leave of any kind in excess of five years in the case of permanent Government servant.

(8) The payment of allowances under sub-rule(2), sub-rule (3) or sub-rule(5) shall be subject to all other conditions under which such allowances are admissible.

(9) The amount determined under the proviso to sub-rule(3) or sub-rule(5) shall not be less than the subsistence allowance and other allowances admissible under Rule 53.

(10) Any payment made under this Rule to Government servant on his reinstatement shall be subject to adjustment of the amount, if any earned by him through an employment during the period between the date of suspension and the date of reinstatement or, the date of retirement on superannuation while under suspension. Where the emoluments admissible under this Rule are equal to or less than those during the employment elsewhere, nothing shall be paid to the Government servant.

NOTE- Where the Government servant does not report for duty within reasonable time after the issue of the order of reinstatement after suspension, on pay and allowances will be paid to him for such period till he actually takes over charge."

11. Admittedly no such procedure has been followed in the instant case and denial of full salary has been made by the impugned order without affording any opportunity to the petitioner by way of issuing a show cause notice, therefore, the impugned order in so far as it denies full salary during the period of suspension without any notice to the petitioner is illegal and liable to be set-aside.

12. Similar view has been taken by this Court in ***Akhilesh Kumar Awasthi Vs. State of U.P. and others, 2008(8) ADJ 243*** equal to ***2008(4) ESC 2679*** and also followed in ***Uma Shankar Purwar Vs. The Principal Secretary, Food and Civil Supplies, Government of U.P., Lucknow and others*** *(Writ Petition No.9519 of 2007, decided on 14.9.2009).*

13. In view of above exposition of law while I uphold the impugned order of punishment in so far as it imposes punishment of stoppage of two increments with cumulative effect, the impugned order dated 05.02.2004, in so far as it deny full salary to the petitioner for the period of suspension, is hereby quashed. The competent authority is directed to pass a fresh order after issuing proper show cause notice to the petitioner and giving an opportunity of submitting his representation on the question of denial of full salary and allowances for the period of suspension. It

14. The writ petition is allowed in the manner as aforesaid.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.11.2011

BEFORE
THE HON'BLE DILIP GUPTA, J.

Civil Misc. Writ Petition No. 59566 of 2011

Mithai Lal and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Shashi Nandan
Sri Abhishek Srivastava

Counsel for the Respondents:
Sri A.K. Singh
Sri R.A. Akhtar
C.S.C.

Right of Children to free and compulsory Education Act, 2009 Section 23 (1)- readwith Section 2 (ii) of National Council for teachers Education act-Eligibility for Appointment as teachers in class I to VIII- a teacher having two years teaching experience with 2 years Degree by distance mode-not required to qualify T.E.T.- such direction to appear in T.E.T.- can not be granted.

Held: Para 18

It is, therefore, clear that the candidates who have to their credit at least two years teaching experience in a government or government recognized Primary Elementary Schools are granted admission to the aforesaid two years course by Distance Mode. Persons who have been appointed as teachers are not required to under take the U.P.-TET under the notification dated 23rd August, 2010.

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

1. The petitioners, who have obtained the B.Ed. two years Degree by Distance Mode from U.P. Rajshree Tandon Open University have filed this petition for a direction upon the respondents to consider it as a valid qualification for appearing at the U.P. Teachers Eligibility Test (hereinafter referred to as the 'U.P.-TET') scheduled to commence from 13th November, 2011.

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

3. It is contended by Sri Shashi Nandan, learned Senior Counsel for the petitioners that notification dated 23rd August, 2010 issued by the NCTE under Section 23(1) of the Act regarding minimum qualification for a person to be eligible for appointment as a teacher in Classes I to VIII so far as it restricts candidates obtaining B.Ed. Degree in one year should be modified to include candidates who have obtained B.Ed. Degree by distance mode in two years as such candidates are at parity with the candidates obtaining B.Ed. Degree in one year in view of the decision of the Division Bench of the Court in **Special Appeal No.1271 of 2007 (Gyanendra Kumar Sharma & 49 others Vs. State of U.P. & Ors.)** decided on 3rd October, 2007. He, therefore, submits that the petitioners, who have obtained the B.Ed. Degree by distance mode in two years, should also be considered eligible under the advertisement dated 22nd September, 2011 issued by the Intermediate Education Board.

4. Sri R.A. Akhtar, learned counsel appearing for the NCTE has pointed out that the B.Ed. Distance Mode Program is offered by a University recognised by NCTE for working Teachers possessing minimum two years teaching experience and, therefore, a person who is already appointed as a teacher is not required to undertake TET and it is for this reason that the B.Ed. Degree of two years obtained by Distance Mode has not been included in the notification. He has stated that he has made this submission on the basis of the instructions sent to him by the NCTE on 26th July, 2011.

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

6. The petitioners, who claim to be possessing B.Ed. degree obtained in two years through Distance Mode are desirous of appearing at the UP-TET conducted by the Intermediate Education Board so that they can possess the minimum qualification for a person to be considered eligible for appointment as a teacher in Classes I to VIII in a school referred to in Section 2(n) of the Act.

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

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

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

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

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

.....

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

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

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

(iii) a school belonging to specified category; and

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

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

"NOTIFICATION

New Delhi, the 31st March, 2010

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

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

1. **Minimum Qualifications.-**

(i) Classes I-V

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

OR

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

OR

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

OR

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

OR

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

AND

(b) Pass in the Teacher Eligibility Test (TET), to be conducted by the appropriate Government in accordance with the

Guidelines framed by the NCTE for the purpose.

(ii) **Classes VI-VIII**

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

OR

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

OR

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

OR

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

OR

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

OR

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

AND

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

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

3. Training to be undergone.- A person -

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

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

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

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

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

special programme on elementary education.

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

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

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

(b) The minimum qualification norms referred to in this notification apply to teachers of Languages, Social Studies, Mathematics, Science, etc. In respect of teachers for Physical Education, the minimum qualification norms for Physical Education teachers referred to in NCTE Regulation dated 3rd November, 2001 (as amended from time to time) shall be applicable. For teachers of Art Education, Craft Education, Home Science, Work Education, etc. the existing eligibility norms prescribed by the State Governments and other school managements shall be applicable till such time the NCTE lays down the minimum qualifications in respect of such teachers.

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

13. It is, therefore, clear that it is only those candidates who have obtained the B.Ed. Degree in one year who can be considered eligible under the notification and, therefore, can appear at the U.P.-TET.

14. It is pointed out by Sri R.A. Akhtar, learned counsel for NCTE that persons who obtain the B.Ed. Degree in two years by distance mode have at least two years teaching experience and, therefore, it is not necessary for them to appear at the U.P.-TET.

15. In this connection it will also be pertinent to refer to the Norms and Standard for Diploma in Elementary Education Programme through Open and Distance Learning Mode leading to Diploma in Elementary Education contained in Appendix-9 to the National Council for Teachers Education (Recognition, Norms and Procedure) Regulation, 2009 (hereinafter referred to as the '2009-Regulation'). The eligibility for admission to such course is Senior Secondary with 50% marks and two years teaching experience in a Government or Government aided Primary/Elementary School.

16. Clauses 1 to 5 of Appendix-9 to the 2009-Regulations are relevant for the purposes of the controversy and are reproduced below:-

"Appendix-9

Norms and standards for Diploma in elementary education programme through Open and Distance Learning System

leading to Diploma in elementary education (D. El. Ed.).

1.Preamble.- (i) The elementary teacher education programme through Open and Distance Learning System is intended primarily for upgrading the professional competence of working teachers in the elementary schools (primary and upper primary/middle). It also envisages bringing into its fold those teachers who have entered the profession without formal teacher training.

(ii) The NCTE accepts open and distance learning (ODL) system as a useful and viable mode for the training of teachers presently serving in the elementary schools. This mode is useful for providing additional education support to the teachers and several other educational functionaries working in the school system.

2. Condition of offering the course.- The institutions or academic units specially established for offering ODL programmes like the National Open University, State Open Universities and the Directorates/School of Open and Distance Learning in the Central or State Universities shall be eligible to offer teacher education programmes (The Deemed to be Universities, Agricultural or Technical Universities, which specialize in a field other than teacher education and other discipline specific Universities/Institutions are not eligible to offer teacher education programme through ODL).

3. Territorial Jurisdiction.- The University offering teacher education programme through ODL will have territorial jurisdiction as defined in the Act of the University. The Study Centres of the University shall also be located in the territorial jurisdiction of the University.

4. Duration.- The duration of the programme shall be of two academic sessions/years (four semesters). The commencement and completion of the programme shall be so regulated that two long spells of vacation (summer/winter/staggered) are available to the learners for guided/supervised instruction and fact to face contact sessions. Sandwitching the programme between two summer vacations will be an ideal proposition.

5. Intake, Eligibility and Admission Procedure.

(1). *Intake.*- The basic unit of intake for the D.El.Ed. programme, shall be five hundred students subject to the condition that one Study Centre shall enroll not more than one hundred students in a given session. The request for additional unit in any programme shall be examined by the NCTE on the basis of the availability of required facilities in respect of study centres and related support in the territorial jurisdiction of the university.

(2) *Eligibility.*-

(i)Senior Secondary (Class XII) or equivalent examination passed with fifty percent marks.

(ii)Two years teaching experience in a Government or Government recognized primary/elementary school.

(3) *Admission Procedure.*

(i)The State Government shall develop a suitable procedure for the selection of candidates.

(ii)The reservation for SC/ST/OBC and other categories shall be as per the rules of the Central Government/State Government, whichever is applicable. There shall be a relaxation of five percent marks in favour of SC/ST/OBC and other categories of candidates."

17. It is true that in **Special Appeal No.1271 of 2007 (Gyanendra Kumar Sharma & 49 others Vs. State of U.P. & Ors.)** the candidates who had obtained two years B.Ed. Degree through Distance Mode were also permitted to seek admission in the Special B.T.C. Course but in the present case, it has been pointed out by the NCTE that only such candidates are permitted to take admission in B.Ed. two years course by Distance Mode who have at least 2 years teaching experience and a person who has already appointed is not required to undertake the U.P-TET.

18. It is, therefore, clear that the candidates who have to their credit at least two years teaching experience in a government or government recognized Primary Elementary Schools are granted admission to the aforesaid two years course by Distance Mode. Persons who have been appointed as teachers are not required to under take the U.P.-TET under the notification dated 23rd August, 2010.

19. In such circumstances, the relief claimed cannot be granted to the petitioners.

20. The petition is, accordingly, dismissed.
