ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.12.2012

BEFORE
THE HON'BLE SAEED-UZ-ZAMAN SIDDIQI, J.

Rent Control No. 9 of 2004

Niyamatullah and 2 others ...Petitioners
Versus
1st A.D.J., Bahraich and 2 others
...Respondents

Counsel for the Petitioner:
Mohd. Arif Khan
Sri M.P. Verma

Counsel for the Respondents:
C.S.C.
Sri B.R. Tripathi

Constitution of India, Article 226-read with Small Cause Court Act 1887 Section 23-during pendency of suit before the Small Cause Court-after 40 years-application to return the plaint by tenant-on ground intricates question of ownership-JSCC as well as Revisional Court dismissed the application on ground the question of ownership is not under consideration only with soul purpose to prolong the litigation such foul game has been played-petition dismissed by imposing cost of Rs. 25,000-direction to conclude the proceeding within 3 month issued.

Held: Para-17

On the basis of discussions made above, writ petition deserves to be dismissed. Writ petition is accordingly dismissed with a cost of Rs.25,000/- to be paid by the petitioners to opposite party no.3 within thirty days from today or in case of refusal by opposite party no.3 the same shall be deposited before the learned Judge, Small Causes Courts within stipulated time, which shall be a condition precedent for the petitioners to participate in the proceedings of S.C.C. Suit No.22 of 1992. Both the order under challenge are hereby confirmed. Learned Judge, Small Causes Court, Bahraich, where the suit is pending is directed to proceed on with the case, on day to day basis, in such a fashion, that it is decided within three months from the date of production of a certified copy of this order.

Case Law discussed:
AIR 1973 SC 1034; 1987 (1) ARC 281; 2005 (1) SCC 705; 2005 AIR (SC) 2342; 2000 SCFBRC 321; 2003 AIR SCW 7158; (2010) 2 SCC 114; AIR 1983 S.C. 1015; 2000 AIR SCW 3793

(Delivered by Hon'ble Saeed-Uz-Zaman Siddiqi, J.)

1. By means of this writ petition, petitioners have sought for a writ in the nature of certiorari, quashing the order dated 26.10.1998, passed by the learned Judge, Small Causes Court / Civil Judge (J.D.), Bahraich, contained as Annexure No.1 and judgment and order dated 16.12.2003, passed by First Additional District Judge, Bahraich, contained as Annexure No.10, to the writ petition.

2. Heard learned counsel for both the parties and gone through the records.

3. The admitted facts between the parties are that the petitioners are tenants of the disputed premises. The opposite party no.3, claiming himself to be landlord filed a small cause case for eviction and recovery of rent and damages for use and occupation before the learned Trial Court. Opposite party no.2 filed written statement and challenged the ownership of opposite party no.3, who was plaintiff before the Judge, Small Causes Court. Replication was also filed by opposite party no.3. The suit was filed

on 2.9.1992. Written statement was filed by the petitioners on 21.10.1993. The replication was filed on 22.3.1994, against which the defendants / petitioners filed another application on 22.08.1996. On the same date, the petitioners moved application before the learned Judge, Small Causes Court under Section 23 of the Provincial Small Cause Courts Act, 1887, for returning the plaint on the ground that intricate question of ownership is involved in this case, which was numbered as Paper No.116-C. It was rejected vide order dated 26.10.1998. The petitioners filed S.C.C. Revision No.21 of 1998, which was also dismissed vide judgment and order dated 16.12.2003. Aggrieved by both the orders, petitioners have knocked the door of this Court.

4. Admittedly, the petitioners are tenants of the disputed shop. They are raising issue of ownership on the ground that Nazar Mohammad was the owner of the disputed premises who executed will on 25.05.1968 in favour of his widow who along with her five sons and one daughter sold it. In the said sale deed all the heirs of Nazar Mohammad were not party. The petitioners have raised a plea that since Smt. Sughra Bano widow of Nazar Mohammad was heir and under Islamic law a will cannot be executed in favour of an heir. The will was void. It is undisputed that a muslim can bequeath his property up to the extent of one third but if the said will is in favour of an heir all the other co-heirs must consent to it. In either case, through sale deeds the opposite party no.3 became owner. His ownership can be challenged by the heirs of Nazar Mohammad. That may be a question of title involved as amongst the heirs of Nazar Mohammad, but such dispute cannot entitle the tenant to raise it in a small cause case and plead that it is an intricate question of title, upon which the plaint should be returned for presentation to the proper court. This misconception of law and creation of the ground of a mischievious tenant to prolong the possession in the disputed premises. Section 23 of the Small Cause Courts Act, 1887 is reproduced as under:-

*"**Return of plaints in suits involving question of title**-(1) Notwithstanding anything in the foregoing portion of this Act, when the right of a plaintiff and the relief claimed by him in a Court of Small Cases depend upon the proof or disproof of a title to immovable property or other title which such a Court cannot finally determine, the Court may at any stage of the proceedings return the plaint to be presented to a Court having jurisdiction to determine the title.*

(2) When a Court returns a plaint under sub-section (1), it shall comply with the provisions of the second paragraph of section 57 of the Code of Civil Procedure (14 of 1882) and make such order with respect to costs as it deems just, and the Court shall, for the purposes of the Indian Limitation Act, 1877 (15 of 1877), be deemed to have been unable to entertain the suit by reason of a cause of a nature like to that of defect of jurisdiction."

5. In view of the above mentioned provisions of law the right of plaintiff and the relief claimed by him must depend upon proof or disproof of title. Title of the plaintiff is not at all involved in this case which is based upon relationship of landlord and tenant. Admittedly the plaintiffs are the tenants. The factum of ownership is foreign to the scope of Judge, Small Causes Court.

6. In ***M/s. Hiralal Ratanlal v. STO, AIR 1973 SC 1034***, this court observed:-

"In construing a statutory provision the first and foremost rule of construction is the literally construction. All that the Court has to see at the very outset is what does the provision say. If the provision is unambiguous and if from the provision the legislative intent is clear, the Court need not call into aid the other rules of construction of statutes. The other rules of construction are called into aid only when the legislative intent is not clear."

7. A full Bench of this Court has held in ***Gopal Das v. Additional District Judge, Varanasi, 1987 (1) ARC 281***, in which it was held that one co-owner is competent to maintain an action for eviction of the tenant of the entire premises, since he can be considered as a "landlord" within the meaning of Section 3(5) of U.P. Act No.13 of 1972. It was further held that one co-owner alone would be competent to sign such application.

8. In view of the legal propositions as mentioned above the petitioners are dragging the landlord / opposite party no.3 in the litigation since 1992. Twenty years have elapsed and suit is yet to see light of the day. This is a case of sheer abuse of court process. In ***Atma Ram Properties (P) Ltd. v. Federal Motors Pvt. Ltd., 2005 (1) SCC 705,*** Hon'ble Supreme Court has held as under:-

"Landlord-tenant litigation constitutes a large chunk of litigation pending in the Courts and Tribunals. The litigation goes on for unreasonable length of time and the tenants in possession of the premises do not miss any opportunity of filing appeals or revisions so long as they can thereby afford to perpetuate the life of litigation and continue in occupation of the premises."

9. This writ petition demonstrates how a determined and dishonest litigant can interminably drag on litigation to frustrate the results of a judicial determination. The history of this litigation shows nothing but cussedness and lack of bonafide on the part of the petitioners. Apart from their tenacity and determination to prevent the opposite party no.3 from enjoying the fruits of decree, there appears to be nothing commendable in the case. In view of the conduct of the petitioner they deserves condemnation which can only be indicated by imposition of cost on the petitioners.

10. While holding this I rely upon the law laid down by the Hon'ble Apex Court in ***Gayatri Devi and others v. Shashi Pal Singh, 2005 AIR (SC) 2342.***

11. In ***Rajappa Hanamantha Ranoji v. Mahadev Channabasappa & ors.*** Reported in ***2000 SCFBRC 321,*** the Hon'ble Supreme Court also made the following observations:

"It is distressing to note that many unscrupulous litigants in order to circumvent orders of Courts adopt dubious ways and take recourse to ingenious methods including filing of fraudulent litigation to defeat the orders of Courts. Such tendency deserves to be taken serious note of and curbed by passing appropriate orders and issuing necessary directions including imposing of exemplary costs. As noticed, despite

eviction order having become final nearly a quarter century ago, respondent no.1 still could not enjoy the benefit of the said order and get possession because of the filing of the present suit by the brother of the person who had suffered the eviction order. Under these circumstances, we quantify the costs payable by the appellant to respondent no.1 at Rs.25,000/-."

12. In ***Ravinder Kaur v. Ashok Kumar & anr.,*** reported in ***2003 AIR SCW 7158***, the Hon'ble Supreme Court has held as under:

"Courts of law should be careful enough to see through such diabolical plans of the judgment-debators to deny the decree-holders the fruits of the decree obtained by them. These type of errors on the part of the judicial forums only encourage frivolous and cantankerous litigations causing law's delay and bringing bad name to the judicial system."

13. In ***Dalip Singh v. State of U.P. and others,*** reported in ***(2010) 2 SCC 114***, the Hon'ble Supreme Court has held as under:

"In exercising jurisdiction under Article 226 of the Constitution, the High Court will always keep in mind the conduct of the party who is invoking such jurisdiction. If the applicant does not disclose full facts or suppresses relevant materials or is otherwise guilty of misleading the Court, then the Court may dismiss the action without adjudicating the matter on merits. The rule has been evolved in larger public interest to deter unscrupulous litigants from abusing the process of Court by deceiving it. The very basis of the writ jurisdiction rests in disclosure of true, complete and correct facts. If the material facts are not candidly stated or are suppressed or are distorted, the very functioning of the writ courts would become impossible."

14. The Hon'ble Supreme Court in the above said case has further held as under:

"In K.D. Sharma v. Steel Authority of India Ltd. and others (2008) 12 SCC 481, the court held that the jurisdiction of the Supreme Court under Article 32 and of the High Court under Article 226 of the Constitution is extraordinary, equitable and discretionary and it is imperative that the petitioner approaching the Writ Court must come with clean hands and put forward all the facts before the Court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his petition may be dismissed at the threshold without considering the merits of the claim. The same rule was reiterated in G. Jayshree and others v. Bhagwandas S. Patel and others (2009) 3 SCC 141."

15. This is the experience of this Court that in last 40 years, a new breed of litigants has cropped up. Those, who belong to this breed, do not have any respect for truth. They shamelessly resort falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new generation of litigants, the Courts have, from time to time evolved new rules and, it is now well established that the litigants, who attempt to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, are not entitled to any

relief, interim or otherwise. I find force while holding this, by the law laid down in ***Dalip Singh v. State of U.P. (2010) 2 SCC, 114*** by Hon'ble Supreme Court. The Hon'ble Apex Court has held in ***Welcome Hotel v. State of A.P. AIR 1983 S.C. 1015*** that a party which has mislead the Court in passing an order in its favour, is not entitled to be heard on the merits of the case.

16. The law laid down by this Court as well as Hon'ble Apex Court in ***Shamim Akhtar v. Iqbal Ahmad and another,2000 AIR SCW 3793***, supports the cause of opposite party no.3.

17. On the basis of discussions made above, writ petition deserves to be dismissed. Writ petition is accordingly dismissed with a cost of Rs.25,000/- to be paid by the petitioners to opposite party no.3 within thirty days from today or in case of refusal by opposite party no.3 the same shall be deposited before the learned Judge, Small Causes Courts within stipulated time, which shall be a condition precedent for the petitioners to participate in the proceedings of S.C.C. Suit No.22 of 1992. Both the order under challenge are hereby confirmed. Learned Judge, Small Causes Court, Bahraich, where the suit is pending is directed to proceed on with the case, on day to day basis, in such a fashion, that it is decided within three months from the date of production of a certified copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.12.2012

BEFORE
THE HON'BLE RAJIV SHARMA, J.
THE HON'BLE MAHENDRA DAYAL, J.

Service Bench No. - 189 of 2012

Dr. Vinay Kumar Pandey ...Applicant
Versus
Chancellor Deen Dayal Upadhyay Gorakhpur University Gorakhpur ...Respondents

Counsel for the Petitioner:
Sri Chandra Bhushan Pandey
Sri Rohit Tripathi

Counsel for the Respondents:
C.S.C.
Sri Alok Mathur
Sri Rajesh Chandra Mishra

Constitution of India, Article 226- dismissel order-without giving inquiry report-without issuing show cause notice before passing major punishment-held-clear violation of settled principles of Law & Natural Justice as well-order quashed-liberty to conduct fresh inquiry in accordance with law.

Held: Para-17

In the present case, the manner in which the Executive Council of the University has acted in awarding punishment to the petitioner is totally illegal and against the principles of natural justice as neither the copy of the Inquiry Report was provided to the petitioner nor any opportunity of hearing was given to him before awarding him the major punishment of dismissal.

Case Law discussed:
AIR 1994 SC 1074

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

1. The petitioner has challenged the order dated 6.1.2012 passed by the Chancellor, Deen Dayal Upadhyay Gorakhpur University, Gorakhpur, respondent no.1, the resolution of the Executive Council dated 28.6.2009, the charge sheet dated 22.4.2009, served upon him and the enquiry report dated 27.6.2009. The petitioner has further prayed that the respondents be directed to reinstate the petitioner in service giving him all the consequential benefits treating him to be in continuous service.

2. The petitioner while he was working as Professor in the Commerce Department of Deen Dayal Upadhyay Gorakhpur University, Gorakhpur (the University), the Vice Chancellor appointed him as Co-ordinator for the evaluation work in the B.Ed.. examination for the session 2006-07 vide order dated 30.7.2007. After the examination was over, one Durga Prasad Yadav of Gorakhpur made a complaint to the Chief Minister on 18.6.2007 pointing out large scale irregularities in the conduct of B.Ed. entrance examination for the session 2005-06 and 2006-07.

3. The State Government vide order dated 20.9.2007 passed an order to hold an enquiry. Pursuant to the said order, the Commissioner, Gorakhpur Division conducted the enquiry and submitted his report on 12.12.2007 indicating certain irregularities. Thereafter on the basis of the aforesaid letter of the Commissioner, the State Government issued directions for conducting full fledged enquiry vide order dated 22.4.2008. The detailed enquiry was conducted by the sub-committee, constituted by the Executive Council of the University. The Commissioner Gorakhpur Division, the respondent no.6 was also one of the members of the sub-committee. A charge sheet was issued to the petitioner levelling charges of irregularity committed by him in the capacity of coordinator. The sub-committee submitted the enquiry report on 27.6.2009. It will not be out of place to mention here that the sub-committee found the charges to be proved and held the petitioner responsible for the irregularities. The committee also recommended for the dismissal of the petitioner. Thereafter on 30.6.2009 the petitioner was informed by the Registrar of the University that the Executive Council of the University has dismissed him from service on 28.6.2009. While the enquiry was in progress, the petitioner preferred Civil Misc. Writ Petition No.24627 of 2009 before this Court which was disposed of on 21.1.2011 with the observation that the petitioner had a statutory remedy of filing the representation before the Chancellor under section 68 of the U.P. State Universities Act, 1973 (the Act). It was further directed by the division bench that if such representation is filed, the Chancellor may consider the same on merit and decide the representation as expeditiously as possible. It appears that after the disposal of the aforesaid writ petition, the petitioner submitted a representation before the Chancellor, respondent no.1, which was decided on 6.2.2012 holding that the dismissal of the petitioner was not made in violation of the provision of the Act, Statute or Ordinance.

4. Heard Mr. Chandra Bhushan Pandey, learned counsel for the petitioner, Mr. Alok Mathur, learned counsel for the Chancellor/opposite party No.1 and Mr. Umesh Chandra, Senior Advocate assisted by Mr. Rajesh Chandra Mishra, learned

counsel for the opposite party Nos.3 to 5 and the learned standing counsel.

5. The petitioner has challenged the entire process of enquiry conducted against him mainly on the ground that the committee submitted the enquiry report without affording any opportunity to the petitioner and without examining any witness. The petitioner has also challenged his appointment as coordinator on the ground that under the Act, Statute or Ordinance, there is no provision for the post or authority of the coordinator. The charge sheet served upon him was, therefore, illegal firstly on account of the fact that it was not issued by the competent authority and secondly, because it was totally vague, without indicating any specific act or irregularity of the petitioner.

6. The submission on behalf of the petitioner is that the committee had clearly indicated in its report that neither it was the duty of the petitioner to evaluate the answer books nor he actually participated in the examination process but since he did not himself inquire into the alleged irregularities, he was responsible for the irregularities committed by the concerned officials. Even the result was not prepared by the petitioner and the result was also not declared by him. But since the irregularities were serious in nature and the petitioner was coordinator, hence he was responsible for all the irregularities committed during the course of examination.

7. The petitioner has also challenged the enquiry report on the ground that his reply to the charge sheet was not considered while holding him responsible and no opportunity of hearing was given to him before passing any order of dismissal by the Executive Council. Even, when he made a representation before the Chancellor, his representation was not properly considered and was decided in a cursory manner.

8. Shri Alok Mathur, learned counsel representing the respondent no.1 and Shri Umesh Chandra, learned senior counsel assisted by Shri Rajesh Chandra Mishra representing the respondents no.3 to 5 and the learned standing counsel submitted that a division bench of this Court while disposing of the writ petition no.24627 of 2009, filed by the petitioner considered all the aforesaid submissions of the petitioner and clearly held that it cannot be said that the order was not passed by the competent authority or that the principle of natural justice were violated. The Bench further came to the conclusion that the averments and material placed on record by the petitioner do not indicate that the order was passed in *malafide* exercise of powers.

9. In view of the observations made by the division bench, the petitioner can not now agitate those grounds again in this writ petition. Moreover, the original records with regard to the disciplinary enquiry conducted against the petitioner have been produced before the Court and the record reveals that the enquiry was conducted in a fair manner giving all possible opportunities to the petitioner to defend himself.

10. It was also pointed out by the learned counsel for the respondents that the B.Ed. entrance examination conducted by the University was subject to judicial scrutiny of the Court. In writ petition no.14587 of 2007 Pradeep Kumar Tripathi vs. State of U.P. and others a single judge of the court passed a detailed order on

23.5.2007 directing the officers of the University including the Vice Chancellor and Registrar to place the record of the writ petition along with the order before the Secretary, Higher Education, U.P. who will conduct a detailed enquiry in the entire episode. It was further directed that the Secretary shall recommend appropriate action against all found responsible.

11. It has been further submitted on behalf of the respondents that all the answer books of the B.Ed. entrance examination were under the control of the Examination Controller and Rs.25 - 30 lakhs were taken from the students to award them good marks. The officers of the University including the Controller increased the marks of about 4000 students by accepting money. Under letters of recognition granted by the National Council for Teachers Education in favour of the Institution it is specifically mentioned that an intake of 100 students would be permissible. However, the admission was granted to much more students by increasing their marks. In compliance of the order of the Court, the University had to compensate the students who were illegally admitted in the B.Ed. course and were subsequently denied admission, and in this way the University had to deposit a sum of Rs.47.00 lakhs as compensation to these students. The copies of such students were also destroyed in order to conceal the fraud and irregularity. The petitioner being the coordinator of the examination was wholly responsible for all these affairs and thus the Disciplinary Committee rightly held him responsible and the Executive Council rightly dismissed him from service.

12. The Chancellor also considered the representation of the petitioner in detail and found the order passed by the Executive Council fully in accordance with law and rightly rejected the representation of the petitioner.

13. Having heard the learned counsel for the parties and going through the pleadings, it appears that the grievance of the petitioner is that after the submission of the enquiry report by the sub committee and before the order of dismissal passed by the Executive Council, the petitioner was not given any opportunity of hearing. It is submitted that the sub committee submitted its report on 27.6.2009 and the Executive Council held an emergent meeting on 28.6.2009 and passed an order for dismissal of the petitioner. This action on the part of the Executive Council is not only against the principles of natural justice but is also against the settled principle of law. Another grievance of the petitioner is that the Chancellor while deciding his representation solely based his findings on the judgment of this Court passed in Civil Misc. Writ Petition No.24267 of 2009 while it was clearly mentioned in the judgment that the Court did not examine the merits of the charges. The Chancellor also failed to consider that no opportunity of hearing was provided to the petitioner after submission of the report of the sub committee and the order passed by the Executive Council of the University. The proceedings of the Executive Council of the University dated 28.6.2009 have neither been annexed by the petitioner along with the writ petition or rejoinder affidavit nor it has been annexed with the counter affidavit filed by the respondents but the record of the enquiry proceedings were placed before this Court by the respondents and a copy thereof is available on record.

14. This document clearly suggests that the sub committee submitted its enquiry report on 27.6.2009 and recommended the dismissal of the petitioner the same day. The Executive Council of the University held a meeting on the very next day i.e. on 28.6.2009 and while accepting the recommendation of the sub committee, passed an order for dismissal of the petitioner from the service. Thus, it is clear that no opportunity was given to the petitioner to make any explanation to the report submitted by the sub committee. This is clear violation of the settled principles of law and the principles of natural justice.

15. In the case of **Managing Director, ECIL, Hyderabad Vs.B. Karunakar reported in AIR 1994 SC 1074,** the Apex Court has clearly held that any employee against whom the disciplinary enquiry has been conducted, has a right to receive a copy of the Inquiry Officer's report before the disciplinary authority arrives at its conclusion with regard to the guilt or innocence of the employee with regard to the charges levelled against him. This right is a part of the employee's right to defend himself against the charges levelled against him. That denial of the Inquiry Officer's report before the disciplinary authority takes its decision on the charges is a denial of reasonable opportunity to the employee to prove his innocence and is a breach of the principles of natural justice.

16. The Apex Court has further held that the delinquent employee shall be entitled to a copy of report even if the statutory rules do not permit the furnishing of the report or are silent on the subject.

17. In the present case, the manner in which the Executive Council of the University has acted in awarding punishment to the petitioner is totally illegal and against the principles of natural justice as neither the copy of the Inquiry Report was provided to the petitioner nor any opportunity of hearing was given to him before awarding him the major punishment of dismissal.

18. So far as the judgment of the Division Bench in writ petition No.24627 of 2009 is concerned, this writ petition was filed by the petitioner for expeditious disposal of his enquiry but during the pendency of the writ petition, the enquiry was completed and punishment was also awarded to the petitioner. The Division Bench while disposing of the writ petition has observed that against the order of Executive Council of the University, the petitioner has a remedy to move representation before the Chancellor under Section 68 of the Act. The Bench further clarified that the merits of the charges were not examined and the discussion of fact in the judgment was only to find out that any case of interference without exhausting alternative remedy has been made out or not. The relevant portion of the judgment is reproduced below;

" In the present case, we do not find that the petitioner has been able to make out any exception to circumvent the alternative remedy, which is efficacious and speedy.

In the above circumstances, it cannot be said that the order was not passed by the competent authority, or that the principle of natural justice were violated. Further at this stage we are not satisfied from the averments and material produced

on record that the order has been passed in malafide exercise of powers.

For the aforesaid reasons, we relegate the petitioner to the statutory remedies of filing representation before the Chancellor under Section 68 of the U.P. State Universities Act, 1973. If such a representation is filed, the Chancellor may consider the same on merits and decide the representation as expeditiously as possible. We make it clear that we have not examined the merits of the charges. The discussion of facts in the judgment is only to find out whether any case of interference, without exhausting alternative remedies has been made out.

The writ petition is disposed of accordingly."

19. Thus, it is clear that their Lordships while disposing of the earlier writ petition of the petitioner did not examine the merits of the case but only confined themselves to find out as to whether the petitioner could be given any relief without exhausting the alternative remedy of filing of the representation before the Chancellor.

20. The Chancellor while deciding the representation of the petitioner did not consider the fact after submission of the Inquiry Report by the sub-committee and recommending the dismissal of the petitioner no opportunity was given to him. The Executive Council of the University proceeded to hold meeting and passed an order dismissing the petitioner from the service without even providing a copy of the Inquiry Report to the petitioner and providing him any opportunity to give explanation to the Inquiry Report.

21. In view of the above, the order passed by the Chancellor cannot be allowed to stand and is liable to be quashed. Since the Executive Council of the University has also not followed the settled principles of law while passing the major punishment to the petitioner, the resolution of the Executive Council dated 28.6.2009 as contained in Annexure No.2 to the writ petition is also liable to be quashed.

22. The petitioner has further challenged the Inquiry Report dated 27.6.1009 submitted by the sub-committee holding that the petitioner is responsible for the irregularities committed during the B.Ed examination for the year 2006-07. It has been submitted on behalf of petitioner that the petitioner was served with the copy of the charge sheet to which he gave his reply but during the course of enquiry by the sub-committee he was not provided sufficient opportunity to defend himself. Even the copy of the documentary evidence used against him was not provided to him. No witness of the alleged irregularity was examined during the course of enquiry, thus the petitioner interest was highly prejudiced. Article 311 of the Constitution of India has protected the interest such employees against whom the disciplining enquiry is being held. It provides that such employee shall be given a reasonable opportunity of being heard in respect of the charges against him.

23. A perusal of the enquiry report does not indicate that any witness was examined during the course of enquiry or petitioner was given any opportunity to cross examine any such witness. However, the submission of the learned counsel for the respondents is that the witnesses were examined during enquiry and the petitioner

also cross-examined some of the witnesses. The copies of the statement of such witnesses have not been placed on record by the respondents. There is also no reference in the enquiry report as to how many witnesses were examined during the course of enquiry and the petitioner was given opportunity to cross examine them. The Inquiry Report reveals that the sub-committee considered only the reply submitted by the petitioner to the charge sheet and considered other documents made available to the committee and found the petitioner guilty of irregularities. Sub-committee thus found it sufficient to consider only the reply of the petitioner submitted against the charge sheet served upon him while the law as well as principles of natural justice require that such employee against whom serious charges have been levelled should be given proper and reasonable opportunity to defend himself in any enquiry against him.

24. In view of this, we are of the view that the Inquiry Report submitted by the sub-committee is also vitiated and is also liable to be quashed.

25. In the result, the writ petition partly succeeds. The order passed by the Chancellor dated 6.1.2012 as contained in Annexure No.1 to the writ petition, the resolution of the Executive Council dated 28.6.2009 as contained in Annexure No.2 to the writ petition and the Inquiry Report dated 27.6.2009 as contained in Annexure No.23 to the writ petition are quashed. However, it will be open to the authorities to conduct fresh enquiry against the petitioner in accordance with law.

26. In the circumstances of the case, there will be no order as to cost.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.11.2012

BEFORE
THE HON'BLE DINESH GUPTA, J.

First Appeal Defective No. - 494 Of 1991

State of U.P. ...Defendant
Versus
Sukhey ...Plaintiff

Counsel for the Petitioner:
S.C.
Sri A.P. Singh

Counsel for the Respondents:
Sri Anil Sharma

Code of Civil Procedure-Section 151 and 152-read with Section 23 (1-A) of Land Acquisition Act 1984-reference court allowed the application-considering amended provision by giving additional amount-solatiam at rate of 9% per annum-objection that reference court can not review its earlier order-held-misconceived-in view of Law developed by Apex Court even if correction application treated review-Court committed no illegality by allowing application under Section 151 and 152 C.P.C.

Held: Para-28

I am unable to accept the contentions raised by the learned counsel for the State even if these applications are treated as review applications even then court has not committed any illegality in allowing these applications in *Jay Chandra Mahapatra Vs. Land Acquisition Officer, Raigarh reported in (2005 (9) SCC 123)*. The Apex Court has clearly held that the review by the reference court amending the decree by allowing the enhance solatium is clearly maintenable thus, if the arguments of the appellant is taken correct even then

the Court has committed no illegality in allowing such applications.

Case Law discussed:

1989 All India Land Acquisition and Compensation Cases page 46; 1989 L.A.C.C. Page 250; A.I.R. 1982 page 184; 1988 L.A.C.C. Page 204; A.I.R. 1985 Supreme Court Cases page 1576; 2005 (9) SCC 123

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

1. This appeal is preferred against the order dated 6.9.1990 passed by Sri M.A. Khan, Ist Additional District Judge, Bijnor in Land Acquisition Reference No. 28 of 1982 between Sri Sukhey Vs. State of U.P.

2. Brief facts giving rise of this appeal are that:-

3. The applicant moved application under Section 151 and 152 C.P.C. for amendment of the judgement and award given by Reference Court in various references made by the Reference Court under Section 18 of the Land Acquisition Act. In so far as they directed for the payment of solatium and interest in accordance with the relevant provisions of the Land Acquisition Act prior to the amendment by Land Acquisition (Amendment) Act, 1984. Since the common question of law and fact is involved that the court decided this case alongwith other miscellaneous cases by common judgement in the miscellaneous case. By these applications the applicant seeks amendment in the decree and prayed that applicant's solatium, interest and additional amount under Section 23 (I-A) permissible under the Land Acquisition (Amendment) Act, 1984.

4. The applicant submitted that as the award given by the Reference Court was made after 30.4.1982 and the applicants are entitled to all the benefits as permissible under the Amendment Act. It is further prayed that the applicants should be entitled to solatium at the rate of 30% on the market value under the Amendment Act, 1984 and further interest at the rate of 9% per annum for a period of one year from the date of taking over possession and thereafter at the rate of 15% per annum on the enhance compensation till the payment of additional amount under Section 23(I-A) at the rate of 12% per annum.

5. The State counsel filed reply and it is submitted that the applications are barred by time and these applications should be treated as review petition; that the grant of interest is discretionary with the court and there is no justification for enhancing the same, no request has been made for condoning the delay and the Central Act 68 of 1984 will not be applicable to the present proceedings.

6. After considering the relevant provisions of law and case law cited by the parties, the Reference Court allowed the applications under Sections 151 and 152 C.P.C.

7. Feeling aggrieved, the State preferred this appeal alongwith delay condonation application as there was delay of 78 days in filing the appeal.

8. Heard learned counsel for the appellant on the delay condonation application as well as on the merit of the appeal.

9. Learned counsel for the appellant submitted that the delay in filing the appeal is bonafide and it has been

explained properly by filing a proper affidavit of the concerned person/ official and thus, the delay in filing the appeal be condoned.

10. On the merit of the appeal, learned counsel for the appellant submitted that the court has committed gross illegality in allowing the applications of the claimants only on the misinterpretation of the provisions of the Act ignoring the fact that the claimants are not entitled to any benefit given by the Amendment Act 58 of 1984.

11. That the court below has also committed gross illegality in awarding the enhancing rate of interim and additional amount as provided in sub section (1-A) and sub section (3) of section 23 inasmuch as the claimants are not entitled to any benefit which has been given by the Amendment Act.

12. That the court below has also erred in law in accepting the application filed under section 151 and 152 C.P.C. As a matter of fact, the application filed by the claimants can be treated as review petition and as such no enhancement should be done in the present case.

13. That the court below has also failed to take into consideration that the applications filed by the claimants were highly barred by time as the Amendment Act has been imposed from 24.9.1984 while this petition is filed in 1989.

14. Learned counsel for the appellant submitted that the appeal should be allowed and the order passed by the Reference Court is liable to be quashed.

15. I am unable to accept the contentions raised by learned counsel for the appellant, first of all, so far as the delay condonation application is concerned, appellant has failed to explain day to day delay and cause shown by the appellant for delay is also not explained properly.

16. So far as the merit of the order is concerned, before considering the entitlement of the owners under the proviso to Section 28 of the Act, it will be proper to reproduce Section 28 of the Land Acquisition Act as amended and it reads as under:-

"If the sum, which in the opinion of the Court, the Collector ought to have awarded as compensation, is excess of the sum which the Collector did award as compensation, the aware of the Court may direct that the Collector shall pay interest on such excess at the rate of 9% per annum from the date on which he took possession of the land to the date of payment of such excess into Court.

Provided that the award of the Court may also direct that where such excess or any part thereof is paid into court after the date of expiry of a period of one year from the date on which possession is taken interest at the rate of 15% per annum shall be payable from the date of expiry of the said period of one year or the amount of such excess or part thereof which has not been paid into the court before the date of such expiry."

17. A bare perusal of the aforesaid provisions, makes it clear that the sum which in the opinion of the court, the Collector ought to have awarded as compensation is in excess of the sum

which the Collector did award as compensation, the court may direct that the Collector shall pay interest on such excess at the rate of 9% per annum on the date on which he took possession of the land to the date of the payment of such excess into court. The aforesaid section further provided whether the excess for any part of the period which paid into the court after the date of expiry of the period of one year from the date on which possession is taken. The court may also direct interest at the rate of 15% per annum from the date of expiry of period of said one year on the excess amount.

18. Further bare perusal of section 23(I) of the Act shows that it deals with the matter to be considered for determining the compensation payable for the land acquired under the Act and for determining such compensation court has to inter-alia first determine the market value of the land on the date of the publication of notification under section 4 sub section (1) of the Act.

19. Sub Section (2) provides that in additions to the market value of the land, the court shall in each case award a sum of 30% on such market value, likewise the newly inserted sub section (1-A) of Section 23 provides for payment of additional amount calculated at the rate of 12% per annum on such market value for the period of commencing on and from the date of publication of notice of section 24 in various decisions it has been held that whether the award has been made by the Collector or the District Judge after 30.4.1984, the land owners are entitled to the benefit of the provisions of Land Acquisition (Amendment) Act, 1984.

20. It is important to mention here that the appellant has not challenged that the claimants are not entitled to enhance the amount of solatium and the rate of interest as provided by the Amendment Act, only objections raised by the appellant are to follow.

21. Firstly, the applications under section 151 or 152 C.P.C. were not maintainable and the Court cannot enhance the amount under these provisions and according to the contentions of the appellant, section 151 and 152 are meant for clerical or arithmetical correction in the judgment and the enhancement of the solatium and the rate of interest does not come within the purview of of mathematical or factual error.

22. The Reference Court has referred a decision of Punjab and Haryana High Court in ***Kehar Singh Vs. Union of India (1989 All India Land Acquisition and Compensation Cases page 46),*** according to this case law, the claimants will be entitled to the benefit of the Act after the cut of date 30.4.1982 and further such cases are squarely fall within the ambit of section 152 C.P.C. which lays down that the clerical or arithmetical mistakes in the judgment and order or errors arising therein from any accidental slip or omission, may at any time, be corrected by the court either or its own motion or on the application of any of the parties. It has further been held in this case that the application under section 152 C.P.C. is maintainable.

23. The Reference Court also referred a decision of the Delhi High Court in ***Bharat Singh Vs. Union of India (1989 L.A.C.C. Page 250)*** which

also covers the same controversies. Reference Court further referred the case of ***Nand Ram and others Vs. State of Punjab (A.I.R. 1982 page 184)*** which has held that interest under section 28 is an integral part of the compensation which is to be awarded by the court. Omission in the judgment to award interest on compensation constitutes an accidental slip within the meaning of section 152 C.P.C. and can be rectified at any time.

24. Reference Court has also referred the case of ***Matu Ram and others Vs. Union Territory of Chandigarh (1988 L.A.C.C. Page 204)*** and held as follows:-

The court has to, inter alia first determine the market value of the land at the date of publication of the notification under section 4, sub section (1) of the Act. The Act further provides that in addition to the market value of the land, the court shall in each case shall award a sum of 30% on such market value, in consideration of the compulsory nature of the acquisition. Likewise the newly inserted sub section (1-A) or section 23 provides for payment of additional amount calculated at the rate of 12% per annum on such market value for the period of commencing on and from from the date of publication of the notification under sub section 4. As a matter of fact, what requires adjudication under section 23 is the determination of the market value of acquired property and the obligation to award additional amount mentioned in sub section (1-A) and sub section (2) of section 23 follow as of course after making arithmetical calculations.

25. Thus, it is very clear that if by way of accidental slip a clerical error appeared in the judgment when the Reference Court omitted to mention in the order that the applicants are also entitled to the benefit of sub section (1-A) is inserted in section 23 of the Land Acquisition Act. Such case in the opinion of the Hon'ble High Court falls within the ambit of section 152 C.P.C.

26. Further in the case of ***Bag Singh and others Vs. Union Territory of Chandigarh (A.I.R. 1985 Supreme Court page 1576).*** It has been held by the Hon'ble Supreme court that the amended provisions of section 23(2) and 28 are applicable to all the proceedings relating to the compensation pending at the date of commencement of amending Act or filed subsequent to that date whether before the Collector or before court or High Court or Supreme Court. It has also been held in this case that even if an award is made by the Collector or the Court before 30.4.1982, and an appeal against such award is pending before the Hon'ble High Court or Supreme Court on 30.4.1982. The provisions of amended section 23 and 28 would be applicable. Thus, Supreme Court made out cut of date 30.4.1982.

27. Lastly, learned counsel for the appellant raised grounds that the applications under section 151 and 152 C.P.C. moved by the claimants are not maintenable and they can only be treated as review application and the Reference Court has no power to review its own order so far as it relates to the payment of compensation and other legal statutory benefit is concerned, only grounds available to the applicant to file an appeal against the award and prayed for the relief which they have been taken in the

applications under section 151 and 152 C.P.C.

28. I am unable to accept the contentions raised by the learned counsel for the State even if these applications are treated as review applications even then court has not committed any illegality in allowing these applications in ***Jay Chandra Mahapatra Vs. Land Acquisition Officer, Raigarh reported in (2005 (9) SCC 123)***. The Apex Court has clearly held that the review by the reference court amending the decree by allowing the enhance solatium is clearly maintenable thus, if the arguments of the appellant is taken correct even then the Court has committed no illegality in allowing such applications.

29. Admittedly, judgment in reference court was passed after 30.4.1982 and failure the reference court to award the benefit of the amended section of the Land Acquisition Act can be rectified by the court by reviewing its own judgment thus, the court has not committed any illegality in allowing the applications under section 151 and 152 C.P.C. Awarding the benefit of the amendment.

30. The application u/s 5 Limitation Act is rejected.

31. So far as the merit of the appeal is concerned, appeal lacks merit, hence, the appeal is dismissed.

32. Accordingly, the appeal is dismissed as barred by time as well as on merit.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.11.2012

BEFORE
THE HON'BLE VIRENDRA VIKRAM SINGH, J.

Criminal Revision No. 679 of 2010

M/S V.K. Traders ...Revisionist
Versus
State Of U.P. & Another
...Opposite Parties

Counsel for the Petitioner:
Sri Suddharth

Counsel for the Respondents:
A.G.A.

Criminal Revision-Magistrate on complaint by Food Inspector-take cognizance and summoned the revisionist-without application of judicial mind by putting rubber stamp-strictly prohibited under section 18 of General Rules (Civil) as well as circular dated 07.02.2001-although by taking cognizance no detail order required-Court explained the procedure on taking cognizance upon investigation report as well as on complaint-but putting rubber stamp-shocking state of affairs-order quashed -direction for fresh consideration issued.

Held: Para-34

Before parting with the case, the Court shall like to record that section 18 of the General Rules (Civil), 1857 provides for the prohibition of the Rubber Stamp in judicial orders and the use of Rubber Stamp for passing any order has been forbidden by the circular letter of the High Court, Allahabad no. 6 of 2001 dated 7th February, 2001. By this circular letter it was impressed upon the Judicial Officers of the Subordinate Courts that for passing any judicial order, the Rubber Stamp shall not be

used. It is unfortunate to observe that despite this circular letter of the year 2001, the Magistrate in the present case has passed the impugned judicial order with the use of rubber stamp and further by filling up the date in it.

Case Law discussed:

(2008) 2 SCC 492; 2012 (5) SCC 424; 2000 (40) ACC page 441; 2003 (46) ACC 786; 2011 (73) ACC page 750

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

1. As both the two revisions mentioned above have been filed against the same order, they are being decided by the present common judgment.

2. By the impugned order, the learned ACJM-I, Shahjahanpur has taken cognizance of the offence and has issued summons against the present two revisionists and another to face trial.

3. The brief facts of the case are that on 25.5.2008 respondent-Manoj Kumar Tomar, Food Inspector of district Shahjahanpur seized bottles of Non Alcoholic Carbonated Water prepared by M/S Priya Drinks, revisionist, from the shop of Rafi Mohammad, co-accused. These bottles were duly sealed and were sent to the public analyst. By his report dated 5.7.2008, the sample was found to be adulterated. The other revisionist M/S V.K.Traders is the stockist and the wholesaler of the drinks in question.

4. After having obtained the sanction of the Chief Medical Officer, the complaint under different provisions of Food Adulteration Act 1954 was filed by the respondent no.2, before first Additional Chief Judicial Magistrate, Shahjahanpur.

5. The learned court below while passing the impugned order directed for registration of the case and summoned the accused while fixing date.

6. It is proper to mentioned it here that this order dated 10th November, 2009 has been passed by way of rubber stamp in the following manner:

"आज यह चालानी रिपोर्ट थाने से प्राप्त हुई दर्ज रजिस्टर हो ।

अभियुक्त द्वारा सम्मन दिनॉक 30.1.2010 नियत करके तलब करं ।"

7. Heard Shri Siddharth, learned counsel for the revisionist and learned Additional Government Advocate.

8. It has been argued on behalf of the revisionist that the manner in which the cognizance has been taken, is against the provisions of law. There is no indication in the impugned order that the learned court below has taken note of and has considered the facts involved nor it has recorded any finding that a prima facie case worth proceeding trial against the accused persons is made out.

9. It has also been argued that the revisionists, not being the personal entity, the Court below has not taken proper care in summoning the accused by application of proper proposition of law.

10. On behalf of the respondents, the argument has been advanced in favour of the impugned order.

11. By the impugned order the learned court below has taken cognizance of the offence on the basis of the complaint filed by respondent no. 2 and thus, while deciding the

present revision it is incumbent on the part of the Court to lay down as to what is the import of the word "cognizance" and when a cognizance is said to have been taken. Further as to what are the requirements for taking cognizance and whether such requirements have been followed in the present case.

12. The word "cognizance" has repeatedly been used in different sections of the Code of Criminal Procedure, hereinafter referred to as "Cr.P.C.". However, this word has nowhere been defined in Cr.P.C.

13. The word "cognizance" has been defined in different judgments of the Apex Court. In the case of ***S. K. Sinha, Chief Enforcement Officer Vs. Videocon International Limited and others (2008)2 SCC page 492.*** The word cognizance has been narrated as follows:

"The expression "cognizance" has not been defined in Cr.P.C.. But the word (cognizance) is of definite import. It has no esoteric or mystic significance in criminal law. It merely means "become aware of" and when used with reference to a Court or a judge, it connotes "to take notice of judicially". It indicates the point when a Court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone"

14. In the latest pronouncement of the Apex Court in the case of ***Bhushan Kumar and another Vs. State of NCT of Delhi and another 2012(5) SCC 424,*** the expression of cognizance has been described as follows:

"The expression "cognizance" in Sections 190 and 204 Cr.P.C. is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons. Under Section 190 Cr.P.C, it is the application of judicial mind to the averments in the complaint that constitutes cognizance. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceedings and not Whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the trial and not at the stage of enquiry. If there is sufficient ground for proceeding then the Magistrate is empowered for issuance of process under Section 204 Cr.P.C."

15. In view of the mandate of the Apex Court discussed above, it is evident that the cognizance is taken by the court whereby it holds that sufficient grounds exist for initiation of criminal proceedings against the accused proposed to be summoned for trial. Further that the cognizance is taken in respect of a case and not in respect of the accused-persons in a case. The fact that the cognizance is taken by the Court is equivalent to the statement that all the condition requisite for the initiation of proceedings are complete.

16. After the definition of the word cognizance now the point arises as to how a cognizance is taken by the Court.

17. In the case of ***S. K. Sinha, Chief Enforcement Officer(Supra)*** quoted above, the Hon'ble the Apex Court in para 20 has defined as to how a cognizance is taken with the following observation:

"Taking Cognizance" does not involve any formal action of any kind. It occurs as soon as a Magistrate applies his mind to the

suspected commission of an offence. Cognizance is taken prior to commencement of criminal proceedings. Taking of cognizance is thus a Sine qua non or condition precedent for holding a valid trial. Cognizance is taken of an offence and not of an offender. Whether or not a Magistrate has taken cognizance of an offence depends on the fact and circumstances of each case and no rule of universal application can be laid down as to when a Magistrate can be said to have taken "Cognizance".

18. Now it has to be seen as to how the Magistrate has taken cognizance in the present case. On the basis of a complaint filed by the respondent no. 2, Food Inspector filed in the Court of the Magistrate, the cognizance is said to have been taken. Thus the cognizance was to be taken in view of the provisions of section 190 (1) Cr.P.C. and the order for summoning the accused was to be passed under the provisions of section 204 Cr.P.C.

19. It has been argued on behalf of the revisionists that the impugned order, which is a composite order of taking cognizance and issuance of process, no ground for issuing summons for taking cognizance has been mentioned. Since the order has been passed without assigning any reason for the same, hence it is liable to be quashed.

20. The cognizance on the basis of complaint has been taken by the Magistrate under the provisions of section 190 (1) Cr.P.C and the provisions of issuance of process to the accused to face trial are embodied in section 204 Cr.P.C. In none of the sections there is any mention that the Magistrate while passing the order for taking cognizance of the offence under section 190 (1) (a)Cr.P.C. or for issuance of process under section 204 Cr.P.C has to record reasons for the same.

21. The provisions of section 203 Cr.P.C. makes it clear that if the Magistrate on the basis of the complaint and inquiry under section 202 Cr.P.C comes to the conclusion that there is no sufficient ground for proceeding, then he will dismiss the complaint and shall record his reasons for doing so. Thus, it is evident that the Magistrate is supposed to record the reason only when he passes an order to dismiss the complaint and not when he passes order to summon the accused persons.

22. The Hon'ble Apex Court in the case of ***Kanti Bhadra Shah vs. State of West Bengal, 2000 (40) ACC page 441*** has laid down as follows:

"The legislature has stressed the need to record reasons in certain situations such as dismissal of a complaint without issuing process. There is no such legal requirement imposed on a Magistrate for passing detailed order while issuing summons. The process issued to accused cannot be quashed merely on the ground that the Magistrate had not passed a speaking order".

23. Again in the case of ***Deputy Chief Controller of Imports and Exports vs. Roshan Lal Agarwal and others 2003 (46) ACC page 786***, the Hon'ble Apex Court has held as under:

"Whether the evidence is adequate for supporting the conviction, can be determined only at the trial and not at the stage of inquiry. At the stage of issuing the process to the accused, the Magistrate is not required to record reasons."

24. In the case of ***Bhushan Kumar and another (Supra***), the Hon'ble the Apex

Court has laid down the requirements for summoning the accused.

"Section 204 Cr.P.C does not mandate the Magistrate to explicitly state the reasons for issuance of summons. Section 204 Cr.P.C mandates the Magistrate to form an opinion as to whether there exists a sufficient ground for summons to be issued but it is nowhere mentioned in Section 204 that the explicit narration of the same is mandatory, meaning thereby that it is not a prerequisite for deciding the validity of the summons issued. Therefore, the order passed by the Magistrate cannot be faulted with only on the ground that the summoning order was not a reasoned order."

25. The result of the above discussion is that the Magistrate at the time of passing an order for taking cognizance or issuance of process under section 204 Cr.P.C is not supposed to record reason by way of any detailed,or speaking order whether on the basis of the facts a prima facie case is made out against the accused worth calling for them to face trial.

26. It is true that the Magistrate while taking cognizance or issuing process to the accused to face trial is not supposed to record a detailed reason, but at the same time, it is also true that the order must be indicate that the Magistrate has taken the facts and the evidence of the case into consideration and has thereby passed such order.

27. In the case of ***Mohammad Sayeed vs. State of U.P and others 2011 (73) ACC page 750,*** the order for taking cognizance mentioned that the Magistrate has seen and gone through the records, and took cognizance, the order was held to be justified.

28. Now the principles of law, which have been laid down earlier to be applied in the present set of facts. In the present case, a perusal of the impugned order categorically goes to show that the order has been passed in a routine way and the facts of the case have nowhere been taken into consideration nor the Magistrate has given any indication in the impugned order that he has gone through the evidence or record at all.

29. The order in question as mentioned earlier is by way of rubber stamp in which the date for appearance of the accused has subsequently been filled up. It is mentioned in the order that the Challani report has been received from the Police Station concerned. The proceedings in this case have not been instituted on the basis of charge sheet filed by the concerned Police Station, but in the present case, the proceedings have been launched by way of complaint filed by the Food Inspector, presently respondent no. 2.

30. There is no mention in the order that the Magistrate has taken cognizance of the offence. Thus, the impugned order can never said to have been equivalent to the statement that the Magistrate has taken cognizance and after perusal of the documents and evidence the summons were issued to the accused to face trial.

31. Under such circumstances, the order in question is violative of the manner and procedure, in which the cognizance of an offence is taken. This order being illegal is bound to be set aside and the revision is liable to be allowed.

32. It is true that the impugned order taking cognizance and issuance of process has been held to be illegal, but this Court has not considered the merits of the case, hence the only course open to is to remand the case

to the Magistrate concerned for a fresh consideration and to pass a fresh order for taking cognizance of offence and issuance of process against the accused persons.

33. It has also been argued on behalf of the revisionists that the Magistrate while issuing summons for facing trial to the accused persons has not taken into account the fact that the accused persons, presently the revisionist in the two cases, are not private persons, but are the companies and has also not considered the due provisions of law in issuing summons to them as per law. Since the matter is being remitted for fresh consideration by the court below,and the Court below by passing the impugned order has not passed any order in this context, this Court does not propose to issue any specific direction to the Magistrate concerned. However, the Magistrate while issuing process to the accused persons shall take into consideration all the relevant provisions before passing any order.

34. Before parting with the case, the Court shall like to record that section 18 of the General Rules (Civil), 1857 provides for the prohibition of the Rubber Stamp in judicial orders and the use of Rubber Stamp for passing any order has been forbidden by the circular letter of the High Court, Allahabad no. 6 of 2001 dated 7th February, 2001. By this circular letter it was impressed upon the Judicial Officers of the Subordinate Courts that for passing any judicial order, the Rubber Stamp shall not be used. It is unfortunate to observe that despite this circular letter of the year 2001, the Magistrate in the present case has passed the impugned judicial order with the use of rubber stamp and further by filling up the date in it.

35. It appears that all the Judicial Officers are not taking note of the circular letter, hence the Registrar General is directed to issue a direction to all the Judicial Officers through the District Judges concerned to ensure that any judicial order be not passed by way of using the Rubber Stamp.

36. The revision is hereby allowed and the impugned order dated 10th November, 2009 is hereby set aside.

37. The Magistrate concerned shall pass a fresh order for taking cognizance in the matter and shall thereafter, proceed with the trial of the case in accordance with law.

38. Let a copy of this judgment be also sent to the Registrar General for compliance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.12.2012

BEFORE
THE HON'BLE ANIL KUMAR, J.

Consolidation No. - 732 Of 2012

Zafarullah Khan ...Applicant
Versus
Deputy Director Of Consolidation Gonda And Ors. ...Respondents

Counsel for the Petitioner:
Sri Ambhrish Tripathi

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 226-Writ against rejection of revision under Consolidation Act-on ground unexplained long term delay-held-rejection of revision without touching merit on ground of inordinate, unexplained delay-held-proper-

warrants-no interference by Writ Court-Writ dismissed.

Held: Para-7

All in all the purpose of the Limitation Law is that the Court could not help the person who after knowledge that he has suffered a legal injury kept sleeping over his right and never approached the Court for the redressal of his grievances within an appropriate period of time.

Case Law discussed:

(2012) 8 Supreme Court Cases 524; (2011) 14 SCC 578

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

1. Heard Sri Ambhrish Tripathi, learned counsel for the petitioner, Sri Vinay Bhushan, learned Additional Chief Standing Counsel and perused the record.

2. Controversy in the present case relates to land situated in village Rankibadalpur, Pargana- Sadullah Nagar, Tahsil- Utraula, District Balrampur. In respect to said land initially an objection has been filed by opposite parties no. 3 to 6 under Section 9-A(2) of U.P. Consolidation of Holdings Act, the same has been allowed by the Consolidation Officer by order dated 21.12.1981 (Annexure no.3). Aggrieved by the said order, petitioner filed a revision,dismissed by order dated 17.12.1990 passed by Deputy Director of Consolidation, Gonda. Hence, the present writ petition has been filed under Article 226 of the Constitution of India.

3. From the perusal of the pleadings as made by the petitioner, he has explained delay in filing of present writ petition at such a belated stage, para-11 to the writ petition is quoted as under:-

"11. That for the facts and circumstances of the case, petitioner got knowledge so late, as such there is delay in filing the writ petition , but in the interest of justice , the delay in liable to be condoned as the opposite parties committed fraud to grab the ancestral property of the petitioner."

4. Thus, taking into consideration the above said fact that statue of limitations is an enactment in a legal system that sets the maximum time after an event that legal proceedings based on that event may be initiated. It prescribes the time-limit for different suits within, which an aggrieved person can approach the court for redress or justice. The suit, if filed after the exploration or time-limit, is struck by the law of limitation. It's basically meant to protect the long and established user and to indirectly punish persons who go into a long slumber over their rights.

5. Under the Civil Legislation of Rome certain actions were allowed to be brought at any time and were known as 'Actiones Perpetuae" while on the other hand certain actions were subjected to a definite period of limitation & these were known as 'Actiones Temporalis'. In India before 1859 there was no uniform law of limitation, in 1859 it was first enacted as Code (Act XV of 1859), which was repealed by the Act of 1877 then came the Act of 1908. The Act of 1908 was repealed by the present Statute of 1963 (Act No.36 of 1963).

6. The main objection behind the Law of Limitation is, not to encourage the persons to raise disputes with regarding to the old and stale claims wherein the court may be reluctant to grant any relief considering the gravity of the

dispute/claim. Further, the person who is not diligent in getting the relief for him/her by acting within time is stopped from seeking the relief against any person as he has given up his right in the said dispute.

7. All in all the purpose of the Limitation Law is that the Court could not help the person who after knowledge that he has suffered a legal injury kept sleeping over his right and never approached the Court for the redressal of his grievances within an appropriate period of time.

8. Hon'ble the Apex Court in the case of ***Cicily Kallarackal Vs. Vehicle Factory (2012) 8 Supreme Court Cases, 524*** after placing reliance on its earlier judgment passed in the case of *Anshul Agarwal Vs. Noida (2011) 14 SCC 578* held that if the delay is not properly explained while filing a petition/ matter rather there is inordinate unexplained delay in filing the same , that matter should be dismissed on the said ground and in that case there was delay of 1314 days in filing a petition, against an order dated 16.9.2008, so Hon'ble the Supreme Court has dismissed the same on the ground that no sufficient reason has been explained in filing the petition at a belated stage .

9. In view of the said fact as in the present case, there is no satisfactory explanation has been given by the petitioner in filing the present writ petition at a belated stage , so liable to be dismissed on the said ground.

10. For the foregoing reasons, the writ petition is dismissed on the ground of delay and latches.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.11.2012

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

Criminal Appeal No. 2350 Of 1982

Bare Babu & others ...Appellants
Versus
State of U.P. ...Respondents

Counsel for the Petitioner:
Sri W.H. Khan
Sri I.K. Chaturvedi

Counsel for the Respondents:
Sri M.B. Singh
Sri Sageer Ahmad
A.G.A.

Criminal Appeal-against conviction under section 307/149 I.P.C.-injury caused relating to watering agricultural field-no cut injury of sharp weapon-fire injury inspite of licensed gun-no prosecution case regarding use of Pharsa-no damage on vital part of body-no element of previous enmity-No allegation of repeated blows-in absence of clinching material with motive to commit or attempt to commit murder-out of 3 eye witness two never came forward to support prosecution story-considering 33 years pending trial and appeal-have developed cordial relations-conviction upheld with modification of their sentences-converted to the period undergone with fine of Rs. 5000/-on each-other appellants namely Ramkesh and Dhirendra-their participation and presence being doubtful-entitled for acquittal-appeal partly allowed.

Held: Para-25

They have also been inside gaol for sometime and have been under the Democles Sword for about 33 years of pending trial and appeal. Accordingly the

appellants, other than Ramdhani (deceased), Ramkesh S/o Shiv Dularey (wrongly described in the memo of appeal as Rakesh appellant no. 8) and Dhirendra, are to be dealt with a lenient view on sentencing even though they have been found guilty for committing an offence punishable under Sections 323, 324 readwith Section 149 IPC. Reference can be had for support from the decisions in the case of State of U.P. Vs. Ram Chand reported in 2005 (51) ACC Pg. 870 and Sukhram Vs. State of U.P. reported in 2010 (68) ACC Pg. 584. Their conviction is therefore accordingly upheld with the modification in their sentences with stand converted to the period undergone coupled with a fine of Rs. 5000/- each on all the convicted appellants. In the event of failure to deposit they shall undergo 3 months rigorous imprisonment in lieu thereof.

Case Law discussed:

2012 (78) ACC 343; 2010 (69) ACC 454 (Supreme Court); 1994 SCC (Criminal) 275; 2009 (17) SCC Pg. 280; 2008 (15) SCC pg. 753; AIR 1965 SC pg. 843; 2012 (3) SCC 221; 2010 (8) SCC 407; 1995 (5) SCC pg.602; 1990 Cr.L.J. pg. 2531 (para 28); 2008 (7) SCC pg. 550; 2005 (51) ACC pg. 870; 2010 (68) ACC pg. 584

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

1. This appeal on behalf of nine appellants is against the conviction under Sections 148, 307/149 of the appellant nos. 1, 3 and 4 coupled with under Section 323 read with 149 IPC. The appellant Nos. 2, 5, 6, 7, 8 and 9 have been convicted under Sections 147/149/307 and 323/149 IPC with their respective sentences without any fine.

2. Sri I.K. Chaturvedi, learned counsel for the appellants has informed that this Court has already taken notice of the death of appellant no. 4 Ramdhani on the report of the Magistrate concerned and therefore the appeal against the said appellant stands abated.

3. He has also filed a supplementary affidavit bringing on record the status of the age and health of the other appellants in order to establish their current status and also to indicate the period of incarceration undergone by these appellants, thirty three years hence, that is at the time of the institution of this appeal when the appellants were let off on bail.

4. The incident is of 17th of January, 1979 at about 8.00 am in the morning when it is alleged in the F.I.R. that Kamlesh Narain the injured was watering his agricultural fields from Tubewell No. 36 which is a Government Tubewell. It is alleged by the first informant who is the brother of the injured that it was the turn of the informant to water his fields when at about 8.00 am the appellants with a premeditated and preplanned concerted design came on the spot to divert the flow of the water towards their own field upon which the injured Kamlesh Narain urged that he would be requiring the water only for a couple of hours whereafter they could utilize the same. On hearing this the deceased appellant Ramdhani, who was armed with a licensed gun called upon the other assailants and exhorted them to assault the injured as he is not listening to him. On this the appellant no. 1 Bare Babu assaulted the injured with a Spear (Barchhi). The informant Bishnu Narain alongwith his father Babu Ram rushed to the spot and also received Lathi blows alongwith the injured. On hearing the hue and cry, the F.I.R. disclosed the arrival of Kulpat and Satya Narain together with Roop Narain who witnessed the scene when the assailants ran away towards the South of the village. The F.I.R. nominates

Bare Babu - appellant no. 1 to be armed with a Spear (Barchhi), Shatrughan son of Baijnath to be armed with a Pharsa, Ram Dhani armed with a licensed gun and the other assailant-appellants Onkar, Bhagwan Din, Ramkesh, Krishna Dutt and Dhirendra armed with Lathis who inflicted the injuries. The F.I.R. was lodged on the same day at about 10 am and the medical report was prepared after the examination of the injured Kamlesh Narain whose injuries are as follows:-

M.I. Black mole on right side of face 2 cm. below the upper lip.

Examination of injuries:

(1) Lacerated would 7 cm. x 1 cm. x Bone deep on left side of head 9 cm. above the left ear. Direction oblique, Bleeding present

(2) Penetrating would of entrance 1.5 cm x 0.5 cm. x 2 cm. on Dorsal side of left hand 3 cm. above the root of index finger. Margin clear cut. Direction posterior anteriorly and slightly upward.

(III) Lacerated wound 1 cm. x 0.5 cm. x 0.8 cm. on Dorsal side of left hand 2 cm. above the root of middle finger.

(IV) Penetrating wound of entrance 0.3 cm. x 0.2 cm. x 0.4 cm. on left side of abdomen, 6 cm. above and one O'clock position from the umbilicus.

(V) Red contusion 4 cm. x 1 cm. on back of left leg 5 cm. below the knee joint.

Opinion: All injuries are simple except injuries No. (1) to (III) which are kept under observation Advised X-ray skull and left hand. Injury No. (I) (III) & (V) are caused by blunt object. Injury No. (II) & (IV) are caused by sharp pointed weapon.

Duration: within 6 hours.

5. Bishnu Narain the informant was also examined who was shown to have received one injury of contusion on his left forearm caused by a blunt object with an advise of an X-Ray. Babu Ram the father was also examined with two injuries of contusion of a similar nature on his left arm.

6. The appellants were committed to the sessions court and they were charged for having committed offences for which they were tried and have been ultimately convicted. The prosecution examined the doctor who prepared the medical report as P.W.-1., the informant Bishnu Narain as P.W.-2, the injured Kamlesh as P.W.-3, Roop Narain as P.W.-4, another doctor P.C. Chandel as P.W. -5 and the Sub Inspector of Police Satya Veer Singh as P.W.-6. The accused got themselves examined together with a defence witness Garib Das D.W.-1. The trial court vide judgment dated 20.9.1982 upon an assessment of the evidence convicted the appellants. Hence, this appeal.

7. Sri I.K. Chaturvedi has extensively taken the court through the evidence on record and he submits that there was no such common intention or object of a premeditated design as alleged by the prosecution and the intention appears to have accrued on the spur of the moment relating to a dispute of watering of fields. The carrying of a gun by Ramdhani was an embellishment as there was no fire arm injury. The allegation of the use of a sharp edged weapon, namely, a Pharsa is

uncorroborated by any medical report, inasmuch as, there is no cut injury of such a sharp weapon that could be used in its natural course. He contends that there is no internal injury on any vital part of the body so as to construe the commission of an offence to commit murder. He contends that the recital in the F.I.R. and its corroboration by the injured witness about the intention is clearly at the best to teach a lesson and not to commit any murder, inasmuch as, there was neither any intention nor any knowledge attributable for the alleged use of the weapons in the hands of the assailants. He therefore submits that the number of accused has been exaggerated and it is evident that three of the accused Ramdhani, Ramkesh and Dhirendra have been admitted by the prosecution witnesses including the injured witness that they did not assault the injured.

8. He further contends that the attempt of the prosecution to establish the injury from a Pharsa on the basis of the statement of the doctor is absolutely misplaced, inasmuch as, injury no. 1 is clearly caused by a hard and blunt object and not by a sharp weapon. He submits that the prosecution never came up with a case that the Pharsa had been utilized from its blunt side so as to cause such an injury and therefore the statement of the doctor during cross examination is of no avail in the absence of any such case pleaded by the prosecution. He further contends that there is no supplementary medical report of any grievous injury and in the absence of any motive or prior dispute the entire story has been trumpet up so as to implicate the appellants. This exaggeration is therefore writ large for which there is no basis. He further contends that in view of the facts disclosed in the supplementary affidavit relating to the age of the appellants and their status of health as well as the fact that the appellants have waited for more than 30 years for the disposal of their appeal the conviction of the appellants should be set aside and they deserve to be acquitted.

9. In the alternative he also contends that in the event this court comes to the conclusion that some of the appellants deserve to be convicted then in that view of the matter, at the most the injuries should be treated to be minor and superficial injuries and with no damage to any vital part they should be treated to be injuries punishable under section 323 IPC or at the most 324 IPC. He further submits that in view of the fact that appellants have undergone incarceration for the periods as referred to in the supplementary affidavit, their sentences should be converted into fine and the appeal be disposed of accordingly.

10. In support of his submissions Sri Chaturvedi has relied on the judgment of a learned Single Judge of this Court in the case of **Ganesh and another Vs. State of U.P. reported in 2012 (78) ACC 343** and the judgment of the apex court in the case of **Neelam Bahal and another Vs. State of Uttarakhand reported in 2010 (69) ACC 454 (Supreme Court).**

11. In order to understand the impact of the alleged injury of Pharsa as claimed by the prosecution, Sri Chaturvedi has relied on paragraph 8 of the judgment in the case of **CH.Madhusudana Reddy and others Vs. State of A.P. reported in 1994 SCC (Criminal) 275.** He therefore contends that in view of the aforesaid background the appeal be allowed and the conviction be set aside.

12. Learned AGA on behalf of the State has however urged that the injury that was aimed at the abdomen was prevented by resisting the thrust of the Spear (Barchhi) by the hand of the injured. He contends that the injury was clearly attempted to cause something fatal as all the assailants had come prepared and armed to assault the injured. They had not come to simply and forcibly divert the course of the water channel but they clearly intended to do something heinous. The intention has to be therefore gathered from the manner in which the assailants arrived with full preparation and the same should not be underestimated to be an act of sudden provocation. Reliance is placed on the decision of **State of M.P. Vs. Kedar Yadav reported in 2009 (17) SCC Pg. 280.** The injury caused on the head was by a "Pharsa", but by its converse side, namely the blunt side of it as suggested in the testimony of the medical examiner. The minor error of description of a "Barchhi" and "Ballam" has been explained by the injured himself in his deposition and as such no capital can be made out of it.

13. The incident being one of broad day light, there is no mistake of identity and the defence has not provided any evidence to the contrary so as to disbelieve the prosecution version. It is urged that even if a couple of the accused have not inflicted any actual injuries or have not assaulted, still their presence cannot be doubted and they being accomplices, are entitled to receive the same penalty as their companions.

14. Having heard learned counsel for either side and having perused the records, the first issue to my mind that deserves attention is the motive part and the intention to commit the offence for a common object and with knowledge. The principles on this issue that are to be applied are dealt with in the decision of **Kesar Singh Vs. State of Haryana reported in 2008 (15) SCC Pg. 753.** Learned AGA is however right in his submissions that so far as an offence under Section 307 IPC is concerned the law on the subject for gathering intention, the seat and nature of the injury are not the final components, has been dealt with in the case of **Sarju Prasad Vs. State of Bihar reported in AIR 1965 SC Pg. 843** as reiterated and followed in State of M.P. Vs. Kedar Yadav (supra). What is intention and how it is to be understood in distinction to knowledge has been explained in Kesar Singh's case (supra). Reference can be had to the decisions in the case of **Roy Fernandes Vs. State of Goa reported in 2012 (3) SCC 221 and Virendra Singh Vs. State of Madhya Pradesh reported in 2010 (8) SCC 407.**

15. In the light of the same, the incident in the present case has to be assessed. There is no element of previous enmity. The only immediate cause is a dispute over watering of fields. There is no prior incident either preceding the incident recently or remotely. There is no explanation by the prosecution as to why the most lethal weapon, as alleged to be available on the spot in the hands of Ramdhani, namely a gun, was not utilised actually to cause any injury if the intent was to commit murder. The dimension of the alleged sharp-pointed weapon is negligible and no repeated blows are alleged. The prosecution never came up with a suggestion to strike a blow on the head of the injured by the converse side of "Pharsa". The appellants counsel is therefore right in placing reliance on the

decision of CH. Madhusudana Reddy (supra). There is no damage to any vital part nor any internal injury has been reported. These objective assessments coupled with a dispute over the change in course of water channel in the morning, therefore do not clearly establish a preconcerted design to commit murder. To make the offence punishable under Section 307 IPC the prosecution evidence on record fails to pass the tests as observed in Kesar Singh's case (supra).

16. The intention therefore was not to commit a heinous offence like murder, but there is no doubt that intention to cause hurt is very much present. The medical report does not contain any supplementary material for e.g. an X-ray or ultrasound to establish the existence of grievous hurt. The injuries were described as simple except injury No. 1 and 3 that did not yield or reveal anything further on being kept under observation.

17. There is a probability of a sudden fight but at the same time the assemblage with weapons is there. The resistance of the injured to delay the change of course of the water channel may have given rise to an exchange of heated dialogues but there is no evidence of any preceding altercation between the parties so as to suggest an existing ongoing perennial dispute. The dialogue began by the injured suggesting that the watering can be done by the accused after a couple of hours. This may have infuriated the accused who might have rushed for their weapons to threaten the injured or even to teach him a lesson. No other motive was even suggested by the prosecution for the court to gather a pre-existing ulterior motive so as to raise a probability of some preconcerted design. In the absence of any clinching material, the motive or intention to commit an attempt to murder is not established. The conversion of the intention into an overt act is to be viewed in the aforesaid background. From that angle, the court is unable to find the material available on record to travel upto the length so as to describe the offence committed as an attempt to commit murder.

18. Three witnesses, namely Kulpat, Satya Narain and Roop Narain were nominated in the F.I.R. but two of them Kulpat and Satya Narain never came forward to support the prosecution story. Roop Narain stated that he was in his field when the incident took place. At one place he states that he witnessed the actual assault and in the next sentence he states that he arrived when a hue and cry was raised. He then admits that the entire story was narrated to him by injured Kailash. This inconsistency in his statement was sought to be improved during cross-examination but ultimately he admitted that he was involved in several cases in a contest with the accused. This existence of litigation therefore clearly reflects on his being an interested witness who was tried to embellish the story of the prosecution on the narration of Kamlesh. His actual presence at the time of occurrence is therefore doubtful which makes his ocular testimony incredible.

19. Then comes the claim of the appellants based on the testimony of DW-1 Garibdas, the tubewell operator who has stated that the tubewell was out of order on the date of incident, and therefore it is urged by Sri Chaturvedi that the story of watering of fields is absolutely imaginary. I am not prepared to accept this testimony as the relevant document of such faults being recorded and communicated were

not produced by Garibdas. Apart from this the site plan prepared by the I.O. does indicate the watering of fields and the flow of water-channel. Thus it cannot be said that the dispute did not arise out of watering of fields. To the contrary the existence of sudden provocation contradicts this probability. Accordingly no capital can be made out of this by the defence.

20. Now coming to the statement of the injured, the same has to be accepted as in my opinion it is difficult to overcome their testimony which is corroborated by medical reports. If any exaggeration does exist relating to Ramdhani, Ramkesh and Dhirendra, the same can be discarded, but their entire testimony cannot be shrugged off as the incident is of daylight and appears to have occurred with the active participation of at least the appellants, except Ramkesh and Dhirendra whose presence is doubtful. The law is explained clearly in the case of **Bharwad Jakshibhai Nagribhai Vs. State of Gujarat reported in 1995 (5) SCC Pg. 602** which affirms the principles as laid down by the High Court in the judgment reported in **1990 Cr.L.J. Pg. 2531 (Para 28).**

21. That having been established the nature of the injuries do definitely conform to the ingredients of Sections 323 and 324 IPC. They have been proved to have been inflicted due to the assault as alleged. Consequently, except the appellant No. 8 Ramkesh S/o Shiv Dularey (wrongly spelt as Rakesh) and appellant no. 9 Dhirendra, are held guilty of having caused injury to the victims and are therefore liable to be sentenced.

22. Accordingly all the appellants except Ramdhani (since deceased), Ramkesh and Dhirendra are found guilty of having caused hurt to victims as defined and punishable under Sections 323, 324 IPC read with Section 149 IPC, and not under Section 307 IPC.

23. The issue of sentencing still remains to be considered. The principles as discussed in the judgment of **State of Punjab Vs. Prem Sagar reported in 2008 (7) SCC Pg. 550,** if taken notice of, will make the task easier. Learned counsel for the appellants has invited the attention of the Court to the judgment of this Court in the case of Ganesh (supra) and that of the Apex Court in the case of Neelam Bahal (supra). In my opinion the nature of the allegations against Bare Babu and Shatrughan, who are stated to be armed with sharp edge weapons, be assessed from that point of view. The dimension of the injuries said to have been caused by a "Barchhi" by Bare Babu has been delineated hereinabove and they resemble a similarity as in the case of Neelam Bahal (supra). The injury by an alleged knock by the reverse side of a "Pharsa" carried by Shatrughan was not the case pleaded by the prosecution at all. This doubt therefore is not removed and the learned counsel has rightly placed reliance on the case of CH. Madhusudana Reddy (supra). The injuries of Lathi are all simple in nature.

24. It is here that the facts brought forth in the supplementary affidavit deserve to be noticed. It is stated that Onkar is not in a sound state of mind. The others are aged enough and the relevant paras 4, 5, 6, 7, 8 and 9 are quoted hereinunder:-

4.That amongst the aforesaid Appellants, one of the appellants, Ramdhani has died during pendency of

trial whereas the appellant Onkar is man of unsound mind who is detained in solitary room in his house and his behaviour towards the public spite of the treatment by the expert doctors, he could not be cured.

5.That the appellant, Krishna Dutt is presently aged about 67 years whereas appellant, Bare Babu who is elder brother of appellant, Krishna Dutt, is presently aged about 75 years. Appellants, Bhagwan Din, Shatrughan, Raghubir Prasad and Onkar are presently aged about 69 years, 64 years, 94 years and 66 years respectively. The Photocopies of the Identity Cards of Bhagwan Din, Shatrughan, Raghubir Prasad, Krishna Kumar @ Bare Babu, and Krishna Dutt are being filed herewith and marked as Annexure No. SA1 to this Supplementary Affidavit.

6.That appellant, Bare Babu is elder about 8 years from his younger brother Krishna Dutt whose real name is Krishna Kumar.

7.That appellant, Raghubir Prasad is father of the appellant, Krishna Dutt and Bare Babu who is presently aged about 94 years and he is on his death bed who is not able ever to walk and perform his routine work.

8.That the appellants and complainant as well as injured witnesses are relating to same family and presently after lapse of considerable time, they have developed cordial relations and since the date of incident till yet not other incident took place between the parties either civil or criminal in nature and both the families are residing peacefully having no grievance against each other.

9.That the Appellants have never challenged in past who are not previous convicts and the present case is solitary criminal case in which they have been convicted."

25. They have also been inside gaol for sometime and have been under the Democles Sword for about 33 years of pending trial and appeal. Accordingly the appellants, other than Ramdhani (deceased), Ramkesh S/o Shiv Dularey (wrongly described in the memo of appeal as Rakesh appellant no. 8) and Dhirendra, are to be dealt with a lenient view on sentencing even though they have been found guilty for committing an offence punishable under Sections 323, 324 readwith Section 149 IPC. Reference can be had for support from the decisions in the case of **State of U.P. Vs. Ram Chand reported in 2005 (51) ACC Pg. 870 and Sukhram Vs. State of U.P. reported in 2010 (68) ACC Pg. 584**. Their conviction is therefore accordingly upheld with the modification in their sentences with stand converted to the period undergone coupled with a fine of Rs. 5000/- each on all the convicted appellants. In the event of failure to deposit they shall undergo 3 months rigorous imprisonment in lieu thereof.

26. So far as Ramkesh and Dhirendra are concerned their participation and presence becomes doubtful as the evidence against them is unconvincing and almost uncertain. They appear to be victims of exaggeration and embellishments that remain uncorroborated. They are therefore entitled for acquittal. Accordingly, the appeal is partly allowed. The conviction of the appellant no. 8 Ramkesh S/o Shiv Dularey and appeallant no. 9 Dhirendra is set aside. The sentences of the other

appellants shall stand modified as ordered hereinabove.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.12.2012

BEFORE
THE HON'BLE B. AMIT STHALEKAR, J.

Civil Misc. Writ Petition No. 2746 of 2012
(Matters under Article227)

Jawla Engineering Pvt. Ltd. And Others ...Petitioner
Versus
M/S Uflex Limited ...Respondents

Counsel for the Petitioner:
Sri Sunil Kumar

Counsel for the Respondents:
Sri Samit Gopal
Sri M.K. Gupta

Constitution of India, Article 227-readwith Order 43 Rule 1(r)-Appeal against order granting temporary Injunction ex-parte-either can be challenged in appeal on to get ex-parte Decree set-a-side-writ against-not maintainable-in view of Full Bench decision.

Held: Para-6

In view of the law laid down by the Full Bench this writ petition is not maintain able and is accordingly dismissed.

Case Law discussed:
AIR 1970 Allahabad 376; 1996 (27) ALR 149

(Delivered by Hon'ble B. Amit Sthalekar, J.)

1. This writ petition has been filed for a direction to reject the plaint of the original suit no.1529 of 2012 (M/s Uflex Limited vs. Jawala Engineering Private Limited and others) and further to set aside the impugned ex-parte stay order granted by the Civil Judge (Senior Division) dated 23.11.2012 in the said suit.

2. Sri M.K.Gupta and Sri Samit Gopal have filed their appearance today on behalf of the respondent and have raised a preliminary objection that this writ petition is not maintainable in view of the provisions of Order 43 Rule 1(r) C.P.C.

3. Sri Sunil Kumar, learned counsel for the petitioner has raised a objection that appeal under Oder 43 Rule 1(r) is not maintainable.

4. Replying to this objection Sri M.K.Gupta has placed a reliance on a Full Bench decision of this Court reported in ***AIR 1970 Allahabad 376 Zila Parishad Budaun and others vs. Brhma Rishi Sharma.*** The relevant portion of the Full Bench is contained in paras 16 and 18 of the judgement which reads as follows:-

"16. The language and the object of Rule 1(r) of Order 43 and the scheme of Rules 1 to 4 of Order 39 show that an appeal also lies against the ex parte order of injunction. As soon as an interim injunction is issued and the party affected thereby is apprised of it, he has two remedies: (1) he can either get the ex parte injunction order discharged or varied or set aside appeal as provided for under Order 43, Rule 1(r), or (2) straightway file an appeal under Order 43, Rule 1 (r) against the injunction order passed under Rules 1 and 2 of Order 39, C.P.C. It is not unusual to provide for alternative remedies. For instance, when an ex parte decree is passed against a person, he has two

remedies: either he may go up in appeal against the ex parte decree or he may seek to get the ex parte decree set aside by the same court.

17.....

18. We are unable to accept this submission of the learned counsel for the respondents. As already discussed above, once the Court, after perusing the application and affidavit, comes to the conclusion that the case is a fit one in which temporary injunction should be issued ex parte the Court takes a final decision in the matter for the time being and the expression of this decision in our opinion is a final order for the duration it is passed. Such an order is contemplated by Rules 1 and 2 of Order 39, C.P.C.. We have looked into the authorities referred to above, but they are not applicable to the facts of this case and they have little bearing on the precise point raised by the learned counsel for the respondents."

5. Subsequently the above Full Bench decision has been followed by this Court in the case reported in ***1996 (27) ALR 149 Mohd. Rafi Khan (Dr.) v. District Judge, Aligarh.*** The relevant paragraph is para-5 which reads as follows:-

"5. I have considered the contention of the learned counsel for `the petitioner and have also carefully perused the aforesaid decisions cited by him. In the case of Zila Parishad (Supra) (F.B.) the question which was referred for the decision was to the effect whether an Ex-parte order issuing injunction against the defendant was appealble in the Full Bench was whether a miscellaneous appeal under Order 43 Rule 1 (r) lay against an ex-parte ad-interim injunction order or only against the final order passed by the trial court after hearing the defendants. It was held that even against an ex-parte order issuing temporary injunction it was open to the defendants to file an appeal straightway under Order 43 Rule 1 (r) C.P.C. While considering the argument in the said case the following observations were made in paragraph 16 of the judgement:-

"16. The language and the object of Rule 1(r) of Order 43 and the scheme of Rules 1 to 4 of Order 39 show that an appeal also lies against the ex parte order of injunction. As soon as an interim injunction is issued and the party affected thereby is apprised of it, he has two remedies: (1) he can either get the ex parte injunction order discharged or varied or set aside under Rule 4 of O.39 and if unsuccessful avail the right of appeal as provided for under Order 43, Rule 1(r), or (2) straightway file an appeal under Order 43, Rule 1 (r) against the injunction order passed under Rules 1 and 2 of Order 39, C.P.C. It is not unusual to provide for alternative remedies. For instance, when an ex parte decree is passed against a person, he has two remedies: either he may go up in appeal against the ex parte decree or he may seek to get the ex parte decree set aside by the same court.

6. In view of the law laid down by the Full Bench this writ petition is not maintain able and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.12.2012

BEFORE
THE HON'BLE SHRI NARAYAN SHUKLA, J.

Writ Petition No. 3129 (S/S) of 2008

Maya ...Petitioner
Versus
State of Uttar Pradesh through its Chief Secretary Chief Secretariat, Lucknow and others ...Opposite Parties

Constitution of India, Article 14-Right to get appointment-Petitioner applied for selection under special recruitment-derive for SC/ST under backlog quota-got selected after facing written as well as interview-government canceled the entire selection-again selection process started with the under chairmanship of another officer-petitioner also applied but could not succeeded-claim the appointment on the basis of earlier selection-petition dismissed as the petitioner participated in subsequent selection without any protest-after being unsuccessful-held-could not question of validity of selection process-in view of law laid down by the Apex Court-Court declined to interfere-petition dismissed.

Held: Para-31

In the light of the decisions discussed, herein above, I am of the considered opinion that even the petitioners being empanalled in the select list have no right to claim appointment save violation of Article 14 of the Constitution of India. In the instant case no element of discrimination exists.

Case Law discussed:
(2000) 1 Supreme Court Cases 600; (2003) 7 Supreme Court Cases 285; (2008) 4 Supreme Court Cases 171; (1998) 3 SCC 45; 1993 supp. (2) Supreme Court Cases 600; (1995) 3 Supreme Court Cases 486; (1991) 3 Supreme Court Cases 47

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

1. Heard Sri Rakesh Srivastava, learned counsel for the petitioner, Shri S.C. Yadav, learned counsel for opposite parties no. 6 to 14 and Mr. Rohit Verma, learned Standing Counsel.

2. In substance the petitioners are aggrieved with the constitution of the Selection Committee under the Chairmanship of Mr Arun Kumar Khare as well as against non implementation of the recommendations of the Selection Committee constituted under the chairmanship of Mr S.S. Singh Yadav.

3. Briefly stated, facts of the case are that the State Government took a decision to fill up the vacancies of different posts of the Scheduled Caste and Scheduled Tribes category under the back log quota.The advertisements were issued inviting applications. The Director, Ground Water Department, U.P., i.e. opposite party No. 3 constituted a selection committee on 19th September, 2007. One Sri C.S. Agarwal, Executive Engineer was nominated as Chairman of the said committee along with four other persons as members of the committee. The petitioners applied against the different posts.

4. Since Selection Committee constituted under the chairmanship of Mr Agrawal was not proceeding speedily, the O.P. 3 replaced Mr Agrawal by Sri S.S. Singh Yadav. This Selection Committee held written examination as well as interview for some post advertised through different advertisements.

5. The petitioners claim that they appeared in the examination and interview

against the respective posts. The Selection Committee after holding written examination as well as interview forwarded its recommendations to the opposite party no. 3 for issuing appointment orders but instead of implementing the same, the opposite party no. 3 constituted a new Selection Committee in which he nominated to himself as Chairman by means of Office Memorandum dated 4th February, 2008. The petitioners claim that since opposite party no.3 was interested to select his favorite persons, he malafidely cancelled earlier Selection Committee headed by Shri S.S. Singh Yadav. It is further stated that the Opposite Party no. 3 issued a back dated order on 4th February, 2008, constituting a new Selection Committee, which was absolutely arbitrary, illegal and without jurisdiction and full of mala fide. However, by means of another order dated 8.2.2008, the opposite party no. 2, i.e, Principal Secretary of the Department, on the event of constitution of fresh selection committee, issued a notice to the opposite party no. 3 to show cause for committing delay in selection of the back log quota.

6. It is pertinent to mention here that meanwhile, the State Government issued directions on 11th and 23 rd January, 2008 to complete the selection process and if the process of interview has been completed, issue the appointment orders.

7. The petitioners submit that their names were recommended for appointment on the respective posts. On enquiry it revealed to the petitioners that vide order dated 7 th November, 2000, another Selection Committee was constituted who made selection of 20 posts of Regional Assistant and 9 posts of Data Processor as well as against other posts also, whereas, against the said selection several complaints were made. On the aforesaid back drop the petitioner based her claim of appointment on the respective post on the basis of recommendation of the Selection Committee, headed by Mr S.S. Yadav.

8. In reply learned Standing Counsel submitted that in order to fulfill the back log quota, the State Government initiated special drive to make selection, in pursuance thereto advertisements were issued. A Selection Committee was constituted under the chairmanship of Mr C.S. Agrawal but since the Committee was moving slow and also misbehaving and disobeying the directions issued by the State Government as well as opposite party no.3, a new Committee was constituted under the chairmanship of Mr S.S. Singh Yadav, who proceeded for selection under Rule 5(6) of U.P. Rules 2002. Under the aforesaid rule, it is provided that after completion of selection process, the select list would be provided to the appointing authority.

9. It is stated that the appointing authority is the respondent no. 3 whereas the Selection Committee sent the select list directly to the State Government without informing opposing party no.3, which exposed secrecy of the selection, therefore, respondent no. 3 cancelled the Selection Committee and constituted a fresh Selection Committee under the chairmanship of Mr M.M. Ansari by means of office memorandum dated 4th February, 2008. On the complaint, the State Government interfered with the matter and restrained the Committee to work. Therefore, respondent no. 3 again cancelled the Selection Committee constituted by the Office Memorandum dated 4.2.2008.

10. Respondent no. 3 also submitted reply to the State Government as he was asked to explain his conduct. Since the State Government had shown its satisfaction with the explanation of respondent no. 3, the respondent no. 3 constituted new Selection Committee under the Chairmanship of one Sri Arun Kumar Khare to proceed a fresh. In order to proceed a fresh selection again an advertisement was issued fixing the date of interview in which all the candidates, who had applied earlier pursuant to different advertisements were allowed to participate. This time Selection Committee completed the selection process on the basis of which the appointment letters have been issued.

11. The petitioners participated in interview. They did not raise any objection at that stage. This time the Committee recommended the candidates for selection. In pursuance of the said recommendations, respondent no. 3 issued appointment orders to the candidates on 11.6.2008. The petitioners, whose names were not recommended by the Committee, since they could not succeed in the selection, now at this stage they have filed writ petitions challenging the publication dated 23.5.2008. It is further stated that the petitioner cannot approbate and reprobate at the same time. The respondent has also categorically given the details of the recommendation of the erstwhile committees.

12. One fact that has also been pointed out by learned Standing counsel that since despite the fact that recommendation of the second committee was not binding, the then Director Mr M.M. Ansari made some appointments pursuant to the said recommendation for which he was put for departmental enquiry. Mr Ansari challenged the same before this Court through W.P.No. 35833 of 2010. The Inquiry Officer completed the enquiry and submitted a report to the disciplinary authority, i.e, the State Government, who issued show cause notice dated 16.3.2011 with proposed punishment and also took consent of the U.P. Public Service Commission, Allahabad. However, the decision on the final punishment is still pending consideration.

13. As per direction of this Court, the learned Standing Counsel produced relevant record of selection, which contains the recommendation of the Selection Committee headed by Mr S.S. Singh Yadav, Chairman of the Selection Committee, upon perusal of which I find that the said committee held interview from 16.2.2008 to 26.2.2008 for 8 posts of Data Processor, pursuant to the advertisement no. 5 reserved for Scheduled Castes and prepared a select list of 8 candidates and waiting list of 4 candidates. The petitioner of W.P. No. 3129(SS) of 2008 is placed at serial no. 1 in the select list. In the said record the select list of the candidates for the post of Filed Assistant is also available which contains the names of 18 candidates in the select list against 18 posts of Field Assistant and waiting list of 8 candidates. The selection was also completed under the Chairmanship of Mr S.S. Singh Yadav in which the petitioner is placed at serial no.1.

14. In addition to the above documents, the learned Standing Counsel also placed the record of final selection made by the Selection Committee under the Chairmanship of Mr Arun Kumar Khare. The committee under the chairmanship of Sri Arun Kumar Khare

was constituted by the Director of Department on 1.5.2008. It held the interview of the candidates for the post of Data Processor and prepared a select list of 9 candidates for selection against the post of Data Processor, pursuant to the advertisement nos. 3 and 5 in which the petitioner's name does not find place.

15. The other petitioners also claim that their names were recommended for issuing appointment orders.

16. The petitioners claim the respondents' action as arbitrary with the submission that the recommendation of the selection committee for their appointments have been negated without any reason and submit that same warrants interference by this Court for cancellation of the subsequent selection made against the same very post by another Selection committee and they have also challenged the appointment of the selected candidates.

17. In support of the petitioners' claim, the learned counsel for the petitioners cited a decision of Hon'ble Supreme Court rendered in the case of **A.P. Aggarwal Vs. Govt. of NCT of Delhi and another (2000) 1 Supreme Court Cases 600.** In this case the Selection Committee recommended a panel of two names for consideration for appointment by the Central Government. The central Government appointed one person but instead of appointing the appellant, who was second person, chose to cause a fresh advertisement to be issued calling for fresh applications. Meanwhile, the appellant made representations and filed Original Application before the Central Administrative Tribunal. The Tribunal quashed the fresh advertisement and issued directions to appoint the appellant as a member. The respondent contested the application on the ground that the appellant did not get any right by inclusion of his name in the panel. The Tribunal opined that it was open to the Government to resort to fresh selection process and dismissed the appellant's application. The appellant field a writ petition before the High Court at Delhi which was dismissed in limine. Then he approached Hon'ble the Supreme Court. Hon'ble Supreme Court held as under;

"In our opinion, this is a case of conferment of power together with a discretion which goes with it to enable proper exercise of the power and therefore it is coupled with a duty to shun arbitrariness in its exercise and to promote the object for which the power is conferred which undoubtedly is public interest and not individual or private gain, whim or caprice of any individual. Even if it is to be said that the instructions contained in the office memorandum dated 14.5.1987 are discretionary and not mandatory, such discretion is coupled with the duty to act in a manner which will promote the object for which the power is conferred and also satisfy the mandatory requirement of the statute. It is not therefore open to the Government to ignore the panel which was already approved and accepted by it and resort to a fresh selection process without giving any proper reason for resorting to the same. It is not the case of the Government at any state that the appellant is not fit to occupy the post. No attempt was made before the Tribunal or before this Court to place any valid reason for ignoring the appellant and launching a fresh process of selection."

18. With the aforesaid observation Hon'ble the Supreme Court allowed the

appeal and directed the respondents to appoint the appellant as Member, Sales Tax Appellate Tribunal as he is the only other person in the panel of names selected by the Select Committee and as nothing has been brought out against him by the Government.

19. Learned counsel for the petitioner further relied upon another decision of Hon'ble the Supreme Court **Union of India and others Vs. Rajesh P.U. Puthuvalnikathu and another (2003) 7 Supreme Court Cases 285**. In this case a list of selected candidates was cancelled by the competent authority. Unsuccessful candidates filed an application before the Central Administrative Tribunal by making allegations of favoritism and nepotism on the part of the officers in conducting the Physical Efficiency Test. The Tribunal dismissed the application on the ground that there was no legitimate cause of action. Aggrieved applicants moved to the Kerala High Court. The High Court allowed the appeal and directed to correct the mistakes in the selection by rearranging the select list and completing the selection as per the re-evaluation found to be necessitated by the very Committee constituted for analyzing the position and in the light of its very report. The appellants filed an appeal before the Hon'ble Supreme Court. Hon'ble Supreme Court did not find any infirmity in the judgment of the High Court and dismissed the appeal.

20. On the other hand, learned Standing Counsel placed reliance upon the case of **Dhananjay Malik and others Vs. State of Uttranchal and others (2008) 4 Supreme Court Cases 171.** In this case Hon'ble the Supreme Court held that when the petitioners appeared at the oral interview conducted by the members concerned of the Commission, who interviewed the petitioners , the petitioners took a chance to get themselves selected at the said oral interview. Therefore, only because they did not find themselves to have emerged successful as a result of their combined performance, they cannot turn around and subsequently contend that the Selection Committee was not properly constituted and the process of interview was unfair.

21. Mr. Rohit Verma, learned Standing Counsel also placed some decisions of the Hon. Supreme Court, which are considered as under:-

(1) State of U.P. and another vs.Nidhi Khanna and another (2007) 5 Supreme Court Cases 572. In this case the vacancies of Lecturers in different Colleges were advertised. The respondent no. 1- Writ Petitioner applied for the post of Lecturer in Geography in August, 2000. A select list was prepared on 19.7.2001. Respondent no.1 was declared selected but her name was placed at serial no. 1 in the wait list of General category candidates. However, she was issued an appointment order but according to the appellants she did not join. Hence another candidate was appointed in her place. On 5.3.2003, another merit list was prepared pursuant to different advertisement. Respondent no. 1 claimed her right of appointment against the said vacancies. However, her request was rejected by the appellant on the ground that a new list was prepared under different advertisement. The select list in which respondent was placed was valid only till new list was prepared. Thus, it had lapsed on the event of preparation of a new list. Therefore, she could not be appointed after the new list was prepared. The High

Court had issued directions to the authorities to give her appointment. The matter reached the Hon'ble Supreme Court. The Hon'ble Supreme Court relying upon its earlier decision of **Kamlesh kumar Sharma** Vs. Yogesh Kumar Gupta reported in (1998) 3 SCC 45 held that the appellant were right in their submissions that the respondent could be appointed in pursuance of Advertisement No. 32 since she was selected and empanelled pursuant to Advertisement No. 29.

22. In the case of **Jai Singh Dalai and others Vs State of Haryana and another** reported in 1993 Supp.(2) Supreme Court Cases 600 Hon'ble Supreme Court held that merely because the State Government had sent a requisition to the Haryana Public Service Commission to select candidates for appointment did not create any vested right in the candidates called for interview, regardless of the fact that the selection process had reached an advanced stage. It does not matter whether the selection process is arrested by cancelling the earlier notification by another notification or by mere communication addressed to the HPSC. Even if the Commission were to complete the process and select candidates, such selection by itself would not confer a right to appointment and the Government may refuse to make an appointment for valid reason. At best Government may be required to justify its action on the touchstone of Article 14 of the Constitution.

23. In the case of **Madan Lal and others Vs. State of J & K. and others (1995) 3 Supreme Court Cases 486 t**he petitioners challenged the process of selection of Munsifs. Hon'ble Supreme Court held that validity of viva voce cannot be judged simply on the basis of the result thereof unless there is anything to show that the entire selection process was vitiated on account of mala fides or bias or that the Interview Committee Members had acted with an ulterior motive from the very beginning and the whole selection process was a camouflage .

24. In the case of **Shankarsan Dash Vs. Union of India (1991) 3 Supreme Court Cases 47** a Constitution Bench of Hon'ble the Supreme Court examined the value of the select list deeply and elaborately as the Division Bench referred the matter before the Constitution Bench for examination of the question whether a candidate whose name appears in the merit list on the basis of competitive examination acquires indefeasible right to appointment as a Government servant if a vacancy exists on the announcement of appellant's name in the select list in IPS and he was offered appointment to the Delhi, Andaman and Nicobar Police Service. Subsequently 14 vacancies arose in IPS in which against the vacancy which was to be filled up by the candidates who had been earlier appointed, the appellant claimed his appointment but the request was turned down. Then the appellant moved Delhi High Court by a writ application which was dismissed in limine. Then he reached the Supreme Court. Hon'ble Supreme Court held that process of final selection had to be closed at some stage as was actually done. A decision in this regard was accordingly taken and the process for further allotment to any vacancy arising later was closed. It was expressly ruled by Hon'ble Supreme Court that existence of a vacancy does not give legal right to a selected candidate. Similarly the claim of some of the candidates selected for appointment was

turned down holding that it was open to the Government to decide as to how many appointments would be made. The plea of arbitrariness was rejected in view of the facts of the case and it was held that the candidates did not acquire any right merely by applying for selection or even after selection.

25. The selection records provided by the Government discloses that the Selection Committee headed by Sri S.S. Singh Yadav prepared a select list of the candidates for appointment against the post of Data Processor and Technical Assistant and provided it to the Director Ground Water Department State Government for further action. Therefore, the contention of learned Standing Counsel that the recommendation was directly sent to the Government instead of sending it to the Director of the Department is unfounded.

26. So far as allegation of irregularity allegedly omitted in the selection process is concerned, I do not find any such irregularity reported in the selection. Therefore, the said ground also appears baseless. However,the fact remains that said recommendation was not implemented and a different selection committee was constituted which also issued an advertisement inviting applications in which the candidates, who had submitted the applications pursuant to the advertisement issued earlier as well as appeared in the interview had also been permitted to apply. They applied also, more so appeared in the Interview Board but could not succeed. Therefore, now at this stage they are called as unsuccessful candidates.

27. Therefore, at this stage there are two basic questions for consideration. Firstly, whether unsuccessful candidates can challenge the constitution of the selection committee as well as the process of selection adopted by. Secondly, whether the candidates being in the select list have any right to claim their appointments on the basis of their being placed in the select list.

28. In the matter following facts are undisputed;

Through various advertisements applications were invited for appointment of different posts. The petitioners applied against the different posts. The selection committee under the Chairmanship of Sri S.S. Singh Yadav prepared the select list and sent it to the State Government for issuing appointment orders. At some point of time the State Government had also shown its willingness to expedite the selection procedure and issue appointment orders but it could not be finalized and a fresh advertisement was issued by permitting the candidates including the petitioners who had already applied pursuant to the earlier advertisements, to apply in the same. The petitioners also applied . They appeared before the Interview Board but in this time the Selection Committee constituted under the different Chairmanships did not select them. Thus, they are definitely unsuccessful candidates of the same very selection which is under challenge.

29. Hon'ble the Supreme Court in the Dhananjay Malik's case (supra) has held that unsuccessful candidates cannot challenge the selection on the ground that the Selection Committee was not properly constituted or the process of selection was unfair.

30. The scope of rights of the candidates, who are empanelled in the select list but have not been given appointment has been discussed by Hon'ble the Supreme Court. The Constitution Bench of Hon'ble the Supreme Court in the case of Shankarsan Dash(supra) has held that the candidates empanelled in the merit list do not acquire indefeasible right of appointment. Only the exception has been carved out on the event of violation of Article 14 of the Constitution of India. In the instant case the whole selection was cancelled and none of the candidates empanalled in the select list prepared by the Committee under the Chairmanship of Sri S.S. Singh Yadav has been given appointment. Though the petitioner has adverted the mala fideness of the respondents but no substantive material has been brought on record to establish it. Only the decision for cancellation of selection and initiate fresh proceedings cannot be said to be mala fide.

31. In the light of the decisions discussed, herein above, I am of the considered opinion that even the petitioners being empanalled in the select list have no right to claim appointment save violation of Article 14 of the Constitution of India. In the instant case no element of discrimination exists.

32. Therefore, I am of the view that no interference is warranted in the selection, which has been given effect to, by issuing orders of appointment in favour of the private respondents.

33. The writ petitions stand dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.11.2012

BEFORE
THE HON'BLE MRS. SUNITA AGARWAL, J.

Civil Misc. Writ Petition No. 3853 of 2005

Ramdhari ...Petitioner
Versus
Addl. Commissioner (J) & Others ...Respondents

Counsel for the Petitioner:
Sri Namwar Singh
Sri Sanjiv Singh

Counsel for the Respondents:
C.S.C.
Sri Anuj Kumar
Sri M.N.Singh
Sri Manish

U.P. Zamindari Abolition and Land Reform Act, 1950-Section 123 (2)-settlement of Land-in favor of R-3-simply based upon report of Lekhpal-as R-3 being pot man making earthen pots-through Chak-had built Mandahi using for residential purpose-should be declared as Abadi-while plot in question recorded with petitioner as Bhumidhar-S.D.O. without opportunity of hearing to petitioner-by one word-written "Sweekrit"-held-such benefit under section 123 (2)-available to those person referred to Section 122-C-who had built a house on 03.06.1995-'Mandahi' being not covered with definition of house-one word order (Sweekrit) by S.D.O.-not sustainable.

Held: Para-14

Taking into consideration of the said judgment, it may be noticed that in the present case, no opportunity of hearing was provided to the petitioner nor there is any report of any of the authorities that the respondent no. 3 has built her

house and such houseexisted on 3.6.1995 on the land of the petitioner. The act of keeping Mandahi, charni and chak will not amount to building of a house as intended and required under Section 123(2) of the Act. This apart, the order dated 18.7.1996 passed by the Up Ziladhikari is a non-speaking order. The land of the petitioner could not have been settled by one word order (Sweekrit) by the Up Ziladhikari. No opportunity of filing any objection for contesting the matter was given to the petitioner by the Up Ziladhikari.

Case Law discussed:

2008 (1) AWC 35

(Delivered by Hon'ble Mrs. Sunita Agarwal, J.)

1. Heard Ms. Minakshi Singh, Advocate holding brief of Sri Namwar Singh, learned counsel for the petitioner, Sri Manish, learned counsel for the respondent no. 3 and learned Standing Counsel appearing on behalf of the respondents no. 1,2 and 5.

2. By the present petition, the petitioner prays for quashing of the orders dated 18.7.1996 and 16.12.2004 passed by the respondents no. 2 and 1; respectively .

3. By the order dated 18.7.1996, Up Ziladhikiari, Chandauli had settled the plot no. 64 area 4- 1/2 Decimal in favour of respondent no. 3 on the report of Tehsildar giving benefit of Section 123(2) of the U.P. Z.A.& L.R. Act, 1950(hereinafter referred to as the 'Act'). The petitioner filed revision challenging the order dated 18.7.1996 before the Additional Commissioner which was rejected by the order dated 16.12.2004 saying that the order dated 18.7.1996 passed by Up Ziladhikari requires no interference.

4. The facts of the case are that the petitioner was recorded Bhumidhar in possession of plot no. 64 area 0.08 Hectares situate in village Khandwari, Pargana Mahuari, Tehsil Sakaldiha, District Chandauli. The application was made by respondent no. 3 for recording area 4-1/2 Decimal as 'Abadi' on the ground that she is using the same by keeping her Mandahi, Charani (Cattle shed) and Chak etc. since before 3.6.1995. She is 'Kumhar' by caste and has got her house beside the land in dispute, therefore the area 4-1/2 Decimal of plot no. 64 which is being used by her for her cattle shed, chak etc. be recorded in her name as her 'Abadi' under Section 123(2) of the Act. The application of the respondent no. 3 has been brought on record. On the said application, the record was called for and Lekhpal, Revenue Inspector submitted reports dated 4.7.1996 that the disputed land was being used by respondent no. 3 as appurtenant land of her house and she is doing work of making earthen pots through Chak etc. in the Mandahi built over the disputed land which was not being used for housing purpose. However, the Tehsildar in his one line report dated 4.7.1996 stated that the respondent no. 3 could be given benefit of village artisan under Section 123(2) of the Act. On the report of the Tehsildar dated 4.7.1996, one word order 'Sweekrit' was passed by the Up Ziladhikari(Sub Divisional Magistrate).

5. Learned counsel for the petitioner submits that in the revision filed before the Commissioner, the grounds were taken that respondent no. 3 had no

concern over the disputed land and her house exists at the southern side of the disputed land and not on the disputed land. In any case, the land could not be recorded as 'Abadi' at the instance of respondent no.3 as there was no construction over the same. It was further contended that there is no report so as to give benefit of Section 123(2) of the Act to the respondent no. 3 and the order had been passed without any information/intimation to the petitioner. The revisonal court did not consider the objections raised by the petitioner and dismissed the revision that as per the report of the Lekhpal, Revenue Inspector and Naib Tehsidar that respondent no. 3 was in possession of disputed land and therefore the order passed under Section 123(2) of the Act taking into consideration of the preferential category given under Section 122-C(3) of the Act required no interference. While concluding the argument learned counsel for the petitioner submitted that mere keeping Mandahi, cattle shed and chak on the disputed land of the petitioner do not confer any right upon the respondent no. 3. The benefit of Section 123(2) of the Act can be given only to a person referred to in sub-section (3) of Section 122-C of the Act who has built a house on the land of the tenure holder.

6. Admittedly, the house of the respondent no. 3 does not exist over the land of the petitioner and keeping of Mandahi etc. will not amount to building of the house. From the report of Lekhpal and Revenue Inspector dated 4.7.1996 it appears that respondent no. 3 at the best is using the land as appurtenant land for the purpose which are not covered under Section 123(2) of the Act. There is no question of adverse possession over the land of the petitioner and no right can be conferred to her. The order passed by the Up Ziladhikari is non-speaking order without giving any opportunity of hearing to the petitioner who is admittedly recorded Bhumidhar of the disputed plot.

7. Learned counsel for respondent no. 3, on the other hand, submitted that the area 4-1/2 Decimal of plot no. 64 is in possession of respondent no. 3 before the cut of date i.e. 3.6.1985 and there is finding to this effect in the report of Tehsildar. The Up Ziladhikari has rightly accepted the report and proceeded to settle the land in favour of respondent no.3 who comes within the preferential category of sub-section(3) of Section 122-C of the Act. The act of building her Mandahi, Charni and Chak and doing work of making pots by the respondent no. 3 come within the meaning of village artisan residing in the village as mentioned in the sub clause (ii) of Sub-Section (3) of Section 122-C of the Act . The respondent no. 3 was found in possession over the disputed land. The revision was rightly rejected.

8. Learned counsel for respondent no. 3 in the counter affidavit has brought on record the fact that respondent no. 3 has filed the Original Suit No. 477 of 1996 against the then petitioner and his heirs who have been brought on record after death of the petitioner Ramdhari.

9. The relief sought in the said suit is for declaration of respondent no. 3 as owner in possession over the disputed land and permanent injunction against the defendant. In the said suit, an interim injunction dated 23.7.1996 was passed by

the Court of Civil Judge, Varanasi restraining the petitioner/defendant from evicting the respondent no. 3 from the disputed land. The interim order is in operation and the suit is still pending.

10. In the rejoinder affidavit, learned counsel for the petitioner submits that the suit filed by the respondent no. 3 is being contested by the heirs of petitioner and the temporary injunction was granted on incorrect facts given by the respondent no. 3.

11. Having heard learned counsel for the parties and perused the record, it is apparent that before passing the order dated 18.7.1996 no proper enquiry was conducted by the Up Ziladhikari. The report of the Tehsildar is only one line report recommending for benefit under Section 123(2) of the Act to the respondent no. 3 being the landless village artisan. Indisputably the house of respondent no.3 exists at the southern side of the disputed land. The report of the Lekhpal and Revenue Inspector dated 4.7.1996 further substantiate the fact that no house has been built by the respondent no. 3 over the disputed land i.e. plot no. 64 area 4-1/2 Decimal. The land was being used by the respondent no. 3 for the purposes other than that is provided under Section 123(2) of the Act. At this stage reference may be made to Section 123(2) of the Act which is quoted below:-

" 123(2)Where any person referred to in sub-section (3) of Section 122-C ***has built a house on any land held by a tenure-holder (not being Government lessee) and such house exists on (June 3, 1995), the site of such house shall****, notwithstanding anything contained in this Act, be deemed to be settled with the owner of such house by the tenure-holder on such terms and conditions as may be prescribed. "*

12. From perusal of Section 123(2) of the Act it is evident that the benefit of Section 123(2) of the Act can only be given to a person referred to in sub section (3) of Section 122-C of the Act who has built a house on any land held by a tenure holder and such house should exist on 3.6.1995.

13. From a perusal of the application moved by the respondent no. 3 dated 27.5.1996 annexed as Annexure 2 to the writ petition, it is clear that she has never pleaded that her house exists on the land held by the petitioner on 3.6.1995. Infact the contention was that she is in possession of the disputed land as 'Abadi' and therefore comes within the preferential category for the purpose over land under Section 122-C (3) of the Act. As held by this Court in **2008(1) AWC 35(Ram Narain & others vs. SDO, Kairana, District Muzaffarnagar and others)** that the deeming provisions under Section 123(2) of the Act has been enacted with non-obstante clause and therefore the same has to be given effect by the Court despite any other provision contrary contained in the Act itself. In order to effectuate the deeming provision under the Statute the Court would assume all those facts on which the legal fiction created by the statute can operate, even if those facts do not exist in reality and the rights of the parties will have to be determined on such imaginary things to achieve the purpose for which such legal fiction has been created by the Statute. It has further been observed in the paragraph 26 of the judgment on the

basis of facts on record that the house of respondents exist on 3.6.1995 therefore the land covered by their houses shall be deemed to be settled with them by the tenure holder of the land in question. It is immaterial whether they have built their houses with the consent/ permission of the tenure holder of the land in question or otherwise by taking forceful possession of the land or their such possession is unauthorized or as of tresspasser. It was concluded that no other view is possible, for the reason that it would completely distort and defeat the very purpose of deeming provisions which are coupled with non-obtante clause of Section 123(2) of the Act.

14. Taking into consideration of the said judgment, it may be noticed that in the present case, no opportunity of hearing was provided to the petitioner nor there is any report of any of the authorities that the respondent no. 3 has built her house and such house existed on 3.6.1995 on the land of the petitioner. The act of keeping Mandahi, charni and chak will not amount to building of a house as intended and required under Section 123(2) of the Act. This apart, the order dated 18.7.1996 passed by the Up Ziladhikari is a non-speaking order. The land of the petitioner could not have been settled by one word order (Sweekrit) by the Up Ziladhikari. No opportunity of filing any objection for contesting the matter was given to the petitioner by the Up Ziladhikari.

15. The revisional court also did not consider this aspect of the matter and not considered the objections raised by the petitioner. Moreover, the report of Lekhpal and Revenue Inspector dated 4.7.1996, if considered, would further substantiate the case of the petitioner that the benefit of Section 123(2) of the Act could not have been given to the respondent no. 3 However, as a suit No. 447 of 1996 was filed by respondent no. 3 against the petitioner and she has got temporary injunction thereunder, the suit is being contested by the petitioner. Both the parties can get their rights decided in the pending suit. Both the impugned orders dated 18.7.1996 and 16.12.2004 are quashed.

16. The writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.12.2012

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN, J.

Civil Misc. Writ Petition No. 5473 of 2006

Nagar Palika Parishad, Saharanpur And Another ...Petitioner

Versus

Deputy Director/ Regional Director Employees State Insurance ...Respondents

Counsel for the Petitioner:
Sri C.K. Parekh
Sri Mukhtar Alam

Counsel for the Respondents:
Sri P.K. Pandey
Sri Rajesh Tiwari

Employees State Insurance Act-1948- Recovery of amount of employees insurance-from Corporation on Nagar Palika-held-provisions of Insurance Act not applicable either upon Municipal or Corporation-recovery order quashed.

Held: Para-4

In view of above authorities ESI Act does not apply to the petitioner; neither it applied when it was Municipality nor it

applies after it became corporation. Accordingly all the orders passed and notices issued against petitioner by the authorities under ESI Act including orders and notices dated 07.12.2005, 22 or 23.12.2005, 06.12.2005, 23/28.09.2005, 20.01.2006 are set aside. The amount of Rs. 16 lacs recovered by E.S.I.Corporation from the petitioner shall be returned to the petitioner within three months from date of service of certified copy of this order upon the authority concerned of ESI Corporation.

Case Law discussed:

1996 (7) SCC 488; 2011 (2) LLJ 256 (UC)

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

1. List revised. No one appears for respondent.

2. Heard Sri C.K. Parekh, learned counsel for the petitioners.

3. The question involved in this case is whether Employees' State Insurance Act 1948 (E.S.I. Act) applies on Municipal Corporations/Municipalities or not? Recovery Officer, ESI Corporation, Kanpur had already recovered an amount of about Rs.16 lacs from the petitioner and issued notice for payment of further amount of about Rs.17 lacs. Neither any counter affidavit has been filed nor any one is present for respondents Deputy/ Regional Director and Recovery Officer, ESI Corporation, Kanpur. Learned counsel for the petitioner has cited two authorities, one of Hon'ble Supreme Court and the other of Uttrakhand High Court. The Hon'ble supreme Court in its authority reported in **1996(7) SCC 488, Municipal Committee, Abohar Vs. Regional Commissioner, E.S.I. Corporation and another** held that ESI Act does not apply on a Municipal corporation. That case was from Punjab. Following that judgment Uttarakhand High Court decided the case of **Nagar Palika Hardwar through its Administrator Vs. E.S.I. reported in 2011 (2) LLJ 256 (UC) Corporation and others** and applying the said judgment of Hon'ble Supreme Court held that Municipalities constituted under U.P. Municipalities Act are also exempted from the operation of ESI ACt. Learned counsel for the petitioners states that Nagar Palika Saharanpur which is petitioner in this writ petition has now become Corporation with effect from October 2010.

4. In view of above authorities ESI Act does not apply to the petitioner; neither it applied when it was Municipality nor it applies after it became corporation. Accordingly all the orders passed and notices issued against petitioner by the authorities under ESI Act including orders and notices dated 07.12.2005, 22 or 23.12.2005, 06.12.2005, 23/28.09.2005, 20.01.2006 are set aside. The amount of Rs. 16 lacs recovered by E.S.I.Corporation from the petitioner shall be returned to the petitioner within three months from date of service of certified copy of this order upon the authority concerned of ESI Corporation.

5. Writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.12.2012

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 6730 of 2010

Khem Chand ...Petitioner
Versus
State of U.P. & Others ...Respondents

Counsel for the Petitioner:
Sri Pramod Kumar Srivastava

Counsel for the Respondents:
C.S.C.

U.P. Police Oficers of Subordinate Ranks (Punishment and Appeal) Rules 1991-Rule 17 (6)-subsistence allowance-petitioner was placed under suspension on contemplated enquiry-reinstated-claim for subsistence allowance during suspension period-denial on pendency of criminal case-held-illegal-words "shall" used in rule held mandatory-not dependent upon whim of authorities-non payment of subsistence allowance-amounts to denial of Fundamental Rights-under Article 21 of Constitution-direction for payment within 8 weeks made.

Held: Para-8 and 9

The aforesaid Rule provides, that where a Government Servant is placed under suspension, he shall be entitled to a subsistence allowance. The word ''shall' is mandatory and it is not directory and is not dependent on the whims and fancies of the appointing authority. Suspension is not a punishment and a government employee is entitled to survive during the period when he was under suspension, otherwise it would be in violation of Article 21 of the Constitution of India. Whenever a disciplinary authority suspends an employee, it is the bounden duty of the disciplinary authority to pay suspension allowance and non-payment of the suspension allowance would be in violation of the fundamental rights of the petitioner to live with dignity as provided under Article 21 of the Constitution of India.

Mere pendency of a criminal case does not entitle the disciplinary authority not to release the suspension allowance. The discretion can be exercised by the disciplinary authority with regard to the balance payment of the salary, but no discretion can be exercised for payment of the suspension allowance.

(Delivered by Hon'ble Tarun Agarwala, J.)

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

2. The petitioner was posted as a Head Constable at Police Station Loni in District Ghaziabad and was placed under suspension by the Superintendent of Police, by an order dated 20.5.1996, on the ground, that a criminal case was registered against the petitioner. Subsequently, by an order dated 22.6.1996, the petitioner was reinstated. Subsequently, for the same criminal case, the petitioner was again suspended on18th April, 1998 and was reinstated in service on 7.4.2000. The petitioner made a representation contending that for the suspension period he should be given his salary and other allowances. Since the same was not paid, the petitioner filed Writ Petition No.41892 of 2006, which was disposed of by a judgment dated 29.6.2009 directing the Senior Superintendent of Police to pass appropriate orders with regard to the release of his salary and other benefits for the period when the petitioner was under suspension. Pursuant to the said

direction, the D.I.G., Moradabad has passed an order dated 25.11.2009 contending that in view of the Criminal Case No.221 of 1996, pending in the Criminal Court of Ghaziabad, no payment of salary during the period of suspension would be payable till the disposal of the criminal case. The petitioner, being aggrieved by the said order, has filed the present writ petition.

3. The petitioner was suspended under Rule 17 of the U.P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991. For facility, Rule 17 is extracted hereunder:

17.**Suspension-** (1) (a) A Police Officer against whose conduct an enquiry is contemplated, or is proceeding, may be placed under suspension pending the conclusion of the enquiry in the discretion of the appointing authority or by any other authority not below the rank of Superintendent of Police, authorised by him in this behalf.

(b) A Police Officer in respect of or against whom an investigation, enquiry or trial relating to a criminal charge is pending may at the discretion of the appointing authority under whom he is serving be placed under suspension, until the termination of all proceedings relating to that charge, if the charge is connected with his position as a Police Officer or is likely to embarrass him in the discharge of his duties or involves moral turpitude, if the prosecution is instituted by a private person on complaint, the appointing authority may decide whether the circumstances of the case justify the suspension of the accused.

(2)A Police Officer shall be deemed to have been placed, or, as the case may be, continued to be placed, under suspension by an order of the appointing authority-

(a)With effect from the date of his detention if he is detained in custody whether the detention is on Criminal Charge or otherwise for a period exceeding forty eight hours;

(b)With effect from the date of his conviction if in the event of a conviction for an offence he is sentenced to a term of imprisonment exceeding forty eight hours and is not forthwith dismissed or removed consequent to such conviction

Explanation. -- The period of forty eight hours referred to in Clause (b) of this sub-rule shall be computed form the commencement of the imprisonment after the conviction and for this purpose intermittent periods of imprisonment, if any, shall be taken into account.

(3) Where a penalty of dismissal or removal from service imposed upon a Police Officer is set-aside in appeal or on review under these rules and the case is remitted for further inquiry or action or with any other directions--

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

(b) If he was not under suspension, he shall, if so directed by the appellate or reviewing authority, be deemed to have been placed under suspension by an order or the appointing authority, on and from the

date of the original order of dismissal or removal;

Provided that nothing in this sub-rule shall be construed as effecting the power of competent authority, in a case where a penalty of dismissal or removal from service imposed upon a Police Officer is set-aside in appeal or on review under these rules on grounds other than the merits of the allegations on which the said penalty was imposed but the case is not remitted for further inquiry or action or with any direction, to pass an order or suspension pending further inquiry against him on those allegations, so, however, that any such suspension shall not have retrospective effect.

(4) Where a penalty of dismissal or removal from service imposed upon a Police Officer is set-side or declared or rendered void in consequence of or by a decision of a Court of law and the appointing authority, on a consideration of the circumstances of the case, decides to hold a further inquiry against him on the allegations on which the penalty of dismissal or removal was originally imposed, whether the allegations remain in their original form are clarified or their particulars better specified or any part thereof a minor nature omitted-

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

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

(5) (a) Any suspension ordered or deemed to have been or to have continued in force under this rule shall continue to remain in force until it is modified or revoke by any authority specified in sub-rule (1).

(b) Where a Police Officer is suspended or is deemed to have been suspended whether in connection with any disciplinary proceeding or otherwise and any other disciplinary proceedings is commenced against him during the continuance of that suspension, the authority competent to place him under suspension may for reasons to be recorded by him in writing, direct that the Police Officer shall continue to be under suspension till the termination of all or any such proceedings.

(6) Subsidiary Rule 199, Financial Hand Book, Volume II, Part II to IV, shall cease to apply to the Police Officers governed by this rule."

4. Under Clause 1(a) of the Rules 17, a police officer could be placed under suspension against whose conduct an inquiry is contemplated or is proceeding which would continue till the conclusion of the inquiry. Under Clause (b) of Rule 17 a police officer can be placed under suspension wherein an investigation, inquiry or trial relating to a criminal charge is pending.

5. In the instant case clause (b) of Rule 17(1) was invoked. The petitioner was suspended on account of the investigation into a criminal case, but subsequently, the petitioner was reinstated in service.

6. The question for consideration is, whether the petitioner is entitled for suspension allowance during the period when he was under suspension ?

7. In this regard Rule 53 of the Financial Hand Book, Volume 2 Part II to IV comes into play. For facility, Rule 53 is extracted hereunder:-

53. (1) A Government servant under suspension or deemed to have been placed under suspension by an order of the appointing authority shall be entitled to the following payments, namely:-

(a) a subsistence allowance at an amount equal to the leave salary which the Government servant would have drawn if he had been on leave on half average pay or on half pay and in addition, dearness allowance, if admissible on the basis of such leave salary;

Provided that where the period of suspension exceeds three months, the authority which made is deemed to have made the order of suspension shall be competent to vary the amount of subsistence allowance for any period subsequent to the period of the first three months as follows:

(i) the amount of subsistence allowance may be increased by a suitable amount, not exceeding 50 per cent of the subsistence allowance admissible during the period of first three months, if, in the opinion of the said authority, the period of suspension has been prolonged for reasons to be recorded in writing, not directly attributable to the Government servant;

(ii) the amount of subsistence allowance may be reduced by a suitable amount not exceeding 50% of the subsistence allowance admissible during the period of the first three months, if, in the opinion of the said authority, the period of suspension has been prolonged due to reasons, to be recorded in writing, directly attributable to the Government servant;

(iii) the rate of dearness allowance will be based on the increased or, as the case may be, the decreased amount of subsistence allowance admissible under sub-clauses (i) and (ii) above.

(b) Any other compensatory allowance admissible from time to time on the basis of pay, of which the Government servant was in receipt on the date of suspension;

Provided that the Government servant shall not be entitled to the compensatory allowance unless the said authority is satisfied that the Government servant continues to meet the expenditure for which they are granted.

(2) No payment under sub-rule (1) shall be made unless the Government servant furnishes a certificate that he is not engaged in any other employment, Business, profession or vocation:

Provided, that in the case of a Government servant dismissed or removed from service, who is deemed to have been placed or to continue to be under suspension from the date of such dismissal or removal, and who fails to produce such a certificate for any period or periods during which he is deemed to be placed or to continue to be under suspension, he shall be entitled to the subsistence allowance and other allowances equal to the amount by which his earnings during such period or periods, as the case may be, fall short of the amount of

subsistence allowance and other allowances that would otherwise be admissible to him; where the subsistence and other allowances admissible to him are equal to or less that the amount earned by him, nothing in this proviso shall apply to him.

8. The aforesaid Rule provides, that where a Government Servant is placed under suspension, he shall be entitled to a subsistence allowance. The word "shall' is mandatory and it is not directory and is not dependent on the whims and fancies of the appointing authority. Suspension is not a punishment and a government employee is entitled to survive during the period when he was under suspension, otherwise it would be in violation of Article 21 of the Constitution of India. Whenever a disciplinary authority suspends an employee, it is the bounden duty of the disciplinary authority to pay suspension allowance and non-payment of the suspension allowance would be in violation of the fundamental rights of the petitioner to live with dignity as provided under Article 21 of the Constitution of India.

9. Mere pendency of a criminal case does not entitle the disciplinary authority not to release the suspension allowance. The discretion can be exercised by the disciplinary authority with regard to the balance payment of the salary, but no discretion can be exercised for payment of the suspension allowance.

10. In the light of the aforesaid, the impugned order cannot be sustained and is quashed. The writ petition is allowed and a writ of mandamus is issued commanding the competent authority to release the suspension allowance for the period when the petitioner was under suspension, as per the provision of Rule 53 of the Fundamental Rules, within 8 weeks from the date of the production of a certified copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.12.2012

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 7971 of 2011

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

Counsel for the Petitioner:
Sri Munesh Kumar Sharma
Sri V.K. Singh
Sri G.K. Singh

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 226- Dismissal of Service-petitioner appointed as Constable under Sports Quota-required to show cause regarding dispense with of services as future performance under sports not upto mark-from progress report-regular improvement noted-ground for dismissal-held patently illegal-appointment not based upon better performance in future-even after expiry of probation period-no further extension of probation-unsatisfactory performance in sports-can not be taken into account.

Held: Para-7

There is another aspect. A person is appointed under a sports quota on the basis of his past performance in the area of his excellence in a particular field of sports. The appointment is given not for the reason that he would perform better in future pursuant to his appointment. The appointment is not based on the condition that he would perform better in future. The Court further finds that

Clause 9 of the G.O. dated 02.01.1999 clearly stipulates that the probation period can be extended twice after the expiry of two years of the probation period in the event the performance was not found satisfactory. Nothing has come on the record to indicate that the petitioner's probation was extended after the expiry of two years on the ground of unsatisfactory performance. Consequently, after the expiry of two years and, in absence of any extension of the probation period, unsatisfactory performance cannot be taken into consideration, nor Clause 9 of the G.O. dated 02.01.1999 could be invoked.

(Delivered by Hon'ble Tarun Agarwala, J.)

1. The petitioner was appointed as a Constable under a sports quota pursuant to the G.O. dated 02.01.1999 which permitted certain relaxation in the Rules for appointment of constables under the sports quota. The petitioner, being athletic, and having a medal in high jump applied for the post of the constable and was selected and was given an appointment on 17.03.2006. On 14th May, 2010, after more than four years, the petitioner was issued a notice to show cause as to why his service should not be dispensed with since he was not performing up to the mark under the sports category.

2. The petitioner submitted his reply denying the charge levelled against him. The respondent no.4 passed an order dated 24.1.2011 dispensing the services of the petitioner. The petitioner being aggrieved by the order dated 24.1.2011, has filed the present writ petition.

3. Clause 9 of G.O. dated 02.01.1999 stipulates that a person appointed as a Constable under the sports quota would be kept under probation for a period of two years which can be extended twice in the event the incumbent does not improve his skill in the sports category.

4. In the light of this G.O., the impugned notice was given and thereafter he was discharged.

5. Having heard the learned counsel for the parties, the Court finds from a perusal of the impugned notice dated 14th May, 2010, that the performance of the petitioner had increased in the year 2009. The petitioner had jumped 1.80 meters in the year 2009 whereas he jumped 1.88 meters in the year 2010. The petitioner recorded 2.52.86 minutes for 800 meters in the year 2009 whereas he recorded 2.45.81 minutes in the year 2010. The petitioner's performance in sprint, however, went down from 7.23 seconds in 2009 to 7.46 seconds in 2010.

6. In the light of the aforesaid facts depicted in the show cause notice, the Court finds that the impugned order discharging the service on the ground that his performance was not up to the mark appears to the patently erroneous.

7. There is another aspect. A person is appointed under a sports quota on the basis of his past performance in the area of his excellence in a particular field of sports. The appointment is given not for the reason that he would perform better in future pursuant to his appointment. The appointment is not based on the condition that he would perform better in future. The Court further finds that Clause 9 of the G.O. dated 02.01.1999 clearly stipulates that the probation period can be extended twice after the expiry of two years of the probation period in the event the performance was not found satisfactory. Nothing has come on the record to indicate that the petitioner's probation was extended

after the expiry of two years on the ground of unsatisfactory performance. Consequently, after the expiry of two years and, in absence of any extension of the probation period, unsatisfactory performance cannot be taken into consideration, nor Clause 9 of the G.O. dated 02.01.1999 could be invoked.

8. In the light of the aforesaid, the impugned order could not be sustained and is quashed. The writ petition is allowed and a writ of mandamus is issued commanding the respondents to permit the petitioner to continue in service. Since the petitioner has not worked for this period he will not be entitled for any salary but this period would be included in the length of service.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.11.2012

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE ABHINAVA UPADHYA, J.

Civil Misc. Writ Petition No. 8068 of 2006

Syed Hasan, Ist Addl. Civil Judge (Sr. Division), Varanasi ...Petitioner
Versus
High Court Of Judicature And Another ...Respondents

Counsel for the Petitioner:
Sri Uday Pratap Singh
Sri Anil Tiwari
Sri Shailendra
Sri Vijay Bahadur Singh

Counsel for the Respondents:
Si Uday Pratap Singh
Sri Anil Tiwari
Sri Shailendra
Sri Vijay Bahadur Singh

Constitution of India, Article 226-punishment-reduction in rank-on ground-while acting Session Judge granted second bail on extraneous considerations-enquiry officer not found the charge proved-punishment on basis of extraneous considerations-without giving details-held punishment-unsustainable.

Held: Para-37

From the above discussions, we are of the view that although the learned Enquiry Judge held that bail was granted on account of extraneous consideration but no extraneous consideration having either been referred to or proved, the charge of misconduct against the officer cannot be said to be proved. Further the opinion of the learned Enquiry Judge that substantially on the same ground first bail application was rejected is also not a proof of misconduct by Charged Officer while allowing the bail application unless the granting of bail is referred to or found out on any extraneous consideration which having not been proved in the present case, the charge of misconduct against the Charged Officer cannot be held to be proved.

Case Law discussed:
A.I.R. 1967 SC 1274; (1992) SC 124; (1993) 2 SCC 56; (2001) 6 S.C.C. 491; (2007) 4 SCC 247; A.I.R. 1997 SC 2286; 2006 (5) AWC 4519; 2002 (46) ALR 138

(Delivered by Hon'ble Ashok Bhushan, J.)

1. This writ petition has been filed by the petitioner, a judicial officer, challenging an order reducing the petitioner in rank consequent to disciplinary proceedings conducted by the High Court.

2. Counter and rejoinder affidavits have been exchanged between the parties and with the consent of learned counsel for the parties, the writ petition is being finally decided.

3. Brief facts, which emerge from pleadings of the parties, are; the petitioner, a member of U.P. Judicial Service, was promoted as Additional District and Sessions Judge in January, 1997. The petitioner at the relevant time was posted as Second Additional District and Sessions Judge, Rae Bareli. In Case crime No. 311 of 2002, under Section 302, 395 and 120-B of I.P.C. a bail application was moved before the District Judge on 9th September, 2002. A transfer application was filed by the complainant for transferring the case from the court of Special Judge, which although was rejected but the District Judge suo moto transferred the bail application to the court of the petitioner. The bail application was filed by one Akhilesh Kumar Singh who was accused in an incident dated 3rd July, 2002 in which allegation was on Akhilesh Kumar Singh and others persons that they went in the morning at the residence of Rakesh Pandey, the brother of the complainant, and entering in his lawn, have open fired. One of the assailants was arrested on the spot. Rakesh Pandey, who was shot, was taken to a nursing home where he died. The bail application was heard and rejected on 18th October, 2002 by the petitioner (Second Additional District and Sessions Judge, Rae Bareli). In the second bail application certain new circumstances and facts were mentioned on the basis of which the accused claimed grant of bail. The complainant filed a transfer application before the District Judge on 2nd September, 2002 alleging that an information has been received from one Ghanshyam Mishra, Advocate that the officer having taken an amount of Rs.2,50,000/- as gratification from the accused, is going to allow the bail application. Earlier 1st November, 2002 was fixed by the Charged Officer as a date for disposal of the second bail application on which date an adjournment application was filed by the complainant praying for 15 days time. The Charged Officer adjourned the hearing and fixed 2nd November, 2002 as a date for hearing of the second bail application on which date transfer application was filed before the District Judge. The District Judge rejected the transfer application on 2nd November, 2002 with the observation that the Charged Officer may expeditiously disposed of the bail application. The Charged Officer fixed 7th November, 2002 for hearing of the bail application on which date a request for adjournment was again made by the complaint, which was refused and after hearing learned counsel for the accused and the District Government Counsel (Criminal), the bail application was allowed by order dated 7th November, 2002. A complaint dated 16th November, 2012 was filed against the Charged Officer by Anurag Kumar Pandey, the brother of the deceased, to the High Court. The disciplinary inquiry was initiated against the Charged Officer by charge-sheet dated 6th October, 2004. In the disciplinary inquiry, department led evidence consisting of seven witnesses and certain documentary materials. The Charged Officer also filed certain papers in the inquiry. According to the department the second bail was granted substantially on the same grounds as were raised in the first bail application and there was no circumstances justifying the grant of second bail. On the other hand the Charged Officer stated before the learned Enquiry Judge that the second bail was granted on new grounds which were available after rejection of the first bail application. The inquiry was conducted by an Hon'ble Judge of this Court who submitted inquiry report dated 11th October, 2005 holding that the Charged Officer granted bail on extraneous consideration and therefore failed to

maintain absolute integrity and devotion to duty and committed misconduct under Rule 3 of the Government Servant Conduct Rules, 1956. The inquiry report was forwarded to the Charged Officer by the High Court for submitting his reply. The Charged Officer by letter dated 6th October, 2005 submitted his reply reiterating that the second bail application was allowed due to certain new circumstances and facts which were brought before him in the second bail application. The matter was taken by the Administrative Committee of the High Court on 29th November, 2005 on which date the Administrative Committee resolved to accept the inquiry report and referred the matter to the Full Court for consideration on quantum of punishment. The Full Court vide its resolution dated 17th December, 2005 accepted the inquiry report and resolved that officer be punished by reversion to the next lower rank from his present substantive rank. The resolution of the Full Court was forwarded to the State Government. The State Government issued an order on 17th January, 2006 reverting the petitioner from the post of Additional District and Sessions Judge to the post of Civil Judge (Senior Division). The writ petition has been filed praying for a writ of certiorari quashing the order dated 17th January, 2006 and further for a writ of mandamus directing the respondents to permit the petitioner to function and discharge the duties as the member of U.P. Higher Judicial Service.

4. Sri Shailendra, learned counsel for the petitioner, in support of the writ petition, contends that learned Enquiry Judge having himself found that the charge of illegal gratification not proved, there was no material to prove charge of granting bail on extraneous consideration and the learned Enquiry Judge committed error in holding charge proved. It is submitted that neither there was any material nor any finding as to what was the extraneous consideration for granting second bail. It is submitted that even if the learned Enquiry Judge found that the second bail application ought not to have been allowed, the said finding was not sufficient to prove any misconduct on the part of the petitioner who has decided the second bail application on the materials available and it is further submitted that error of judgment alone is not sufficient for proving the charge of misconduct. Learned counsel for the petitioner further submits that petitioner's work and conduct for the last 27 years was satisfactory and at no point of time any adverse comment or any allegation was found in his working. Learned counsel for the petitioner further submits that there were several new circumstances and materials which were brought in the second bail application on the basis of which second bail application was allowed. It is submitted that the Charged Officer has referred to those new grounds and circumstances which were highlighted in his written argument submitted in the inquiry. The new grounds referred to are; (i) filing of charge-sheet, (ii) site plan filed along with the charge-sheet, (iii) statement of witnesses under Section 161 of Cr.P.C., (iv) post-mortem report, (v) entries of G.D. etc. It is submitted that the bail application was decided after giving full opportunity to the parties and was based on cogent reasons.

5. Sri Manish Goyal, learned counsel appearing for the respondents, refuting the submissions of learned counsel for the petitioner, contends that charges against the petitioner having been proved in the disciplinary inquiry, which inquiry report has been accepted by the Full Court, this Court in exercise of writ jurisdiction shall

neither reappraise the evidence nor interfere with the findings of fact recorded in the inquiry report. It is submitted that there was no new circumstances or grounds for grant of second bail that too within 21 days. He further submits that from the materials brought on the record, it was proved that second bail was granted on extraneous consideration, the Enquiry Judge has rightly recorded such finding. The punishment has been awarded on sufficient grounds which needs no interference by this Court.

6. Learned counsel for the parties have relied on various judgments of the Apex Court as well as this Court which shall be referred to while considering the submissions in detail.

7. We have considered the submissions of learned counsel for the parties and have perused the record.

8. The petitioner was proceeded with in the disciplinary inquiry on following charge:-

"You are hereby charged as under:-

That you, while posted as IInd Addl. District & Sessions Judge Rae-Bareli allowed second bail application of main accused Akhilesh Singh who was absconder with a cash of price of Rs.2,500/- on his head, in a case of broad daylight murder u/s 302, 304, 147 & 148 I.P.C., registered at Crime No.311/2002, P.S. Kotwali, Rae-Bareli having rejected the first bail application on substantially the same grounds, without affording sufficient opportunity of hearing to the complainant or the prosecution, for extraneous considerations and you thereby failed to maintain absolute integrity and complete devotion to duty and thus committed misconduct within the meaning of Rule 3 of the U.P. Government Servant Conduct Rules 1956.

....."

9. A perusal of the above charge indicates that following are the allegations on which the charge of misconduct within the meaning of Rule 3 of the U.P. Government Servant Conduct Rules, 1956 was based:-

(i) Rejected the first bail application substantially on the same grounds;

(ii) Without affording sufficient opportunity of hearing to the complainant or the prosecution; and

(iii) For extraneous consideration.

10. The charge against the petitioner was thus regarding the order passed by him allowing the second bail application on 7th November, 2002 copy of which order has been filed as Annexure-6 to the writ petition. The first bail application was rejected by the petitioner on 18th October, 2002 which order has been brought on the record as Annexure-4 to the writ petition. The Charged Officer in his written submission, which was submitted before the learned Enquiry Judge, referred to several grounds, which according to the Charged Officer, were not available at the time of first bail application. The grounds as mentioned in the written submission submitted before the Enquiry Judge are as under:-

"New grounds taken by accused in IInd Bail Application

(which were not mentioned in/available at the time of First Bail Application)

1. Charge Sheet filed in case which brought knowledge of new facts. (Para-7 of

Main appl.) This ground non-existent earlier.

[This point was considered at the time of disposal of IInd Bail Application]

*2. Site Plan (filed with C.S.) was discussed with FIR for doubting place of occurrence. (**Ground of Bail No.3, 4).** This ground came into existence after filing of Charge Sheet. Non-existent earlier.*

[Ground no.3 was considered at the time of disposal of IInd Bail appl.].

*3. Neighbours, independent witnesses not named the accused Akhilesh. **(Ground of Bail No.9 of II B.A.)**. This ground came into existence after filing of Charge Sheet. Non-existent earlier.*

*4. Entries & contents of Panchnama & related documents discussed. **(Ground of Bail No.1- o l n% 10 of B.A.)** This ground not available earlier. Become available only after supply of copies of documents and statements of witnesses, after filing of Charge-sheet. **[Bail order also based on Ground of bail no.1- व स]***

*5. Statement of 5 witnesses u/s 161 CrPC discussed for doubting prosecution case. **(Ground of Bail No.8- अ व स द).** This ground non-existent earlier. Become available only after supply of copies of documents and statement of witnesses. [**Bail order also based on Ground of bail no.8**. अ„*

*6. Post Mortem Report discussed for doubting prosecution case. **(Para 11 and 17 of Main Appl.).** This ground non-existent earlier. Become available only after supply of copies of Post Mortem report, after filing of Charge Sheet.*

*7. Entries of G.D. discussed for doubting prosecution case. **(Para 17 of Main Appl.).** This ground non-existent earlier. Become available only after supply of copies to accused."*

11. Learned Enquiry Judge considered the above grounds taken by the Charged Officer and repelled the same. Learned Enquiry Judge also examined the allegations against the petitioner of granting the second bail application after taking illegal gratification. The charge up to that extent was disbelieved by the Enquiry Judge himself. The concluding portion of the report of the Enquiry Judge gives the basis for holding the charge proved against the petitioner. It is useful to quote the conclusion of learned Enquiry Judge in the last portion of the report which is to the following effect:-

"The first bail application had been rejected on 18.10.2002, while the second bail application was filed after merely 11 days i.e. on 29.10.2002 and was granted on the 9th day i.e. 7.11.2002. There was no change of circumstances in such a short period. As there was no new material to justify the grant of second bail and the second bail application was filed after 11 days of the rejection of the first bail application and was granted about three weeks after rejection of the first bail application it appears that the second bail application was granted on extraneous consideration. Oral evidence has been given to the effect that there was transaction of illegal gratification. Ghanshyam Mishra one of the departmental witnesses deposed that the transaction was done through one Jai Karan. What has been said is that Jai Karan Shukla is said to have stated that he had settled with the Presiding Officer for Rs.2 and half lacs. However, there is no

direct evidence on the point. The evidence in this regard apart from being hearsay is insufficient. The allegation that money was paid to the Presiding Officer is therefore not proved but the allegation that the bail was granted on extraneous consideration stands proved in view of the circumstances discussed above. The charge is therefore proved that the charged officer granted bail on extraneous consideration and therefore failed to maintain absolute integrity and devotion to duty and committed misconduct under Rule 3 of the Government Servant Conduct Rules, 1956."

12. The inquiry report along with the comments of the Officer were considered by the Administrative Committee in its meeting dated 29th November, 2005 by which resolution the report was accepted and the matter was referred to the Full Court for consideration on quantum of punishment. The Full Court vide its resolution dated 17th December, 2005 resolved to accept the enquiry report. Following resolution was taken by the Full Court:-

"Considered the enquiry report dated 11.08.2005 submitted by Hon'ble Mr. Justice Janardan Sahai, Enquiry Judge and comments dated 06.10.2005 of the officer concerned thereon in view of A.C. resolution dated 29.11.2005.

Resolved that the enquiry report be accepted.

It is further resolved that the officer be punished by reversion to the next lower rank from his present substantive rank.

Immediate effect be given."

13. Before we proceed to consider the rival submissions of learned counsel for the parties, as noted above, it is useful to look into the parameters and principles on which a charge can be proved against a judicial officer while passing an order in exercise of his judicial power.

14. The argument that there can be no disciplinary inquiry with regard to an order passed by an officer exercising quasi judicial/judicial function has been repelled long back in the case of ***S. Govind Menon vs. Union of India*** reported in A.I.R. 1967 SC 1274. In the said case the Charged Officer was working as Commissioner under Madras Hindu Religious and Charitable Endowments Act, 1951 and had passed order which was quasi judicial in character. The disciplinary proceedings were challenged on the ground that the action of the officer was quasi judicial in nature and was not subject to administrative control of the Government. The said argument was repelled and following was laid down by the Apex Court in the said judgment:-

" ..... We are unable to accept the proposition contended for by the appellant as correct. Rule 4(1) does not impose any limitation or qualification as to the nature of the act or omission in respect of which disciplinary proceedings can be instituted. Rule 4(1)(b) merely says that the appropriate Government competent to institute disciplinary proceedings against a member of the Service would be the Government under whom such member was serving at the time of the commission of such act or omission. It does not say that the act or omission must have been committed in the discharge of his duty or in the course of his employment as a Government servant. It is therefore open to the

Government to take disciplinary proceedings against the appellant in respect of his acts or omissions which cast a reflection upon his reputation for integrity or good faith or devotion to duty as a member of the Service. It is not disputed that the appellant was, at the time of' the alleged misconduct, employed as the First Member of the Board of Revenue and he was at the same time performing the duties of Commissioner under the Act in addition to his duties as the First Member of the Board of Revenue. In our opinion, it is not necessary that a member of the Service should have committed the alleged act or omission in the course of discharge of his duties as a servant of the Government in order that it may form the subject-matter of disciplinary proceedings. In other words, if the act or omission is such as to reflect on the reputation of the officer for his integrity or good faith or devotion to duty, there is no reason why disciplinary proceedings should not be taken against him for that act or omission even though the act or omission relates to an activity in regard to which there is no actual master and servant relationship. To put it differently, the test is not whether the act or omission was committed by the appellant in the course of the discharge of his duties as servant of the Government; The -test is whether the act or omission has some reasonable connection with the nature and condition of his service or whether the act or omission has cast any reflection upon the reputation of the member of the Service for .integrity or devotion to duty as a public servant. We are of the opinion that even if the appellant was not subject to the administrative control of the Government when he was functioning as Commissioner under the Act and was not the servant of the Government subject to its orders at the relevant time, his act or omission as Commissioner could form the subject-matter of disciplinary proceedings provided the act or omission would reflect upon his reputation for integrity or devotion to duty as a member of the Service....."

15. In the case of ***Union of India and others vs. A.N. Saxena*** reported in (1992) SCC 124, the question arose as to whether disciplinary action can be taken in regard to action taken or purported to be done in the course of judicial or quasi-judicial proceeding. Following was laid down in paragraph 8 of the said judgment:-

*"**8.** In our view, an argument that no disciplinary action can be taken in regard to action taken or purported to be done in the course of judicial or quasi-judicial proceedings is not correct. It is true that when an officer is performing judicial or quasi-judicial functions disciplinary proceedings regarding any of his actions in the course of such proceedings should be taken only after great caution and a close scrutiny of his actions and only if the circumstances so warrant. The initiation of such proceedings, it is true, is likely to shake the confidence of the public in the officer concerned and also if lightly taken likely to undermine his independence. Hence the need for extreme care and caution before initiation of disciplinary proceedings against an officer performing judicial or quasi-judicial functions in respect of his actions in the discharge or purported to discharge his functions. But it is not as if such action cannot be taken at all. Where the actions of such an officer indicate culpability, namely, a desire to oblige himself or unduly favour one of the parties or an improper motive there is no reason why disciplinary action should not be taken."*

16. Again in the case of ***Union of India and others vs. K.K. Dhawan*** reported in (1993)2 SCC 56, a three Judge Bench of the Apex Court examined the issue in context of an Income Tax Officer who was exercising quasi judicial function. Referring to the judgment of the Apex Court in ***S. Govind Menon's*** case (supra), following tests to determine as to when a disciplinary inquiry can be initiated against an officer exercising quasi judicial power, were laid down. Paragraph 19 of the said judgment is quoted below:-

*"**19.** The above case, therefore, is an authority for the proposition that disciplinary proceedings could be initiated against the government servant even with regard to exercise of quasi-judicial powers provided :*

(i) The act or omission is such as to reflect on the reputation of the government servant for his integrity or good faith or devotion to duty, or

(ii)there is prima facie material manifesting recklessness or misconduct in the discharge of the official duty, or

(iii)the officer had failed to act honestly or in good faith or had omitted to observe the prescribed conditions which are essential for the exercise of statutory power."

17. Paragraphs 26, 28 and 29 of the judgment in ***Union of India and others vs. K.K. Dhawan's*** case (supra) which are relevant for the present case, laid down as under:-

*"**26.** In the case on hand, article of charge clearly mentions that the nine assessments covered by the article of charge were completed*

(i) in an irregular manner,

(ii) in undue haste, and

(iii) apparently with a view to confer undue favour upon the assessees concerned.

(Emphasis supplied)

Therefore, the allegation of conferring undue favour is very much there unlike Civil Appeal No. 560/91. If that be so, certainly disciplinary action is warranted. This Court had occasion to examine the position. In Union of India & Ors. v. A.N. Saxena, [1992] 3 SCC 124 to which one of us (Mohan, J.) was a party, it was held as under:

"It was urged before us by learned counsel for the respondent that as the respondents was performing judicial or quasi-judicial functions in making the assessment orders in question even if his actions were wrong they could be corrected in an appeal or in revision and no disciplinary proceedings could be taken regarding such actions.

In our view, an argument that no disciplinary action can be taken in regard to actions taken or purported to be done in the course of judicial or quasi-judicial proceedings is not correct. It is true that when an officer is performing judicial or quasi-judicial functions disciplinary proceedings regarding any of his actions in the course of such proceedings should be taken only after great caution and a close scrutiny of his actions and only if the circumstances so warrant. The initiation of such proceedings, it is true, is likely to shake the confidence of the public in the

officer concerned and also if lightly taken likely to undermine his independence. Hence, the need for extreme care and caution before initiation of disciplinary proceedings against an officer performing judicial or quasi-judicial functions in respect of his actions in the discharge or purported to discharge his functions. But it is not as if such action cannot be taken at all. Where the actions of such an officer indicate culpability, namely a desire to oblige himself or unduly favour one of the parties or an improper motive there is no reason why disciplinary action should not be taken."

.....

28. *Certainly, therefore, the officer who exercises judicial or quasi-judicial powers acts negligently or recklessly or in order to confer undue favour on a person is not acting as a Judge. Accordingly, the contention of the respondent has to be rejected. It is important to bear in mind that in the present case, we are not concerned with the correctness or legality of the decision of the respondent but the conduct of the respondent in discharge of his duties as an officer. The legality of the orders with reference to the nine assessments may be questioned in appeal or revision under the Act. But we have no doubt in our mind that the Government is not precluded from taking the disciplinary action for violation of the Conduct Rules. Thus, we conclude that the disciplinary action can be taken in the following cases*

(i) Where the officer had acted in a manner as would reflect on his reputation or integrity or good faith or devotion to duty; (ii)if there is prima facie material to show recklessness or misconduct in the discharge of his duty;

(iii)if he has acted in a manner which is unbecoming of a government servant;

(iv)if he had acted negligently or that he omitted the prescribed conditions which are essential for the exercise of the statutory powers;

(v) if he had acted in order to unduly favour a party-,

(vi) if he had been actuated by corrupt motive however, small the bribe may be because Lord Coke said long ago "though the bribe may be small, yet the fault is great."

29. *The instances above catalogued are not exhaustive. However, we may add that for a mere technical violation or merely because the order is wrong and the action not falling under the above enumerated instances, disciplinary action is not warranted. Here, we may utter a word of caution. Each case will depend upon the facts and no absolute rule can be postulated."*

18. In context of the judicial officers of the State of U.P. two cases need special reference. In the case of ***P.C. Joshi vs. State of U.P. and others*** reported in (2001)6 S.C.C. 491 the disciplinary proceedings was drawn against a judicial officer regarding orders passed by the officer deciding bail applications. Following was laid down in paragraph 7 of the judgment:

*"**7.** In the present case, though elaborate enquiry has been conducted by the Enquiry Officer, there is hardly any material worth the name forthcoming except to scrutinize each one of the orders made by the appellant on the judicial side to arrive at a different conclusion. That there*

was possibility on a given set of facts to arrive at a different conclusion is no ground to indict a judicial officer for taking one view and that too for alleged misconduct for that reason alone. The Enquiry Officer has not found any other material, which would reflect on his reputation or integrity or good faith or devotion to duty or that he has been actuated by any corrupt motive. At best he may say that the view taken by the appellant is not proper or correct and not attribute any motive to him which is for extraneous consideration that he had acted in that manner. If in every case where an order of a subordinate court is found to be faulty a disciplinary action were to be initiated, the confidence of the subordinate judiciary will be shaken and the officers will be in constant fear of writing a judgment so as not to face a disciplinary enquiry and thus judicial officers cannot act independently or fearlessly. Indeed the words of caution are given in K.K. Dhawans case [supra] and A.N. Saxenas case [supra] that merely because the order is wrong or the action taken could have been different does not warrant initiation of disciplinary proceedings against the judicial officer. In spite of such caution, it is unfortunate that the High Court has chosen to initiate disciplinary proceedings against the appellant in this case."

19. In the case of ***Ramesh Chander Singh vs. High Court of Allahabad and another*** reported in (2007)4 SCC 247 a three Judge Bench of the Apex Court had occasion to consider a case of judicial officer of the State of U.P. In the said case the judicial officer was proceeded with departmentally on allegations made against him in orders passed granting bail. The allegation against the officer was that he was paid a sum of Rs.80,000/- for grant of bail and the bail order was passed by the officer on extraneous consideration with oblique motives on insufficient grounds. It is useful to quote the allegations which were noted in paragraph 4, they are as under:-

*"**4**. In the transfer application filed by the brother of the complainant, there was an allegation that a sum of Rs. 80,000/- was paid and that it was settled through a library clerk with the involvement of two other clerks. In the transfer application, he also alleged that the brother and father of accused Ram Pal were found going in and coming out of the residence of the appellant. Despite all these allegations, no charge was framed against the appellant that he had received illegal gratification for granting bail. The charge sheet contained the only allegation that the bail order was passed by the appellant for extraneous consideration with oblique motives on insufficient grounds and that the appellant was guilty of misconduct and failed to maintain absolute integrity and devotion to duty within the meaning of Rule 3 of U.P. Government Servants Conduct Rules, 1956. The charge sheet as well as the statement of facts are clubbed together and the gist of allegations is contained in paragraphs 6 and 7 of the charge sheet."*

20. The Apex Court in the said case after considering the materials and evidence on record held that mere fact that judgment and orders passed by the judicial officer are wrong is not a ground for initiating disciplinary inquiry. Following was laid down in paragraphs 11, 12 and 17 which are as under:-

*"**11.** We fail to understand as to how the High Court arrived at a decision to initiate disciplinary proceedings solely based on the complaint, the contents of which were not believed to be true by the*

High Court. If the High Court were to initiate disciplinary proceedings based on a judicial order, there should have been strong grounds to suspect officer's bona fides and the order itself should have been actuated by malice, bias or illegality. The appellant-officer was well within his right to grant bail to the accused in discharge of his judicial functions. Unlike provisions for granting bail in TADA Act or NDPS Act, there was no statutory bar in granting bail to the accused in this case. A Sessions Judge was competent to grant bail and if any disciplinary proceedings are initiated against the officer for passing such an order, it would adversely affect the morale of subordinate judiciary and no officer would be able to exercise this power freely and independently.

12. *This Court on several occasions has disapproved the practice of initiation of disciplinary proceedings against officers of the subordinate judiciary merely because the judgments/orders passed by them are wrong. The appellate and revisional courts have been established and given powers to set aside such orders. The higher courts after hearing the appeal may modify or set aside erroneous judgments of the lower courts. While taking disciplinary action based on judicial orders, High Court must take extra care and caution.*

.....

17*. In Zunjarrao Bhikaji Nagarkar v. Union of India, AIR 1999 SC 2881, this Court held that wrong exercise of jurisdiction by a quasi judicial authority or mistake of law or wrong interpretation of law cannot be the basis for initiating disciplinary proceeding. Of course, if the Judicial Officer conducted in a manner as would reflect on his reputation or integrity or good faith or there is a prima facie material to show recklessness or misconduct in discharge of his duties or he had acted in a manner to unduly favour a party or had passed an order actuated by corrupt motive, the High Court by virtue of its power under Art. 235 of the Constitution may exercise its supervisory jurisdiction. Nevertheless, under such circumstances it should be kept in mind that the Judges at all levels have to administer justice without fear or favour. Fearlessness and maintenance of judicial independence are very essential for an efficacious judicial system. Making adverse comments against subordinate judicial officers and subjecting them to severe disciplinary proceedings would ultimately harm the judicial system at the grassroot level."*

21. The Apex Court in the case of ***High Court of Judicature at Bombay vs. Shirish Kumar Rangrao Patil and another*** reported in A.I.R. 1997 S.C. 2631, had considered the imputation against the judicial officer of demanding illegal gratification. The Apex Court laid down that lymph-nodes (cancerous cells) of corruption constantly keep creeping into the vital veins of judiciary and the need to stem is out by judicial surgery lies on judiciary itself by its self imposed or corrective measures or disciplinary action. It is useful to quote following observations made by the Apex Court in paragraph 16 of the judgment which is as under:-

*"**16.** ..... The Tymph-nodes (cancerous cells) of corruption constantly keep creeping into the vital veins of judiciary and the need to stem it out by judicial surgery lies on judiciary itself by its self-imposed or corrective measures or disciplinary action under the doctrine of control enshrined in Articles 235,124(6) of the constitution. It would, therefore, be necessary that there*

should be constant vigil by the High Court concerned on its subordinate judiciary and self-introspection. What is most necessary is to stem out the proclivity of the corrupt conduct rather than to catch when the corrupt demands made and acceptance of illegal gratification. Corruption in judiciary cannot be committed without some members of the Bar become privy to the corrupt. The vigilant watch by the High court, and many a time by the members of the Bar, is the sustaining stream to catch the corrupt and to deal with the situation appropriately. At the same time the High Court is the protector of the subordinate judiciary. Often some members of the bar, in particular, in Muffasil courts, attempt to take undue advantage of their long standing at the bar and attempt to abuse their standing by bringing or attempting to bring about diverse form of pressures and pin-pricks on junior judicial officers or stubborn and stern and unbendable officers. If they remain unsuccessful, to achieve their nefarious purpose, some members of the Bar indulge in mudslinging without any base, by sending repeated anonymous letters against the judicial officer questioning their performance/ capacity/integrity. The High Court should, therefore, take care of the judicial officers and protect them from such unseeming attempts or pressures so as to maintain their morale and independence or the judicial officer and support the honest and upright officers."

22. In the case of ***High Court of Judicature at Bombay vs. Uday Singh*** reported in A.I.R. 1997 SC 2286, which was again a case of disciplinary inquiry against a judicial officer, following was laid down in paragraph 13 of the judgment which is as under:-

*"**13.** Under these circumstance, the question arises: whether the view taken by the High Court could be supported by the evidence on record or whether it is based on no evidence at all ? From the narration of the above facts, it would be difficult to reach a conclusion that the finding reached by the High Court is based on no evidence at all. The necessary conclusion is that the misconduct alleged against the respondent stands proved. The question then is: what would be the nature of punishment to be imposed in the circumstances? Since the respondent is a judicial officer and the maintenance of discipline in the judicial service is a paramount matter and since the acceptability of the judgment depends upon the credibility of the conduct, honesty, integrity and character of the office and since the confidence of the litigant public gets affected or shaken by the lack of integrity and character of the judicial officer, we think that the imposition of penalty of dismissal from service is well justified. It does not warrant interference."*

23. Having noticed the law laid down by the Apex Court in the aforesaid cases, it is thus clear that the disciplinary inquiry regarding conduct of a judicial officer while passing order in exercise of his judicial function can very well be inquired and gone into and can be made subject matter of disciplinary inquiry. However, the misconduct in passing an order by a judicial officer in exercise of his judicial function can be inquired only when the officer has acted in the manner as would reflect on his reputation or integrity or good faith or devotion to duty or there is material to show recklessness or misconduct in the discharge of his duty or he acted in a manner which is unbecoming of a government servant or acted negligently or omitted the prescribed conditions which are essential for exercise

of statutory power or an order has been passed to unduly favour one of the parties or actions of the officer are actuated by corrupt motive. An officer while exercising his judicial functions passes large number of orders. The orders may be assailed both on the ground of error of law and error of facts but the mere fact that orders are erroneous is no ground to draw a disciplinary proceeding. When the orders have stemmed out of any corrupt motive or when intend to favour one of the parties or a consideration which is not germane with the case, it can be said that officer has misconducted himself and such conduct can be gone into and enquired.

24. The charges against the petitioner, as noticed above, were in three parts i.e. (i) rejecting the first bail application substantially on the same ground, (ii) without affording sufficient opportunity of hearing to the complainant or prosecution and (iii) extraneous consideration. As far as second charge is concerned, no finding has been given by the learned Enquiry Judge that bail application was allowed without affording opportunity to the complainant or prosecution. The allegation that officer has passed the order after taking illegal gratification was specifically examined and rejected by the learned Enquiry Judge. The allegation that substantially on the same ground earlier bail application was rejected, has been found favour with the learned Enquiry Judge. Although the Charged Officer in his reply to the charge-sheet and written submission submitted before the learned Enquiry Judge, has explained in detail the new materials which were available to the officer while deciding the second bail application but for the purposes of this case, we need not enter into the issue as to whether the second bail application was rightly allowed by the Charged Officer or not. Even if it is assumed that there was no sufficient ground to allow second bail application, whether that itself can be held to be misconduct, is to be examined in the present case.

25. As noted above, the law is very clear that mere fact that a wrong order has been passed in exercise of judicial function itself is not a misconduct unless it is proved that the said order was passed due to any corrupt motive to give benefit to either of the parties, recklessly passed by the officer or not in consonance with the conditions attached for exercise of that power.

26. The findings of the learned Enquiry Judge, which is basis for proving the charge, are that Charged Officer granted bail on extraneous consideration. As noted above, the allegation of taking illegal gratification was disbelieved by the learned Enquiry Judge himself holding that the evidence in that regard was hearsay and insufficient. What was the extraneous consideration, which was held to be proved, has to be looked into. The word "extraneous" has been defined in Webster Comprehensive Dictionary (Encyclopedic Edition) as follows:-

*"**extraneous**. Not intrinsic or essential to matter under consideration;"*

27. The meaning of the word "extraneous" is also "extrinsic" and the word "extrinsic" has been defined in Black's Law Dictionary (Ninth Edition) as follows:-

*"**extrinsic,** Form outside sources; of or relating to outside matters. - Also termed extraneous."*

28. The word "extraneous" thus means something which is outside of the

subject matter and not intrinsic. Thus if a judicial officer bases an order on a consideration which is beyond the scope of the case in hand, he is said to be committed a misconduct, but what is the extraneous consideration has to be spelled in the inquiry. When an inquiry is held against an officer on the charge that order has been passed on extraneous consideration, the extraneous consideration has to be inquired and found out before the judicial officer is punished for passing a judicial order. The allegations against the Charged Officer which was levelled in the complaint and with regard to which certain oral evidence was also led in the inquiry, was that one Ghanshyam Mishra, Advocate while sitting on the Basta of Sri Shanker Lal Gupta, Advocate heard a Mukhtar of Akhilesh Kumar Singh that matter has been settled with the officer and second bail application shall be allowed. All allegations pertaining to taking of money have been examined and repelled by the learned Enquiry Judge. The passing of the order after taking bribe is clearly a misconduct for which an officer can be punished, but what is the extraneous consideration on the basis of which the learned Enquiry Judge found the charge proved, has not been spelled in the inquiry report. The grant of second bail substantially on the ground on which the first bail application was rejected, cannot itself be an extraneous consideration unless such extraneous consideration is spelled. The extraneous consideration is a consideration which is not germane from the case and which is alien to the proceeding or the materials on the record.

29. The judgment of the Apex Court in ***Ramesh Chander Singh's*** case (supra) applies with full force in the present case. In the said case also the learned Enquiry Judge had proved the charge, as noticed by the Apex Court, in following words:-

"However, the learned Judge inquiring the matter eventually came to the conclusion that the bail had been granted by the appellant in utter disregard of judicial norms and on insufficient grounds and based on extraneous consideration with oblique motive and the charges had been proved."

30. The Apex Court in the very next sentence in paragraph 5 sounded a note of caution, **"It is important to note that the Judge who conducted the enquiry has not stated in his report as to what was the oblique motive or the extraneous consideration involved in the matter".**

31. In the present case also, it is clear from the report of the learned Enquiry Judge that neither any oblique motive nor any extraneous consideration has been referred to in the inquiry report which may be said to be motivating factor for grant of bail to the accused. Thus accepting the findings of the learned Enquiry Judge in toto, we are of the view that charge of misconduct has not been proved against the judicial officer since no extraneous consideration has been referred to or found proved in passing the order by the judicial order.

32. Learned counsel for the respondents has heavily relied on two Division Bench judgments of this Court. The first judgment is in the case of ***Umesh Chandra Shukla vs. State of U.P. and others*** reported in 2006(5) AWC 4519. In the said case the officer had granted bail to an accused named Atul Mehrotra on 29th June, 1993 and subsequently on an application moved by the accused he was

discharged on 6th August, 1993. The Division Bench in the said case has found that accused has been given undue and unwarranted advantage which is mentioned in paragraph 30 of the judgment. Paragraph 30 of the judgment is quoted below:-

*"**30**. Even in a criminal trial, where standard of proof is much higher, and the case is required to be proved beyond reasonable doubt, such omission in the charges etc. is not fatal unless the accused establishes that his cause got prejudiced. In State of Andhara Pradesh Vs. Thakkidiram Reddy, (1998) 6 SCC 554, the Apex Court while dealing with a similar issue relied upon its earlier judgment in Willie (William) Slaney Vs. State of Madhya Pradesh, AIR 1956 SC 116, wherein it has been observed that in judging a question of prejudice, as of guilt, Courts must act with a broad vision and look to the substance and not to technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given full and fair chance to defend himself, and rejected the contention that for omissions and errors in the charge, the trial stood vitiated."*

33. The Division Bench in the aforesaid case also dealt with the power of judicial review. Following was laid down in paragraphs 34 and 35 of the judgment:-

*"**34**. n judicial review, the Court "has no power to trench on the jurisdiction to appreciate the evidence and to arrive at its own conclusion. Judicial review is not an appeal from a decision but a review of the manner in which the decision is made. It is meant to ensure that the delinquent receives fair treatment and not to ensure that the conclusion, which the authority reaches, is necessarily correct in the view of the Court or the Tribunal. When the conclusion reaches by the authority is based on evidence, the Court or the Tribunal is devoid of power to re-appreciate the evidence and would come to its own conclusion on the proved charges. The only consideration the Court/Tribunal has, in its judicial review, is to consider whether the conclusion is based on the evidence on record that support the finding, or whether the conclusion is based on no evidence."*

***35.** We have examined the matter microscopically and Shri Rajvanshi could not establish that the findings recorded by the Hon'ble Inquiry Judge were perverse and could not have been accepted by the Court. It is not the grievance of the petitioner that the inquiry has not been conducted in accordance with the statutory rules or there has been any violation of principles of natural justice or the punishment imposed is disproportionate to the misconduct. Petitioner had not only proceeded in undue haste but extended undue and unwarranted advantage to the main accused Atul Mehrotra, who was enlarged on bail without considering the gravity of the charge. Even if the petitioner had competence to entertain the bail application, there was no occasion for the petitioner to grant bail to the main accused on the ground of parity, if the co-accused carrier of the main accused had earlier been enlarged on bail, for the reason that in such a fact-situation, there could be no parity. Undoubtedly, the learned Inquiry Judge had proceeded with the presumption that the petitioner*

was competent to entertain the bail application but also recorded the finding that though there was no direct evidence of passing the bail order on extraneous consideration, even otherwise the charge against the petitioner stood established. In such cases, there cannot be direct evidence for granting the relief on extraneous consideration by the Presiding Officer. However, presumption can be drawn from the attending circumstances."

34. There cannot be any dispute with the proposition as laid down by the Division Bench in the aforesaid case. The judicial review is not an appeal from a decision but it is review of the manner in which decision is made. We in the present case, have not reappreciated the evidence or have come to a different conclusion, rather our view is that accepting the entire finding of the learned Enquiry Judge, the charge of misconduct was not proved since no extraneous consideration was referred to or found proved.

35. In another Division Bench, as relied by learned counsel for the respondents, in the case of ***Ram Chandra Shukla vs. State of U.P. and others*** reported in 2002(46) ALR 138, the bail application was rejected by the Incharge Sessions Judge on 6th April, 1994. The bail application was filed in the High Court which too was rejected on 28th November, 1994. After rejection of the bail application by the High Court, the charged officer entertained the second bail application and granted bail on 6th February, 1995. The finding was recorded in the said case that the officer has adjourned the hearing on several occasions and in the meantime struck the bargain with the accused. It is useful to quote following observations made in paragraph 5 of the judgment:-

*"**5.** ..... The bail application had already been rejected by the Incharge Sessions Judge on 6.4.1994 and also by the High Court on 28.11.1994 but the petitioner granted bail to the accused on 6.2.1995. By this time, the sessions trial had commenced and two eye-witnesses had also been examined, who had supported the prosecution version of the incident. The Enquiry Judge also took notice of the fact that the bail application was moved on 14.9.1994 and it was adjourned on as many as eight occasions and ultimately the bail was granted on 6.2.1995. The plea of the petitioner that a substantial new ground had arisen and long period had elapsed since rejection of the first bail application was not accepted. It was also held that from the facts and circumstances of the case, an irresistible inference had to be drawn that the petitioner adjourned the hearing of bail application on several occasions and in the meantime struck the bargain with the accused. On these findings, the Enquiry Judge held that the petitioner committed gross misconduct in violation of Rule 3 of U.P. Government Servants Conduct Rules, 1996."*

36. Both the above judgments of the Division Bench were thus based on different findings recorded by the Enquiry Judge and are distinguishable. In the judgment of the Apex Court in the case of ***High Court of Judicature at Bombay vs. Shirish Kumar Rangrao Patil*** (supra) the charge that the officer demanded illegal gratification was found proved due to which reason the dismissal of the officer was upheld. Similarly in another judgment of the Apex Court, as relied by

the learned counsel for the respondents, in the case of ***High Court of Judicature at Bombay vs. Uday Singh and others*** (supra) the charge against the officer that the officer demanded a sum of Rs.10,000/- from the defendant in a suit for eviction was found proved.

37. From the above discussions, we are of the view that although the learned Enquiry Judge held that bail was granted on account of extraneous consideration but no extraneous consideration having either been referred to or proved, the charge of misconduct against the officer cannot be said to be proved. Further the opinion of the learned Enquiry Judge that substantially on the same ground first bail application was rejected is also not a proof of misconduct by Charged Officer while allowing the bail application unless the granting of bail is referred to or found out on any extraneous consideration which having not been proved in the present case, the charge of misconduct against the Charged Officer cannot be held to be proved.

38. In view of the foregoing discussions, we are of the view that punishment of reversion of the petitioner cannot be sustained.

39. In result, the writ petition is allowed. The order dated 17th January, 2006 is set-aside. The petitioner shall be entitled to all consequential benefits.

40. Parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.10.2012

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE ABHINAVA UPADHYA, J.

Civil Misc. Writ Petition No. 19014 of 2012

Tempo Taxi Sewa Samiti and another ...Petitioner
Versus
State of U.P. And others ...Respondents

Counsel for the Petitioner:
Sri U.N. Sharma
Sri Chandra Bhan Gupta
Sri C.B. Gupta
Sri Gavendra Mishra
Sri Neelam Pandey

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C.S.C.

Constitution of India, Article 226-validity of notification-inviting tender-about charging levy/user charge from Taxi Tempo parked on stand-challenged as ultra vires-according to Section 541(12) corporation can frame by-laws regulating movement of these tempos and autos-falling within category of services-being under obligation to maintain clearness and hygiene-would incur expenditure-inviting tenders can not be faulted.

Held: Para-49, 50 and 54

Section 541 sub-clause(42) clearly stipulates that the Corporation can frame bye laws for regulating the charges for services rendered by it. Regulating the movement of these tempos and autos would, in our view, fall within the category of services rendered

and the beneficiary of such service is the tempos/autos operators.

That apart, if places are identified and specified for halting of these tempos for the purposes of taking up and setting down passengers it would mean more footfalls on that spot and the Corporation being a civic body will also be under obligation to maintain cleanliness and hygiene at such places which would require deployment of man power which in turn would incur expenditure and, therefore, that also will fall under the category of services rendered.

In the present case, user charge has been fixed at Rs. 5/- per day as per vehicle which, we are of the considered view, is neither arbitrary nor vexatious. Consequently, the Municipal Corporation inviting tenders for collection of user charge from such vehicles cannot be faulted on this ground, the same in accordance with law. Thus, the question No.II is answered in the negative, against the petitioner.

Case Law discussed:

AIR 1980 SC 1785; AIR 1989 SC 1988; JT 1992 (2) SC 363; AIR 1993 SC 2313; Writ Petition No. 3119 of 1887 (Sanjay Agarwal and another Vs. Nagar Mahapalika, Allahabd and others) dated 20.04.1999; 2007 (4) AWC 3733; 2003 (6) AWC 5245; 2001 (4) AWC 2696; Manju Singh Vs. State of U.P. And others (supra)

(Delivered by Hon'ble Abhinava Upadhya, J.)

1. Heard Sri U.N.Sharma and Sri Chandra Bhan Gupta, learned counsel appearing for the petitioners and Sri M.C.Tripathi and Sri Vivek Varma, learned counsel appearing for the Nagar Nigam.

2. The Kanpur Municipal Corporation, within its municipal area, for the convenience of the public, has allowed plying of taxi, buses, tempo, auto rickshaws as well as cycle rickshaws.

3. In this writ petition the dispute raised by the Tempo and Auto rickshaws Association is with regard to the bye laws of the Corporation empowering it for realization of user charges from them.

4. It is alleged that the Kanpur Municipal Corporation does not provide any facility to charge user fee as such the bye laws promulgated through notification dated 29.3.2006 and Gazette publication dated 22.7.2006 is against the G.O. dated 18.7.1998 (Annexure-6 to the writ petition) and violative of Section 54 Clause (42) of the U.P. Municipal Corporation Act, 1959 (in short the Act) and is arbitrary and, therefore, the same be quashed.

5. Brief facts, as narrated by the learned counsel for the parties, are that by a resolution of the Municipal Corporation being resolution no.1 dated 28.1.2006 it proposed bye laws for imposition of user charge within the Municipal Corporation Limits. A publication was made for information/ and inviting objection and suggestion from the public in general regarding the framing of said bye laws. Thereafter the bye-laws were framed and notified by notification dated 29th March, 2006 and were made applicable from the date of its publication in the official Gazette which was published on 26.7.2006.

6. In the aforesaid notification in Clause-5 user charge fee has been defined to be a charge for use and utilization of any service and facility of the Corporation within the municipal limits. The rate, at which the same has to be charged, has been indicated in the chart annexed with the bye laws. It is further provided that the user

charge will be levied for use of park land as well as green belt for providing means of removing dustbin and other public convenience facility, such as toilets, urinals and for providing other utilities and for the use of land for such purposes within the Municipal area.

7. In exercise of the aforesaid power and for the aforesaid purpose the Municipal Commissioner issued an advertisement dated 8.4.2012 specifying the routes and spots for halting, setting down and picking up passengers by four thousand tempo and three thousand auto rickshaws charging Rs. 5/- per day from the aforesaid tempo and auto rickshaws for plying from one point to another for the remainder period of financial year 2012-2013.

8. At this juncture it was pointed out that pursuant to the aforesaid bye laws earlier also by advertisement dated 24.3.2012 tenders were invited but the same was withdrawn by the Corporation upon receiving certain complaints and was directed to be re-advertised.

9. Learned counsel for the petitioners further points out that the petitioners have been agitating this issue earlier also pursuant to the tender invited for user charge for the year 2008-2009 in which the petitioners were also granted contract. However, with regard to dispute relating to parking fee the petitioners filed Writ Petition No. 53357 of 2008 and another writ petition being Writ Petition No. 42177 of 2008. Both these writ petitions are said to be still pending. The petitioners are said to have filed another writ petition being Writ Petition No. 15902 of 2012 challenging the earlier advertisement dated 24.3.2012 but once the advertisement itself was withdrawn the said writ petition was dismissed as withdrawn with liberty to file afresh writ petition. Consequently, the present writ petition has been filed challenging the said advertisement. It is further stated that another writ petition being Writ Petition No. 66059 of 2011 was filed challenging the earlier tender granted in favour of other persons relating to the year 2011-2012 which published on 8.4.2012 but has been dismissed as infructuous on account of subsequent advertisement, namely, advertisement dated 24.3.2012 and 8.4.2012.

10. Petitioner no.1 is an association of Tempo Taxi Owners, a registered society and petitioner no.2 is the President of petitioner no.1.

11. In this writ petition the petitioners have challenged the validity of the bye laws notified vide Notification dated 29.3.2006 (Annexure-2 to the writ petition) and have prayed for quashing of the advertisement inviting tenders dated 8.4.2012 published by the Municipal Commissioner, Kanpur (Annexure-18 to the writ petition) on the ground that the bye laws empowering the Corporation to levy/user charge from the members of its association for plying the autos and tempos within the Corporation limit is illegal, arbitrary in view of the fact that no service or facility is provided by the Corporation to impose such a charge.

12. Learned counsel for the petitioners submits that the autos, tempos have already paid road tax to the Regional Transport Authority and have also paid registration fee and since no facility or service is provided by the Municipal Corporation, no extra user charge can be demanded from its members.

13. According to the learned counsel for the petitioners Section 542 Clause (42)

of the Act specifically provides for....."regulating charges for service rendered by any Municipal Authority." According to him, the tempos and the autos plying within the city limits on the streets which are maintained by the PWD and merely pick up and settle down passengers from point to point and only for halting briefly for the said purpose on the street, no user charge in the shape of parking fee can be imposed by the Corporation as no services are rendered by the Corporation to demand any charge where off.

14. Sri Sharma, learned Senior Counsel has placed reliance on a Government Order dated 18.7.1998 (Annexure-6 to the writ petition) to assert that the current bye laws framed by the Corporation is contrary to the said G.O. and, therefore, deserves to be set-aside. He submits that in paragraph-3 of the G.O. it is clearly provided that any bye laws framed by the local body with regard to charging of parking fee will be valid only if two conditions are fulfilled:

(A) The parking area should be clearly specified and no parking fee shall be charged from vehicles other than in the parking area. It is further provided in the G.O. that no parking fee will be charged from the vehicles for briefly halting on the PWD roads.

(B) Where parking fee is charged the local body will provide the facilities of drinking water, waiting sheds and ladies toilets.

15. The said G.O. further authorizes the District Magistrate to decide whether the local body for charging parking fee have complied with the conditions mentioned above and in case of any dispute regarding the same, the District Magistrate of the area would be the competent authority to decide.

16. It is submitted that since the auto and tempo owners are already paying annual licence fee to the Nagar Nigam, they cannot be restricted in plying their vehicles on any route, especially when the RTO itself has not fixed any route for plying the vehicle.

17. The contention of the learned counsel for the petitioners is that for the realization of user charge, the appointment as agents by inviting tenders for the purpose by the impugned advertisement is colourable exercise of power as the bye laws itself do not provide for any route and as such the bye laws as well as the advertisement dated 8.4.2012 deserve to be set aside. It has further been alleged that none of the municipalities or the municipal corporation within the State are charging such user charge but only the Kanpur Municipal Corporation is charging the same without any authority of law.

18. Learned counsel has relied upon various judgments of the Hon'ble Apex Court with regard to vesting of streets and pavements in the municipalities and the right of the user qua the municipalities, namely, A***IR 1980 SC 1785 (State of U.P. Vs. Ata Mohd.), AIR 1989 SC 1988 (Sodan Singh Vs. New Delhi Municipal Committee and another), JT 1992 (2) SC 363 (Ahmedabad Municipal Corporation Vs. Dilbagsingh Balwantsingh and others), AIR 1993 SC 2313 (M/s. Gobind Pershad Jagdish Pershad Vs. New Delhi Municipal Committee)*** and the judgment of this Court passed in ***Writ Petition No. 3119 of 1987 (Sanjay Agarwal and another Vs. Nagar Mahapalika, Allahabad and others)*** dated 20.4.1999.

19. On the strength of the aforesaid judgments it has been emphasized that the streets can not be encroached by any one including the Corporation, inasmuch as, the tempo stands cannot be allowed to be made either on the road or on the pavement/foot path as the same is impermissible in law as such no user charge can be demanded for use of such streets and land.

20. All these judgments have elaborately dealt with vesting of streets and encroachment upon the same and regulation of parking as well as the rights of the traders using pavements of the streets for such trading. Since there can be no dispute with the aforesaid pronouncements of this Court as well as the Apex Court, it is not necessary to quote the relevant portion of the aforesaid decisions. Therefore, upon the aforesaid assertions the pleadings in the writ petition and the aforesaid judgments, the claim of the petitioners is that the Municipal Corporation was not within its right to promulgate the bye laws and charge user charge from the auto and tempo vehicles for plying in the State of U.P. within the limits of Municipal Corporation, Kanpur.

21. Sri M.C.Tripathi, learned counsel appearing for the Corporation, on the other hand, submits that the petitioners' association itself was involved in collection of user charge in the earlier year and was also granted contract for the same which is the subject matter of Writ Petition No. 53357 of 2008 for the year 2008-2009 and Writ Petition No. 42177 of 2008 filed by the petitioners.

22. It is submitted by the learned counsel for the respondents that when the petitioners did not deposit the amount under the contract for realization of user charge, the recovery proceedings were initiated which is subject matter of Writ Petition No. 1415 of 2011. Therefore, now his challenge is to the very imposition of user charge for which he himself was agent appointed by the Nagar Nigam for collection is not justified as on one hand he has drawn benefit from imposition of user charge and now on the other hand having not participated in the tender he is precluded from challenging the same. In order to demonstrate that the petitioners were themselves agents of the Corporation for collection of user charges, Annexure-13 of the writ petition has been relied upon by the learned counsel for the respondents which is a list of various operators and fee collected by the petitioner no.2 from them and deposited with Corporation.

23. Learned counsel for the Corporation further submits that by virtue of Section 272 of the Act the streets within the municipal limits have vested in the Corporation and is under control of the Municipal Commissioner. Under Sections 273, 274 and 277, the Municipal Commissioner has been fully empowered to manage, maintain the streets and can also regulate vehicular traffic thereon.

24. It is submitted that in the already congested Kanpur city there are more than 8000 autos/ tempos and in order to maintain smooth traffic flow the Corporation has to regulate the movement and parking of these autos/tempos. For convenience of the public their routes have been assigned from point to point and at the terminal of each route parking areas has been assigned. In some place facilities for public convenience like shed, Benches Urinals etc. have been provided and in other places they are being installed and it is an on going process. In order to maintain the upkeep and for further providing facility, 'user charge' @ Rs. 5/-

per day is levied as per bye laws of the Corporation promulgated in exercise of power under Section 541 (42) of the Act.

25. It has been alleged by the learned counsel for the respondents that by a recent decision of this Court in the case of **Manju Singh Vs. State of U.P. and others, 2007(4)AWC 3733** vide decision dated 16.7.2007 this Court has given elaborate direction for regulating traffic within the local areas of the municipalities and have directed that the Regional Transport Officer and the Additional Regional Transport Officer shall prepare a scheme for respective districts in the State of Uttar Pradesh to provide parking slots, halting places for buses, taxis and other vehicles in consultation with the local body, like Nagar Nigam, Nagar Palika and other authorities expeditiously preferably within a period of two months and the competent authority shall take appropriate and effective steps to enforce the same.

26. It is submitted that pursuant to the aforesaid direction elaborate plan was drawn and to regulate the tempos and autos etc. 31 places were identified for the said purpose which included existing 21 places which were already in use since 2001. The said identification of places was in consultation with all the relevant authorities which included the District Magistrate and Executive Engineer of Public Works Department and vide letter dated 27.12.2007 no objection certificate was also granted by the Public Works Department and as such the places have been identified for parking and halting of the aforesaid tempos and routes have also been allocated to streamline their movement. Learned counsel has relied upon Annexure-6 to the writ petition which is a letter of the Assistant Regional Transport Authority, Kanpur Nagar being letter dated 4.1.2008 for submitting that the aforesaid proposal was drawn after meeting with the various association in which the petitioner and his association also participated and the same is also accepted by the petitioner himself in paragraph-12 of the rejoinder affidavit. It is submitted by the learned counsel for the respondents that the documents filed by the petitioner as Annexure-7 to the writ petition, which is in response to the information sought by the petitioner under RTI Act vide letter dated 12.9.2008 discloses that various facilities have been provided at various places. However, there are still places where work is in progress for providing required facilities and as such, upon the own showing of the petitioner it cannot be said that the Corporation does not provide any facility to entitle it to charge user charge from the tempos and taxi operators.

27. Learned counsel for the respondents has relied upon a Division Bench decision of this Court in the case of **Tika Ram Yadav and another Vs. State of U.P. and others,** reported in **2003 (6) AWC 5245** in which the Division Bench has quoted certain decisions of the Hon'ble Supreme Court wherein it was observed that there is no need for any element of quid pro quo in a regulatory fee. It is submitted that in order to regulate the traffic of city of Kanpur and also in pursuance of the direction of this Court in the case of **Manju Singh (supra)** fee being charged is in fact for regulating the traffic and movement of 8000 tempos and taxis plying in the city and therefore,the principles of quid pro quo would not apply although the Nagar Nigam do provide certain facilities at the places identified.

28. According to the learned counsel for the respondents, similar view was also taken by another Division Bench of this Court in the case of **Dr. Chankresh Kumar Jain and others Vs. State of U.P. and others,** reported in **2001 (4) AWC 2696.** According to him, there is no illegality in framing of the bye laws which is in consonance of the statutory provisions and have been framed in accordance with the due procedure prescribed and since the Nagar Palika provides for facility and has also to continuously improve the facility inviting tenders for collection of user charge by way of advertisement dated 8.4.2012 is totally justified and does not call for any interference by this Court and the writ petition deserves to be dismissed.

29. From the aforesaid submissions, the question that arises for consideration is that (I) whether the Municipal Corporation was within its capacity to frame its bye laws? (II) whether the action of the respondents-corporation in issuing the advertisement for calling for tender from the agents so appointed for realizing user charge from the tempos, taxis plying within the limits of Kanpur is illegal and arbitrary and the same is contrary to Government Order dated 18.7.1998.

30. The city of Kanpur being larger area is covered by the provisions of U.P. Municipal Corporation Act, 1959. The power to make bye laws is referable to Section 541 (42) which lays down that the corporation may from time to time make bye laws with respect to the matters, apart from others, fixing of fees for any licence, sanction or permission to be granted under the Act. So the statute itself provides for the corporation to have power to make bye laws. Section 541 of the Act is quoted herein below:

*"**541. Bye laws for what purpose to be made.- T**he Corporation may from time to time make bye-laws, not inconsistent with this Act and the rules, with respect to the following matters, namely:*

.....
.....
.....

31. Sub-clause (42) of Section 541 is quoted herein below*:*

"regulating the charges for services rendered by any municipal authority;"

Sections 542 to 545 provide for procedure for making the bye laws. The aforesaid provisions are quoted herein below:

***"542. Municipal Commissioner to lay draft bye-laws before the Corporation for its consideration.--** It shall be the duty of the Municipal Commissioner from time to time to lay before the Corporation for its consideration a draft of any bye-law which he shall think necessary or desirable for the furtherance of any purpose of this Act.*

***543. Hearing by Corporation of objections to proposed bye-laws.-** No bye-law shall be made by the Corporation unless:*

(a) a notice of the intention of the Corporation to take such bye-law into consideration or on after a date to be specified in the notice shall have been given in the official Gazette and in the Bulletin of the corporation, if any, before such date;

(b) a printed copy of such bye-law shall have been kept at the chief Corporation office and make available for public inspection free of charge by any

person desiring to peruse the same at any reasonable time from the date of the notice given under clause(a);

(c)printed copies of such bye -law shall have been delivered to any person requiring the same on payment of such fee for each copy as shall be fixed by the Municipal Commissioner;

(d) all objections and suggestions which may be made in writing by any person with respect thereto before the date of the notice given under clause (a) shall have been considered by the Corporation.

544. Bye-laws to be published.- *The bye-laws made under Section 541 shall be published in the Official Gazette.*

545. Printed copies of bye-laws to be kept on sale.-*(1) The Municipal Commissioner shall cause all bye-laws from time to time in force to be printed, and shall cause printed copies thereof to be delivered to any person requiring, the same, on payment of such fee for each copy, as he may fix.*

(2) Printed copies of the bye-laws for the time being in force shall be kept for public inspection in some part of the municipal office to which the general public has access and in such other places, if any, like places of public resort, markets, slaughter-houses and other works or places affected thereby, as the (Municipal Commissioner) thinks fit, and the said copies shall from time to time be renewed by the (Municipal Commissioner)."

32. From the bye laws annexed as Annexure-2 to the writ petition, it appears that the same has been framed in exercise of the power vested in the corporation under Sections 296, 298, 302 and 541 (42) of the Act for levy of user charge. By Resolution no.1, after the approval of the Municipal Commissioner dated 28.1.2006, draft bye laws were framed and the notice of the intention of the corporation to make such bye laws was made public for its consideration, suggestions and objections were invited after due publication. By a resolution of the corporation being resolution no.2 on 11.3.2006 the said draft bye laws were approved and were sent for publication in the official gazette which was to be enforced from the day of its publication in the official gazette. The said bye laws were finally published in the official gazette on 22.7.2006 and are enforced since then.

33. Considering the provisions of the Act, the procedure prescribed for framing bye laws to our view, appears to have been complied with and we hold that the corporation was well within its rights to frame the aforesaid bye laws. Therefore, the first question is answered in affirmative.

34. Now having held that the Municipal Corporation was competent to frame the aforesaid bye laws, we have to see whether imposition of user charge under the aforesaid bye laws is valid and the advertisement inviting tenders for appointment of agents for collection of the said user charge is justiciable in law or not.

35. Chapter XII of the Municipal Corporation Act is with regard to construction, maintenance and improvement of streets. Section 272 of the Act provides for vesting of the public streets in the Corporation. Section 273 of the Act further empowers the Municipal Commissioner to manage the aforesaid streets and Section 274 of the Act

empowers the Municipal Commissioner to make new public streets. For ready reference provisions of Sections 272,273 and 274 of the Act are quoted herein below:

*"**272. Vesting of public streets in Corporation.**-(1) Subject to any special reservation made by the State Government from time to time all streets within the City being, or which at any time become, public streets, excepts streets which on the appointed day vested in the State Government or the Central Government or after the said day may be constructed and maintained by an authority other than the Corporation, with the soil, sub-soil and the side drains, footways, pavements, stones and other materials thereof, shall vest in the Corporation and be under the control of the Municipal Commissioner.*

(2)The State Government may after consulting the Corporation by notification withdraw any such street with the soil, sub-soil, and the side drains, footways, pavements, stones and other materials thereof from the control of the Corporation.

***273.Power of Municipal Commissioner in respect of public streets.**-(1) the Municipal Commissioner shall from time to time cause all public streets vested in the Corporation to be levelled, metalled or paved, channelled, altered and repaired, as occasion shall require, and may also from time to time widen, extend or otherwise improve any such street or cause the soil thereof to be raised, lowered or altered and may place and keep in repair fences and posts for the safety of pedestrians:*

Provided that no widening, extension or other improvement of a public street, the aggregate cost of which will exceed five thousand rupees or such higher amount as the Corporation may, from time to time fix, shall be undertaken by the Municipal Commissioner unless or until such undertaking has been authorised by the Corporation.

(2) With the sanction of the Corporation given in accordance with the rules and bye-laws in force in that behalf, the Municipal Commissioner may turn, divert, discontinue the public use of, or permanently close the whole or any part of a public street vested in the Corporation and upon such closure may, subject to the previous sanction of the State Government and the Corporation dispose of the site of such street, or of the portion thereof which has been closed, as land vesting in the Corporation.

***274. Power to make new public streets.**- The Municipal Commissioner, when authorised by the Corporation in this behalf, may at any time-*

(a) lay out and make a new public street;

(b)agree with any person for the making of a street for public use through the land of such person, either entirely at the expense of such person or partly at the expense of such person and partly at the expense of the Corporation, and may further agree that such street shall, on completion, become a public street and vest in the Corporation;

(c)construct tunnels, bridges, causeways and other works subsidiary to the layout and making of a new public street;

(d) divert or tun an existing public street vested in the Corporation or a portion thereof."

36. Considering the aforesaid provisions it is clear that the streets within the Municipal Area vests with the Corporation and the Municipal Commissioner has power to manage the said streets.

37. Section 277 refers to the power of the Municipal Commissioner to prohibit use of public streets for certain kinds of traffic which is quoted herein below:

"277. Power to prohibit use of public streets for certain kinds of traffic.- *(1) It shall be lawful for the Municipal Commissioner with the sanction of the Corporation to-*

(a) prohibit vehicular traffic in any particular public street vesting in the Corporation so as to prevent danger, obstruction or inconvenience to the public by fixing up posts of both ends of such street or portion of such street;

(b) prohibit in respect of all public streets, or particular public streets, the transit of any vehicle of such form, construction weight, or size or laden with such heavy or unwieldy objects as may be deemed likely to cause injury to the roadways or any construction thereon, or risk or obstruction to other vehicles or to pedestrians along or over such street or streets, except under such conditions as to time, mode of traction or locomotion, use of appliances for protection of the roadways, number of lights and assistants and other general precautions and the payment of special charges as may be specified by the Municipal Commissioner generally or specially in each case.

(2) Notices of such prohibitions as are imposed under sub-section (1) shall be posted up in conspicuous places at or near both ends of the public streets or portions thereof to which they relate, unless such prohibitions apply generally to all public streets."

38. Sections 292 and 293 of the Act deal with the power of the Municipal Commissioner with respect to prohibition and imposition of projection upon the streets etc. Sections 294, 295 and 296 of the Act provide for power to the Municipal Commissioner in regulating and managing the streets which has vested in the Municipal Corporation. From these provisions it is clear that the Municipal Commissioner also has the power to manage, regulate and control vehicular traffic on the streets.

39. Section 117 of the Motor Vehicles Act, 1988 provides for the power of the State Government or any authority authorized by it for providing parking places and halting stations. Section 117 of the Motor Vehicles Act is quoted herein below:

"117. Parking places and halting stations-. *The State Government or any authority authorised in this behalf by the State Government may, in consultation with the local authority having jurisdiction in the area concerned, determine places at which motor vehicles may stand either indefinitely or for a specified period of time, and may determine the places at which public service vehicles may stop for a longer time than is necessary for the taking up and setting down of passengers."*

40. Rule 195 of the U.P. Motor Vehicles Rules, 1998 empowers the District Magistrate with the authority of the State Government in consultation with the local authority to specify places for parking and halting and for prescribing fee for the said purpose. Provision of Rule 195 of the Motor Vehicles Rules, 1998 is quoted herein below:

"195. Stands and halting places.-(1) District Magistrates are authorised by the State Government to take action under Section 117 of the Act and may, in consultation with the local authority having jurisdiction in the area concerned, by the creation, of traffic signs or notices-

(a) specify places within the territorial area of a municipality or Cantonment Board or within such other limits as he may define where alone public service vehicle or any specified class or classes of public service vehicles and /or goods carriages may stand indefinitely or for such period as may be specified or public service vehicle may stop for a longer time than is necessary for the taking up and setting down of passengers: or

(b) conditionally or unconditionally prohibit the use of any specified place, or any place of a specified nature or class as a stand or halting place:

Provided that no place which is privately owned shall be specified as a stand or halting place without the previous consent in writing of the owner thereof.

(2)When a place has been specified by traffic signs or notices, as being a stand or halting place for the purpose of this rule, then, notwithstanding that the land is in possession of any person the place shall, subject to the provisions of these rules, be deemed to be a public place within the meaning of the Act and the District Magistrate may enter into an agreement with or grant a licence to any person for the provision or maintenance of such place including the provision or maintenance of the buildings or works necessary thereto, subject to the termination of the agreement licence forthwith upon the breach of any condition thereof and may otherwise make rules or give directions for the conduct of such place including rules or directions:-

(a) prescribing the fees to be paid by the owners of public service vehicle using the place and providing for the receipt and disposal of such fees;

(b) specifying the public service vehicles or the class or classes of public service vehicles which shall use the place or which shall not use the place;

(c) appointing a person to be the manager of the place and specifying the powers and duties of the manager;

(d) requiring the owner of the land, or the local authority, as the case may be, to erect such shelters, lavatories, and latrines and to execute such other works as may be specified in the rules or in the direction and other works as may be specified in the rules or in the direction and to maintain the same in a serviceable, clean and sanitary condition;

(e) prohibiting the use of such place by specified persons or by other than specified persons.

(3) Nothing in sub-rule (2) shall require any person owing the land, which has been appointed as a stand or halting

place, to undertake any work or to incur expenditure in connection therewith without his consent and in the event of any such person declining to carry out such work or to incur such expenditure or failing to comply with any rule or direction made or given to him under this rule, the competent authority may prohibit the use of such a place for the purpose of this Rule."

41. The aforesaid provision empowers the District Magistrate in consultation with the local authority to identify and specify places where public vehicle which is primarily used for transportation or carrying passengers from one place to another can be allowed to stand or halt on the footpath. From the aforesaid provision it is also clear that it is the obligation of the corporation to maintain the streets, pavements and footpath and also to restrict and regulate vehicular traffic on the same.

42. This Court vide its judgment in the case of **Manju Singh Vs. State of U.P. and others (supra)** dated 16.7.2007 has given elaborate directions for regulating and identifying places for parking and regulating vehicular traffic within the municipal area in a planned and streamlined manner.

43. The relevant direction contained in the judgment are quoted herein below:

"XIX. XIX. The State shall ensure that in every city, places should be earmarked for the bus and tempo-taxi stand. The drivers of buses and tempo-taxi should not be permitted to stop their vehicles at the place of their choice creating hindrance to traffic movement. The bus and tempo-taxi stand should be made disabled-friendly. No encroachment should be permitted adjacent to the place near tempo-taxi and bus stand for keeping a water trolley or other radies.

XX The State shall immediately remove the hazardous boards, neon signboards and other fixtures keeping in view the Supreme Court's judgment in M.C. Mehta's case (supra).

XXII. The State authorities are further directed to constitute a Committee consisting of members of the local bodies like Nagar Nigam or Nagar Palika, Transport Department, Traffic Department, Developmental Authority and Lok Nirman Vibhag and if necessary, a nominee of the District Magistrate in every district of the State to monitor the removal of roadside encroachment, hazardous boards, new neon light etc. and also find out the places to earmark parking slots, tempo and taxi, bus-stand and create prohibited parking zone, one way driving etc. keeping in view the necessity for smooth vehicular movement.

So far as State capital, Lucknow is concerned, let a Committee, headed by Mr. D.S. Bhatnagar, Former Director General of Police, Municipal Commissioner, Lucknow or his nominee, Secretary, Lucknow Development Authority, Superintendent of Police (Traffic) and Regional Transport Officer, Lucknow (R.T.O.) be constituted. Mr. Farid Ahmad, an advocate of this Court shall be member of the Committee and shall also be an amicus curiae to assist the Court and he shall be entitled for fee and expenses in accordance with rules. The Committee may hold its meeting minimum once in a month either in the premises of Lucknow Nagar Nigam or Lucknow Development Authority after mutual discussion. Lucknow Nagar Nigam or Lucknow Development Authority, as the case may be, shall provide necessary

assistance to convene and regulate the meeting. In the absence of Sri D.S. Bhatnagar, Municipal Commissioner shall preside the meeting of the Committee."

44. It has been alleged that pursuant to the aforesaid direction and in consultation with the District Magistrate, PWD, RTO, Municipal Corporation, Traffic Department as well as Associations of Tempo and Taxi Owners, certain places were identified for halting, setting down and taking up passengers by tempos and taxi drivers.

45. Annexure-6 to the writ petition is one such letter to the District Magistrate, Kanpur Nagar by the Regional Transport Officer dated 4.1.2008 indicates that 31 places for halting and parking have been identified for which the District Magistrate has been authorized under the Motor Vehicles Act, 1988 and Rules 195 of the Motor Vehicles Rules, 1998, therefore, it was well within the domain of the Municipal Corporation in consultation with the concurrence of the District Magistrate and other departments to identify places from where the tempos and taxi would be allowed to halt for the purposes of setting down and taking up passengers and specific places where they can park their vehicle upto a specified time.

46. It is undisputed fact that there are about more than 8000 such auto rickshaws and tempos within the city of Kanpur which are used for the purposes of transportation of public from one place to another upon charging fare from the passengers.

47. The 8000 and increasing numbers of tempos and autos cannot be allowed to operate in an unregulated manner. The Corporation is duty bound to regulate and streamline traffic on the roads. Therefore, for proper movement of these tempos and to provide utmost benefit to the passengers, routes have been specified. Identified numbers of tempos are allowed to ply only on those routes. Places and spots are also specified from where they can pick up and set down passengers. It is for the benefit of the passengers that they would know that from a particular spot they can hire an auto/tempo for a particular destination and they would also know from where they can embark and disembark the said taxi. Such identification of place is also beneficial for the tempo taxi as on a specified place passengers would be waiting to hire the tempo taxi. Such activity, so far as the corporation is concerned, is a regulatory activity and in public interest. But so far as the tempo taxi owners are concerned, it is a commercial activity as the auto and tempo drivers do their business of ferrying passengers on payment from one place to another.

48. In our considered view, the aforesaid activities of streamlining and regulating more than 8000 autos and tempos on the congested road of the city would require traffic regulations and manpower so that these autos and tempos do not operate in a haphazard way and clog the flow of traffic. This would necessarily mean incurring expenditure by the Corporation by providing its own man power or hiring some agency to do it. Such an arrangement would fall within the category of regulation and facility provided to the tempo/taxi operators as well as the passengers and for regulation of such facility imposition of user charge cannot be held to be either arbitrary or illegal.

49. Section 541 sub-clause(42) clearly stipulates that the Corporation can frame bye laws for regulating the charges for

services rendered by it. Regulating the movement of these tempos and autos would, in our view, fall within the category of services rendered and the beneficiary of such service is the tempos/autos operators.

50. That apart, if places are identified and specified for halting of these tempos for the purposes of taking up and setting down passengers it would mean more footfalls on that spot and the Corporation being a civic body will also be under obligation to maintain cleanliness and hygiene at such places which would require deployment of man power which in turn would incur expenditure and, therefore, that also will fall under the category of services rendered.

51. So far as G.O. dated 18.7.1998 prohibiting parking fee for vehicle parked at places other than the specified parking area is concerned, the same cannot be said to have been violated by framing of the aforesaid bye laws as specified area has been earmarked for specified parking for a period of time and parking fee is, accordingly, charged.

52. From the document filed by the petitioner himself being information given to it under the RTI Act (Annexure-7 to the writ petition) also indicates that at certain places facilities are provided and at certain places it is in the process of being provided. We have to also consider that by the advertisement dated 24.3.2012 the tenders that have been invited are only for the purpose of realization of Rs. 5/- per tempo per day as the user charge is not in the nature of parking fee but as discussed above, providing facility of identification of places for setting down and taking up passengers on specific route at specific places and the maintenance will fall within the category of service rendered and the same cannot be said to be in any manner in violation of G.O. dated 18.7.1998 (Annexure-6 to the writ petition).

53. In the aforesaid G.O. dated 18.7.1998 so heavily relied upon by the petitioners, it is provided that the District Magistrate would be the authority competent to see whether at the relevant parking places the aforesaid facilities have been provided or not and in case any dispute arises with regard to the same, he will consider and pass appropriate order. Therefore, if the petitioners have any grievance with regard to the specified parking places and such facilities have not yet been provided and parking fee is being charged, they can always approach the District Magistrate, who would consider their demand and pass appropriate orders in accordance with the G.O. dated 18.7.1998.

54. In the present case, user charge has been fixed at Rs. 5/- per day as per vehicle which, we are of the considered view, is neither arbitrary nor vexatious. Consequently, the Municipal Corporation inviting tenders for collection of user charge from such vehicles cannot be faulted on this ground, the same in accordance with law. Thus, the question No.II is answered in the negative, against the petitioner.

55. However, we cannot shut our eyes to the fact of remarkable increase of population for which the authorities have not been able to cater and meet the growing demand of stricter, regulation of traffic. They are under obligation to maintain safety and security on the streets and provide all possible facility to the commuters.

56. In view of the foregoing discussion, the petitioners are not entitled for the reliefs as claimed in the writ petition.

The writ petition is dismissed subject to observations as made above and liberty as provided for. The parties shall bear their own cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.11.2012

BEFORE
THE HON'BLE AMITAVA LALA, A.C.J.
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Civil Misc. Writ Petition No.20236 of 2012

Naseemuddin Siddiqui and another ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri P.N. Saxena
Sri Shashi Nandan, Sr. Advocate,
Sri Ashutosh Gupta
Sri Syed Mohammad Fazal

Counsel for the Respondents:
Mr. S.P. Gupta, Sr. Advocate, Advocate General,
Mr. Yashwant Varma, Chief Standing Counsel,&
Mr. Ramanand Pandey, Standing Counsel.

U.P. Lokayukta and Up-Lokayuktas Act 1975-Section-14 (3)-direction for further Investigation-whether amount to review by Lokayukta-argument that once investigation concluded with innocence of petitioner-in absence of specific provisions for review-further investigation-without jurisdiction-held-no embargo on procedural review.

Held: Para-11

Having considered the rival contentions of the parties, in totality we find that the intention of the Lokayukta was to send the matter to the competent authority for the purpose of getting recommendation for investigation by an appropriate agency of the State or the Central Government with the concurrence of the Government as per Section 14(3)(i) of the Act, to which there is no bar. It may be accepted by the competent authority or it may be rejected. However, it is true to say that the communication will not be understood by the wrong recital but by the contents of the letter when no investigation has been made by any agency as yet in the matter.

Case Law discussed:
AIR1970 SC 1273; 1986 (4) SCC 326; 1987 (4) SCC 525; 1994 (5) SCC 479; 2002 (9) SCC 509; 2004 (10) SCC 201; 1964 (6) SCR 857; 1976 (4) SCC 709; 1977 (2) SCC 616; 1983 (2) SCC 422; AIR 1997 SC 3892; 1980 (Supp) SCC 420; 1996 (5) SCC 550; 1999 (4) SCC 396; 2005 (13) SCC 777; 2006 (3) SCC 699

(Delivered by Hon'ble Amitava Lala, A.C.J.)

Amitava Lala, ACJ.-- This writ petition has been filed by the petitioners basically to obtain an order of the Court quashing the recommendation dated 15th March, 2012 made by the Lokayukta, Uttar Pradesh to the Chief Minister of the Uttar Pradesh to pass an appropriate order in connection with the investigation through an appropriate agency. Other incidental prayers have also been made in connection thereto.

2. The facts of the case in nutshell are that the petitioner no. 1 is an Ex-Cabinet Minister of the State of Uttar Pradesh, whereas presently both the petitioners i.e. petitioner no. 1 and petitioner no. 2, who is wife of petitioner no. 1, are said to be Members of the Legislative Council of the State. A complaint was filed before the Lokayukta levelling certain allegations against thse petitioners. Pursuant to the

notice issued by the Lokayukta, the petitioners filed their reply to such complaint. On 22nd February, 2012 the Lokayukta made recommendation to the Chief Minister, being competent authority, recommending for investigation by any Central Investigating Agency, like Central Bureau of Investigation or Enforcement Directorate, on the points referred to in such recommendation and to take further action according to the investigation/enquiry report. The Cabinet Secretary, Government of Uttar Pradesh, on behalf of the competent authority, vide its report/letter dated 27th February, 2012 turned down the request of the Lokayukta and informed the decision of the competent authority to close the matter. The Lokayukta again on 15th March, 2012 made the recommendation to the competent authority to review its earlier decision taken on the recommendation dated 22nd February, 2012 with regard to maintainability of the complaint and jurisdiction of the Lokayukta. Such recommendation dated 15th March, 2012 of the Lokayukta is under challenge in this writ petition.

3. Mr. Shashi Nandan, learned Senior Counsel appearing for the petitioners, has contended before us that as per Section 12 of the Uttar Pradesh Lokayukta & Up-Lokayuktas Act, 1975 (hereinafter in short called as the "Act") a report is to be filed by the Lokayukta to the competent authority to examine the same, for his satisfaction, to the extent whether the proceedings will be closed or will be proceeded further and he may also make a special report to the Governor, who, on receipt of such special report, shall cause a copy thereof together with explanatory memorandum to be laid before each House of the State Legislature. Neither the Lokayukta is empowered to recommend for investigation by any agency nor he has any power to send the matter to the competent authority for review of such investigation when in the earlier occasion the competent authority has closed the investigation. After sending the report, the Lokayukta becomes *functus officio*. Review is a creature of the statute. No review can be made beyond the provisions of the Act. In support of his submissions as regards power of review, Mr. Shashi Nandan has relied upon the judgements reported in **AIR 1970 SC 1273 (Patel Narshi Thakershi and others Vs. Pradyumansinghji Arjunsinghji), 1986 (4) SCC 326 (A.K. Roy and another Vs. State of Punjab and others), 1987 (4) SCC 525 [Dr (Smt.) Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) and others] and 1994 (5) SCC 479 (All Kerala Private College Teachers' Association Vs. Nair Service Society and others).**

4. On the other hand, Mr. S.P. Gupta, learned Advocate General, duly assisted by Mr. Yashwant Varma, learned Chief Standing Counsel and Mr. Ramanand Pandey, learned Standing Counsel, has contended before this Court that the petitioner has proceeded on a wrong premise. There is a basic difference in making report before investigation and after investigation. Under Section 12 of the Act, the report is to be placed by the Lokayukta before the competent authority only after investigation and not before investigation. Admittedly, in this case no investigation has been made as yet, therefore, the Lokayukta thought it fit to get permission from the competent authority for investigation. Such power is

available to the Lokayukta under Section 14(3) of the Act, which speaks as follows:

"**14(3).** Without prejudice to the provisions of sub-section (1), the Lokayukta or an Up-Lokayukta may for the purpose of conducting investigation under this Act utilise the services of--

(i) any officer or investigation agency of the State or Central Government with the concurrence of that Government,

(ii) any other person or agency."

5. Therefore, sub-section (3) of Section 14 of the Act is applicable in the case of the petitioners to recommend the matter to the competent authority for the purpose of investigation. According to Mr. Gupta, the Act is not happily drafted, otherwise there is no occasion to incorporate sub-section (3) under Section 14 of the Act and place it after Section 12, which speaks about the stage after the investigation. He further said that wrong recital in the order impugned/recommendation being proceeding under Section 12(3) of the Act does not wash out the contents and spirit of the communication, by which the recommendation has been made. In other words, the Court will proceed on the basis of the contents and not on the basis of the heading or recital alone. In support of his submissions, Mr. Gupta has relied upon the judgement of the Supreme Court reported in **2002 (9) SCC 509 [Vikram Singh Junior High School Vs. District Magistrate (Fin. & Rev.) and others],** wherein it has been held that merely quoting wrong provision of the statute for exercising power would not invalidate the order passed by the authority if it is shown that such order could be passed under other provisions of the statute.

6. We have also gone through the judgement reported in **2004 (10) SCC 201 (State of W.B. Vs. Kesoram Industries Ltd. and others)** and found that it has been held by the Supreme Court as under:

"**57.** ..... A doubtful expression occurring in a judgment, apparently by mistake or inadvertence, ought to be read by assuming that the court had intended to say only that which is correct according to the settled position of law, and the apparent error should be ignored, far from making any capital out of it, giving way to the correct expression which ought to be implied or necessarily read in the contest,.... .

*** *** ***

71. ... A statement caused by an apparent typographical or inadvertent error in a judgment of the Court should not be misunderstood as declaration of such law by the court...."

(emphasis supplied)

7. The Supreme Court had occasion to consider this issue in the judgement reported in **1964 (6) SCR 857 (Hukumchand Mills Ltd. Vs. State of M.P.)**, wherein there was a wrong reference in the order issued by the Government. The Supreme Court observed as follows:

"**3.** ..... It is well settled that merely a wrong reference to the power under which certain actions are taken by Government would not per se vitiate the actions done if they can be justified under some other power under which the

Government could lawfully do these acts. It is quite clear that the Government had the power under Section 5 (l) and (3) of Act 1 of 1948 to amend to Tax Rules, for that was a law in force in one of the merged States. The only mistake that the Government made was that in the opening part of the notification Section 5 of the Act was not referred to and the notification did not specify that the Government was making a regulation under Act 1 of 1948. But that in our opinion would make no difference to the validity of the amendments, if the amendments could be validly made under Section 5 of Act 1 of 1948. It is not disputed that the amendments could be validly made under Section 5 of the Act 1 of 1948. We are therefore of opinion that the mere mistake in the opening part of the notification in reciting the wrong source of power does not affect the validity of the amendments made."

8. Similar view has also been taken in the judgements reported in **1976 (4) SCC 709 [Mayongbam Radhamohan Singh Vs. The Chief Commissioner (Administrator), Manipur and others], 1977 (2) SCC 616 (The Vice-Chancellor, Jammu University, and another Vs. Dushinant Kumar Rampal) and 1983 (2) SCC 422 (Municipal Corporation Of the City of Ahmedabad Vs. Ben Hiraben Manilal).**

9. So far as part of review is concerned, Mr. Gupta has contended that there is no difference between the 'review' and 'reconsideration' as per the judgement reported in **AIR 1997 SC 3892 (Reliance Industries Ltd. Vs. Pravinbhai Jasbhai Patel and others).** It is a case of reconsideration. He further submitted that the word "review" includes "procedural review" and "review on merit". In case of review on merit, the Court will have to proceed if the relevant Act provides for the scope of review. But the case of procedural review is inbuilt and there is no embargo in reviewing any issue related to procedure. Here, the case is strictly covered by the scope of procedural review to the effect whether the Lokayukta can send the matter to the competent authority for reconsideration regarding investigation after the same has been declined by the competent authority in the earlier occasion. In respect of procedural review, he has cited various judgements reported in **1980 (Supp) SCC 420 (Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal and others), 1996 (5) SCC 550 [Indian Bank Vs. Satyam Fibres (India) Pvt. Ltd.], 1999 (4) SCC 396 (Budhia Swain and others Vs. Gopinath Deb and others), 2005 (13) SCC 777 (Kapra Mazdoor Ekta Union Vs. Birla Cotton Spinning and Weaving Mills Ltd. and another) and 2006 (3) SCC 699 [Jet Ply Wood (P) Ltd. and another Vs. Madhukar Nowlakha and others].**

10. In the midst of hearing, it was brought to our notice by the learned Advocate General that there is no signature of the competent authority on the recommendation made to it in the earlier occasion, meaning thereby the Chief Minister, who happens to be the competent authority as per Section 2(c)(i) of the Act, had not examined and considered the report of the Lokayukta, therefore, the Court had no other option but to adjourn the matter and direct the State to produce the record before the Court. Thereafter, the record was produced, from which it appears that all the papers pertaining to the report have been considered by the Cabinet Secretary. There was no separate order of

the Chief Minister, her signature was found only on the note-sheet and ultimately in the last page of note-sheet signature of the then Chief Minister, being competent authority, is there as if she, only as a matter of formality, has put her signature and sent the file which, according to us, is not the intention of the Act. The competent authority has to apply her/his mind before directing or recommending for investigation or closing the proceeding, particularly when the charges are under the Prevention of Corruption Act, 1988 against a Cabinet Minister in discharging duties of office.

11. Having considered the rival contentions of the parties, in totality we find that the intention of the Lokayukta was to send the matter to the competent authority for the purpose of getting recommendation for investigation by an appropriate agency of the State or the Central Government with the concurrence of the Government as per Section 14(3)(i) of the Act, to which there is no bar. It may be accepted by the competent authority or it may be rejected. However, it is true to say that the communication will not be understood by the wrong recital but by the contents of the letter when no investigation has been made by any agency as yet in the matter. Thus, we are of the view that the writ petition is premature in nature and, as such, it is liable to be dismissed. Accordingly, the writ petition is dismissed. Interim order, if any, stands vacated.

12. However, no order is passed as to costs.

13. The original record, which was produced before the Court by Mr. Yashwant Varma, learned Chief Standing Counsel, and which was directed to be kept under the sealed cover, is directed to be returned to Mr. Yashwant Varma.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.10.2012

BEFORE
THE HON'BLE AMITAVA LALA, A.C.J.
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Civil Misc. Writ Petition (P.I.L.) No. 22757 of 2008

Collectorate Bar Association, Etah ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Shashi Nandan, Sr. Advocate,
Sri S.P.S. Rathore.
Sri Dhiraj Srivastava
Sri S.P.S. Chauhan
Sri Satendra Pal Singh

Counsel for the Respondents:
Sri H.M. Srivastava
Sri Neeraj Srivastava
Sri V.M. Srivastava
Sri Zafer Nayyer
C.S.C.

Constitution of India, Article 226-Public Interest Litigation-by notification dated 15.04.2008-new district with name of 'Sri Kashi Ram Nagar' by carving out tehsil Kasganj and patiyali created-but till date no budget and infrastructure provided-relying upon judgment of Apex Court in Ram Milan Shukla case-relief for quashing the notification and to proceed further-claimed-held-not proper to quash notification but direction issued to complete the infrastructure and use budgetary sanction within next financial year 31.03.2014-in case of failure notification itself automatically stand quashed.

Held: Para-15

Against this background, we are of the view that the purpose will be subserved if we grant a reasonable time to the State Government to complete the infrastructure and use the budgetary sanction, that too not in a periodic or phase manner but at a time considering the case as emergent one. For such purpose, we direct the State Government to complete the course of action within the next financial year, which will come to an end by 31st March, 2014. If it is not completed within the aforesaid period, the impugned notification dated 17th April, 2008, being annexure-1 to the writ petition, issued by the State Government for creation of District Kanshi Ram Nagar will automatically stand quashed. We hope and trust that all the works will be started and completed within this period on war footing.

Case Law discussed:

1999 JIR 453 (All) :1999 (1) AWC 723; 2008 (5) SCC 550; (2008) 5 SCC 550; 2002(2) SCC 333; 2000 (1) AWC 750; Writ Petition No. 10159 (M/B) of 2010 (PIL Civil) (Brij Kishore Verma Vs. State of U.P. And others)

(Delivered by Hon'ble Amitava Lala, A.C.J.)

Amitava Lala, ACJ.-- Both the aforesaid writ petitions have been heard together as the fate of the second writ petition i.e. Writ Petition No. 46428 of 2010 depends upon the result of the first writ petition i.e. 22757 of 2008. Therefore, firstly we take the first writ petition for consideration.

2. **So far as first writ petition is concerned,** Collectorate Bar Association, Etah through its President has filed this writ petition in the form of public interest litigation. According to the petitioner, on 15th April, 2008 the then Chief Minister of the State of Uttar Pradesh made a public announcement that henceforth Tehsil Kasganj will be a separate district in the name of Sri Kanshi Ram. Pursuant to the aforesaid public announcement, on 17th April, 2008 notification has been issued by the State Government creating a new district called as Kanshi Ram Nagar by carving out Tehsils Kasganj and Patiyali and Block Soron from District Etah. Challenging such notification dated 17th April, 2008 the petitioner has filed the present writ petition and also sought for a direction restraining the respondents from proceeding any further towards bifurcation of District Etah pursuant to the impugned notification. The ground of challenge is that before issuance of notification by the State Government for creation of new revenue District Kanshi Ram Nagar necessary budget and infrastructure was not provided. In support of his submissions, the petitioner has relied upon the judgements reported in **1999 JIR 453 (All) : 1999 (1) AWC 723 (Ram Milan Shukla and others Vs. State of U.P. and othres) and 2008 (5) SCC 550 (State of Uttar Pradesh and others Vs. Chaudhari Ran Beer Singh and another).**

3. On 15th December, 2009 a Division Bench of this Court passed a detailed order recording the submissions of the parties, as follows:

"In this public interest litigation the Collectorate Bar Association, Etah has prayed for quashing the notification dated 17.4.2008 issued by the State Government for creation of revenue district Kanshi Ram Nagar on the grounds that the necessary budget and infrastructure was not provided before notifying the revenue district creating serious anomalies and difficulties

for the residents of the district. The petitioner has relied upon **Ram Milan Shukla Vs. State of U.P., 1999 (1) AWC 723** and **State of U.P. Vs. Choudhary Ranvir Singh, (208) 5 SCC 550** in support of their submissions.

In the supplementary counter affidavit of Shri Anand Prakash Upadhyaya presently posted as Joint Secretary, Revenue, Government of U.P. it is stated that there is no violation of Art.204 and 205 of the Constitution of India. There was specific provisions in the budget 2008-09 relating to the establishment and other necessary expenses for the district. An amount of Rs.263.30 crores has been earmarked. For the essential expenditure towards newly created district the Board of Revenue, U.P. has sanctioned budget and total amount of Rs.4.07 crores has been earmarked for the year 2008-09. No amount was initially withdrawn from the contingency fund of the State. The other budgetary provisions have been given in para 7 of the counter affidavit.

Shri H.M. Srivastava, Advocate appearing for the Kasganj Bar Association and Democratic Bar Association, Kasganj states that the new building of the district judiciary was inaugurated after Shri Aditya Nath Mittal was appointed as officer on special duty, Kanshi Ram Nagar by the Hon'ble Judge of the High Court and has annexed various photograph of the building and the inauguration ceremony. The officers and staff have been appointed and that district judiciary functioning from new district with the officer on special duty, two Addl. Civil Judges and a Chief Judicial Magistrate, a Judicial Magistrate and Civil Judge (JD).

The petitioner insists that the necessary infrastructure has not been created. The District Magistrate and the Superintendent of Police are still sitting in the office of Nagar Palika. There are no residence provided and that all the senior officers are still residing in Distt. Etah. The District Judge and officers are working in the hurriedly renovated and old court building without any proper accommodation. About 1 1/2 years has passed but there is no infrastructure and arrangement for the office and staff of the officers and employees.

Shri Jafar Naiyer, learned Addl. Advocate General states that he will file an affidavit giving the entire status of the budget, number of officers, offices constructed and the residences and also inform the Court about the steps taken for acquiring the land and construction of building.

List this case on 15.1.2010. We feel constrained to observe that if the State Government has not taken any effective steps for creating infrastructure and establishment of district office and Court rooms, suitable to the status and function of the office of the District Judge and other judicial officers so far, the Court may consider to stay the notification on the next date.

A copy of the order be given to the Chief Standing Counsel."

4. On 05th September, 2012, when the matter was placed before this Bench, following order was passed:

"Rejoinder filed today be kept with the record.

In a surprise situation this public interest litigation has come before us. It is in respect of creation of a district namely Kanshi Ram Nagar, which has now been named as Kasganj, carving out the same from the district Etah. Several affidavits and photographs were filed before this Court from which it appears that insufficiency is there in respect of infrastructure. This has also been observed by a Division Bench of this Court at the time of hearing the matter, vide an order passed on 15.12.2009.

We have gone through the Division Bench judgment of this Court reported in **[1999 JIR 453 (All)] (Ram Milan Shukla & Ors. Versus State of U.P. & Ors.)**, wherein it has been held that creation of a new district is an administrative act under Section 11 of the U. P. Land Revenue Act yet such administrative powers must be exercised on relevant considerations and not arbitrarily. It was further held that before creating a district a serious exercise must be carried out about the available financial resources and an infrastructure must be created otherwise it will be putting the cart before the horse. Till the infrastructure facilities have been arranged and worked out, the decision to create a new district cannot and ought not to be implemented, and the notification under Section 11 of the U. P. Land Revenue Act should not be issued. Further to bring about transparency in administration, the Government must disclose the compelling administrative, political and economic compulsions for taking such a decision.

According to us a recent trend is there to get a political mileage by carving out and creating a new district without any infrastructure as it has been pointed out in this writ petition. Therefore, we want to know by further affidavits on the part of the respondents as to what is the present situation in connection with the financial resources available and infrastructure and also transparency in administration and what was the compelling circumstances to create such district.

We also find that in this State not only this district but several other have also been carved out. The public interest litigation cannot be restricted only in isolation, therefore, there is every possibility that in case of any insufficiency in reply on the part of the Government, it may extend the scope of this public interest litigation to all the districts carved out in the similar manner. Presently, we are of the view that there should be a report of the concerned District Judge before this Court under a sealed cover in respect of the aforesaid issue. However, further orders likely to be passed will be passed on the next date considering all the pros and cons.

In any event, neither of the parties are estopped from filing their affidavits, if any, to apprise us about the present scenario.

The matter will appear once again on 19th September, 2012. A copy of the order will be given to the Registrar General of this Court to send a copy of the same to the concerned District Judge to file such report, as aforesaid."

5. From the supplementary affidavit dated 23rd January, 2010 filed by Sri Anand Prakash Upadhyaya, Joint Secretary, Revenue, Government of U.P., Civil Secretariat, Lucknow, on behalf of the State-respondents, we find that such affidavit has been filed giving the entire status of the budget, number of officers, offices constructed and the residences and

also the steps taken for acquiring the land and construction of building, as was directed in the order dated 15th December, 2009 passed by this Court. In that regard, it has been categorically stated in such affidavit as follows:

"1) **Judiciary:-**

A. That at present in the district total 11 posts have been created for District and Session Judge and 10 posts have been created for Civil Judge (Senior Division). Six posts have been created for Chief Judicial Magistrate and for Judicial Magistrate 6 posts have been created. For the Civil Judge (Junior Division) total 9 posts have been created and for the administrative work in the district Judgeship 51 posts have been created total 93 posts are sanctioned at present for the newly created district the Govt. order dated 18 Sept. 2008 would clearly reflected that total 93 posts have been sanctioned in this regard. A photocopy of the order dated 18 Sept. 2008 is being filed herewith and marked as **Annexure No. SCA-1** to this affidavit.

B. It is relevant to mention here that for the regular establishment of residential houses total 49.71 acre land is earmarked at Tehsil- Kashganj, Pargana Vilram Mauza Mamo. The acquisition proceeding has already commenced, whereas the State Govt. vide Govt. order dated 12.01.2010 had already sanctioned the amount of Rs.42,69,529/- 10% acquisition charges and another 10% acquisition amount of Rs.42,69,529/- total amount of Rs.85,39,058/- had sanctioned. A photocopy of the Govt. Order dated 12.01.2010 is being filed herewith and marked as **Annexure No. SCA-2** to this affidavit.

C. That the counsel of the petitioner had heavily relied that no necessary infrastructure had been created at the district level and the District Judge and Judicial Officers are working in the hurriedly renovated and old Court building without any proper accommodation. In response it is respectfully submitted that before creation of the new district there was already inexistence of Additional and Session Judge, Court and other 4 subordinate Courts. In addition on 10th March 2000 Hon'ble Mr. Justice Vashisht Kumar Chaturvedi (then Administrative Judge) had inaugurated the said building the total area of the Court Campus is approximately 9320 Square meter (2.30 acre) and total covered area is 3047 Square meter and at present in the said campus 10 Courts are working in separate Courts each Court room is approximately 92.16 Square meter. In the same premises there is also Jail for the prisoner those are brought for an appearance the same is approximately 52 Square meter. It is respectfully submitted that there is also room for Senior Prosecuting Officer, Retiring Room, Accounts Office, Central Nazarath Room, Library, Model Bar Association Room, there is also computer room these are all in very good condition there is also residential Houses for the Judicial Officers in the same campus which consist of 6 residences for Type IV, 3 residences for Type-II and 3 residences for Type-I, in which the Judicial Officers are residing. And at present the District and Session Judge are residing in the P.W.D. Guest House. For the security purpose of the campus 24 hours P.A.C. is also stationed, there is also very high wall around the campus.

It is highly important to mention here that on 19 Sept. 2008 Sri Aditya Nath

Mittal was appointed as Officer on Special Duty. Thereafter, after getting the complete infrastructure for smooth running of the District Court, the then District Judge and Session Judge on 24 December 2008 had given permission for running the Court in the said premises. For the smooth functioning of the newly created District Court the Hon'ble High Court vide letter dated 02.02.2009 and 06 October, 2009 had transferred the total 116 employees and all the employees had joined their duty. Therefore, it is respectfully submitted before this Hon'ble Court that the entire facilities as well as infrastructure is fully being provided at the District Judgeship and is no hardship to any judicial officers. The relevant photographs and also would clearly reveal to this Hon'ble Court that all the Court rooms are sufficiently big and is good conditions and judicial work is being conducted smooth manner and also to any litigants. The original copy of the photographs are being filed herewith and marked as **Annexure No. SCA-3** to this affidavit.

3. **Revenue Department:-**

The office of the District Magistrate, at present is running from the office of Nagar Palika Parishad, Kashganj, whereas two storey newly constructed Houses is situated in area of 20,173.23 square foot from the said building the work of the District Magistrate, Additional District Magistrate and other Administrative Officers are continuing from the said building and it is further relevant to mention here that the office of Chief Development Officer, Project Officer, District Development Officer, District Election Officer, District Panchasthani Election Office, District Board Office, Assistant Regional Transport Officer, Stamp Commissioner etc. are also running in very smooth manner from the newly created District.

It is highly important to mention here that the full-fledged establishment of the District Headquarters (Collectorate), total area of 7.854 Hect. is identified of the Energy Department, the meeting was headed by Chief Secretary on 14.12.2009 by which the Energy Department was agreed to transfer the land to the Revenue Department. It is highly important to mention here that on 05.01.2010 the Energy Department had also handed over the actual physical possession to the Revenue Department for establishment of full-fledged District Collectorate and for the establishment of residential and office purpose, the demand has also been submitted for coming budged. It is further submitted that for the establishment of Headquarter Collectorate another land of 20.833 Hect. land is also under process to acquire at Mauza Jakharudrapur from the farmers. The transfer of the possession letter of Energy Department is being filed herewith and marked as **Annexure No. SCA-4** to this affidavit.

It is categorically submitted that at present there is no scarcity of any residences accommodation for officials and at present the State Govt. had already sanctioned 28 posts for the District Headquarter. The photocopies of the Govt. Orders dated 3 July, 2008 and 11.01.2010 are being filed herewith and marked as **Annexure No. SCA 5 & 6** to this affidavit.

4. Home Department:-

A) At present after the creation of the new District the State Govt. vide Govt. order

dated 23.01.2009 had provided the following Prosecution Officer:-

1. Senior Prosecuting Officer	1 Post.
2. Prosecuting Officer	1 Post.
3. Senior Assistant	1 Post.
4. Class-IV	1 Post.

In addition 6 Assistant Prosecuting Officer had also been transferred from District Etah to the newly created Kanshiram Nagar.

B) For the establishment of Police Line at the District level the process has also for acquisition of the land from Fishery Department and at present the Police Line is working through District Govt. Polytechnic.

C) It is relevant to mention here that the Office of the Superintendent of Police is also running from the two storey building from Nagar Palika Parishad which constructed in total area of 324 Square Meter.

D) It is highly important to mention here that total 28 Police Stations were inexistence at District Etah out of which 10 Police Station are now situated in newly created District Kanshi Ram Nagar, therefore, there was no requirement of any creation of new police station. After the creation of the new district one woman Police Station had also been created and at present the Superintendent of Police is also provided residence at Forest Department Guest House.

5. Prisoner (Jail) Department:-

It is highly important to mention here that the 50 Acre land is also identified for the establishment of new prison at newly created District for which the land of the Veterinary Department at Village Puchlana had been identified for the proposal of the said prison, the Hon'ble Minister of the concerned department had already given the consent.

6. Health Department:-

That at present the District Hospital is running from the newly built Community Health Center, Kashganj in which the Chief Development Officer is running his office. It is relevant to mention here that 7 subordinate posts in the office of Chief Medical Officer had also been created. At present the State Govt. has already sanctioned 100 Bed Hospital at the District level for which 5 crore budged has also been earmarked for the purpose. As per the National Village Health Mission 2009-10, the total amount of Rs. 637.57 Lakhs had also been distributed at the District level. And at present for the better infrastructure for the establishment of District Hospital Govt. has also initiated for acquiring the land."

6. From the aforesaid statements made on behalf of the State in the supplementary affidavit, it appears that even after two years of creation of district in 2008, the newly created district is neither financially nor infrastructurally equipped. Only recent sanction of budget has been shown. Therefore, according to us, no case has been made out on the part of the State.

7. We have also gone through the counter affidavit and supplementary counter affidavit filed on behalf of the

State respondents on 20th August, 2008 and 18th April, 2009 respectively. In the counter affidavit it has been stated that no abrupt decision has been taken by the State by issuing the impugned notification. Creation and abolition of District/s or Division/s is nothing but a kind of reorganization of territorial administration and/or management of the area of the State for performance of its functions and duties. No body can have any legal right to seek for judicial review in connection with reorganization of the district. It has further been submitted that in **2002 (2) SCC 333 (Balco Employees Union Vs. Union of India)** the Supreme Court has held that the Courts should not embark upon the public policy. So far as supplementary counter affidavit filed on 18th April, 2009 is concerned, the State wanted to clarify about the budgetary sanction for creation of district. From Annexure-2 to such supplementary counter affidavit, we find that calculations have been given under the signature of the authority concerned dated 04th March, 2009, according to which the total allocated fund for the financial year 2008-09 is Rs.4,07,22,393.00. Therefore, it can be understood from any common parlance that whether the amount, which has been stated to be allocated in the financial year 2008-09 for such newly created district, is sufficient for the purpose of creation and establishment of new district or not. However, from 2008 to 2010 several statements have been made periodically but no drastic change in respect of budgetary sanction and providing infrastructure has been made to form such district.

8. Mainly the writ petition has been opposed by two Bar Associations i.e. Kasganj Bar Association, Kasganj, District Kanshi Ram Nagar and Democratic Bar Association, Kasganj, District Kanshi Ram Nagar to protect their interest about creation of the Court. Similar comments can be made in respect of the petitioner also, but at this belated stage when the affidavits are exchanged, we cannot ignore the affidavits of the parties and their submissions in connection with creation of the district. The respondents-Bar Associations have relied upon the judgement of **Chaudhari Ran Beer Singh (supra)**, wherein a three Judges' Bench of the Supreme Court observed that in **Ram Milan Shukla (supra)** this Court (Supreme Court) did not interfere because there was a direction for reconsideration, and distinguishing such case i.e. **Ram Milan Shukla (supra)** the Supreme Court held that Cabinet's decision was taken nearly eight years back and appears to be operative. Therefore, in matters of policy decisions, the scope of interference of the Court is extremely limited. It must be left to the Government. Lastly, it has been held that in assessing the propriety of a decision of the Government the Court cannot interfere even if a second view is possible from that of the Government. However, a Division Bench judgement of this Court reported in **2000 (1) AWC 750 (Brijendra Kumar Gupta and others Vs. State of U.P. and others)** has been cited by such respondents to show that in such judgement **Ram Milan Shukla (supra**) has been treated to be not binding precedent so as to refer the case to the larger Bench. It was also held therein that in creation of new district, the Government has already spent lot of money.

9. Against this background, now let us go through the Full Bench judgement of the Lucknow Bench of this Court dated **21st September, 2012** delivered in **Writ Petition No. 10159 (M/B) of 2010 (PIL**

Civil) (Brij Kishore Verma Vs. State of U.P. and others) and other connected matters. In paragraph-148 of such judgement the Full Bench has summed up the entire issue. Paragraph-148 is as follows:

"148. To sum up:-

(1) Every order passed by the State Government in pursuance of power conferred by Articles 154, 162 read with Article 166 of the Constitution, may not be administrative. It shall depend upon the facts and circumstances of each case. Similarly, every order passed by the State Government in pursuance of power conferred by statute, may either be legislative or administrative and shall depend upon the facts and circumstances of each case.

(2) The order passed under statutory provisions or in pursuance of powers conferred under Articles 154, 162 read with Article 166 of the Constitution, may be administrative or legislative or quasi-legislative and quasi-administrative, will depend upon the facts and circumstances of each case. The decision taken by the State Government while deciding representation in pursuance of the order passed by the Court or on its own, keeping in view the 1992, regulatory Government order (supra) ordinarily, shall be administrative in nature.

(3) The impugned notification has been issued while deciding representation in compliance of the judgment and order passed by the Division Bench of this Court based on factual matrix of past and present hence administrative in nature, but it has legislative trapping. However, in case, the State Government took a decision in compliance of different constitutional provisions dealt with (supra) followed by notification under Section 11 of the Act and the Rules of Business, then in such a situation, decision may be of legislative character.

(4) Though, there is no conflict between the Census Act and Census Rules, 1990 with Section 11 of U.P. Land Revenue Act since both deal with the different sphere but once a notification is issued under Census Rule by the Government of India as well as the State Government, then direction under Census Rule, shall prevail over and above the State action under Section 11 of the U.P. Land Revenue Act. Since both are irreconcilable during the operation of a notification issued under Rule 8 (4) of Census Rules, 1990, no notification could have been issued under the U.P. Land Revenue Act.

(5) The jurisdiction exercised by the Government during census operation and continuance of notification issued under Section 8 (4) of Census Rules, the power exercised by the Government under Section 11 of the U.P. Land Revenue Act, shall be illegal and void hence all consequential action therein shall also not survive. Of course, it shall be open for the Government to issue a notification to meet out exigency of services within the constitutional frame and four corners of the law after census operation.

(6). In the event of order passed under Rule 1990 during the continuance of census operation, the State Government may not exercise power conferred by Section 11 of the U.P. Land Revenue Act in a manner which may amount to change of boundaries of district or local bodies. Power under the Census Act and the Rules

framed thereunder, as well as power conferred under Section 11 of the U.P. Land Revenue Act cannot be exercised simultaneously, because there is irreconcilable conflict between the two legislative action of the State Government and the Central Government.

(7) Moreover, the SLP filed against the judgment in the case of Ram Milan Shukla (supra) was consciously dismissed by Hon'ble Supreme Court hence it is binding in view of Article 141 of the Constitution of India. No contrary finding may be recorded by the High Court in view of binding precedent. Otherwise also, judgment in Ram Milan Shukla's case (supra) lays down correct law.

(8) Section 11 of the Act does not lay down the grounds or criteria for creation of districts. Government has rightly issued the Government order 1992 (supra) to fill up the gap, providing grounds for the creation of District. Government order 1992 (supra) supplements the statutory provision (Section 11) conferring power on Chairman, Board of Revenue (supra), for compliance, hence binding."

10. Out of the aforesaid summed up points, Point No. 7 is very relevant, whereunder it has been held that the special leave petition filed against the judgement in the case of **Ram Milan Shukla (supra)** was consciously dismissed by the Supreme Court, hence it is binding in view of Article 141 of the Constitution of India. No contrary finding may be recorded by the High Court in view of the binding precedent. Otherwise also, the judgement in **Ram Milan Shukla (supra)** lays down correct law.

11. So far as **Ram Milan Shukla (supra)** is concerned, we find that in Paragraph-18 thereof the Division Bench of this Court has allowed the writ petition, quashed the order dated 09th November, 1998 and directed the State Government to reconsider the matter and decide whether there was any good administrative and financial ground to issue the notification dated 05th September, 1997 for creation of District Sant Kabir Nagar or not. From such judgement, we find that the judgement was delivered on 15th January, 1999 as against the notifications dated 05th September, 1997 and 09th November, 1998.

12. Therefore, two very pertinent questions are under consideration before this Court:

(a) Whether the Court will interfere with a policy decision of the State Government following the notification dated 17th April, 2008 having binding effect of the Full Bench judgement of this Court in **Brij Kishore Verma (supra)** holding **Ram Milan Shukla (supra),** whereunder the notification in respect of creation of new District carving out old district has been quashed by the Division Bench, as correct law, or not?

(b) Whether delay is one of the parameters for not passing any order in respect of the policy decision of carving out and forming of new district in view of the three Judges' Bench judgement of the Supreme Court in **Chaudhari Ran Beer Singh (supra)**?

13. According to us, both the three Judges' Bench judgements of the Supreme Court and this Court i.e. **Chaudhari Ran Beer Singh (supra)** and **Brij Kishore**

Verma (supra) respectively have a binding effect upon us. It is true to say that in a policy decision, like creation of district, normally the Courts should not interfere. But the ratio of **Ram Milan Shukla (supra)** says that such creation will be done only when necessary budget will be provided and infrastructure will be made before notifying the revenue district, otherwise it will create serious anomaly and difficulty to the residents of the district. On the other hand, three Judges' Bench of the Supreme Court in **Chaudhari Ran Beer Singh (supra)** has held that after long lapse of eight years' period from the date of notification, it will not be proper to quash the notification and also indicated about **Ram Milan Shukla (supra)** that there is a distinguishing feature between these two and, therefore, in such matter the notification was not quashed. However, the larger Bench of this High Court has sent the matter back to the concerned Bench for consideration of the issue.

14. In the present case, though there is lapse of four years' period from the date of issuance of notification but we are not satisfied as yet with regard to allocation and use of necessary budget and providing of infrastructure. So far as budget is concerned, it has been stated on behalf of the State that such budget is sanctioned but we do not find any answer as to whether the budgetary allocation has reached to the district for the purpose of proper use or not. So far as infrastructure is concerned, only the process for acquisition of land has been started. None of the references as given in the counter affidavit or other affidavits of the State can be construed as a very happy situation for the purpose of creation of new district.

15. Against this background, we are of the view that the purpose will be subserved if we grant a reasonable time to the State Government to complete the infrastructure and use the budgetary sanction, that too not in a periodic or phase manner but at a time considering the case as emergent one. For such purpose, we direct the State Government to complete the course of action within the next financial year, which will come to an end by 31st March, 2014. If it is not completed within the aforesaid period, the impugned notification dated 17th April, 2008, being annexure-1 to the writ petition, issued by the State Government for creation of District Kanshi Ram Nagar will automatically stand quashed. We hope and trust that all the works will be started and completed within this period on war footing.

16. Accordingly, the first writ petition is disposed of, however, without any order as to costs.

17. **So far as second writ petition i.e. Writ Petition No. 46428 of 2010 is concerned,** this writ petition has been preferred seeking issuance of writ of certiorari for quashing the notification dated 17th April, 2008, whereby a new district has been created in the name of Kanshi Ram Nagar. A further direction has also been sought for upon the Election Commissioner not to interfere with the functions of the Zila Panchayat, Etah.

18. A brief reference of the facts would suffice. In the elections for Zila Panchayat, Etah held sometimes in October, 2005, the petitioner in this writ petition was elected as Chairman of the Zila Panchayat, Etah. He was administered oath of the office on 18th February, 2006 and after assuming the office on the same day, the petitioner was functioning on such post. On 17th April,

2008 the State Government issued a notification, whereby a new district, namely, Kanshi Ram Nagar has been carved out of district Etah. Against this background, the petitioner filed this writ petition for the aforementioned reliefs. When the writ petition was entertained by this Court on 06th August, 2010, an order of status quo was passed as regards the office of Chairman, Zila Panchayat, Etah on the ground that the aforesaid notification dated 17th April, 2008 has been challenged by way of Public Interest Litigation (P.I.L.) No. 22757 of 2008 (Collectorate Bar Association Vs. State of U.P. and others), and further this writ petition was connected with such public interest litigation. Said interim order was modified on 19th August, 2010, however, the status quo order was continued.

19. So far as the aforesaid connected public interest litigation i.e. first writ petition is concerned, we have disposed of the same with the certain directions as given herein-above.

20. In this writ petition, a counter affidavit has been filed on behalf of the State respondents i.e. respondent nos. 1, 2 and 3. The stand taken in the counter affidavit is that the present writ petition is not maintainable being second one as the petitioner has already got the process of election stayed in another writ petition filed before the Lucknow Bench of this Court, being Writ Petition No. 6739 (M/B) of 2008 (Joginder Singh Yadav Vs. State of U.P. and others). It is stated that the last election of the Chairman, Zila Panchayat, Etah was held in the year 2006 and the tenure of such election came to an end on 14th January, 2011. Two separate notifications dated 21st May, 2008 each have been issued showing the Gram Panchayats of each district. The Joint Commissioner, State Election Commission vide communication dated 23rd August, 2010 has informed the Principal Secretary, Department of Panchayati Raj, Government of U.P., Lucknow regarding the proposed schedule of the elections of Pradhans of Gram Panchayats, Members of the Gram Panchayats, Kshettra Panchayats and Zila Panchayats. Copy of such communication regarding proposed scheduled elections has been placed on record by the respondents as Annexure-1 to the counter affidavit. Attention of the Court has been drawn to Article 243 E of the Constitution of India, which provides that the term of every panchayat shall continue for five years from the date appointed for the first meeting and no longer. The said provision has also been incorporated and adopted under Section 12(3)(a) of the U.P. Panchayat Raj Act, 1947 for Gram Panchayats.

21. Against this background, we are of the view that in view of the aforesaid factual and legal submissions and also the directions issued by this Court in the first writ petition i.e. Public Interest Litigation (PIL) No. 22757 of 2008 (supra), as above, no relief can be granted in this writ petition. Hence, this writ petition is dismissed. Interim order dated 06th August, 2010, as modified on 19th August, 2010, stands vacated. The State Government and the State Election Commission are directed to take appropriate steps in accordance with law and in the light of the directions issued in the aforesaid public interest litigation.

22. No order is passed as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.12.2012

BEFORE
THE HON'BLE SHEO KUMAR SINGH, J.
THE HON'BLE VIRENDRA VIKRAM SINGH, J.

Civil Misc. Writ Petition No. 30002 of 2010

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

Counsel for the Petitioner:
Sri Yogesh Agarwal

Counsel for the Respondents:
C. S. C.
Sri B.P. Singh
Sri K.C.Sinha
Sri P.S. Baghel
Sri Pushpendra Singh
Sri V.P.Mathur
Sri Gautam Baghel
Sri Sunil

Constitution of India, Article 226- Disproportionate punishment-petitioner while appearing I.A.S. Examination in Union Public Service Commission-given incorrect particulars of attempt-instead of 8th written 7th attempt-cancellation of candidature for the year 2009 and debarring for 10 years in future examination-blindly followed by State Public Services Commission-without notices opportunity-held-excessive-without allegations of malice on part of petitioner-punishment of cancellation of candidature for 2009 upheld-but subsequently debarring for 10 years in future examination-set-a-side.

Held: Para-21, 25 & 26

Thus, we found that the punishment to the petitioner for disclosing wrong number of attempts made by him in terms of not only debarring him from the Civil Services main examinations 2009 but also debarring him for a further period of ten years was definitely in disproportionate punishment to him. The action of the U.P. Commission in blindly accepting the mandate without issuance of the mandatory notice, debarring the petitioner from all examinations to be conducted by it for a period of ten years also can not be held to be the legal exercise of the powers of the U.P. Commission.

The order passed by respondent no.3 dated 15.2.2010 insofar as it relates to debarring the petitioner from the Civil Services Main Examination, 2009 is hereby upheld.

The remaining part of the order debarring the petitioner from all the examinations conducted by the Commission from 11.2.2010 for a period of ten years is hereby quashed.

Case Law discussed:
(2009) 15 SCC 620; (2010) 6 SCC 614; 2012 (3) ESC 1021

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

1. The petitioner has rushed to this Court while complaining the indiscriminate orders passed by the Union Public Service Commission (hereinafter to be referred as Commission) and U.P. Public Service Commission (hereinafter to be referred as U.P. Commission).

2. The brief facts are that the petitioner in search of Government job appeared in different examinations conducted by the Commission and the U.P. Commission presently respondents no. 2 and 3.

3. In the same series of examinations he appeared in the Civil Services Examinations, 2009 conducted by the Commission. In the Civil Services Main Examinations while the application of the petitioner was scrutinized by the Commission, it was found that the petitioner made false statement regarding the previous attempts made by him. It was eighth attempt whereas the petitioner showed it to be seventh only. It was found that if the petitioner would have disclosed the correct number of previous attempts made, he would not have been eligible for appearing in all the concerned examinations.

4. After issuing notice to the petitioner on 22.1.2010, the Commission passed the impugned order dated 15.2.2010 and thereby cancelled the candidature of the petitioner for the Civil Services Main Examination 2009 and also debarred him from all the examinations to be conducted by the Commission for a period of ten years to be commuted from 11.2.2010. This order was also circulated to all the State Commissions.

5. Apart from the examinations conducted by the Commission, the petitioner also appeared in the examinations conducted by the U.P. Commission. The details whereof have been given in the writ petition.

6. Having received the information about debarring the petitioner, the U.P. Commission also debarred the petitioner from all the examinations with effect from 11.2.2010 for a period of ten years and did not declare the results of the petitioner. While the result of the petitioner was not declared by U.P. Commission, he on 5.4.2010 filed an application under Right to Information Act, which was replied in terms that he has been debarred for all examinations to be conducted by the U.P. Commission. This office memo dated 12.4.2010 is also under challenge in the present writ petition.

7. By filing the present petition, the petitioner has made the following prayers.

"I. Issue a writ, order or direction in the nature of certiorari quashing the decision dated 15.2.2010 taken by the U.P. Public Service Commission as informed by the information dated 12.4.2010 given to the petitioner under Right to Information Act.

II. Issue a writ, order or direction in the nature of mandamus directing the opposite parties to declare the results of the petitioner for the examinations that is Combined Lower Subordinate Mains Exams-2004 (General Recruitment), (Combined State Lower Subordinate Prelims Examination Special Recruitment-2004, Combined State/Upper Subordinate Service Mains Examination-2007, Combined State/Upper Subordinate Mains Examination-2008, Combined State Upper Subordinate Special Recruitment Prelims Examination-2008, Combined State Upper Subordinate Special Recruitment Prelims Examination-2008, Combined State/Upper Subordinate Prelims Examination-2009, GIC Inter College Screening Examination-2009 and may not be treated as debarred"

8. In the present case, pleadings have been exchanged between the parties and after hearing learned counsel for the parties the petition is being decided.

9. It has been argued on behalf of the petitioner that the decision of the Commission dated 15.2.2010 is

indiscriminately harsh to the petitioner. It has further been argued that under the provisions of article 315 of the Constitution of India, the Commission and the U.P. Commission are two different and separate entities and simply by the fact that the Commission has debarred the petitioner from further examination conducted by it, the U.P. Commission was nowhere bound by the decision and it could not have debarred the petitioner in the manner it has done and has been communicated to the petitioner by its memo dated 12.4.2010.

10. It has also been argued that the U.P. Commission has nowhere issued any notice to the petitioner before debarring him from examinations. Hence the order is bad in law and can not be allowed to sustain.

11. Learned counsel for the Commission has argued that according to the prevalent policy, the order passed by the Commission is being adopted by the U.P. Commission and by the memo dated 12.4.2010, same has been communicated to the petitioner.

12. It is not in dispute that the petitioner could have been punished for furnishing wrong information in the Civil Services Main Examination 2009 for furnishing incorrect number of attempts made by him. If the petitioner would have submitted the correct number of attempts made by him, he would not have been eligible to appear in the Civil Services Main Examination. Hence the decision of the Commission to the extent that he was debarred from the Civil Services main Examination 2009 could not said to be illegal exercise of powers by the Commission.

13. Now the question is whether the petitioner could have been debarred for further ten years by both the two Commissions for this act of the petitioner. It was necessary for both the two Commissions presently respondent no. 2 and 3 to have justified the punishment in terms that it was proportionately awarded punishment.

14. On behalf of the Commission, the only argument advanced was that as per the prevalent policy and to provide uniform punishment to all such candidates, who have not given correct information, or have submitted wrong information, order is passed debarring them for ten years and such order is accepted and enforced by all the State Commission as well.

15. At the argument as it has been advanced on behalf of respondents no. 2 and 3, the commissions, can not be permitted to prevail in each and every case. The facts are different and the punishment should have been awarded as per the prevailing and the attending circumstances. Thus it has to be decided whether the punishment awarded can be said to be proportionate punishment.

16. The matter of proportionality has repeatedly been considered by the Apex Court. in the case of ***Chairman-cum-Managing Director, Coal India Limited and another v. Mukul Kumar Choudhuri and others, (2009) 15 SCC 620.***In para 19 and 20 of this judgment the Apex Court while discussing the proportionality held as follows"

19. The Doctrine of proportionality is, thus, well recognized concept of judicial review in our jurisprudence. What is otherwise within the discretionary domain

and sole power of the decision maker to quantity punishment once the charge of misconduct stands proved, such discretionary power is exposed to judicial intervention if exercised in a manner which is out of proportion to the fault. Award of punishment which is grossly in access to the allegations cannot claim immunity and remains open for interference under limited scope of judicial review.

20. On of the tests to be applied while dealing with the question of quantum of punishment would be would any reasonable employer have imposed such punishment in like circumstances? Obviously, a reasonable employer is expected to take into consideration measure, magnitude and degree of misconduct and all other relevant circumstances and exclude irrelevant matters before imposing punishment."

17. Again in the case of ***All India Railway Recruitment Board v. K. Shyam Kumar, (2010) 6 SCC 614,*** explained the principle of proportionality as a ground of judicial review of administrative action. The factor of proportionality has been considered with the following observations:

"Proportionality, requires the Court to judge whether action taken was really needed as well as whether it was within the range of courses of action which could reasonably be followed. Proportionality is more concerned with the aims and intention of the decision-maker has achieved more or less the correct balance or equilibrium. Courts entrusted with the task of judicial review has to examine whether decision taken by the authority is proportionate, i.e. well balanced and harmonious, to this extent Court may indulge in a merit review and if the Court finds that the decision is proportionate, it seldom interferes with the decision taken and if it finds that the decision is disproportionate i.e. if the Court feels that it is not well balanced or harmonious and does not stand to reason it may tend to interfere."

18. The matter about the disproportionate punishment for wrong disclosure of number of attempts by the petitioner has reasonably been considered by the Division Bench of this Court in the case of ***Prem Chandra Yadav vs. Union of India and others, 2012(2) ESC 1021,*** The Court has considered the question as to whether the candidate who does not disclose correctly the number of attempts that he has taken in the competitive examinations, whether the candidature of the petitioner can be debarred for further period of ten years apart from the examinations in question.

19. While considering the different pronouncement of Hon'ble the Apex Court, the Court has decided that the such punishment is indiscriminate and held that the order for debarring the petitioner's candidature in the concerned examination alone was sufficient and the proportionate punishment. We feel accede to the decision of the Court.

20. The petitioner at the time he filled up the Civil Services Main Examination form was under giving his circumstances when he was rushing for obtaining the Government job and from his end, he filled up almost all the examination form regarding examination conducted by the Commission and U.P. Commission respondent no. 2 and 3. In such a situation it was most likely for the petitioner to have forgotten or misplaced the exact number of attempts made by him or in any case such a possibility can not be excluded. Apart from

it, nothing could be put forward on behalf of the Commission or the State Commission that while making wrong number of attempts, the petitioner has any malicious or fraudulent intention. On the contrary, the petitioner being a literate person could have easily considered that such wrong reply made by him may expose him to peril and he was this wrong information by him may easily be detected, specially when the entire system with all the Commissions is fully computerized. Since there is no such circumstances to suggest the malice on the part of the petitioner, the punishment of the petitioner for debarring for a further period of ten years is definitely is indiscriminately disproportionate and this Court has every reason to accede to the view held by this Court in the case of ***Prem Chandra Yadav (supra)*** referred to above.

21. Thus, we found that the punishment to the petitioner for disclosing wrong number of attempts made by him in terms of not only debarring him from the Civil Services main examinations 2009 but also debarring him for a further period of ten years was definitely in disproportionate punishment to him. The action of the U.P. Commission in blindly accepting the mandate without issuance of the mandatory notice, debarring the petitioner from all examinations to be conducted by it for a period of ten years also can not be held to be the legal exercise of the powers of the U.P. Commission.

22. It has been argued on behalf of the U.P. Commission respondent no. 2 that it is the prevailing practice that the order passed by the Commission is adopted by the U.P. Commission and the candidature of the erring candidate is also debarred for the same period as ordered by the Commission.

23. No legal strength could be put forward on behalf of the respondents as to why such practice is prevalent. Thus the order of the U.P. Commission deserves to be set aside. The order is otherwise also is not sustainable as previous discussion makes it clear that the proportionate punishment for furnishing incorrect information in the application form was debarring him in the concerned examination only.

24. In view of the discussion made above, the writ petition deserves to be partly allowed with the following conditions.

25. The order passed by respondent no.3 dated 15.2.2010 insofar as it relates to debarring the petitioner from the Civil Services Main Examination, 2009 is hereby upheld.

26. The remaining part of the order debarring the petitioner from all the examinations conducted by the Commission from 11.2.2010 for a period of ten years is hereby quashed.

27. The order and the memo passed by respondent no. 2 U.P. Commission whereby the order of the Commission dated 15.2.2010 and the memo dated 12.4.2010 whereby the decision was communicated to the petitioner has been adopted debarring the petitioner to the same tune are hereby set aside.

28. It is being made clear that in pursuance of the order passed by this Court, the petitioner shall not be allowed to appear in any examination or the interview which has already taken place and no examination or the interview shall be conducted for the petitioner alone.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.12.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 30312 of 2002

Suraj Bhan & Others ...Petitioner
Versus
Addl. District Judge & Others
...Respondents

Counsel for the Petitioner:
Sri A.C. Nigam
Sri Triveni Prasad

Counsel for the Respondents:
Sri A.N. Sinha
S.C.

Uttar Pradesh Urban Building (Regulation of Letting Rent and Eviction) Act 1972-Section 20(4)-Benefit claimed by tenant-on ground on first day of hearing-deposit of entire amount except deficit of Rs. 249.65-held-decision of Apex Court in M.C. Pal available-where omission caused due to calculation with result of human error-petitioner before the Court below placed to deposit entire amount-failed to availed the benefit-can not be treated to arithmetical error-citation relied by petitioner not applicable-defence rightly strike off-petition dismissed.

Held: Para-7

In the present case, it was not the case of petitioners at any point of time that deficit was on account of any clerical or calculation mistake. On the contrary, they have always asserted that this is a correct amount which ought to have been deposited and this is what has been done. Having failed in his attempt in both the Courts below, where benefit under Section 20(4) of Act, 1972 has been denied and decree of eviction has been passed, they have now come to this Court but here also, in this writ petition, there is no averment that short deposit was on account of any clerical or calculation mistake. This show that due to deliberate intentional reasons short deposit was made by asserting that petitioner was not liable to deposit more than Rs.8,200/-. Reliance thus placed on Apex Court's decision in Mam Chand Pal (supra) has no application to the facts and circumstances of this case.

Case Law discussed:
2002(3) SCC 49; Writ Petition No.17220 of 1999 (Subhash Chandra Purwar Vs. District Judge, Mahoba & Anr.) decided on 16.8.2012, in paras 12 and 13; 2002 (1)ARC 370 (SC); 1982 ARC 734; 1976 ALJ 124; Writ Petition No.24393 of 2003 (Murari Lal Vs. Sri Girwar & Ors.) decided on 12.9.2012

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

1. Heard Sri A.C.Nigam, learned counsel for the petitioner and perused the record.

2. Admittedly on the first hearing of the suit petitioners have not deposited entire amount as contemplated in Section 20(4) of Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 *(hereinafter referred to as "Act, 1972")* but against requisite amount of Rs.8,449.65, the petitioner deposited Rs.8,200/- on 31.8.1982.

3. Learned counsel for the petitioner submitted that deficit was only marginal i.e. Rs.249.65 which is a petty amount for which petitioner should not have been made to suffer and in this regard placed reliance on Apex Court's decision in **Mam Chand Pal Vs. Shanti Agarwal (Smt.), 2002(3) SCC 49.**

4. It is no doubt true that tenant is under an obligation to comply

requirement of Section 20(4) of Act, 1972 in words and spirit and from all four corners so as to claim its benefits otherwise he has to fail. But the said compliance cannot be stretched to the extent of meeting every i's and dots. In law, the things are not always considered with strict principle of mathematics but human and social aberration, which in particular are bona fide and sometimes for the reasons beyond the control of individuals, always find their weight to find out whether in a particular case there is compliance of a particular provision or not. Construing Section 20(4) of Act, 1972, this Court in **Writ Petition No.17220 of 1999 (Subhash Chandra Purwar Vs. District Judge, Mahoba & Anr.)** decided on 16.8.2012, in paras 12 and 13, said as under:

"12. The compliance of Section 20(4) in order to call for its benefit is mandatory in words and substance but it cannot be stretched to an extent of hyper technicality and conceiving every situation for which the tenant is not responsible yet to hold him guilty of non-compliance. Law does not contemplate compliance of something to the extent of impossibility. It is in this context the Courts have observed that a substantial and virtual compliance would be deemed to be sufficient instead of sticking to every i's and dots. In taking the view, I find support from Apex Court's decision in ***Mam Chand Pal Vs. Smt. Shanti Agarwal, 2002(1) ARC 370 (SC)****. Considering Section 20(4) the Court observed "While considering the import of such provisions, it may have to be seen that the requirement of law is* ***substantially and virtually stands satisfied. A highly technical view of the matter will have no place in construing compliance of such a provision.*** *We may, however, hasten to add that it is not intended to lay down that non compliance of any of the requirements of the provision in question is permissible. All the dues and amounts liable to be paid have undoubtedly to be paid or deposited on the date of first hearing but within that framework virtual and substantial compliance may suffice without sticking to mere technicalities of law." (Para 11)*

(emphasis added)

13. In the context of a petty shortage, a Division Bench of this Court in ***Amar Nath Agarwal Vs. Ist Addl. District Judge and others 1982 ARC 734*** *affirmed this Court's decision in* ***Dinesh Chandra Gupta Vs. Kashi Nath Seth, 1976 ALJ 124*** *that the rule of deminimis can be applied to a case of such petty shortfall. Though the above judgment was in respect to a question if there is a very small or trifling shortfall, principle of deminimis can be brought into aid or not. In this matter it is not the question of shortfall but actual payment made after two days from the date of first hearing but applying the above principle particularly when reason for actual payment is not attributable to tenant but to the procedural delay taken before the Court below, the tenant cannot be made to suffer. Therefore actual payment made by him on 24th August, 1995 would relate back to the date on which he rendered Tender seeking permission of the Court for making payment i.e. 22.8.1995."*

5. This has been followed in W**rit Petition No.24393 of 2003 (Murari Lal Vs. Sri Girwar & Ors.)** decided on 12.9.2012.

6. The dictum laid down therein can always apply where tenant has also come out with a specific case and pleading that

mistake in short deposit of amount was not deliberate and intentional but there was some calculation mistake or there was some human error or something like that. In other words, dictum laid down in **Mam Chand Pal (supra),** as discussed above, is attracted where petty shortfall is not attributable to a deliberate mischief on the part of tenant but for something over which he has no control or otherwise bona fide.

7. In the present case, it was not the case of petitioners at any point of time that deficit was on account of any clerical or calculation mistake. On the contrary, they have always asserted that this is a correct amount which ought to have been deposited and this is what has been done. Having failed in his attempt in both the Courts below, where benefit under Section 20(4) of Act, 1972 has been denied and decree of eviction has been passed, they have now come to this Court but here also, in this writ petition, there is no averment that short deposit was on account of any clerical or calculation mistake. This show that due to deliberate intentional reasons short deposit was made by asserting that petitioner was not liable to deposit more than Rs.8,200/-. Reliance thus placed on Apex Court's decision in **Mam Chand Pal (supra)** has no application to the facts and circumstances of this case.

8. In view of the above, I find no merit in the writ petition.

9. Dismissed.

10. Interim order, if any, stands vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.11.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 34824 of 2012

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

Counsel for the Petitioner:
Sri D.S. Srivastava

Counsel for the Respondents:
C.S.C.
Sri J.N. Maurya
Sri Yashwant Verma
Sri Alok Kumar Srivastava

U.P. Government Servants (Disciplinary and Appeal Rules 1999, Rule -4)-earlier suspension order revoked-second suspension for same allegation for such charges-no major punishment could be awarded-held-subsequent suspension without application of mind-no mechanical arbitrary exercise permissible-order quashed with cost of Rs. 25,000

Held: Para-18

In view of above, both the writ petitions are allowed. The impugned orders of suspension dated 23.06.2012 are hereby quashed. The petitioner is also entitled to cost, which I quantify to Rs. 25,000/- for each set of writ petitions, against the respondents with further direction that after payment of cost to petitioner(s) by respondent no. 1, it shall have liberty to recover the said amount from official concerned who held the office of respondent no. 3 at the relevant time when impugned orders of suspension were passed, after making such inquiry as permissible in law. I am also constrained to direct the Principal

Secretary to see whether such official who passed impugned orders of suspension, is a person fit to occupy such a responsible office as that of respondent no. 3, and take appropriate action/decision in the matter.

Case Law discussed:

2004 (3) UPLBEC 2934

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

1. Heard Sri D.S. Srivastava, learned counsel for the petitioner and learned Standing Counsel for the respondents. Sri Alok Kumar Srivastava, Conservator of Forest, Jhansi is present alongwith record. I have also perused the record.

2. In both these writ petitions the questions of law and facts are common, therefore, have been heard together and are being decided by this common judgment. However, since the facts are common, this Court is taking up the facts of leading writ petition, i.e., Writ Petition No. 34824 of 2012 for the purpose of brevity.

3. The petitioner was initially appointed as Forester on 15.12.1990 and at the relevant time giving cause of action for present writ petition, he was posted as Deputy Forest Ranger in Forest Range, Lalitpur Social Forestry Division, Lalitpur. He was placed under suspension vide order dated 16.02.2012 on the allegations that a Joint Forest Management Committee held a preliminary inquiry and found him prima facie guilty of non observing its duties and functions in respect to plantation, social forestry improvement etc. and also permitting mining within 100 meters of forest area which is in violation of orders of Apex Court. It was also stated that a departmental inquiry is in contemplation. The aforesaid order of suspension, however, was revoked and petitioner was reinstated with full benefit of salary by disciplinary authority, i.e., Sri B.C. Tiwari vide order dated 29.02.2012, who had also passed the order of suspension. It, however, stated that departmental inquiry against him shall continue. A charge sheet dated 24.05.2012 was served upon petitioner containing a single charge.

4. The petitioner submitted reply dated 15.06.2012. Thereafter again vide order dated 23.06.2012 the petitioner was placed under suspension. This order has been assailed alleging that there is a complete non application of mind inasmuch as earlier Sri B.C. Tiwari, the then Conservator of Forest, suspended petitioner on 16.02.2012 but thereafter reinstated vide order dated 29.02.2012. After almost three months, a charge sheet was served upon petitioner which was replied by him and no further action has been taken thereafter except that a fresh order of suspension has been passed on 23.06.2012 which is almost identical to the earlier order of suspension which has already been revoked, except the change of order number and date, as also the name of authority concerned. Since Conservator of Forest appears to have been changed in the meantime and one Sri Alok Kumar Srivastava had joined, he passed the impugned order of suspension.

5. The argument was appreciated by this Court and the order of suspension was stayed on 07.08.2012 giving time to respondents to file their counter affidavit.

6. Para 2 and 3 of interim order dated 07.08.2012 reads as under:

"2. From bare perusal of two orders of suspension this Court find that except the order number and date, in all other respect, the two orders are identical. Nothing has

been said that when petitioner was already reinstated then what was the occasion to pass a fresh order of suspension which is identically worded to earlier order of suspension, which has already been revoked by reinstating the petitioner on 29.02.2012.

3. Learned Standing Counsel prays for and is allowed two weeks time to file counter affidavit. Petitioner may file rejoinder affidavit, if any, within one week thereafter."

7. A counter affidavit has been filed by respondents, which is sworn by Sri Ashok Kumar Rai, Forest Range Officer, Lalitpur. It is stated therein that the earlier order of suspension dated 16.02.2012 was revoked by Conservator of Forest under the directions of Chief Conservator of Forest, Buldelkhand Zone, Jhansi reinstating petitioner with full salary. Subsequently a complaint was received on 15.06.2012 from Secretary, Japan International Corporation and the said complaint was inquired by a two member committee headed by Sri Iqbal Singh, Additional Principal Chief Forest Conservator under Government's direction contained in its letter dated 24.02.2012. Pursuant to report submitted by the said committee, the State Government issued order dated 22.06.2012 directing to hold departmental inquiry against the Forest Officer and Range Officer of Field Management Unit and pursuant thereto the petitioner was suspended on 23.06.2012.

8. When it was pointed out to learned Standing Counsel that there is a discrepancy in the facts stated in para 6 of counter affidavit, inasmuch when the complaint was received on 15.06.2012, where was the occasion to direct for an inquiry almost four months ahead, i.e., on 24.02.2012, he realized some mistake and referred to the supplementary counter affidavit where a clarification is given in para 8 that the complaint was received on 15.02.2012 and not on 15.06.2012.

9. Thereupon he was required to place the relevant record before court inasmuch if the complaint was already there, on 15.02.2012, and thereafter petitioner was earlier suspended on 16.02.2012, what was the occasion to reinstate him on 29.02.2012 and again by suspending with an identically worded order. He was also confronted with office order dated 12.10.2012 filed as Annexure-1 to the supplementary counter affidavit wherein the incident relating to earlier suspension order has been mentioned in first paragraph and in second paragraph it is said that another complaint was received subsequently which resulted in second order of suspension but the fact remain that complaint dated 15.02.2012 was received before the earlier order of suspension passed on 16.02.2012 and a committee to hold preliminary inquiry on the complaint was also constituted on 24.02.2012 yet within a week thereafter, i.e., on 29.02.2012 the suspension order dated 16.02.2012 was revoked with full benefit of salary to petitioner and after four months thereafter the Conservator of Forest passed identically worded order on 23.06.2012 in respect whereof no justification has come forth except that the order of suspension was made pursuant to State Government's direction contained in its letter dated 22.06.2012.

10. Consequently the original record has been produced before this Court. It shows that the committee headed by Sri Iqbal Singh, Additional Chief Forest Conservator submitted report on 02.04.2012 with the following conclusions:

"सामाजिक वानिकी वन प्रभाग,ललितपुर के ग्राम संयुक्त वन प्रबन्ध के सदस्य सचिवों ने मुख्य वन संरक्षक, बुन्देलखण्ड वृत्त, झाँसी श्री उमाशंकर सिंह तथा वन संरक्षक, बुन्देलखण्ड वृत्त झाँसी श्री बी0सी0तिवारी के विरूद्ध की गयी शिकायत पर हस्ताक्षर किया जाना स्वीकार किया। प्रकरण में किसी निष्कर्ष तक पहुॅचने के लिए प्रत्यक्ष साक्ष्यों की आवश्यकता है। व्यक्तिगत रूप से लिखे गये पत्रों में सदस्य सचिवों ने उपरोक्त अधिकारियों के विरूद्ध किसी प्रकार की शिकायत न होने का उल्लेख किया है किन्तु सामूहिक रूप से लिखे गये पत्रों में उन्होंने पुनः गम्भीर आरोंपो की पुनरावृत्ति की है। सामूहिक रूप से लिखे गये पत्र में जॉच हेतु विशिष्ट विवरण उपलब्ध नही कराया है। यद्यपि प्रत्यक्ष साक्ष्यों के अभाव में किसी निष्कर्ष तक पहुॅचना सम्भव नहीं है किन्तु यह स्पष्ट है कि सामाजिक वानिकी वन प्रभाग, ललितपुर की परिस्थितियों सामान्य नहीं है तथा उपरोक्त अधिकारियों एवं सदस्य सचिवों के मध्य परस्पर अविश्वास व भय की स्थिति उत्पन्न हो गयी है। ऐसी स्थिति में जे0आई0सी0ए0 परियोजना के कार्यो के हित में उपरोक्त अधिकारियों के अन्यत्र स्थानान्तरण करना उचित होगा।"

"Member Secretaries of Village Joint Forest Management of Social Forestry Division, Lalitpur have admitted having signed the complaint made against Sri Uma Shanker Singh, Chief Forest Conservator, Bundelkhand Circle, Jhansi and Sri B.C. Tiwari, Forest Conservator, Bundelkhand Circle, Jhansi. In order to reach any finding in the matter, there is need of direct evidences. In the letters written individually, the members have not mentioned any sort of complaint against the aforesaid officers. But in the letters written collectively, they have reiterated serious allegations. In the letters written collectively, they have not provided specific details for investigation. Though, for lack of direct evidences, it is not possible to come to any conclusion yet it is clear that the situation in Social Forestry Division, Lalitpur is not normal and mutual distrust and sense of fear has cropped up between the aforesaid officers and the Member Secretaries. In such a circumstance, in the interest of work of JICA project, it would be appropriate to transfer the aforesaid officers elsewhere."

(English Translation by the Court)

11. Having gone through the aforesaid record much could have been said but I am refraining myself from making any observations which may prejudice the pending or contemplated inquiry against petitioner since I am not inclined at this stage to interfere with the same but is confining my scope of judicial review only in respect to suspension order dated 23.06.2012.

12. It appears, when earlier order of suspension was passed on 16.02.2012, prior thereto an inspection was made by Chief Conservator of Forest, Jhansi on 14.02.2012. Immediately whereafter a joint complaint was made by Secretaries, Joint Management of Village JICA Project, Social Forestry Division, Lalitpur against the Conservator of Forest as well as Chief Conservator of Forest and the said complaint was signed by 48 persons/Secretaries of different committees including the petitioner. Within forty eight hours thereafter, on 16.02.2012, the petitioner was placed under suspension. In respect to area governed by Joint Forest Committee Kapasi, the Regional Forest Officer, Jakhora headed a team to verify plantation, conditions of plants etc., who submitted report on 29.03.2012. On the same date, the Chief Conservator of Forest issued an order No. 3347/Sangh, dated 29.02.2012 and pursuant thereto, the then Conservator of Forest, Sri B.C. Tiwari revoked the order of suspension. Thereafter Deputy Regional Forest Officer, Mehrauni (Lalitpur) Sri V.K. Mishra was appointed as Inquiry Officer on 17.05.2012 and a charge sheet was issued to petitioner on 24.05.2012. The petitioner submitted his reply on 15.06.2012 and nothing happened thereafter. In the meantime the complaint

made against to senior officers by Secretaries of Joint Forest Committee, (almost the entire Social Forestry Division) was enquired into by senior officials, namely, Sri V.K. Thakur, the Chief Conservator of Forest/Project Director, JICA, Lucknow and Sri Iqbal Singh, Principal Chief Conservator of Forest/Project Research and Training Lucknow who submitted their report on 02.04.2012. The State Government issued an order on 22.06.2012 and pursuant thereto an identically worded order of suspension has again been issued on 23.06.2012 which do not explain as to why in the identical circumstances second order of suspension was justified.

13. The power of suspension has been conferred upon the competent authority vide Rule 4 of U.P. Government Servant (Discipline and Appeal) Rules, 1999 *(hereinafter referred to as the "Rules, 1999").* It says that disciplinary authority/ appointing authority shall apply its mind before suspending an official, and, if it is satisfied that the charges, if proved, may entail major penalty, it may suspend the officer concerned. In the present case it is evident from record and also admitted by Conservator of Forest, present in the Court, that the order of suspension was passed in mechanical exercise so as to comply the directions issued by State Government. There is nothing either in the counter affidavit or in the original record produced before this Court that anybody applied its/his mind to find out the expediency of suspending the petitioner again when earlier suspension for the same reason has already resulted in his reinstatement with full benefit of salary. Meaning thereby the competent authority was already satisfied that there was no such serious allegation against petitioner which may result in any penalty whatsoever or atleast a major penalty and, therefore, reinstated him with full benefit of salary.

14. It cannot be doubted that a higher authority than appointing authority can also issue appropriate direction to place an officer under suspension, but then there must be an application of mind on its part also. If it is not aware of the complete facts or has not applied its mind as to in what circumstances the official was earlier suspended and reinstated, and, now whether a suspension is required again without which an impartial and fair inquiry may not be possible, then order of suspension passed by it would suffer the vice of non-application of mind.

15. In other words this Court is of the view that in order to place an officer under suspension again, on the same identical allegation, a strong case has to be made out by the respondents that suspension on the second time become inevitable. No mechanical and arbitrary exercise is permissible. An order of suspension is a serious thing for a Government Official. It is not in a routine manner that an employee can be placed under suspension. The statutory Rules framed by rule framing authority also indicate to this fact that suspension in one or the other manner, if not results in suo moto punishment, yet, it causes something adverse to employee concerned and, therefore, it should not be passed in a mechanical manner. The Rules also demonstrate that charges if not enough serious which may not entail in a major penalty, an order of suspension cannot be passed. This mandate contained in rules demonstrate that an order of suspension visits civil consequences to the concerned employee and, therefore, should be passed in a limited sphere enshrined in the rules

very specifically. Some of the relevant civil consequences are that during the period of suspension, the Government servant is not entitled for full salary and paid, either only half of salary or 3/4, as the case may be, within which he has to manage his and his family's all affairs. It goes without saying that amongst the colleagues and social circle, the Government servant carries a stigma of "under suspension" which affects not only the individual Government servant but every member of his family. In the future carrier prospects also the factum of suspension of the Government servant plays its own role. Its negative aspects/ colour is not wiped out all together. The shadow of suspension follow a Government servant throughout his carrier. Even his family does not remain untouched. Commenting on the effect of suspension when it is not by way of punishment but in a contemplated and pending inquiry, a Division Bench of this Court in **Gajendra Singh Vs. High Court of Judicature at Allahabad, 2004 (3) UPLBEC 2934** has 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."*** *(emphasis added)*

16. In the present case, from the discussions made above this Court is fully satisfied that the impugned order of suspension dated 23.06.2012 has been issued by respondent no. 3 wholly illegally and showing a total non-application of mind. It is patently arbitrary and is not inconformity with requirement of Rule 4 of Rules, 1999.

17. I am also constrained to observe that the manner in which the impugned orders of suspension have been passed and the things have taken place subsequently also, show that officer concerned, who passed impugned orders, holding the office of Conservator of Forest, Bundelkhand Circle, Jhansi, at the relevant time, has neither acted legally nor has applied its mind nor otherwise shown due regard to the rule of law so that unmindful illegal orders are not issued abruptly giving a cause of grievance to the departmental employee(s) and also adding a burden on this court in the shape of avoidable litigation.

18. In view of above, both the writ petitions are allowed. The impugned orders of suspension dated 23.06.2012 are hereby quashed. The petitioner is also entitled to cost, which I quantify to Rs. 25,000/- for each set of writ petitions, against the respondents with further direction that after payment of cost to petitioner(s) by respondent no. 1, it shall have liberty to recover the said amount from official concerned who held the office of respondent no. 3 at the relevant time when impugned orders of suspension were passed, after making such inquiry as permissible in law. I am also constrained to direct the Principal Secretary to see whether such official who passed impugned orders of suspension, is a person fit to occupy such a responsible office as that of respondent no. 3, and take appropriate action/decision in the matter.

19. A copy of this judgment shall be remitted to Principal Secretary, Forest forthwith by Registrar General so as to reach him within three weeks from today.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.10.2012

BEFORE
THE HON'BLE AMITAVA LALA, A.C.J.
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Civil Misc. Writ Petition No. 41737 of 2012

Jag Jiwan Ram ...Petitioner
Versus
State of U.P. And others ...Respondents

Counsel for the Petitioner:
Sri Anil Kumar Aditya.

Counsel for the Respondents:
Mr. Ramanand Pandey (S.C.)
C.S.C.

U.P. Panchayat Raj Rules 1947-Rule-47-Gram Panchahyat in open meeting in presence of Tehsil authorities-passed resolution for allotment of Fair Price Shop-being failure complainant filed-S.D.O.-based upon enquiry report of Naib Tehsildar-passed impugned cancellation order-without permission of D.M.-held-nor requisition signed by two third members-held-action of S.D.O. Wholly without jurisdiction, illegal.

Held: Para-7

In such circumstances, if we consider this factual aspect on the touchstone of the relevant rules and Government order as discussed above, we find, as is apparent from the order impugned, that neither the matter was brought to the notice of the concerned Collector, who could direct for any enquiry in the matter and also for holding a fresh meeting to take resolution, as per the Government order dated 03rd July, 1990 nor as per the Rule 40 of the Rules any requisition signed by two-third members of the Gram Panchayat was given consenting for reconsideration of the matter. Moreover, stopping of execution of the resolution taken in the open meeting of the Gram Panchayat is also beyond the jurisdiction of the Sub Divisional Magistrate as per the provisions of Section 96 of the Act. Thus, according to us, the impugned order passed by the respondent no. 2 is wholly illegal and without jurisdiction and as such, the same cannot be sustained, particularly when neither any other provision has been shown by the respondents supporting the order passed by the respondent no. 2 nor any material fact has been brought to the notice of the Court controverting the submissions of the petitioner.

Case Law discussed:
AIR 1967 SC 1170; AIR 1987 SC 537

(Delivered by Hon'ble Amitava Lala, A.C.J.)

Amitava Lala, ACJ.-- By means of this writ petition, the petitioner seeks relief for quashing of the impugned order dated 14th August, 2012 passed by the Sub Divisional Magistrate, Tehsil Rampur Maniharan, District Saharanpur, the respondent no. 2 herein, whereby the resolution taken by the concerned Gram Panchayat on 10th July, 2012 for allotment of fair price shop in favour of the petitioner has been rejected and again the meeting has been directed to be convened on 18th August, 2012 for taking a fresh resolution.

2. Briefly stated facts, according to the petitioner, are that in Gram Panchayat Pahasu, Block and Tehsil Rampur Maniharan, District Saharanpur (in short called "Gram Panchayat"), on account of death of fair price shop dealer, vacancy arose for allotment of said shop to the new dealer. Such vacancy was informed to the respondent no. 2, who directed to hold meeting of Gram Panchayat on 09th June, 2012 for taking resolution in connection thereto. However, on 09th June, 2012 the

meeting could not be held for want of quorum. Subsequent thereto, after following due process of law and by issuing agenda and munadi, the date for holding meeting was fixed for 10th July, 2012. On 10th July, 2012 open meeting of the Gram Panchayat was held in presence of Inspector of Police, Secretary of Gram Panchayat and Gram Panchayat Sahayak for considering appointment of new fair price shop dealer and videography of such meeting was also done. In such meeting, candidature of the petitioner and one Sri Sanjay Kumar was considered for the purpose. However, Sri Sanjay Kumar, looking to the less support of Members of the Gram Panchayat in his favour, started creating hindrance in the meeting, but due to interference of the police, he could not succeed and had boycotted the meeting with his supporters. Ultimately, in the meeting dated 10th July, 2012 all the persons unanimously resolved for appointment of the petitioner as dealer of fair price shop and such resolution was sent to the respondent no. 2 for further action. Thereafter, the persons, who boycotted the meeting in support of Sri Sanjay Kumar, disputing the correctness of the meeting made a complaint before the concerned Block Development Officer-respondent no. 3, who directed the Assistant Development Officer (Panchayat) to enquire into the matter. The Assistant Development Officer (Panchayat), after enquiry, submitted his report dated 16th July, 2012 stating that meeting was held in accordance with law and no dispute or quarrel took place in the meeting. Thereafter, another complaint was made by the supporters of Sri Sanjay Kumar before the respondent no. 2, who directed the Naib Tehsildar to enquire into the matter. Naib Tehsildar submitted his report dated 08th August, 2012 stating therein that during the course of enquiry, the persons, who were in favour of the petitioner, told that no dispute was raised, whereas the persons, who were supporters of Sri Sanjay Kumar, told that there was dispute and since there was equal strength from both the sides, no referendum could be made. On the basis of such report, the respondent no. 2 by the impugned order dated 14th August, 2012 cancelled the resolution dated 10th July, 2012 and directed to hold a fresh meeting on 18th August, 2012.

3. It is against this order dated 14th August, 2012 that the petitioner has filed the present writ petition by saying that the meeting was held by the Gram Panchayat on 10th July, 2012 in presence of Supervisor/Sector Prabhari and Secretary of the Gram Panchayat wholly in accordance with law and after following due procedure prescribed under the relevant rules. There was no illegality in the meeting. No one has challenged the validity of meeting of the Gram Panchayat dated 10th July, 2012 since there was no dispute about holding of meeting. Once the Gram Sabha has passed a resolution after following the due process of law for appointment of a person as fair price shop dealer, the respondent no. 2 has only to see whether the meeting has been held or not and if the meeting is held, he is bound to accept the resolution, but in the present case the respondent no. 2 by rejecting the resolution and directing for holding fresh meeting has given a chance to the petitioner's rivals to motivate the supporters of the petitioner. Neither Sub Divisional Magistrate nor Naib Tehsildar has recorded any valid material of evidence to show that meeting was not held in accordance with law or resolution was not passed in favour of the petitioner but they proceeded on assumptions and without application of mind. The respondent no. 2 has not independently made any enquiry either

under the provisions of the Uttar Pradesh Panchayat Raj Act, 1947 (hereinafter in short called as the "Act") or in accordance with the Government order dated 03rd July, 1990, which prescribes the procedure for appointment of fair price shop dealer and does not give any power to the respondent no. 2 for sub-delegation of his power to any other authority, but instead of making any enquiry at his own, the respondent no. 2 delegated his power to the Naib Tehsildar to hold the enquiry and on his report passed the impugned order. Moreover, copy of the alleged enquiry report of Naib Tehsildar dated 08th August, 2012 has not been supplied to him.

4. It is further contended on behalf of the petitioner that the impugned order is against the provisions of Rule 40 of the U.P. Panchayat Raj Rules, 1947 (hereinafter in short called as the "Rules"), which prohibits the Gram Sabha or the Gram Panchayat to reconsider the matter once finally disposed of, within three months next, unless not less than two-third of the members of Gram Sabha or Gram Panchayat consent by signing a requisition to the effect, and in the present case no such requisition has been made. Furthermore, power to prohibit/stop the execution of resolution only lies with the Zila Panchayat on the conditions mentioned under Section 96 of the Act, therefore, the respondent no. 2 has no power to defer the execution of resolution. Apart from that, meeting of the Gram Panchayat can only be held with prior notice of 15 days but in the present case by order dated 14th August, 2012 the meeting has been directed to be held on 18th August, 2012. It is submitted on behalf of the petitioner that it is well settled proposition of law that where a statute requires that a certain thing must be done in a certain way, then the thing must be done in that way or not at all.

5. Against this background, we have heard the matter on the question of law whether the resolution once taken by the Gram Panchayat for appointment of a fair price shop dealer can be rejected by the Sub Divisional Magistrate and can he direct for holding a fresh meeting.

6. In this regard, we find that the Government order dated 03rd July, 1990, which has been issued by the State Government specifically in respect of the selection of the fair price shop dealers, in its Paragraph 4.4 provides that the fair price shop in the village will be opened on the opinion expressed by the Gram Sabha in the resolution to be passed in open meeting. Paragraph 4.12 of such Government order categorically and emphatically provides that once the resolution is passed by the Gram Sabha, generally there will not be necessity of any other enquiry. But in any special case if the Collector wants to get any enquiry conducted, then there will not be any embargo for that, however, before that, it is to be ensured that selection of fair price shop dealer will not be delayed on account of any such enquiry. Apart from that, Rule-40 of the Rules, which deals with reconsideration of a decision by Gram Sabha or Gram Panchayat, clearly articulates that no subject, once finally disposed of by a Gram Sabha or a Gram Panchayat, shall be reconsidered within three months next after passing of the resolution concerned unless not less than two-third of the members of Gram Sabha or Gram Panchayat, as the case may be, consent by signing a requisition to the effect. Furthermore, Section 96 of the Act deals with prohibition of certain proceedings and provides that the prescribed authority or any other officer specially empowered in this behalf by the State Government on information received

or on his own initiative, may, by order in writing prohibit the execution or further execution of a resolution or order passed or made under this or any other enactment by a Gram Sabha, Gram Panchayat or a Joint Committee, or any officer or servant thereof if in his opinion such resolution or order is of a nature as to cause or likely to cause obstruction, annoyance or injury to the public or to any class or body of persons lawfully employed, or danger to human life, health or safety, or riot or affray. It may prohibit the doing or continuance by any person of any act in pursuance of or under cover of such resolution or order.

7. In the instant case, factually we find that as per the direction of the respondent no. 2 open meeting of the Gram Panchayat was held in presence various officers/official concerned for considering appointment of new fair price shop dealer. In such meeting, name of the petitioner was recommended for appointment. However, the other candidate, who did not get sufficient support in his favour to become successful, made complaint and only on his complaint the matter was got enquired by the Assistant Development Officer (Panahcyat) and also by Naib Tehsildar. The Assistant Development Officer (Panahcyat) gave his report that meeting was held in accordance with law and there was no dispute in the meeting, whereas in his report the Naib Tehsildar submitted that some persons told that there was no dispute when some persons told that there was dispute. However, relying upon the report of the Naib Tehsildar, the Sub Divisional Magistrate has passed the impugned order cancelling the resolution taken by the Gram Panchayat in favour of the petitioner. In such circumstances, if we consider this factual aspect on the touchstone of the relevant rules and Government order as discussed above, we find, as is apparent from the order impugned, that neither the matter was brought to the notice of the concerned Collector, who could direct for any enquiry in the matter and also for holding a fresh meeting to take resolution, as per the Government order dated 03rd July, 1990 nor as per the Rule 40 of the Rules any requisition signed by two-third members of the Gram Panchayat was given consenting for reconsideration of the matter. Moreover, stopping of execution of the resolution taken in the open meeting of the Gram Panchayat is also beyond the jurisdiction of the Sub Divisional Magistrate as per the provisions of Section 96 of the Act. Thus, according to us, the impugned order passed by the respondent no. 2 is wholly illegal and without jurisdiction and as such, the same cannot be sustained, particularly when neither any other provision has been shown by the respondents supporting the order passed by the respondent no. 2 nor any material fact has been brought to the notice of the Court controverting the submissions of the petitioner.

8. From the judgement reported in **AIR 1987 SC 537 (The Comptroller and Auditor General of India, Gian Prakash, New Delhi and another Vs. K.S. Jagannathan and another)**, as cited by the petitioner, we find a three Judges' Bench of the Supreme Court has held that the High Courts exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the Government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in

such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. Though the Constitution Bench of the Supreme Court in **AIR 1967 SC 1170 (State of Madhya Pradesh and another Vs. Thakur Bharat Singh)** dealt with the applicability of Article 358 of the Constitution of India (suspension of provisions of Article 19 of the Constitution during emergencies) but has held that all executive action which operates to the prejudice of any person must have the authority of law to support it, and the terms of Article 358 do not detract from that rule. It has further been held held that even the Article 358 expressly authorises the State to take legislative or executive action provided such action was competent for the State to make or take, but for the provisions contained in Part III of the Constitution.

9. Thus, in view of the aforesaid factual aspect and also the law and settled legal propositions discussed above, we are of the view that the order impugned passed by the respondent no. 2 is not sustainable in nature and the present writ petition deserves to be allowed. Hence, in totality, the writ petition succeeds and is allowed. The order impugned dated 14th August, 2012 passed by the respondent no. 2 stands quashed, meaning thereby the resolution as taken by the Gram Panchayat on 10th July, 2012 in a democratic manner in recommending the name of the petitioner stands revived. Appropriate action will be taken by the authority concerned on the basis of such resolution for allotment of fair price shop to the petitioner.

10. No order is passed as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.10.2012

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 51137 of 2012

Afsar Khan and another ...Petitioner
Versus
Central Bank of India, Kanpur Nagar ...Respondents

Counsel for the Petitioner:
Sri Piyush Shukla
Sri Pratush Shukla

Counsel for the Respondents:
Sri K.R.S. Jadaun

Secularization and Reconstruction of financial Assets and Enforcement of Security Interest Act, 2002-Section 34-Bar of Civil Courts Jurisdiction-Section 17 of Recovery of Debts due to Banks and Financial Institution Act 1993-authorized the Tribunal to decide the application of Bank-but if amount is less than 10 Lakhs not to be recovered by Tribunal- impugned notice at pre-litigation stage for settlement purpose by exercising power under Section 22 C of L.S.A. Act 1987-can not be termed without jurisdiction.

Held: Para-9

Thus, in view of totality of the aforesaid facts and circumstances, the issuance of the notice by the Lok Adalat at a pre-litigation stage in exercise of powers under Section 22C of the Legal Services Authority Act, 1987 is not at all without jurisdiction. It is only a device to explore the possibility of any settlement instead of getting the dispute adjudicated by the court.

(Delivered by Hon'ble Pankaj Mithal, J.)

1. This is a petition for quashing of the notice annexure-2 to the writ petition issued

by the District Legal Services Authority to the petitioners stating that the Central Bank of India has initiated a drive to settle all outstanding Bank dues on lump sum basis by negotiations before moving to the court for its recovery and therefore you are called upon to enter appearance for settlement of the dues of Rs. 6,02,993/-.

2. The submission of the learned counsel for the petitioners is that the aforesaid notice is without jurisdiction, as the jurisdiction of civil court is barred by Section 34 of the Secularization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (herein after referred to as the 'Act').

3. Section 34 of the above Act provides that no civil court shall have jurisdiction to entertain any suit or proceedings in respect of any matter which can be determined by a Debts Recovery Tribunal or the Appellate Tribunal. It clearly means that the jurisdiction of the civil court stands excluded in respect of matters which are cognizable by Debts Recovery Tribunal or the Appellate Tribunal.

4. Section 17 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 authorizes the Debts Recovery Tribunal to decide applications of the Bank and financial institutions for recovery of debts due to such banks and financial institutions. However, Section 1 Sub-section 4 of the said Act clearly lays down that the aforesaid Act would not be applicable where amount of debts due to any bank or financial institutions is less than Rs.10,000,00/-. Thus, the recovery of any amount by the bank or financial institution of a sum of Rs. 10,000,00/- and less would not be covered by the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and would not be cognizable by Debt Recovery Tribunal.The Debts Recovery Tribunal covers matters relating to recovery of loan/dues of Rs. 10,000,00/- and above.

5. In this view of the matter, the bar of jurisdiction contained in Section 34 of the Act would not apply in respect of recovery of Rs. 6,02,993/-.

6. Apart from the above, so far no proceedings before the civil court or before the permanent Lok Adalat have been instituted by the bank for recovery of the aforesaid amount.

7. The notice impugned has been issued at a pre-litigation stage in exercise of powers under Section 22C of the Legal Services Authority Act, 1987 for the purposes of making a settlement, if possible, before bringing any dispute for adjudication before the court.

8. In the end learned counsel for the petitioners submits that the matter can not even be resolved at any stage by the Lok Adalat, in as much as, it is not a matter relating to the public utility service. This is a matter which the petitioners can agitate before the Lok Adalat pursuant to the impugned notice.

9. Thus, in view of totality of the aforesaid facts and circumstances, the issuance of the notice by the Lok Adalat at a pre-litigation stage in exercise of powers under Section 22C of the Legal Services Authority Act, 1987 is not at all without jurisdiction. It is only a device to explore the possibility of any settlement

instead of getting the dispute adjudicated by the court.

10. The petitioner can appear and show cause before the Lok Adalat pursuant to the above notice.

11. Accordingly, I am of the view that no case for exercising any extra-ordinary jurisdiction under Article 226 of the Constitution of India is made out.

12. The writ petition is devoid of merit and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.11.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 52749 of 1999

Smt.S.Ravis ...Petitioner
Versus
The Judge Small Cause Courts & Others ...Respondents

Counsel for the Petitioner:
Sri A.D. Saunders

Counsel for the Respondents:
C.S.C.
Sri Komal Mehrotra,
Sri M.A. Qadeer
Sri Rajesh Tandon
Sri Shamim Ahmad

U.P. Urban Buildings (Regulation of Letting rent and Eviction) Act 1972-Section 20 (4) (a)-first date of hearing-date for filing W.S. fixed 10-08-1988-entire amount deposited on 04.08.1988-non compliance founded on ground of rate of rent as Rs. 240-while finding recorded about monthly rent Rs. 40/-findings can not be said to be perverse-petition dismissed.

Held: Para-17

In the present case when I apply the aforesaid dictum, I find that deposit made on 4.8.1988 satisfy requirement of deposit made on the first date of hearing of the suit. In fact in appears that dispute raised by petitioner was regarding rate of rent and his entire claim of non compliance of Section 20(4) was founded on the ground that monthly rent was Rs.240/- per month while the Courts below have determined monthly rent at Rs.40/- per month and this is a finding of fact in respect whereto nothing has been shown perverse or contrary to record.

Case Law discussed:
AIR 1982 SC 816; 1995 (1) ARC 563; 1993 (4) SCC 406; (1999) 8 SCC 31; 2002 (3) SCC 49; AIR 2002 SC 2520; 2001 (2) AWC 1468; 2004 (56) ALR 460; 2004 (57) ALR 233; 2005 (60) ALR 697; 2006 (3) ARC 657; 2006 (2) ARC 208; Civil Misc. Writ Petition No. 19834 of 2003 (Sri Om Prakash Vs. Sri Anil Kumar)

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

1. Heard Sri A.D.Saunders, learned counsel for the petitioner and Sri M.A.Qadeer, Senior Advocate, assisted by Sri Shamim Ahmad, Advocate for the respondents.

2. The suit filed by petitioner for ejectment of respondent no.3 from accommodation in question has been decreed partly to the extent of recovery of arrears of rent by permitting landlord to withdraw the amount deposited by respondent-tenant under Section 20(4) of Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 *(hereinafter referred to as "Act, 1972")* but the suit for the relief of ejectment has been dismissed vide order dated 14.10.1996 and the said order has been confirmed by dismissing petitioner's revision vide judgment dated 23.9.1999.

3. Learned counsel for the petitioner submitted that there was no deposit on first date of hearing. The amount paid under Section 30(1) of Act, 1972 after issuance of notice could not be given due credit under Section 20(4) of Act, 1972 and therefore, impugned orders are liable to be set aside.

4. The submissions, as advanced, if considered vis a vis facts of the case, are thoroughly misconceived.

5. Section 20(4) of Act, 1972 itself provides that amount, which a tenant would deposit at the first date of hearing of the suit should be computed after deducting therefrom any amount already deposited by him under Section 30(1) of Act, 1972. Therefore, the amount deposited by tenant under Section 30(1) has to be given due credit for finding out whether there is compliance of Section 20(4) or not. It is not the case of petitioner that after deducting such amount, still deposit made by tenant does not satisfy requirement of Section 20(4) of Act, 1972.

6. The petitioner's counsel submitted that deposit was not made on the first date of hearing, inasmuch as, suit was filed on 31.5.1988 in which 3rd August, 1988 was the date fixed for filing written statement and 10th August, 1988 was the date fixed for hearing. The deposit was made by tenant on 4.8.1988 and therefore it cannot be said that the said amount was deposited on the first date of hearing.

7. The question as to what would be the first date of hearing of the suit in the light of the explanation in Section 20 has been considered by this Court time and again. The expression "first hearing" has been explained in Section 20(4) Explanation (a) and reads as under:

"the expression "first hearing" means the first date for any step or proceeding mentioned in the summons served on the defendant."

8. This expression has been considered by Apex Court in **Ved Prakash Wadhwa Vs. Vishwa Mohan, AIR 1982 SC 816**. It was held that the date of first hearing would not be before a date fixed for preliminary examination of parties and framing of issues. Similar was the view taken in an earlier judgment also in **Advaita Nand Vs. Judge, Small Causes Court, Meerut & Ors., 1995(1) ARC 563.**

9. A three-Judge Bench of Apex Court also considered this issue in **Siraj Ahmad Siddiqui Vs. Prem Nath Kapoor, 1993 (4) SCC 406** and said as under

"The date of first hearing of a suit under the Code is ordinarily understood to be the date on which the court proposes to apply its mind to the contentions in the pleadings of the parties to the suit and in the documents filed by them for the purpose of framing the issues to be decided in the suit. Does the definition of the expression 'first hearing' for the purposes of Section 20(4) mean something different? The "step or proceedings mentioned in the summons" referred to in the definition should we think, be construed to be a step or proceeding to be taken by the court for it is, after all, a "hearing" that is the subject matter of the definition, unless there be something compelling in the said Act to indicate otherwise; and we do not find in the said Act any such compelling

provision. Further, it is not possible to construe the expression "first date for any step or proceeding" to mean the step of filing the written statement, though the date for that purpose may be mentioned in the summons, for the reason that, as set out earlier, it is permissible under the Code for the defendant to file a written statement even thereafter but prior to the first hearing when the court takes up the case, since there is nothing in the said Act which conflicts with the provisions of the Code in this behalf. We are of the view, therefore, that the date of first hearing as defined in the said Act is the date on which the court proposes to apply its mind to determine the points in controversy between the parties to the suit and to frame issues, if necessary."

10. Again it was considered in **Sudershan Devi & Anr. Vs. Sushila Devi & Anr., (1999) 8 SCC 31** and held that the date fixed for hearing of the matter is the date of first hearing and not the date fixed for filing of written statement. The Court observed that emphasis in the relevant provision is on the word "hearing". The Court also relied on its earlier decision in **Ved Prakash Wadhwa (supra).**

11. The matter again came to be considered in **Mam Chand Pal Vs. Shanti Agarwal (Smt.), 2002 (3) SCC 49.** Therein the suit was filed on 5.12.1988 and summons were issued fixing 19th January, 1989 for filing of written statement and 27th January, 1989 for hearing. The defendant was not served. The order was passed for service of notice on the defendant by publication fixing 3.7.1989 for hearing. By mistake in the publication, the date of hearing was shown as 26.4.1989 instead of 3.7.1989. On 26.4.1989, Presiding Officer was not available having proceeded for training. The case was thereafter adjourned to 11.5.1989 and further gone on adjournment for one or the other reasons on several dates. The Court held that in the present case 26th April, 1989 would not be regarded as "first date of hearing" since on that date the Presiding Officer was not available. In para 7 the court said, "where the Court itself is not available it could not be treated as the date of first hearing". \

12. In **Ashok Kumar & Ors. Vs. Rishi Ram and others, AIR 2002 SC 2520**, the Court noticed distinction between the phraseology in Order XV, Rule 5 C.P.C. and Explanation (a) to sub-section (4) of Section 20 of Act, 1972 and in para 8, said:

"Rule 1 of Order V speaks of issue of summons. When a suit has been duly instituted a summons may be issued to the defendant to appear and answer the claim on a day specified therein. Rule 2 thereof enjoins that the summons shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement. Rule 5 of Order V says that the Court shall determine, at the time of issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit which shall be noted in the summons. However, in every suit heard by a Court of Small Causes, the summons shall be for the final disposal of the suit. It may be apt to notice here that Sub-section (3) of Section 20 of the Act was deleted in U.P. Civil Laws Amendment Act, 1972 with effect from September 20, 1972 and Rule 5 was inserted in Order XV of the Civil Procedure Code which deals with disposal of the suit at the first hearing.

Explanation 1 to Rule 5 of Order XV defines the expression "first hearing" to mean the date for filing written statement or for hearing mentioned in the summons or where more than one of such dates are mentioned, the last of the dates mentioned. But the said expression, as noticed above, is defined in Clause (1) of Explanation to Sub-section (4) of Section 20. Section 38 of the U.P. Act says that the provisions of the said Act shall have effect notwithstanding anything inconsistent therewith contained in the Transfer of Property Act or in Code of Civil Procedure, therefore, the definition contained in Clause (a) of Explanation to Sub-section (4) of Section 20 of the Act will prevail over the definition contained in Rule 5 of Order XV of the Code of Civil Procedure as applicable to the State of U.P. It is too evident to miss that in contra-distinction to the "filing of written statement" mentioned in the definition of the said expression contained in Rule 5 of Order XV, the language employed in Clause (a) of the Explanation to Section 20(4) of the U.P. Act, refers to 'the first date for any step or proceeding mentioned in the summons served on the defendant'. In our view those words mean the first date when the court proposes to apply its mind to identify the controversy in the suit and that stage arises after the defendant is afforded an opportunity to file his written statement." (emphasis added)

13. In para 12 of the judgment in **Ashok Kumar (supra),** considering the above observation and also relying on its earlier decisions in **Sudershan Devi (supra), Advaita Nand (supra) and Siraj Ahmad Siddiqui (supra),** the Court said:

"Now adverting to the facts of the case on hand it has been noticed above that the suit was posted on May 20, 1980 for final disposal but that date cannot be treated as the first hearing of the suit as the Court granted time till July 25, 1980 to the tenant for filing written statement. On July 25, 1980 time was extended for filing written statement and the suit was again adjourned for final disposal to October 10, 1980. Inasmuch as after giving due opportunity to file written statement the suit was posted for final disposal on October 10, 1980 it was that date which ought to be considered as the date fixed by the Court for application of its mind to the facts of this case to identify the controversy between the parties and as such the date of first hearing of the suit."

14. It also held that once the date of "first hearing" is determined and thereafter the case is adjourned, the date of first hearing of the suit would not change on every adjournment of the suit for final hearing.

15. Thus the effective date of first hearing of the suit should be, when the Court proposed to apply its mind. Therefore it would be the date fixed earliest for final disposal/hearing and not adjourned for reasons attributable to the defendant-tenant. There are certain decisions of this Court also and I need not to burden this judgment giving in detail all such judgments except of making reference to some of those hereto i.e **Mohd. Salim alias Salim Uddin Vs. 4th Addl. District Judge, Allahabad & Ors. 2001(2) AWC 1468, Har Prasad Vs. Ist A.D.J., Etah 2004 (56) ALR 460, Jai Ram Dass Vs. Iind Addl. District Judge, Jhansi & Ors. 2004(57) ALR**

233, Chaturbhuj Pandey Vs. VI A.D.J., Kanpur & Ors. 2005 (60) ALR 697, Hira Lal & Ors. Vs. Ram Das 2006 (3) ARC 657 and Saadat Ali Vs. J.S.C.C., Moradabad & ors. 2006 (2) ARC 208.

16. Considering the above authorities and exposition of law laid down therein, this Court in **Civil Misc. Writ petition No.19834 of 2003 (Sri Om Prakash Vs. Sri Anil Kumar)** decided on 30.10.2012 held as to what shall be the first date of hearing and in para 19 of the judgment it said as under:

"19. In the present case the written statement was filed on 25.7.1995 whereafter 24.8.1995 was fixed as the date for first hearing but on that date there was some holiday and the matter was taken up on 25.8.1995 which, in my view, should have been the first date of hearing. All deposits made thereon or till that date are liable to be given due credit to find out whether there is compliance of requirement of Section 20(4) of Act, 1972 or not."

17. In the present case when I apply the aforesaid dictum, I find that deposit made on 4.8.1988 satisfy requirement of deposit made on the first date of hearing of the suit. In fact in appears that dispute raised by petitioner was regarding rate of rent and his entire claim of non compliance of Section 20(4) was founded on the ground that monthly rent was Rs.240/- per month while the Courts below have determined monthly rent at Rs.40/- per month and this is a finding of fact in respect whereto nothing has been shown perverse or contrary to record.

18. I, therefore, find no reason to interfere with the impugned judgment. The writ petition therefore lacks merit. Dismissed.

19. Interim order, if any, stands vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.11.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 56688 of 2008

Dinesh Kumar ...Petitioner
Versus
State Of U.P. & Others ...Respondents

Counsel for the Petitioner:
Sri V.K. Singh
Sri G.K. Singh
Sri P.K.Singh

Counsel for the Respondents:
C.S.C.
Sri Chandra Dutta
Sri Pradeep Kumar
Sri Pradeep Verma
Sri Shailendra Kumar Verma

Constitution of India, Article 226- Payment of salary-petitioner appointed on post of peon-after following the procedure prescribed under law-salary not paid as Respondents No. 4 working on compassionate ground-and the respondent No. 6 being adopted son entitled to work on class 4th post-both appointment under compassionate ground challenged-as Respondent No. 4 on the retirement date was minor-likewise Respondent No. 5-under Mohammedan Law there is no concept of adoption even otherwise could not be appointed on age of 65 years-even then with collusion of Respondent No. 3 and 4 succeeded to get salary-both appointments quashed-direction to release salary to petitioner being

appointed under reserve quota-State Government to recover entire amount of salary from Respondents No. 2 and 3 in equal proportion.

Held: Para-58

Since appointment of respondents No.4 and 5 are wholly illegal and have been quashed hereinabove, the amount of salary paid to them also wholly unauthorized and illegal. However, since they have been allowed to work by DIOS as well as the Principal of the College, the responsibility enabling illegal and unauthorized appointment to them lie upon respondents No.2 and 3. In these circumstances, in my view, recovery of amount paid to respondent No.4 and 5 towards salary must be directed from respondents No.2 and 3 in equal proportion.

Case Law discussed:

1997 (11) SCC 390; 1999 (I) LLJ 539; AIR 1998 SC 2230; AIR 2000 SC 2782; AIR 2004 SC 4155; 1995 (6) SCC 436; (1996) 8 SCC 23; AIR 1998 SC 2612; 2002 (3) SC 485=2002 (10) SCC 246; AIR 2005 SC 106; AIR 2006 SC 2743; (2009) 13 SCC 122=JT 2009 (6) SC 624; 2009 (6) SCC 481; 2007 (6) SCC 162; 2011 (4) SCALE 308; 2011 (3) ADJ 91; JT 2011 (4) SC 30

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

1. Heard Sri P.K.Singh, learned counsel for the petitioner, learned Standing Counsel for respondents No.1 and 2 and Sri Shailendra Kumar Maurya, Advocate holding brief of Sri Pradeep Verma, Advocate, for respondent No.4. None appeared on behalf of respondents No.3 and 5 despite service of notice, though the case has been called in revised.

2. As requested and agreed by learned counsel for the parties, this case was heard finally and and is being decided under the Rules of the Court.

3. There are three orders, which have given a cause of action to the petitioner and have been assailed in this writ petition. They are the orders dated 14.2.2006 (Annexure 2 to the writ petition); 30.7.2007 (Annexure 3 to the writ petition); and 25.7.2008 (Annexure 1 to the writ petition). All are passed by District Inspector of Schools, Allahabad *(hereinafter referred to as "DIOS")*.

4. The DIOS vide first impugned order dated 14.2.2006 directed Manager/Principal of Jari Bandhan Inter College, Baijnath Ganj, Gorigon, Allahabad *(hereinafter referred to as "College")* to appoint Sri Sunil Kumar Yadav, respondent no.4, Son of Late Ram Awadh, (Assistant Teacher) working in the College till his death, as "Peon" in the pay scale of Rs.2250-3200 as a compassionate appointee. The Principal/Manager has been directed to make appointment, as contemplated in Regulation 107, Chapter III Regulations framed under Intermediate Education Act, 1921 *(hereinafter referred to as "Act, 1921")* and send compliance report to the DIOS.

5. The second order dated 30.7.2007 has been passed by DIOS in purported compliance of this Court's order dated 28.2.2006, in Writ Petition No.11251 of 2006, whereby he (DIOS) was required to decide representation of Smt. Sabira Begum, (respondent no.5 in the present writ petition) in respect to compassionate appointment on Class IV in the College. Therein he (the DIOS) has held that respondent no.5, Smt. Sabira Begum, is entitled for compassionate appointment being widow and legal heir of a deceased Class IV employees, Late Kallu, working in the College and accordingly directed

Principal of the College to appoint her as Class a IV employee in the College.

6. The third order dated 25.7.2008 (Annexure 1 to the writ petition) has been passed by DIOS pursuant to this Court's order dated 8.2.2008 in Writ Petition No.40280 of 2007, filed by present petitioner, earlier, in which DIOS was directed to decide petitioner's representation objecting compassionate appointment of respondents no.4 and 5. The DIOS, by means of order dated 25.7.2008 has rejected petitioner's representation.

7. The facts in brief giving rise to the present dispute are narrated as under:

8. The College is imparting education upto intermediate classes and is governed by the provisions of Act, 1921. Payment of salary to the staff, teaching and non teaching, both, is governed by the provisions of Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and Other Employees) Act, 1971 *(hereinafter referred to as "Act, 1971").*

9. One Kallu, a class IV employee working in the college died on 13.12.2001. After the death of Kallu, her widow Smt. Sabira Begum sought compassionate appointment of one Ali Ahmad (Ali Hasan) stating that he is adopted son. The Principal did not agree probably for the reason that in Muslim Law, there is no concept of adoption and there could not have been an adopted son of an employee who was a Muslim. It is in these circumstances, Smt. Sabira Begum and Ali Ahmad (Ali Hasan), both, came to this Court in Writ Petition No.29715 of 2003 in which notices were issued at that time but no interim order was passed. The said writ petition was ultimately dismissed vide judgment dated 18.3.2004.

10. The Principal of College, being Appointing Authority of Class IV employees, sought permission of DIOS for making recruitment and appointment in the aforesaid vacancy, which was granted vide order dated 24.1.2005 (Annexure 4 to the writ petition). While granting permission, DIOS, however, directed that appointment should be made from a candidate belong to either Scheduled Caste or Scheduled Tribe since there are five sanctioned posts in the College and therefore, one would fall within the quota prescribed in SC/ST category.

11. Consequently, Principal of the College advertised vacancy on 5.2.2005 in daily newspaper "Northern India Patrika" and "Nyayadhish" and after considering various candidates, Selection Committee recommended petitioner for appointment in the aforesaid vacancy. The relevant documents were forwarded to DIOS for his approval which was considered by Regional Level Committee and vide letter dated 20.9.2005 it directed DIOS to take a decision at its own level under the rules and regulations. Consequently, DIOS granted approval vide letter dated 10.10.2005. The petitioner was appointed as a Class IV employee in the College vide appointment letter dated 15.10.2005 issued by Principal of the College. The petitioner belongs to reserved category (SC). Pursuant to the aforesaid appointment, the petitioner joined on 21.10.2005 and has been working since thereafter accordingly.

12. It appears that Committee of Management preferred a Writ Petition No.6277 of 2006 stating that vacancy, in which petitioner was appointed, ought to have been filled in, from dependent of

deceased employee Kallu i.e. Smt. Sabira Begum, respondent no.5. The writ petition filed by Committee of Management was dismissed by this Court's judgment dated 9.5.2007.

13. The petitioner, however, was not paid salary during pendency of the above writ petition and therefore after dismissal of writ petition, represented before DIOS that since writ petition of management has been dismissed, he should be paid salary. Failing to get any response from DIOS, regarding payment of salary, petitioner came to this Court in writ petition No.40280 of 2007 which was disposed of vide order dated 8.2.2008 directing DIOS to consider and decide petitioner's representation regarding payment of salary. Pursuant thereto the DIOS passed the impugned order rejecting petitioner's representation and also cancelling/revoking order dated 10.10.2005 whereby approval was granted to the petitioner's selection. The DIOS has held that the aforesaid approval was obtained by concealment of material facts and therefore, the said approval was liable to be revoked.

14. Learned counsel for the petitioner, Sri P.K.Singh, contended that there were five sanctioned posts out of which three were already occupied by Sri Ram Raj, Sri Lalan Prasad and Sri Rajendra Prasad appointed on 8.7.1972, 8.7.1978 and 1.3.1987. There were two vacancies in 2005 when the process of recruitment on Class IV post begun after permission granted by DIOS on 24.1.2005. No claim for compassionate appointment against any of the vacancy in Class IV was pending for consideration at that time. Therefore, recruitment, selection and appointment of petitioner on a Class IV post can neither be said to be illegal nor any material fact was concealed and DIOS has completely misdirected himself by distorting the facts in a mixed up manner. Assailing the appointment of respondent no.5 in particular, Sri P.K.Singh, Advocate, said that at the time of appointment, she was above the age of 60 years, therefore could not have been appointed at all and her appointment made in 2007 is patently illegal and in flagrant violation of relevant statutory provisions applicable in this regard. So far as Sunil Kumar, respondent no.4 is concerned, who is alleged to have been appointed on 16.2.2006 or 31.7.2007, it is contended that he was not at all available for appointment when vacancy in question was advertised i.e. in 2005. The petitioner was selected and actually appointed in 2005 therefore, petitioner's appointment cannot be said to have been vitiated in law for an illegal appointment made subsequently in 2006 or 2007 when there was no vacancy of Class IV in the college. He contended that DIOS, in a wholly illegal and arbitrary manner, has passed the impugned orders and the same are liable to be set aside.

15. A counter affidavit has been filed by Principal stating that petitioner's appointment was made illegally since there was no vacancy. The respondents no.4 and 5 were already appointed vide appointment letters dated 30.7.2007 as a result whereof there was no vacancy in Class IV hence petitioner could not have been appointed. It is further said that before the claim of petitioner, application for compassionate appointment for the benefit of respondent no.4 was already pending, inasmuch as, his mother Smt. Ganga Devi, Wife of Late Ram Awadh had filed an application on 7.9.2001 requesting for compassionate appointment of respondent no.4.

16. Another counter affidavit has been filed by respondent no.4 himself stating that his father Ram Awadh, Assistant Teacher, working in the college died in 1999. The respondent no.4 at that time was minor. His date of birth being 10th July, 1986, vide Annexure 1 to the counter affidavit of respondent no.4, he passed High School in June, 2001 and Intermediate in 2003. He attained the age of majority i.e. 18 years on 10th July, 2004 but in anticipation, moved an application on 2nd May, 2004 for claiming appointment on and after 10th July, 2004 as a Class III employee in the College. The application was forwarded to DIOS by Management vide letter dated 31.5.2004.

17. It is not clear as to when DIOS granted approval and neither order of appointment allegedly issued in 2006 to respondent no.4 is on record nor otherwise said to have been issued on a particular date but it appears that he was allowed to join and work on 16th February, 2006. The respondent no.2, however, has mentioned the date of appointment of respondent no.4 as 16.2.2007.

18. The respondents no.1 and 2 have also filed counter affidavit. With respect to the age of appointment of respondent no.5, in para 13 of counter affidavit, it has been said that there is a restriction with respect to minimum age but no restriction about maximum age.

19. In the counter affidavit of respondent no.2, however, in para 8 it has been stated that Sri Sunil Kumar, respondent no.4 was appointed after attaining majority, on 16.2.2007, while respondent no.5, Smt. Sabira Begum, was appointed by DIOS vide order dated 31.7.2007.

20. No individual counter affidavit sworn by respondent no.5 himself has been filed.

21. Now coming to first aspect, i.e. on the correctness of appointment of respondent no.5, I am of the view that it was patently illegal.

22. It is admitted and evident from the record that respondent no.5, after the death of her husband Kallu, did not claim any appointment for herself but requested for appointment for her adopted son Ali Ahmad (Ali Hasan). For this purpose she along with Ali Ahmad filed writ petition no.29715 of 2003 which was ultimately dismissed on 18.3.2004. Therefore, till dismissal of writ petition, no claim was set up by respondent no.5 for her appointment on compassionate basis after the death of her husband.

23. Though, respondents no.1 and 2 in para 18 of their counter affidavit have stated that application was given by respondent no.5 requesting for compassionate appointment on 7.6.2003 but no such application has been placed on record to show whether it was an application for appointment of her ownself or for the benefit of Ali Ahmad (Ali Hasan) for which purpose respondent no.5 filed writ petition no.29715 of 2003. It is also inconceivable, when the aforesaid writ petition was pending before this Court in 2003 and was dismissed on 18.3.2004, what was the occasion for respondent no.5 to move an application for appointment of herself and if so, when such an application was given by her.

24. It is no doubt true that respondent no.5 filed writ petition no.11251 of 2006 which was disposed of on 28.2.2006 directing DIOS to decide her application for

compassionate appointment but in that writ petition also she has not disclosed about her earlier writ petition filed along with Ali Ahmad (Ali Hasan) in which she has sought compassionate appointment for her adopted son Ali Ahmad (Ali Hasan). An order, which was obtained by petitioner in writ petition no.11251 of 2006 is clearly by concealment of material fact. Come what may but alleast there is nothing on record to show that respondent no.5 till 15.10.2005, when petitioner was actually appointed by the Principal of the College after approval granted by DIOS, had never moved any application claiming appointment on compassionate basis for herself and therefore, to claim that petitioner could not have been appointed since claim of compassionate appointment of respondent no.5 was pending consideration before DIOS is clearly incorrect.

25. So far as claim for compassionate appointment of alleged adopted son is concerned, suffice it to mention that firstly, this claim stood negated after dismissal of writ petition no.29715 of 2003 and secondly; there is no concept of adoption, recognised in Muslim Law. In absence of any recognition of principle of adoption in Muslim Law there would not have been any occasion to claim that there was any legal heir of the deceased Kallu by way of adopted son available for claiming compassionate appointment and hence request for this behalf was a nullity since its inception.

26. The petitioner has specifically pleaded and placed on record the documents to show her age. He has specifically stated that Smt. Sabira Begum had crossed the age of 60 years as per the medical certificate issued by Department of Radiology and Ultrasound, MLN Hospital, Allahabad on 9.8.2002. Obviously on the date of appointment in 2007, respondent no.5 must be around 65 years of age. The averments contained in para 22 of writ petition have not been denied in the counter affidavit sworn by Principal of College though he has mentioned that he is filing counter affidavit on behalf of respondent no.5. In para 12 of counter affidavit, he simply says that the contents of paras 21, 22 and 23 of the writ petition are not concerned to him. To the same effect is the reply given in the counter affidavit filed by the respondent no.4. The respondent no.5,having not filed any reply by not appearing, has left these pleadings of petitioner uncontrovered.

27. The respondents no.1 and 2 in a very strange and interesting manner have replied para 22 of writ petition in para 13 of the counter affidavit by asserting that department has no document relating to the age of respondent no.5 but for compassionate appointment no limit of maximum age has been prescribed.

28. This Court finds it interesting that copy of service book of respondent no.5 has been filed along with counter affidavit, sworn by Principal of the College, and on pages 16 and 17 thereof date of birth of respondent no.5 has been mentioned as 3.10.1952. The basis of date of birth is not disclosed anywhere. In the column of signature/thumb impression, respondent no.5 has put her thumb impression showing that she is not literate at all. Her date of appointment has been mentioned as 31.7.2007.

29. The averments made in para 22 of writ petition in respect to the age of respondent no.5 as such have not been

contradicted or disputed by any of the respondents. However, from the copy of service book filed along with the counter affidavit of Principal of the College, it has been shown that her age was about 55 years on the date of her appointment since her date of birth mentioned is 3.10.1952. It thus has to be examined whether in respect to the age, there is any restriction for appointment and whether appointment of petitioner made in 2005 could have vitiated in law for the so called appointment of respondents no. 4 and 5, which admittedly are subsequent to the date of appointment of the petitioner.

30. Now, I would consider validity of appointment of respondent no.5 in the context of her age.

31. The case set up by official respondents, there is no maximum age prescribed for compassionate appointment hence it can be made at any point of time, at any age.

32. The submission is not only misleading but thoroughly misconceived. Even a thoroughly erratic person cannot argue that if no maximum age is prescribed, a person can be appointed at any age, for the first time, in a service, governed by statutory rules where age of superannuation is prescribed. Here the age of superannuation of Class IV employee in Secondary Schools/Colleges is 60 years. Therefore by no stretch of imagination, a person, who has completed 60 years can be appointed for the first time as direct recruit. It is now settled that appointment on compassionate basis is a direct recruitment and not promotion or transfer etc. Therefore, even if there is no maximum age prescribed, by implication of statutory provisions prescribing age of superannuation, the restraint is there. No appointment can be permissible after the age of 60 years on a Class IV post which is presently the age of superannuation in Secondary Schools/College governed by Intermediate Education Act, 1921 and the Regulations framed thereunder. Another aspect is that an appointment can be made on compassionate basis only when incumbent is fit and suitable for the post in question. This also has to be examined.

33. Secondly a compassionate appointment is to mitigate immediate financial hardship suffered by deceased employee and not to serve as source of recruitment. It is not a right of a person to claim, as a matter of course, as and when he or she likes. The deceased employee Kallu, husband of respondent no.5, admittedly died on 13.12.2001. The respondent No.5 did not find any hardship or otherwise reason to claim compassionate appointment immediately thereafter for himself. Instead she tried to get a stranger accommodated in the garb of compassionate appointment by requesting the authorities to give him (Ali Ahmad i.e. Ali Hasan) compassionate appointment but failed in her attempt after dismissal of her writ petition No.29715 of 2003 on 18.3.2004. Thereafter, in 2004 and 2005 also she did not make any application for compassionate appointment as there is nothing on record to show that any such application was filed by her. It is only for the first time in 2006, when the petitioner had already been appointed as a Class IV employee on 15.10.2005, she claimed that she is entitled for compassionate appointment amd came to this Court in Writ Petition No.11251 of 2006 without disclosing the factum of her earlier writ petition and got an order for deciding her representation

whereupon, in a clandestine manner, the authorities of Education Department and that of the College came to her rescue and appointed her though there was no vacancy at that time at all. All this show the way in which provision relating to compassionate appointment has been misused by respondent authorities.

34. In **Managing Director, MMTC Ltd., New Delhi and Anr. Vs. Pramoda Dei Alias Nayak 1997 (11) SCC 390** the Court said:

"As pointed out by this Court, the object of compassionate appointment is to enable the penurious family of the deceased employee to tied over the sudden financial crises and not to provide employment and that mere death of an employee does not entitle his family to compassionate appointment."

35. In **S. Mohan Vs. Government of Tamil Nadu and Anr. 1999 (I) LLJ 539** the Supreme Court said:

"The object being to enable the family to get over the financial crisis which it faces at the time of the death of the sole breadwinner, the compassionate employment cannot be claimed and offered whatever the lapse of time and after the crisis is over."

36. In **Director of Education (Secondary) & Anr. Vs. Pushpendra Kumar & Ors. AIR 1998 SC 2230** the Court said:

"The object underlying a provision for grant of compassionate employment is to enable the family of the deceased employee to tide over the sudden crisis resulting due to death of the bread earner which has left the family in penury and without any means of livelihood."

37. In **Sanjay Kumar Vs. The State of Bihar & Ors. AIR 2000 SC 2782** it was held:

"compassionate appointment is intended to enable the family of the deceased employee to tide over sudden crisis resulting due to death of the bread earner who had left the family in penury and without any means of livelihood"

38. In **Punjab Nation Bank & Ors. Vs. Ashwini Kumar Taneja AIR 2004 SC 4155,** the court said:

"It is to be seen that the appointment on compassionate ground is not a source of recruitment but merely an exception to the requirement regarding appointments being made on open invitation of application on merits. Basic intention is that on the death of the employee concerned his family is not deprived of the means of livelihood. The object is to enable the family to get over sudden financial crisis."

39. An appointment on compassionate basis claimed after a long time has seriously been deprecated by Apex Court in **Union of India Vs. Bhagwan 1995 (6) SCC 436, Haryana State Electricity Board Vs. Naresh Tanwar, (1996) 8 SCC 23**. In the later case the Court said:

"compassionate appointment cannot be granted after a long lapse of reasonable period and the very purpose of compassionate appointment, as an exception to the general rule of open recruitment, is intended to meet the immediate financial problem being suffered by the members of the family of the

deceased employee. ..... the very object of appointment of dependent of deceased-employee who died in harness is to relieve immediate hardship and distress caused to the family by sudden demise of the earning member of the family and such consideration cannot be kept binding for years."

40. In **State of U.P. & Ors. Vs. Paras Nath AIR 1998 SC 2612**, the Court said:

"The purpose of providing employment to a dependent of a government servant dying in harness in preference to anybody else, is to mitigate the hardship caused to the family of the employee on account of his unexpected death while still in service. To alleviate the distress of the family, such appointments are permissible on compassionate grounds provided there are Rules providing for such appointment. The purpose is to provide immediate financial assistance to the family of a deceased government servant. None of these considerations can operate when the application is made after a long period of time such as seventeen years in the present case."

41. In **Hariyana State Electricity Board Vs. Krishna Devi JT 2002 (3) SC 485 = 2002 (10) SCC 246** the Court said:

"As the application for employment of her son on compassionate ground was made by the respondent after eight years of death of her husband, we are of the opinion that it was not to meet the immediate financial need of the family ...."

42. In **National Hydroelectric Power Corporation & Anr. Vs. Nanak Chand & Anr. AIR 2005 SC 106**, the Court said:

"It is to be seen that the appointment on compassionate ground is not a source of recruitment but merely an exception to the requirement regarding appointments being made on open invitation of application on merits. Basic intention is that on the death of the employee concerned his family is not deprived of the means of livelihood. The object is to enable the family to get over sudden financial crises."

43. In **State of Jammu & Kashmir Vs. Sajad Ahmed AIR 2006 SC 2743** the Court said:

"Normally, an employment in Government or other public sectors should be open to all eligible candidates who can come forward to apply and compete with each other. It is in consonance with Article 14 of the Constitution. On the basis of competitive merits, an appointment should be made to public office. This general rule should not be departed except where compelling circumstances demand, such as, death of sole bread earner and likelihood of the family suffering because of the set back. Once it is proved that in spite of death of bread earner, the family survived and substantial period is over, there is no necessity to say 'goodbye' to normal rule of appointment and to show favour to one at the cost of interests of several others ignoring the mandate of Article 14 of the Constitution."

44. Following several earlier authorities, in **M/s Eastern Coalfields Ltd. Vs. Anil Badyakar and others, (2009) 13 SCC 122 = JT 2009 (6) SC 624** the Court said:

"The principles indicated above would give a clear indication that the compassionate appointment is not a vested

right which can be exercised at any time in future. The compassionate employment cannot be claimed and offered after a lapse of time and after the crisis is over."

45. In **Santosh Kumar Dubey Vs. State of U.P. & Ors. 2009 (6) SCC 481** the Apex Court had the occasion to consider Rule 5 of U.P. Recruitment of Dependents of Government Servants Dying in harness Rules, 1974 *(hereinafter referred to as "1974 Rules")* and said:

"The very concept of giving a compassionate appointment is to tide over the financial difficulties that is faced by the family of the deceased due to the death of the earning member of the family. There is immediate loss of earning for which the family suffers financial hardship. The benefit is given so that the family can tide over such financial constraints. The request for appointment on compassionate grounds should be reasonable and proximate to the time of the death of the bread earner of the family, inasmuch as the very purpose of giving such benefit is to make financial help available to the family to overcome sudden economic crisis occurring in the family of the deceased who has died in harness. But this, however, cannot be another source of recruitment. This also cannot be treated as a bonanza and also as a right to get an appointment in Government service."

46. The Court considered that father of appellant **Santosh Kumar Dubey (supra)** became untraceable in 1981 and for about 18 years the family could survive and successfully faced and over came the financial difficulties. In these circumstances it further held:

"That being the position, in our considered opinion, this is not a fit case for exercise of our jurisdiction. This is also not a case where any direction could be issued for giving the appellant a compassionate appointment as the prevalent rules governing the subject do not permit us for issuing any such directions."

47. In **I.G. (Karmik) and Ors. v. Prahalad Mani Tripathi 2007 (6) SCC 162** the Court said:

"Public employment is considered to be a wealth. It in terms of the constitutional scheme cannot be given on descent. When such an exception has been carved out by this Court, the same must be strictly complied with. Appointment on compassionate ground is given only for meeting the immediate hardship which is faced by the family by reason of the death of the bread earner. When an appointment is made on compassionate ground, it should be kept confined only to the purpose it seeks to achieve, the idea being not to provide for endless compassion."

48. The importance of penury and indigence of the family of the deceased employee and need to provide immediate assistance for compassionate appointment has been considered by the Apex Court in **Union of India (UOI) & Anr. Vs. B. Kishore 2011(4) SCALE 308.** This is relevant to make the provisions for compassionate appointment valid and constitutional else the same would be violative of Articles 14 and 16 of the Constitution of India. The Court said:

"If the element of indigence and the need to provide immediate assistance for relief from financial deprivation is taken out from the scheme of compassionate appointments, it would turn out to be reservation in favour of the dependents of

an employee who died while in service which would be directly in conflict with the ideal of equality guaranteed under Articles 14 and 16 of the Constitution."

49. It is thus clear that rule of compassionate appointment has an object to give relief against destitution. It is not a provision to provide alternate employment or an appointment commensurate with the post held by the deceased employee. It is not by way of giving similarly placed life to the dependents of the deceased. While considering the provision pertaining to relaxation under 1974 Rules, the very object of compassionate appointment cannot be ignored. This is what has been reiterated by a Division Bench of this Court in **Smt. Madhulika Pathak Vs. State of U.P. & ors. 2011 (3) ADJ 91.**

50. In **Local Administration Department and Anr. v. M. Selvanayagam @ Kumaravelu JT 2011 (4) SC 30,** Apex Court considered almost a similar case arising out of a judgment of the Madras High Court. One Meenakshisundaram, a Watchman in Karaikal Municipality died on 22nd November, 1988 leaving behind a widow and two sons, one of whom was eleven years old at that time. The widow was thirty-nine years of age but immediately did not make any application for compassionate appointment. On 29th July, 1993, after about four and a half years and odd, she made an application for compassionate appointment of M. Selvanayagam @ Kumaravelu since he had passed S.S.L.C. Examination in April, 1993. However, the appointment could not have been granted since M. Selvanayagam @ Kumaravelu was minor at that time also. Another application thereafter was given after 7 years and 6 months from the date of death of Meenakshisundaram. Having received no reply, a writ petition was filed which was disposed of directing the Municipality to pass an order on the application for compassionate appointment. The claim for compassionate appointment was ultimately rejected by Municipality vide order dated 19th April, 2000. The writ petition against the said order was dismissed by the learned Single Judge but in intra-court appeal, it was allowed vide judgment and order dated 30th April, 2004 and the Municipality was directed to provide compassionate appointment. It is this order, which was assailed before the Apex Court. The Municipality had declined to give compassionate appointment observing that wife of the deceased employee did not make any request immediately after the death for compassionate appointment which shows that she was not facing any financial crisis in the family at that time. This reasoning was negatived by the Division Bench of the High Court but the Apex Court did not approve the view taken by High Court and said:

"....there is a far more basic flaw in the view taken by the Division Bench in that it is completely divorced from the object and purpose of the scheme of compassionate appointments. It has been said a number of times earlier but it needs to be recalled here that under the scheme of compassionate appointment, in case of an employee dying in harness one of his eligible dependents is given a job with the sole objective to provide immediate succor to the family which may suddenly find itself in dire straits as a result of the death of the bread winner. An appointment made many years after the death of the employee or without due consideration of the financial resources available to his/her dependents and the financial deprivation caused to the

dependents as a result of his death, simply because the claimant happened to be one of the dependents of the deceased employee would be directly in conflict with Articles 14 & 16 of the Constitution and hence, quite bad and illegal. In dealing with cases of compassionate appointment, it is imperative to keep this vital aspect in mind.

8. Ideally, the appointment on compassionate basis should be made without any loss of time but having regard to the delays in the administrative process and several other relevant factors such as the number of already pending claims under the scheme and availability of vacancies etc. normally the appointment may come after several months or even after two to three years. It is not our intent, nor it is possible to lay down a rigid time limit within which appointment on compassionate grounds must be made but what needs to be emphasized is that such an appointment must have some bearing on the object of the scheme.

9. In this case the Respondent was only 11 years old at the time of the death of his father. The first application for his appointment was made on July 2, 1993, even while he was a minor. Another application was made on his behalf on attaining majority after 7 years and 6 months of his father's death. In such a case, the appointment cannot be said to sub-serve the basic object and purpose of the scheme. It would rather appear that on attaining majority he staked his claim on the basis that his father was an employee of the Municipality and he had died while in service. In the facts of the case, the municipal authorities were clearly right in holding that with whatever difficulty, the family of Meenakshisundaram had been able to tide over the first impact of his death. That being the position, the case of the Respondent did not come under the scheme of compassionate appointments."

51. In the present case, respondents No.1 to 3 claimed to have appointed respondent No.5 by letter of appointment dated 30/31.7.2007, as is evident from the copy of her service book, without answering the question whether on that date she was 55 years of age or 60 years. Considering specific and clear pleadings of the petitioner about age of respondent no.5 that she was about 65 years of age in 2007 and absence of any rebuttal/denial on the part of respondent no.5 as also for lack of any specific reply by respondents, I am inclined to uphold the above submission on the basis of uncontroverted pleadings of the petitioner. The appointment of respondent no.5 at the age of 65 on a Class IV post is ex faice illegal and impermissible considering the fact that the age of superannuation of a Class IV employee of a Secondary School / College is 60 years and therefore by no stretch of imagination, a person having crossed 60 years can be appointed on a Class IV post.

52. Moreover, suffice it to mention that she was not entitled for compassionate appointment on that date not only having not approached for such appointment within a reasonable time but also for the reason that there was no vacancy in Class IV post. The respondents have completely failed to consider that in vacancy caused by the death of Kallu, in absence of any claim otherwise by his legal heir, it was already filled in by appointment of petitioner vide appointment letter dated 15.10.2005 leaving no such vacancy. In the second vacancy since respondent no.4 was already appointed therefore, respondent no.5 could not have been appointed at all.

53. Now coming to the validity of appointment of respondent no.4. A copy of service book of respondent no.4 filed along with counter affidavit sworn by the Principal of the College. His date of birth has been shown as 10.7.1986. His educational qualification High School passed in 2001, Intermediate in 2003 and B.A. in 2006 and his date of appointment has been mentioned as 31.7.2007. This Court finds that he was admittedly minor on the date when his father died in 1999. He claimed to have filed an application for compassionate appointment on 02.5.2004. On that date also he was minor. An application filed by a minor cannot be treated to be a valid application for processing the case for compassionate appointment. There is nothing on record to show that respondent no.4 claimed compassionate appointment after attaining the age of majority. The minimum age prescribed for appointment on a class IV Post is 18. Admittedly, he attained the said age of 18 years on 10.7.2004 but on that date and thereafter at least nothing has been placed on record to show that he submitted any application whatsoever requesting for compassionate appointment. He was admittedly at that time undergoing education in intermediate or graduation, as the case may be. He was not available for appointment on Class IV post. Even the so called application which was filed by him on 2.5.2004 was for appointment on Class III post. In absence of any valid application in law seeking appointment on a class IV post in the College, I find no justification or validity in the act of respondents in appointing him in 2007 but even before appointing him by permitting him to work in the College. All this show sheer undue and illegal favour by respondents No.1 to 3 to respondent no.4. In any case, respondent No.4 having not filed any application for compassionate appointment after attaining age of majority, could not have been appointed by acting upon so called application submitted by a minor.

54. Even otherwise, this Court finds that, in 2005, there was no such fact, which is said to have been concealed by petitioner so as to render his appointment invalid, as has been held by DIOS. It is evident that DIOS has not at all applied his mind to all the facts in a rational and valid manner but has proceeded with a predetermined objective and notion.

55. In 2005, when Principal sought approval from DIOS for appointment on Class IV against vacancy caused due to death of Kallu, a Class IV employee, there was no claim of compassionate appointment pending either in the College or before DIOS in respect to the College in question and hence it cannot be said that there was any concealment of fact by the Principal or that there was any fault on the part of DIOS in granting permission to make direct recruitment or according approval for selection and appointment of the petitioner on Class IV post.

56. Moreover, vacancy was found to be reserved for scheduled caste candidate. None of respondents No.4 and 5 belong to that category. The DIOS, in this case, appears to have proceeded in a very reckless, unmindful manner and it is his inaction or mischievous action which has caused spate of litigation between parties. The payment of salary made to respondents No.4 and 5 was wholly illegal for which responsibility primarily lie upon the respondents No.2 and 3.

57. In the result, the writ petition is allowed. The impugned orders dated

14.2.2006 (Annexure 2 to the writ petition) 30.7.2007 (Annexure 3 to the writ petition) and 25.7.2008 (Annexure 1 to the writ petition) all passed by District Inspector of Schools, Allahabad are hereby quashed. The petitioner shall be deemed to have been appointed on the Class IV post validly with all consequential benefits in view of his appointment letter dated 15.10.2005 issued by respondent no.3 after DIOS's approval dated 10.10.2005.

58. Since appointment of respondents No.4 and 5 are wholly illegal and have been quashed hereinabove, the amount of salary paid to them also wholly unauthorized and illegal. However, since they have been allowed to work by DIOS as well as the Principal of the College, the responsibility enabling illegal and unauthorized appointment to them lie upon respondents No.2 and 3. In these circumstances, in my view, recovery of amount paid to respondent No.4 and 5 towards salary must be directed from respondents No.2 and 3 in equal proportion.

59. Accordingly, I direct that respondent No.1 shall proceed to recover the amount of salary paid illegally to respondents no.4 and 5, in equal proportion, from respondents No.2 and 3 i.e. respective officials held the office at relevant time when alleged illegal appointment of respondents No.4 and 5 were made, after making such enquiry as provided in law. Such enquiry shall be completed and recovery shall be effected within a period of six months from the date of production of a certified copy of this order before respondent no.1.

60. For the purpose of compliance of above direction this matter shall be listed before this Court in the second week of May, 2013 under the title "Compliance Report".

61. The petitioner shall also be entitled to cost, which I quantify to Rs.25,000/-, which shall be equally apportioned among all the respondents.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.11.2012

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No. 58093 of 2012

Mithlesh Kumari ...Petitioner
Versus
D.D.C. And Others ...Respondents

Counsel for the Petitioner:
Sri K. Kumar Tripath
Sri Anand Mohan Pandey

Counsel for the Respondents:
C.S.C.

U.P. Consolidation of Holdings Act-1953-Section 52 (2)-Appeal against the judgment of consolidation officer filed-with delay condonation application-after notification under Section 52 of the Act-whether appeal filed after notification would be competent?-held-"Yes"-once delay condoned-it shall be treated to be filed within time-appeal being continuation of original proceeding-can not be quashed.

Held: Para-13

On perusal of the meaning of the word 'pending', it is clear that the matter, which is undecided or awaiting settlement, shall be treated to be pending. Here in this case, the appeal was filed after the notification under section 52 of the Act along with an application for condonation of delay. The

delay was condoned, meaning thereby, the appeal came into existence and since the Settlement Officer of Consolidation has fixed the date for passing order on the appeal, therefore, the same shall be treated to be pending and would be unaffected with the rigor of sub-section (1) of section 52 of the Act.

Case Law discussed:

AIR 1957 SC 540; AIR 1967 ALD 214; AIR 1973 All. 414; AIR 1973 All 411; (JT 1987 (1) SC 537=1987 (2) SCR 387); JT 1996 (7) SC 204; JT 1995 (7) SC 69; JT 1998 (6) SC 242; JT 2000 (5) 389

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

1. Through this writ petition, the petitioner has prayed for issuing a writ of certiorari quashing the orders dated 16.8.2012 and 24.9.2011 passed by respondent nos. 1 and 2 respectively.

2. Heard Sri Anand Mohan Pandey, holding brief of Sri K. Kumar Tripathi, learned counsel for the petitioner and learned Standing Counsel.

3. It appears, respondent no. 3 filed an appeal against the order dated 14.7.2008 passed by the Consolidation Officer. The appeal was also accompanied with an application for condonation of delay. The Settlement Officer of Consolidation, after hearing both the sides, condoned the delay and fixed 30.11.2011 for passing the order in the appeal. The petitioner herein has filed revision no. 101 (Mithlesh Kumari Vs. Ramwati). The said revision was dismissed by the Deputy Director of Consolidation on 16.8.2012.

4. Sri Pandey has vehemently contended that after the order dated 14.7.2008 passed by the Consolidation Officer, the notification under section 52 of U.P. Consolidation of Holdings Act, 1953 (hereinafter referred to as, 'the Act') was issued on 25.4.2009, whereas the appeal was filed on 4.1.2010. Taking shelter of sub-section (2) of section 52 of the Act, he has further contended that the cognizance by the consolidation courts could only be taken with respect to the pending proceedings and no fresh proceeding could be instituted in view of sub-section (1) of section 52 of the Act. In his submissions, since in this case, no appeal was pending, before notification under section 52 of the Act, therefore, both the courts below have erred in passing the impugned orders.

5. Sri S.K. Mourya, learned Standing Counsel appearing for the State contended that the argument of learned counsel for the petitioner is misconceived in view of the provisions contained under section 53B of the Act, which provides for applicability of section 5 of the Limitation Act in the consolidation proceedings. In his submissions, if the statute provides right of filing appeal, along with an application for condonation of delay, in that circumstances, if the delay is condoned, the appeal would be treated well within time and in that eventuality, the provisions contained under section 52 of the Act would not be attracted as the appeal is nothing but a creation of statute and continuation of the suit proceedings.

6. I have heard learned counsel for the petitioner and learned Standing Counsel.

7. In order to resolve the controversy, it would be useful to go through the provisions contained in sub-sections (1) & (2) of section 52 of the Act, which reads as under:

"52. Close of consolidation operations - (1) As soon as may be, after fresh maps and records have been prepared under sub-section (1) of Section 27, the State Government shall issue a notification in the Official Gazette that the ***consolidation operations have been closed in the unit and the village or villages forming a part of the unit shall then cease to be under consolidation operations.***

Provided that the issue of the notification under this section shall not affect the powers of the State Government to fix, distribute and record the cost of operations under this Act.

(2) Notwithstanding anything contained in sub-section (1), any order passed by a Court of competent jurisdiction in cases of writs filed under the provisions of the Constitution of India, ***or in cases of proceedings pending under this Act on the date of issue of the notification under sub-section (1), shall be given effect to by such authorities, as may be prescribed and the consolidation operation shall, for that purpose, be deemed to have not been closed."***

8. From the bare reading of sub-sections (1) & (2) of section 52 of the Act, it would transpire that effect of notification under sub-section (1) of section 52 of the Act would be closing of the consolidation proceedings, but exception has been carved out in sub-section (2) of section 52 of the Act, according to which, any order passed by a Court of competent jurisdiction in cases of writs filed under the provisions of the Constitution of India, or in cases of proceedings pending under this Act on the date of issue of the notification under sub-section (1), shall be given effect to by such authorities, as may be prescribed and the consolidation operation shall, for that purpose, be deemed to have not been closed, meaning thereby, the pending proceeding may be concluded on its own merit without influenced by the notification under section 52 of the Act.

9. The learned Standing Counsel has submitted that the appeal is the continuation of the suit proceedings. I find substance in the submission of learned Standing Counsel, in view of the judgment of the apex Court in ***Garikapati Veeraya Vs. N. Subbiah Choudhry and Others*** AIR 1957 SC 540, wherein following observation has been made:

"23. From the decisions cited above the following principles clearly emerge:

(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

(iv) The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law

that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise."

10. A Full Bench of this Court in the case of ***Shyam Sunder Lal Vs. Shagun Chand*** AIR 1967 ALD 214 has held as under:

"....The question that was the cardinal question was whether the word 'suit' in section 15 of the Act included an appeal and as we have already held, there could be, ***on decided cases and on general principles of law as well, no escape from the position that an appeal was a continuation of a suit."***

11. A Division Bench of this Court in the case of ***Ram Bahadur Vs. Deputy Director of Consolidation***, AIR 1973 All. 414 relying upon another Division Bench judgment in the case of ***Dilawar Singh Vs. Gram Samaj and Others***, AIR 1973 All 411 has held that an appeal does not initiate a fresh proceeding.

12. Learned counsel for the petitioner has contended that on the date of notification under section 52 of the Act, no appeal was pending, therefore, it could not be instituted after the said notification. For testing this argument, the meaning of word 'pending' has to be looked into. The word 'pending' has been defined in "(Law Lexicon), The Encyclopedic Law Dictionary, General Editor Justice Y.V. Chandrachud, 1997 Edition" as under:

*"**Pending:** The term 'pending' means nothing more than undecided. 'PENDING' is defined to mean depending remaining undecided; not terminated. An action is considered as pending from the time of its commencement of the proceeding. An legal proceeding is "pending" as soon as commenced and until it is concluded, i.e., so long as the Court having original cognizance of it can make an order on the matters in issue, or to be dealt with, therein. Asgarali Nazarali Singapore Walla V. State of Bombay, AIR 1957 SC 503, 509.*

Pending that matter is not concluded and court having cognizance of it can make order on matter in issue, until the case is concluded it is pending. Lt. Col. S.K. Kashyap and Another V. State of Rajasthan, AIR 1971 SC 1120, 1128.

An action would not cease to be a pending action, so as to prevent thte operation of the statute of limitation, because the clerk of the court had failed for several terms to place it upon the docket or court calendar. A suit is pending until final judgment is rendered.

An action is pending until the judgment is fully satisfied. A pending action is an action which has been commenced and in which some proceeding may be taken. So long as it is possible for any proceeding to be taken in a case, such cause is still pending. For the purposes of sec. 24(5) and (7) of the Judicature Act, 1873, and action is pending after final judgment so long as the judgment remains unsatisfied.

An action is pending the entire time from the beginning of the action until final judgment has been pronounced and entered up, for until final judgment there

cannot be said to be a termination of the action and it is therefore still pending.

A prosecution will not be deemed pending where no indictment has been filed, but only preliminary proceedings begun before a magistrate.

A suit filed in a court on the averments in the suit giving jurisdiction to the court to try the suit, but later on the averments giving jurisdiction having been found not correct, even then the suit was legally pending before the court.

A criminal case is pending against one as early as his arrest and commitment for a crime for which he is afterwards indicted.

The appeal preferred to the Subordinate Judge (Under the Madras Buildings (Lease & Rent Control Act) must be deemed to be pending though it was actually disposal of before Act 8 of 1951 so long as the application to quash the order is pending in the High Court.

Literally hanging in suspense; remaining undecided or awaiting settlement."

13. On perusal of the meaning of the word 'pending', it is clear that the matter, which is undecided or awaiting settlement, shall be treated to be pending. Here in this case, the appeal was filed after the notification under section 52 of the Act along with an application for condonation of delay. The delay was condoned, meaning thereby, the appeal came into existence and since the Settlement Officer of Consolidation has fixed the date for passing order on the appeal, therefore, the same shall be treated to be pending and would be unaffected with the rigor of sub-section (1) of section 52 of the Act.

14. The matter may be examined from another angle also. In this case, the order impugned in the appeal was passed on 14.7.2008 and the notification under section 52 of the Act was issued on 25.4.2009. Section 53B of the Act provides that section 5 of the Limitation Act would be applicable in the consolidation proceedings, meaning thereby, for the sufficient reason, appeal could be filed even after expiry of the period of limitation, along with an application under section 5 of the Limitation Act, for extending the period of limitation/condonation of delay in filing the appeal and in case delay was condoned, the appeal would be treated well within time and shall be treated to be instituted even before issuance of notification under section 52 of the Act. Therefore also, no infirmity can be attached to the orders passed by the consolidation courts.

15. The last limb of the argument of Sri Pandey is that the delay has wrongly been condoned, as there was no sufficient material to condone the delay. On that count, it may be observed that this Court as well as the apex Court in a number of cases has observed that in the matter of condonation of delay, the Court should take liberal view as the law of limitation is not meant to take away the right of appeal. This has also been held by the apex Court that every efforts should be made by the courts to impart substantial justice to the parties instead of scuttling the process of justice on technicalities. The reference may be given in the case of ***Collector, Land Acquisition, Anantnag & Anr. Vs. Mst. Katiji & Ors.*** (JT 1987 (1) SC 537 = 1987 (2) SCR 387), ***Special Tehsildar, Land***

Acquisition, Kerala Vs. K.V. Ayisumma JT 1996 (7) SC 204, ***Nand Kishore Vs. State of Punjab*** JT 1995 (7) SC 69 and ***N. Balakrishnan Vs. M. Krishnamurthy*** JT 1998 (6) SC 242.

16. Further, once the delay has been condoned, the higher Court normally should not interfere with the positive exercise of the discretion of the court in condoning the delay unless order is perverse. The apex Court in the case of State of ***Bihar and others Vs. Kameshwar Singh and Others*** JT 2000 (5) 389, has held as under:

" .....Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court."

17. In view of that, I do not find any illegality in the impugned judgments. The petitioner has failed to make out any good ground for interference with the orders impugned. The writ petition is dismissed summarily.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.12.2012

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No. 67665 of 2012

Lalanjoo ...Petitioner
Versus
D.D.C. And Others ...Respondents

Counsel for the Petitioner:
Sri Pradeep Chandra
Sri Pratik Chandra

Counsel for the Respondents:
C.S.C.

U.P. Consolidation of Holding Act-1953-Section 48 (2)-Revision-against order allowing restoration application-being interlocutory order revision itself not maintainable-apart from that once the consolidation officer exercised its jurisdiction for doing substantial justice and condoned the delay in filing restoration with specific finding of no proper service-can not be interfered by superior authority on Court.

Held: Para-8 and 9

So far as the submissions with regard to the condonation of delay is concerned, in this regard also it is well settled that once the delay has been condoned meaning thereby the Court has exercised positive discretion in condoning the delay and the exercise of this kind of discretion should not be interfered by the higher court particularly the revisional court unless the delay has been condoned totally on non-existing ground or without there being any explanation for the simple reason that the purpose of establishment of the court is to impart substantial justice to the parties and not to close the door of

justice on technicalities, therefore this ground is also unsustainable.

The matter may be examined from another angle also, the order dated 13.1.2009 which was passed on the restoration application was challenged by the petitioner in revisional jurisdiction. Section 48 (1) of U.P. Consolidation of Holdings Act, 1953 provides a remedy of filing revision to a party against any order, other than an interlocutory order. The explanation 2 of Section 48 defines interlocutory order which means such order deciding any matter arising in such case or proceeding or collateral thereto as does not have the effect to finally disposing of such case or proceeding.

Case Law discussed:

JT 2000 (5) 389; Lalji Vs. D.D.C. and others (Writ Petition No. 44754 of 2012 decided on 5.9.2012)

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

1. Heard Sri Pradeep Chandra, learned counsel for the petitioner.

2. In this writ petition, the validity of the order dated 16.8.2012 passed in Revision No. 97 (Lalanjoo Vs. D.D.C. and others) has been challenged. While assailing this order, Sri Pradeep Chandra, learned counsel appearing for the petitioner contends that the order dated 13.1.2009 was passed after due notice to the otherside. In his submissions, a notice was pasted, therefore it was sufficient service on the respondents. He has further contended that highly belated application for recall of the order dated 13.1.2009 was filed which was accompanied with an application under Section 5 of the Limitation Act and there was no explanation for condoning the delay but the Consolidation Officer has not only condoned the delay but also recalled the order dated 13.1.2009. The petitioner filed revision that too has been dismissed without addressing on the question of service as well as limitation. In his submissions, the orders impugned are perfectly illegal and deserves to be quashed.

3. I have heard learned counsel for the petitioner and perused the record of writ petition.

4. The facts giving rise to the case are that it appears an order was passed by the Consolidation Officer on 13.1.2009 in Case No. 935/2008-09 under Section 9-A (2) of U.P. Consolidation of Holdings Act, 1953 in between Lalnjoo (the petitioner) and State by which the objection of the petitioner was allowed and the existing boring over Plot No. 1091/1, was directed to be recorded in the name of the petitioner by fixing its valuation Rs. 15000/-. For recall of the aforesaid order, an application was filed along with an application for condonation of delay by the respondents on the ground that they are the co-owner of the bore and without there being any notice to them, the order dated 13.1.2009 was passed. The Consolidation Officer has condoned the delay and recalled the order dated 13.1.2009. Challenging the aforesaid order, the petitioner has filed revision that has been dismissed by the Deputy Director of Consolidation by the impugned order.

5. Sri Chandra has contended that the ntoice was pasted therefore it was sufficient service on the respondents and it was not open to the Consolidation Officer to recall this order by treating it exparte. In his submissions, the order passed by C.O. is without jurisdiction as consolidation authorities/courts have no power to review its own order.

6. I have heard learned counsel for the petitioner and also gone through the order passed by the C.O. and the exact words used

for pasting the notice on which Sri Chandra has contended that the otherside was dully noticed. For appreciation, aforesaid line noticed by the C.O. is reproduced hereinunder :-

आदेश के पूर्व सह खातेदारो को जारी सूचना चस्पा है /

7. From the perusal of the aforesaid line, the place of pasting of notice is not clear. However, it appears that the notice was pasted on some register maintained by the court's office for purposes of records of sending notice and it has no relevance with the pasting of the notice on the house of respondents. Therefore, it cannot be said to be sufficient service on the respondents and even if it is assumed that the notice pasted was on the door of the respondents, it will not be treated to be sufficient service unless the satisfaction is recorded by the court/authority concerned that the service is sufficient, therefore the submission of Sri Chandra in this regard appears to be misconceived. Otherwise also the service of the notice on the respondents is a question of fact and once the C.O. has recorded a finding that there was no service on the respondents, it cannot be interfered with under article 226 of the Constitution unless the finding is perverse, which in my considered opinion is not.

8. So far as the submissions with regard to the condonation of delay is concerned, in this regard also it is well settled that once the delay has been condoned meaning thereby the Court has exercised positive discretion in condoning the delay and the exercise of this kind of discretion should not be interfered by the higher court particularly the revisional court unless the delay has been condoned totally on non-existing ground or without there being any explanation for the simple reason that the purpose of establishment of the court is to impart substantial justice to the parties and not to close the door of justice on technicalities, therefore this ground is also unsustainable. Reference may be given to the judgment of the Apex Court in ***State of Bihar and others Vs. Kameshwar Singh and others*** reported in ***JT 2000 (5) 389*** where the Apex Court has observed as under :-

"Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. *But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court".*

9. The matter may be examined from another angle also, the order dated 13.1.2009 which was passed on the restoration application was challenged by the petitioner in revisional jurisdiction. Section 48 (1) of U.P. Consolidation of Holdings Act, 1953 provides a remedy of filing revision to a party against any order, other than an interlocutory order. The explanation 2 of Section 48 defines interlocutory order which means such order deciding any matter arising in such case or proceeding or collateral thereto as does not have the effect to finally disposing of such case or proceeding. This Court in the case of ***Lalji Vs. D.D.C. and others (Writ Petition No. 44754 of 2012 decided on 5.9.2012)*** has held that an order

restoring the case on its original number will not fall in the ambit of final order and it will remain interlocutory order, therefore in view of Sub-section (1) of Section 48 of the Act, the revision itself was not maintainable. There is no merit in this case.

10. The writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.12.2012

BEFORE
THE HON'BLE SAEED-UZ-ZAMAN SIDDIQI, J.

Review Petition No. - 564 of 2012

Laxmi Kant Yadav (Inre 307 Sapl 2012) ...Petitioner

Versus

Hitai @ Hit Lal ...Respondents

Counsel for the Petitioner:
Sri D.C. Mukerjee
Sri R.S. Pandey

Counsel for the Respondents:
.....

Code of Civil Procedure, Section 114 readwith Order 37 Rule 1-review against judgment passed in Second Appeal without disclosing any error on point of Law or facts-rehearing of appeal in garb of review treating to be a revision or appeal-held-not permissible-even where two opinions can be found can not be basis for review.

Held: Para-10

In view of the law as discussed above, a review petition cannot be treated to be a revision or an appeal in disguise. Rehearing at all is not permissible under Order 47 Rule 1 of Code of Civil Procedure. By the petition, the petitioner has attempted to postulate rehearing of the dispute between the parties and has highlighted all the aspects of the case and attempted to impress upon the Court that the judgment passed by this Court earlier, on merits, with detailed discussions was an erroneous decision and deserves to be reheard and corrected. Even if it is presumed that two opinions can be found the Court cannot review a judgment or order even on this ground. Crux of the matter is that an error patent on the record and can be established by lengthy and complicated argument cannot be cured under Order 47 Rule 1 of the Code of Civil Procedure.

Case Law discussed:
2012 (30) LCD 1635; 2006(3) Supreme 125; [AIR 1964 1372]; [AIR 1995 SC 455]

(Delivered by Hon'ble Saeed-Uz-Zaman Siddiqi, J.)

1. Heard learned counsel for the applicant and gone through the records.

2. By means of instant review petition, petitioner has sought for review of the order dated 07.11.2012, passed by this Court in Second Appeal No.307 of 2012, by which the second appeal was dismissed on the ground that no substantial question of law is involved in this case.

3. The applicant has sought for review of the order on the ground that this court was legally not justified in dismissing the second appeal on the ground that no substantial question of law was involved in the case; without considering and critically examine the grounds and substantial question of law formulated in the memo of second appeal; that the law laid down by the Hon'ble Apex Court in ***Union of India v. Ibrahim Uddin and another, 2012 (30) LCD 1635*** has wrongly been interpreted.

4. The order passed by this Court is very exhaustive. The suit for permanent

injunction by demolition and for possession has been decreed and first appeal against which has been dismissed.

5. Neither there is any error on point of law or on point of facts nor any grounds for review as enumerated in Section 114 of the Code of Civil Procedure and under Order 47 Rule 1 of the Code of Civil Procedure are made out. A review is distinguishable with appeal. Under the disguise of review even an erroneous decision cannot be reheard or corrected.

6. In ***Haridas Das v. Smt. Usha Rani Banik & ors. reported in 2006 (3) Supreme 125,*** the Hon'ble Apex Court has held as under:-

"Neither of them postulate a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the Court and thereby enjoyed a favourable verdict. This is amply evident from the explanation in Rule 1 of the Order XLVII which states that the fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment. Where the order in question is appealable the aggrieved party has adequate and efficacious remedy and the Court should exercise the power to review its order with the greatest circumspection."

7. In this case, the Hon'ble Supreme Court has relied upon its earlier law laid down in ***M/s. Thungabhadra Industries Ltd. (in all the Appeals) v. The Government of Andhra Pradesh represented by the Deputy Commissioner of Commercial Taxes, Anantapur, [AIR 1964 1372]*** in which the Hon'ble Apex Court has held as follows:

"There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by "error apparent". A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. Where without any elaborate argument one could point to the error and say here is a substantial point of law which states one in the face and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out."

8. In ***Meera Bhanja v. Smt. Nirmala Kumari Choudhary [AIR 1995 SC 455]*** it was held that :-

"It is well settled law that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order XLVII, Rule 1, CPC. In connection with the limitation of the powers of the Court under Order XLVII, Rule 1, while dealing with similar jurisdiction available to the High Court while seeking to review the orders under Article 226 of the Constitution of India, this Court, in the case of Aribam Tuleshwar Sharma v. Aribam Pishak Sharma speaking through Chinnappa Reddy, J. has made the following pertinent observations:

It is true there is nothing in Article 226 of the Constitution to preclude the High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of

justice or to correct grave and palpable errors committed by it. But, there are definitive limits to be exercise of the power of review. The power of review may be exercised on the discovery of new and important matter of evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found, it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merit. That would be in the province of a court of appeal. A power of review is not to be confused with appellate power which may enable an appellate Court to correct all manner of error committed by the Subordinate Court."

"The following observations in connection with an error apparent on the face of the record in the case of Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tiruyamale [AIR 1960 SC 137] were also noted:

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

9. Relying upon the judgments in the cases of Aribam's (supra) and Smt. Meera Bhanja (supra) it was observed as under:-

"Under Order XLVII, Rule 1, CPC a judgment may be open to review inter alia, if there is a mistake or an error apparent on the face of the record. An error which is not self evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review under Order XLVII, Rule 1, CPC. In exercise of the jurisdiction under Order XLVII, Rule 1, CPC it is not permissible for an erroneous decision to be reheard and corrected. A review petition, it must be remembered has a limited purpose and cannot be allowed to be an appeal in disguise."

10. In view of the law as discussed above, a review petition cannot be treated to be a revision or an appeal in disguise. Rehearing at all is not permissible under Order 47 Rule 1 of Code of Civil Procedure. By the petition, the petitioner has attempted to postulate rehearing of the dispute between the parties and has highlighted all the aspects of the case and attempted to impress upon the Court that the judgment passed by this Court earlier, on merits, with detailed discussions was an erroneous decision and deserves to be reheard and corrected. Even if it is presumed that two opinions can be found the Court cannot review a judgment or order even on this ground. Crux of the matter is that an error patent on the record and can be established by lengthy and complicated argument cannot be cured under Order 47 Rule 1 of the Code of Civil Procedure.

11. With these observations, review petition is dismissed.
