APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.01.2012

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

Special Appeal (Defective) No. 1 of 2012

Mohan Singh ...Appellant
Versus
U.P. Rajya Vidyut Utpadan Ltd. and others ...Respondents

Counsel for the Appellant:
Shri Pranav Dubey, Advocate

Counsel for the Respondents:
Shri P.K. Tripathi, Advocate

U.P. Recruitment of Services (Determination of Birth) Rules 1974-Rule-2-correction of date of birth-admittedly the appellant is class 6th passed-at the time of entering in services-date of birth recorded in Service Book as 05.11.1951 in 1980-on 06.09.2011 C.M.O. reported his age 45 years, petitioner appellant never objected the entry-for first time filed Writ Petition-after a considerable period-subsequent certificate issued by C.M.O.-can not help in any manner-held at the fag end of service carrier-can not be allowed to question the entry made in Service book.

Held: Para 18

In view of above, the law can be summarized that normally the date of birth entered in the service book is sacrosanct and cannot be altered or changed at the fag end of service or after long lapse of time. However, in a very exceptional circumstances, where it is found that the claim is irrefutable/incontrovertible and the same has been raised within the limitation provided under the relevant Rules and in the absence of any limitation, within a reasonable time, then the application for correction of date of birth may be made. In the case in hand, the appellant entered in service in February, 1980 and as per service book, his date of birth was entered as 5th February, 1951 at the time of entry in service. However, for the first time, the appellant filed the application for correction of date of birth in the month of February, 1991. Thereafter, it appears, he did not pursue the same and slept over the matter. However, only when he was served with the notice dated 6th September, 2011 intimating that as per the date of birth recorded in the service book, he shall retire on 30th November, 2011 on attaining the age of 60 years, he approached this Court by filing the writ petition. No convincing explanation is coming forth as to why he did not approach the Court when his alleged representation filed in the year 1991 was not decided within a reasonable period or time. If his application seeking correction was not decided, then what prevented him to approach the Court within a reasonable time. Thus, in view of the settled law that correction in the date of birth cannot be made at the time of retirement from service and also in the absence of any clinching evidence whereupon it could be held that his date of birth is 1962 and further in view of Rule 2 of the Rules of 1974 which prohibits entertaining an application for correction of date of birth where the employee, at the time of entry in service, was not high school passed and in that event the date of birth mentioned in the service record shall be deemed to be correct date of birth of such employee, the relief sought in the writ petition and in this appeal cannot be granted.

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

1. This intra-court appeal, under the Rules of the Court, arises from the order of the learned Single Judge dated 3rd

November, 2011 dismissing the appellant's Writ Petition No. 62099 of 2011.

2. We have heard learned counsel for the appellant.

3. The short question involved in this appeal is as to whether the date of birth recorded in the service book of an employee can be modified or changed at his instance after long lapse of time or at the fag end of his service.?

4. It appears that the appellant was appointed as a Contract Labour in the month of February, 1980 in the Central Store Division of Parkisha Thermal Power Corporation at Pariksha in the district of Jhansi (hereinafter referred to as the 'Corporation'). His date of birth in the service book was recorded as 5th November, 1951. However, in the Identity Card, his date of birth was mentioned as 6th November, 1962. The appellant claims that when he came to know in January 1991 that his date of birth in the service record is wrongly recorded as 5th November 1951 in place of 6th September, 1962, he moved an application on 15.02.1991 for correction of his date of birth. He further claims that pursuant to the said application, the authority concerned assured that necessary correction would be made in the service record, however, nothing was done. Thereafter, the appellant submitted various representations/reminders but all went in vain. The appellant, however, did not pursue the matter. Thereafter, the appellant was served with the notice dated 6th September, 2011 intimating him that as per service record, wherein his date of birth is mentioned as 5th November, 1951, he shall retire on 30th November, 2011 on completion of 60 years of age. The aggrieved appellant, therefore, filed the aforesaid writ petition for quashing the notice dated 6th September, 2011 on the ground, inter-alia, that his real date of birth is 6th September, 1962 and as far back as in 1991, he made a request for correction of his date of birth but without correcting the same or disposing of his application, he has been served with the notice, impugned in the writ petition. The learned Single Judge, in the order has taken note of the fact that there is no denial by the appellant that his date of birth in the service book is recorded as 5th November, 1951, hence, he will attain the age of superannuation on 30th November, 2009 and his claim for continuance in service on the basis of the date of birth recorded in his Identity Card cannot be allowed. The learned Single Judge, therefore, relying on a judgment of Apex Court in the case of **Burn Standard Co. Ltd. & Ors. Vs. Shri Dinabandhu Majumdar & Anr., JT 1995 (4) SC 23,** wherein it has been held that the date of birth cannot be allowed to be changed at the verge of retirement, dismissed the writ petition. Hence, this appeal.

5. Learned counsel for the appellant vehemently contended that the learned Single Judge did not appreciate the submissions and the necessary facts for adjudication of the case and, therefore, fell in error in dismissing the writ petition. The contention is that the appellant, when came to know that his date of birth is wrongly recorded as 5th November, 1951, immediately filed the representation for its correction on 15.02.1991, which remained un-disposed by the authorities concerned despite several reminders. Learned counsel submits that the certificate issued by the Chief Medical

Officer, Jhansi, wherein his age has been determined as 45 years on the date of issuance of such certificate, i.e. 06.09.2011, has also not been taken into account by the learned Single Judge. He further submits that the appellant, in the representation, has claimed that in the school certificate as well as the medical certificate, his date of birth is recorded as 6th September, 1962 and, therefore, his date of birth entered in his service record is required to be corrected.

6. We have considered the submissions.

7. The appellant has asserted his claim mainly on the basis of the certificate issued by the Chief Medical Officer, Jhansi and also on the basis of the date of birth mentioned in the mark sheet of class six. Though, in paragraph 7 of the writ petition, it has been stated that the appellant was asked to be examined by the Chief Medical Officer, Jhansi but the certificate issued by him on 06.09.2007 does not indicate that he was sent for medical examination for determination of his age by the Department/Corporation. The mark sheet of class six has also not been enclosed with the writ petition, though it has been stated that it is enclosed as Annexure-1 to the writ petition. It further transpires that after making representation in the year 1991, the appellant though claims to have submitted various reminders but sat over the matter and did not pursue further and it was only when the impugned notice informing him his date of retirement, he filed the writ petition.

8. The Apex Court has repeatedly held that on the strength of representation, stale claim should not be revived by the Courts by way of passing an order to decide the representation. In **C. Jacob Vs. Director of Geology & Mining & Anr., AIR 2009 SC 264,** the Apex Court has observed as under:-

"8. When a direction is issued by a court/tribunal to consider or deal with the representation, usually the directee (person directed) examines the matter on merits, being under the impression that failure to do may amount to disobedience. When an order is passed considering and rejecting the claim or representation, in compliance with direction of the court or tribunal, such an order does not revive the stale claim, nor amount to some kind of `acknowledgment of a jural relationship' to give rise to a fresh cause of action.

10. We are constrained to refer to the several facets of the issue only to emphasize the need for circumspection and care in issuing directions for `consideration'. If the representation is on the face of it is stale, or does not contain particulars to show that it is regarding a live claim, courts should desist from directing `consideration' of such claims."

9. In the instant case, the petitioner-appellant even did not bother to approach this Court for deciding his representation for correction of his date of birth prior to the notice of retirement given in the year 2011.

10. Learned counsel for the respondent-Corporation submitted that the provisions of the U.P. Recruitment of Service (Determination of Date of Birth) Rules, 1974 (hereinafter referred to as the 'Rules of 1974') applies to the Corporation and its employees and the date of birth for

the purposes of retirement would be determined as per Rules of 1974.

11. To appreciate the controversy, it would be useful to refer to the relevant Rule. Rule 2 of the Rules of 1974, which was amended by first amendment in the year 1980 and is relevant for the present controversy, reads as under:-

"2. Determination of correct date of birth or age.- The date of birth of a Government servant as recorded in the certificate of his having passed the High School or equivalent examination at the time of his entry into the Government service, or where a Government servant has not passed any such examination as aforesaid or has passed such examination after joining the service, the date of birth or the age recorded in his service book at the time of his entry into the **Government service shall be deemed to be his correct date of birth or age, as the case may be, for all purposes in relation of his service, including eligibility for promotion, superannuation, premature retirement benefits,** and no application or representation shall be entertained for correction of such date or age in any circumstances whatsoever."

12. From a perusal of the above Rule, it transpires that if a person enters into service after passing the High School examination, then the date of birth recorded in the High School certificate shall be deemed to be his correct date of birth. However, in case, the employee has entered into service before passing the High School examination, then the date of birth recorded in the service book shall be deemed to be his correct date of birth. The said Rule also provides that no application or representation shall be entertained for correction of such date or age in any circumstances whatsoever. Thus, in relation to correction of date of birth, a legal fiction has been made which means that the date of birth recorded in either of the circumstances referred to under Rule 2 of the Rules of 1974 shall be deemed to be correct for all purposes particularly for the purpose of determining the age of retirement. The effect of deeming provision/legal fiction has been considered time and again. The Apex Court in the case of **Sant Lal Gupta & Ors. Vs. Modern Cooperative Group Housing Society Ltd. & Ors., (2010) 13 SCC 336,** has observed as under:-

"... It is the exclusive prerogative of the legislature to create a legal fiction meaning thereby to **enact a deeming provision for the purpose of assuming the existence of a fact which does not really exist. ..."**

13. Further reference may be made to the decision of the Apex Court in **Manorey alias Manohar Vs. Board of Revenue (U.P.) & Ors., (2003) 5 SCC 521.**

14. Taking note of the dictum of the Apex Court as well as Rule 2 of the Rules of 1974, it is abundantly clear that if a person has entered into service without passing the High School examination, then the date of birth recorded in his service book shall be deemed to be correct and in case the employee has entered into service after passing the High School examination, the date of birth recorded in the High School certificate shall be deemed to be correct.

15. In the case in hand, admittedly, the appellant entered in service without

passing the High School examination, therefore, the date of birth recorded in the service book shall be deemed to be correct and in view of the legal fiction created under Rule 2, no application or representation for its correction could be entertained.

16. That apart, the appellant approached this Court seeking correction in the date of birth at the fag end of his service and filed the writ petition in the month of October, 2011, just a month prior to the date of his superannuation, as he was due to retire in the month of November, 2011. It is settled legal position that the date of birth cannot be allowed to be corrected at the fag end of service of an employee. Reference may be made to the judgment of the Apex Court in **Burn Standard Co. Ltd. (supra), and State of Madhya Pradesh & Ors. Vs. Premlal Shrivas, (2011) 9 SCC 664.**

17. However, it is true that in certain extraordinary circumstances, an employee can claim correction in the date of birth provided he has got some irrefutable proof relating to his date of birth as different to that recorded earlier in his service book and satisfies that there has been real injustice to him and the correction sought in the date of birth is as per the procedure prescribed and within a reasonable time fixed by any rule or order. However, if there is no rule or order prescribing the period within which such application is to be filed, then such application must be filed within a reasonable period or time. Reference may be made to the judgments of the Apex Court in **Union of India Vs. Harnam Singh, (1993) 2 SCC 162; State of Gujarat & Ors. Vs. Vali Mohd. Dosabhai Sindhi, (2006) 6 SCC 537, and Punjab and Haryana High Court at Chandigarh Vs. Megh Raj Garg & Anr., AIR 2010 SC 2295.**

18. In view of above, the law can be summarized that normally the date of birth entered in the service book is sacrosanct and cannot be altered or changed at the fag end of service or after long lapse of time. However, in a very exceptional circumstances, where it is found that the claim is irrefutable/incontrovertible and the same has been raised within the limitation provided under the relevant Rules and in the absence of any limitation, within a reasonable time, then the application for correction of date of birth may be made. In the case in hand, the appellant entered in service in February, 1980 and as per service book, his date of birth was entered as 5th February, 1951 at the time of entry in service. However, for the first time, the appellant filed the application for correction of date of birth in the month of February, 1991. Thereafter, it appears, he did not pursue the same and slept over the matter. However, only when he was served with the notice dated 6th September, 2011 intimating that as per the date of birth recorded in the service book, he shall retire on 30th November, 2011 on attaining the age of 60 years, he approached this Court by filing the writ petition. No convincing explanation is coming forth as to why he did not approach the Court when his alleged representation filed in the year 1991 was not decided within a reasonable period or time. If his application seeking correction was not decided, then what prevented him to approach the Court within a reasonable time. Thus, in view of the settled law that correction in the date of birth cannot be made at the time of retirement from

service and also in the absence of any clinching evidence whereupon it could be held that his date of birth is 1962 and further in view of Rule 2 of the Rules of 1974 which prohibits entertaining an application for correction of date of birth where the employee, at the time of entry in service, was not high school passed and in that event the date of birth mentioned in the service record shall be deemed to be correct date of birth of such employee, the relief sought in the writ petition and in this appeal cannot be granted.

19. In view of above, we do not find any fault in the order of the learned Single Judge.

20. The appeal, being without merit, stands dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.01.2012

BEFORE
THE HON'BLE RAJIV SHARMA,J.

Misc. Single No. - 4 of 1994

Abdul Atiq and another ...Petitioner
Versus
Sub Divisional Magistrate and others ...Respondents

Counsel for the Petitioner:
Sri S.C.Sitapuri
Sri V.Bhatia

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 226- Demand of additional stamp duty-no allegation of concealment or fraud by petitioner-petition pending since 1994- No counter affidavit filed-facts remained un-contradicted-held-mere assumptions-stamp duty can not be imposed.

Held: Para 5

It is not the case of the respondents that the land in question was under valued. For imposing liability for payment of additional stamp duty, it would be the duty of the respondents to categorically show that there was some concealment made by the petitioner at the time of execution of the sale deed. On mere presumption, stamp duty cannot be imposed after valuing the constructions.

Case law discussed:
[2007 All.C.J. 718]

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

1. Heard.

2. Counsel for the petitioner says that the petitioner had purchased a house,which consists of room and a Verandahs in district Biswan Sitapur of which sale deed was executed on 3.2.1992 and had also paid a total sum of Rs. 5380/- as stamp duty. Thereafter all of a sudden, the opposite party no.1-Sub Divisional Officer, Stamp Collector, Biswan passed an order requiring the petitioner to make good the deficiency in the stamp duty and also imposed ten times penalty.

3. It has been vehemently contended that neither any notice before passing of the impugned order was given or actually served upon by the petitioner either by the opposite party no.1 or by the Tehsildar, who is said to have conducted inquiry in the matter. Therefore, the impugned order is in breach of the provisions of natural justice apart from being bad in law as the penalty is excess than the prescribed under the relevant provisions.

4. It is to be noted that this writ petition was filed in the year 1994 and this court while directing the respondents to file counter affidavit also passed an ad-interim order dated 3.1.1994 staying the operation of the impugned order. It is unfortunate that till date no counter affidavit has been filed and as such averments made in the writ petitioner remained unrebutted.

5. It is not the case of the respondents that the land in question was under valued. For imposing liability for payment of additional stamp duty, it would be the duty of the respondents to categorically show that there was some concealment made by the petitioner at the time of execution of the sale deed. On mere presumption, stamp duty cannot be imposed after valuing the constructions. It is also pertinent to mention that a Full Bench of this Court in **Shri Ramesh Chandra Srivastava, Kanpur vs. State of U.P. and others** [2007 All.C.J.718]held that the market value of the property has to be determined with reference to the date on which the document is executed.

6. In view of the aforesaid discussions, the impugned order dated 22.9.1993 is hereby set-aside. Consequent to follow. However, it will be open for the authorities to pass fresh order, if they so desire after giving opportunity of hearing to the petitioners.

7. The writ petition stands allowed in above terms.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.01.2012

BEFORE
THE HON'BLE SANJAY MISRA, J.

First Appeal No. - 13 of 2012

Smt. Suman ...Petitioner
Versus
Braj Kishore ...Respondent

Counsel for the Appellant:
Sri Atul Srivastava

Counsel for the Respondents:
.....

Hindu Marriage Act, 1955-Section 28-Appeal against judgment decree passed under Section 13 of the Act-valuation of appeal shown Rs. 10,000-appeal before High Court-held not maintainable.

Held: Para 4 and 5

The aforesaid clearly indicates that Section 28 of the Hindu Marriage Act does not provide for appeal against judgement. It provides for appeal only against decree and since an appeal under Section 19 of the Family Courts Act lies only against a judgement or order, no appeal would lie under Section 19 of the Family Courts Act against a decree. An appeal against a decree passed by the Civil Judge would lie under Section 28 of the Hindu Marriage Act.

Since in the present case the impugned judgement and decree have been assailed under Section 28 of the Hindu Marriage Act and the valuation of this appeal is Rs. 10,000/-, the pecuniary jurisdiction as well as appellate jurisdiction would not be with the High Court. An appeal against a decree passed by the original Court under Section 13 of the Hindu Marriage Act, would lie before

the court of competent appellate jurisdiction.

Case law discussed:

(2006 Alld. C.J. 1936)

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

1. This is an appeal under Section 28 of the Hindu Marriage Act 1955, against the judgement and order dated 16.11.2011 and decree dated 30.11.2011 passed in Case No. 774 of 2007, Brij Kishore vs. Smt. Suman, by Additional Civil Judge (Senior Division), Court No. 2, Bulandshahar. Stamp Reporter has reported that this appeal is not maintainable before this Court.

2. Learned counsel for the appellant has submitted that the plaintiff respondent had filed Original Suit No. 774 of 2007, under Section 13 of the Hindu Marriage Act, which has been decreed by the trial Court. According to him, since the proceedings were under Section 13 of the Hindu Marriage Act, the appeal under Section 19 of the Family Courts Act would not be maintainable. However, since it is a matrimonial dispute decided by the Civil Judge in the absence of establishment of Family Court in Bulandshahar, the appeal would lie to the High Court under Section 28 of the Hindu Marriage Act, as is provided under Section 19 of the Family Courts Act.

3. The question was considered by a Full Bench of this Court in the case of **Kiran Bala Srivastava (Smt.) vs. Jai Prakash Srivastava (2006 Alld. C.J. 1936).** The Full Bench considered the difference of an appeal under Section 19 (1) of the Family Courts Act, which provided for an appeal against a judgement or order of the Family Court. It also considered the provision of Section 28 of the Hindu Marriage Act, which provides for an appeal against a decree or order. It was held that Section 28 of the Hindu Marriage Act does not provide for appeal against a judgment, therefore, the answer to the question referred to the Full Bench as to whether an appeal under Section 19 of the Family Courts Act would lie against an order passed under Section 24 of the Hindu Marriage Act was given in affirmative since the order under Section 24 granting pendente lite maintenance is a judgment and an appeal would therefore, lie under Section 19 (1) of the Family Courts Act. Paragraph 21 of the said judgement of the Full Bench is quoted hereunder:

"21. What noticeable in sub-section (1) of Section 19 of the Act of 1984, is that deviating from Section 96 of the Code of 1908 or from sub-section (1) of Section 28 of the Act of 1955, it provides for appeals against "judgment". The Code of Civil Procedure, 1908, does not provide for appeal against judgments. It provides for appeals against decrees and orders. Likewise Section 28 of the Act of 1955 also does not provide for appeals against judgments. It provides for appeals only against decrees [see: sub-section (1)] and against certain orders [see: sub-section (2)]. The question arises as to why the legislature made a departure by providing appeal against judgments also, under sub-section (1) of Section 19 of the Act of 1984. Not that the legislature was not aware of the established practice or did not know the meaning of the word judgment, as given by the Apex Court in Khimji's case (supra)."

4. The aforesaid clearly indicates that Section 28 of the Hindu Marriage Act does not provide for appeal against

judgement. It provides for appeal only against decree and since an appeal under Section 19 of the Family Courts Act lies only against a judgement or order, no appeal would lie under Section 19 of the Family Courts Act against a decree. An appeal against a decree passed by the Civil Judge would lie under Section 28 of the Hindu Marriage Act.

5. Since in the present case the impugned judgement and decree have been assailed under Section 28 of the Hindu Marriage Act and the valuation of this appeal is Rs. 10,000/-, the pecuniary jurisdiction as well as appellate jurisdiction would not be with the High Court. An appeal against a decree passed by the original Court under Section 13 of the Hindu Marriage Act, would lie before the court of competent appellate jurisdiction.

6. In view of the aforesaid circumstances, the report of the Stamp Reporter is accepted and it is upheld. This appeal is not maintainable before the High Court. The appellant may avail his remedy under Section 28 of the Hindu Marriage Act before the competent court having appellate jurisdiction against decrees. The period, w.e.f. 16.11.2011 (the date when present appeal was presented before the Stamp Reporter) to 12.01.2012 i.e. today, shall be given benefit of for the purpose of limitation, in case the appeal is filed under Section 28 of Hindu Marriage Act against a decree by the appellant. This appeal is dismissed as not maintainable before this Court.

7. No order is passed as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 24.01.2012

BEFORE
THE HON'BLE RITU RAJ AWASTHI,J.

Misc. Single No. - 84 of 2012

Ravindra Kumar Singh and others ...Petitioner

Versus

State of U.P. Thro Secy. Department of Home and others ...Respondents

Counsel for the Petitioner:
Sri Vinay P.Singh Rathore

Counsel for the Respondent:
C.S.C.
Sri N.C.Mehrotra
Sri O.P. Srivastava.

Constitution of India, Article 226- General Direction to deposit Fire Arm License with dealer-considering Lok Sabha or Vidhan Sabha election-without considering individual role regarding apprehensive of danger of violence-held-illegal-without being written order of competent authority-such direction-unsustainable.

Held: Para 10

"23. Considering the facts and circumstances of the case these writ petitions are disposed of with the following directions:

(1) A writ in the nature of Mandamus commanding the State of U.P. is issued directing that the citizens who have valid fire arm licenses including the petitioners may not be compelled to deposit their fire arms in general merely on the basis that Lok Sabha Election is to be held in near future.

(2) It is also directed that no District Magistrate or District

Superintendent of Police or any officer subordinate to them shall compel the citizen in general to deposit their fire arm unless thee is an order of the Central Government as indicated in the body of the judgment.

(3) The decision made in the case of Mohd. Arif Khan v. District Magistrate (Supra) by the Division Bench of this Court shall be followed by the State Government and its officers posted in the districts within the State of U.P.

24. However, the above directions shall not preclude the competent officer/authority to pass orders/prohibitory orders in individual cases or in general under the provisions of Arms Act or Code of Criminal Procedure 1973 after application of mind in accordance with law."

Case law discussed:

1994 LCD (Vol. 12), page 93; 1999 (17) LCD, page 1171

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

1. Learned Standing Counsel has produced the copy of the Government Order dated 29.12.2011, which is taken on record.

2. Heard Mr. Mohd. Arif Khan, learned Senior Advocate, appearing for the petitioners as well as Mr. Sanjay Sareen, learned Standing Counsel appearing for the State and Mr. Manish Mathur, learned counsel appearing for Election Commission.

3. With the consent of parties' counsels the case has been heard finally at the admission stage.

4. This is a bunch of writ petitions involving the same legal question and similar facts, therefore, they are being heard together and are decided by a common order.

5. By earlier order this Court had directed the learned Standing Counsel to seek instructions in the matter.

6. Mr. Sanjay Sareen, learned Standing Counsel on the basis of instructions submits that on the basis of directions issued by the Election Commission of India, the Government Order dated December 29, 2011 has been issued wherein it has been provided that general orders for deposit of firearms is not necessary. On declaration of elections the District Magistrate of the concerned districts would review the activities/antecedents of the license holders of firearms so that free, fair and independent elections are held and only those licensee would be required to deposit their firearms, who have been identified. The license of only those persons would be deposited from whom there is a danger of violence in the elections.

7. It is the clear stand of the State that no general orders have been issued for deposit of firearms by the public during elections.

8. Mohd. Arif Khan, learned Senior Advocate appearing for the petitioners submitted that in spite of the fact that there is no specific circular/order/directions for deposit of firearms, the police of the concerned police station are compelling the petitioners to deposit their firearms in the police station or with the firearm dealers.

9. In support of his submissions, he relied on a Division Bench Judgment of

this Court rendered in the case of ***Mohd. Arif Khan Vs. District Magistrate and others,*** reported in ***1994 LCD (Vol.12), page 93,*** wherein the Division Bench of this Court had quashed the circular dated 16.7.1993 issued by the Election Commission requiring the firearm license holders to deposit all their firearms with the District Administration during the period of one week from the day after the last date for withdrawal of candidatures and the fire arm would remain deposited till the declaration of the result and no person shall be allowed to carry his own personal fire arms. The relevant paragraphs 7, 21 and 22 are reproduced below:

*"**7.** We have heard the learned counsel for the petitioners and learned Chief Standing Counsel on behalf of the opposite parties nos. 1 to 5 and 7 in Writ Petition No. 4782 (MB) of 1993 and Dr. Ashok Nigam, Senior Standing Counsel, Central Government on behalf of the Chief Election Commissioner, opposite party no.6. After hearing the learned counsel for the parties and perusing the record, we passed the following order in their presence:-*

"We have heard the learned counsel for the parties at length.

We are satisfied that the impugned order dated 18.10.1993 passed by the District Magistrate, Lucknow contained in Annexure No. 3 to the writ petition and Annexure-A-4 to the counter-affidavit of opposite party no.1 are liable to be quashed. Therefore, for reasons to follow, we allow the writ petition and quash the aforesaid impugned order subject, however, to the observation that it will be open to the opposite party no.1 to pass such order afresh in his discretion in accordance with law as may be considered by him appropriate and warranted by the circumstances."

***21.** We have no doubt in our mind that the democracy being the basic feature of our Constitution, it must be ensured that free, fair and peaceful elections are held and for that purpose the Constitutional authorities as well as other authorities must have the fullest scope for taking appropriate action in exercise of their powers according to their discretion under the Constitution and the existing laws. We have, therefore, made it clear that even after the quashing of the impugned order dated October 18, 1993 it will be open to the District Magistrate to take such action in accordance with law, whether under Section 144 CrPC or otherwise, as he considers necessary and appropriate in his discretion in the circumstances of the case.*

***22.** It is for these reasons that we have passed the order indicated earlier allowing the writ petitions and quashing the impugned order dated October 18, 1993 and leaving it open to the District Magistrate to take appropriate action according to law in future."*

10. He also relied on the case of ***Shahabuddin Vs. State of U.P. and others,*** reported in ***1999 (17) LCD, page 1171***, wherein this Court had issued directions that the citizens who have valid firearm licenses including the petitioners shall not be compelled to deposit their firearms in general merely on the basis that *Lok Sabha* election is to be held in near future. The relevant paras 23 and 24

of the aforesaid judgment are reproduced below:

"23. *Considering the facts and circumstances of the case these writ petitions are disposed of with the following directions:*

(1) A writ in the nature of Mandamus commanding the State of U.P. is issued directing that the citizens who have valid fire arm licenses including the petitioners may not be compelled to deposit their fire arms in general merely on the basis that Lok Sabha Election is to be held in near future.

(2) It is also directed that no District Magistrate or District Superintendent of Police or any officer subordinate to them shall compel the citizen in general to deposit their fire arm unless thee is an order of the Central Government as indicated in the body of the judgment.

(3) The decision made in the case of Mohd. Arif Khan v. District Magistrate (Supra) by the Division Bench of this Court shall be followed by the State Government and its officers posted in the districts within the State of U.P.

24. *However, the above directions shall not preclude the competent officer/authority to pass orders/prohibitory orders in individual cases or in general under the provisions of Arms Act or Code of Criminal Procedure 1973 after application of mind in accordance with law."*

11. I have considered the various submissions made by the learned counsel for the parties.

12. Since the learned Standing Counsel on the basis of instructions submits that there is no specific direction/order/ circular/notification issued by the Election Commission as well as by the State Government that all the licensee of fire arms are required to deposit their fire arms during *Vidhan Sabha* Elections and the Government Order dated December 29, 2011 only provides that the District Magistrate of the concerned District would review the activities/antecedents of the licensee and identify the persons from whom there is a threat to law and order situation during elections and only those persons would be required to deposit the fire arms, who are required individually to do so and there is no general order for deposit of fire arms during *Vidhan Sabha* Elections this Court is of the considered opinion that the opposite parties can not compel the valid license holders of fire arms to deposit their arms in the concerned police station or with the firearm dealers during the *Vidhan Sabha* Elections, which are scheduled to be held in near future without there being a written order by the competent authority.

13. In this view of the matter, the writ petitions are allowed with the direction that in case the petitioners possess valid license for their firearms and no written orders have been issued by the competent authority to deposit their firearms, the opposite parties shall not compel the petitioners to deposit their firearms during incoming *Vidhan Sabha* Elections.

14. The State of U.P. is directed that the citizens, who have valid firearm licenses shall not be compelled to deposit their arms in general merely on the basis

of incoming *Vidhan Sabha* Elections. However, it will be open for the concerning District Magistrates to take such action in accordance with law whether under Section 144 Cr.P.C. or otherwise or as they consider necessary and appropriate in their discretion in the circumstances of individual case.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.01.2012

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

Special Appeal No. 148 of 2008

Mahendra Pratap Sharma ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Bhoopendra Nath Singh

Counsel for the Respondents:
Sri Yogendra Yadav
C.S.C.

U.P. Recruitment of Dependant of Govt. Servant, Dying in Harness Rules 1974-Rule 5 (2) (3) as Amended by G.O. At 13.10.2013-Compassionate Appointment-claimed after expiry of statutory period-denied on ground of non consideration of delay-non appointment on compassionate ground can not be treated as reservation-which itself violative the rights of other claimants-amendment with prospective effect-can not be enforced retrospectively-held-refusal of appointment-justified.

Held: Para 29

There is also no provisions of keeping vacancy reserved for the minors of dependents of government servants who died in harness. The 51% appointments under compassionate appointments is to be made in the existing vacancies for minors in each year. If reservation of vacancies for minors in such manner is permitted, many a deserving dependents of government servants who have died in harness and living in indigent circumstances would be deprived of the benefit of dependents U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974. The Rule which is a beneficial piece of legislation would loose its beneficial part and turn into an unworkable Rule.

Case law discussed:
2010 (7) A.D.J. -1 (DB); 2010 (10) ADJ-289; 1996 (5) SCC-308; 2008 (2) A.D.J. 433 (DB); 2000 (2) E.S.C. 967; 2005 (3) U.P.L.B.E.C.2426; 1993 (supp) E.S.C 37 (L.B.); 2009 (4) A.D.J.-89; 2009 (120) F.L.R. 164; 2008 Vol.6 A.D.J. 741 (DB); 2003 (1) U.P.L.B.E.C.; ALR-1976 SC-1766; AIR 2006 SC 2743

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

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

2. This special appeal is preferred challenging the validity and correctness of the judgment and order dated 6.11.2007 by which the Civil Misc. Writ Petition No. 11036 of 2006, Mahendra Pratap Sharma versus State of U.P. and others has been dismissed. The appellant also prays for setting aside the order dated 18.9.2002 passed by respondent no.2, Director, Panchayat Raj, U.P. Lucknow rejecting the claim of the appellant for compassionate appointment under the U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 (hereinafter referred to as " 1974 Rules") which was impugned in the writ petition.

3. At the time of admission following order was passed by the Division Bench of this Court on 22.1.2008.

" Heard Sri B.N. Singh on behalf of the appellant. Sri Yogendra Yadav appears for the respondents.

The appeal seeks a question with respect to interpretation of U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974. The matter requires consideration. The appeal is admitted. The appeal be listed for final hearing in the week beginning on 12.2.2008."

4. The ground of challenge by the appellant is that the order dated 18.9.2002 passed by the Director Panchayat Raj U.P. in pursuance of the judgment dated 6.5.2002 in Civil Misc. Writ Petition 18812 of 1001, M.P.Sharma versus State of U.P. and others is illegal and is liable to be set aside by which the Court directed respondent no.2 to consider the question of condonation of delay. The authority, however, rejected the prayer for condonation of delay by order dated 18.9.2002 on the ground of latches of more than 5 years in moving the application for compassionate appointment. The power of condonation of delay vests the authority with power of relaxation in limitation to the applicant in moving an application for appointment on compassionate grounds. It is stated that the order dated 18.9.2002 suffers from non-application of mind, non-speaking and against the judgment dated 6.5.2002.

5. Learned counsel for the appellant has relied upon judgment in **2010(7) A.D.J.-1 (DB), Vivek Yadav versus State of U.P. and others** and submits that similar controversy has been decided by Division Bench of this Court in which application for compassionate appointment was rejected by respondents under Rule 5 of 1974 Rules. In that case, the father of the petitioner had died on 26th May, 1986. It was argued therein that as soon as the petitioner became major, he moved an application for compassionate appointment but the writ petition was dismissed by the learned Single Judge. On appeal being filed, the appellate Court set aside the judgment of the learned Single Judge. The same judgment has been relied upon in **Subhas Yadav versus State of U.P. and others, 2010 (10) ADJ-289 .** In the judgment of the Apex Court the case of **State of Haryana versus Rani Devi, 1996 (5) SCC-308** was distinguished in view of rule 5 of 1974 Rules. The father of applicant died on 8.8.1994 when he was 6 years old. He moved an application for compassionate appointment on 5.5.2005 on attaining the majority which was rejected on the ground that the application was moved after 11 years by the applicant from the date of death of the government servant. The appellate Court quashed the order of rejection and the order passed by the learned Single Judge directing the respondents to consider the case for appointment of the appellant.

6. It is also stated that similar Rule was considered by the Division Bench of this Court in judgment reported in **2008 (2) A.D.J. 433 (DB), Chairman-cum-Managing Director, U.P. Power Corporation Ltd. versus Jitendra Pratap Singh and 2000 (2) E.S.C. 967, Manoj Kumar Saxena versus District Magistrate, Bareilly and others** wherein the father of the applicant Manoj Kumar

died on 13.8.1987 when he was 12 years old. In this case also the applicant moved an application for appointment on compassionate grounds when he attained majority. His application was also rejected on the ground of delay. The learned Single Judge considering the judgment of the two Division Benches quashed the order of rejection and held that as the applicant moved an application within 5 years of his attaining majority as such there is no delay in moving application and directed the concerned authorities to take decision on merit on the application.

7. Relying upon the case of **Manoj Kumar Saxena's case** similar view was taken by the learned Single Judge of this Court in the case of **Dharmendra Singh versus State of U.P., 2005 (3) U.P.L.B.E.C. 2426** relying upon the case of Manoj Kumar Saxena's case. In **Sunil Kumar Srivastava versus Collector/District Magistrate, Sultanpur, 1993 (supp) E.S.C.37 (L.B.)** when father of the petitioner died on 9.9.1973, U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974 was not in existence. It came to be operative on 31.12.1973.In that case it was held that the dying in harness rule is social legislation. It should not be considered in strict sense. Similar view is said to have been taken by the learned Single Judge of this Court in **Manoj Kumar versus State of U.P. and others, 2009 (4) A.D.J.-89** wherein the father of the applicant died in harness on 17.9.1987 when the petitioner was minor. After he became major, he moved an application on 27.8.1994 which was rejected on 21.3.1997. In paragraph 7 of the judgment the Court quashed the impugned order therein holding that 1974 Rules extend consideration of statutory right to dependents of deceased employee in Government job and it is incumbent upon the State authorities to consider the hardship of livelihood which is a fundamental right guaranteed under the Constitution.

8. It is further stated that in **2009 (120) F.L.R. 164, Shiv Murati versus State of Andhra Pradesh Government,** the scheme providing for compassionate appointment on retirement on medical invalidation was quashed by Andhra Pradesh High Court holding such scheme to be violative of Articles 14 and 16 of the Constitution of India but in appeal Supreme Court quashed the judgment holding the scheme to be constitutionally saved by Articles 14 and 16 of the Constitution of India. It is stated that judgment of the learned Single Judge impugned in special appeal is against the judgment of the aforesaid Supreme Court, hence the provision of Rule 5 of the Dying in Harness Rules, 1974 is not applicable and the view taken by the learned Single Judge in paragraphs 19,20 and 22 of the judgment is contrary to rule 5 which had been affirmed by Division Benches of the Andhra Pradesh High Court referred to above.

9. He then submits that the judgment passed by the learned Single Judge is also against the binding precedence of the Co-ordinate Benches and Division Bench judgments of this Court referred to above and in view of the Division Bench judgment in **Kuldeep Tripathi versus Ram Bahadur and others, 2008 Vol.6, A.D.J.741 (DB)** wherein it was held that the learned Single Judge or Division Bench is bound by earlier judgment passed by same strength or Division

Benches and if Judges not agreed, has to refer the matter to Chief Justice for constituting larger Bench and similarly in **Vijay Bihari Srivastava versus U.P. Posted Primary Cooperative Bank Ltd. 2003(1) U.P.L.B.E.C.,** five Judges Bench of this Court observed that a division Bench cannot hold that an earlier full Bench decision is not binding precedence due to subsequent judgment of the Apex Court as such the impugned judgment is contrary to previous binding judgments of this Court passed by the learned Single Judges and Division Benches.

10. He next submits that the learned Single Judge in his decision relied on various Supreme Court judgment in which Rule 5 of Dying in Harness Rule 1974 was not under consideration and those judgments have no universal application in all cases of compassionate appointment. The Supreme Court judgments are to be interpreted and applied in particular facts of the case. Same view is said to be taken by the Supreme Court in **Regional Manager and others versus Pawan Kumar Dubey and others, ALR- 1976 SC-1766** which clarify how the Supreme Court judgment has to be interpreted and applied in particular facts of the case.

11. The counsel for the appellant argues that learned Single Judge in the impugned judgment has considered certain facts which have not been considered by respondent no.2 in the impugned order dated 19.9.2002. Those facts have been taken from the counter affidavit which has been sworn by deponent on the basis of information received from file without enclosing any documents and such averment cannot be accepted in view of the law laid down by the Apex Court in **Mohindra Singh Gill and others versus Chief Election Commission of India and others.**

12. Learned counsel for the appellant submits that the learned Single Judge has not considered paragraphs 16 and 19 of the writ petition in which the appellant has narrated his miserable family condition and continuing disturbing economical condition which was being taken care of by the maternal uncle. Paragraphs 16 and 19 of the writ petition read thus:-

" 16. That it is stated that family pension paid to the petitioner will not be paid to the petitioner after attaining the age of 25 years i.e. 1.2.2007 as such petitioner would be hand to mouth and shall not be in a position to maintain himself and his younger brother.

19. That the petitioner's family were solely dependent on the salary earned by late petitioner's father and petitioner's father was having no other property or any income from any movable property and similar is a position of the uncle of the petitioner who has been maintaining the petitioner and since family pension received by the petitioner is very meager and on Rs.2200/-, petitioner or his younger brother son cannot continued his studies and maintained themselves as such condition of the petitioner's family is very pitiable and petitioner was forced to left his studies but respondents have not considered the petitioner pitiable condition due to which petitioner and his younger brother's carrier is at stake."

13. Learned counsel for the respondents submits that the appellant cannot claim compassionate appointment

after a lapse of more than five years since the date of death of the deceased (father of the appellant) as provided under rule 5 para 2(3) of the 1974 Rules which has been amended vide G.O.no. 6/12/73/Ka-2/93 dated 13.10.1993. It is stated that neither the mother of the appellant nor any member of his family including the appellant had filed any application within five years since the date of death of the deceased, the father of the appellant.

14. He also submits that the appellant cannot get appointment in government services due to poverty and other reasons if the appellant is given compassionate appointment after lapse of more than five years since the date of the death of his father the same would create severe difficulty to the State respondents as 5% of vacancy in the relevant year only can be filled up by appointment on compassionate ground; that the Director, Panchayati Raj Uttar Pradesh, Luckow had already decided the representation dated 11.6.2002 made by the appellant vide order dated 18.9.2002 after considering his comment dated 19.8.2002 submitted by the then District Panchayati Raj Officer and the entire aspects of the case. There is no illegality or irregularity in the impugned judgment and order dated 6.11.2007 passed by the learned Single Judge and the present special appeal is liable to be dismissed with costs.

15. It is stated that from the record it is apparent that the petitioner's father late Ram Kishore Sharma was working as Village Panchayat Officer and died in harness on 2.8.1989; that petitioner's mother Smt. Satyawati Devi was offered benefit of 1974 Rules by the respondents but she by her letter dated 9.3.1992 informed that due to mental stress she would not like to serve the department and that the widow of the deceased employee also informed the authorities on 30.8.1989 that her two sons aged about five years and two years respectively and a daughter aged about 12 years were minor and, therefore, none of them were eligible for compassionate appointment at that time. She also sent a letter dated 9.3.1992 requesting the authorities to keep a post vacant till one of her sons becomes major to get appointment. Further the petitioner's application dated 28th February 2001 which was received in the concerned office on 11th April 2001 was considered and by order dated 9th May 2001 it was rejected in view of Rule 5 of 1974 Rules on the ground that the representation has rightly been rejected as belated as such the petitioner cannot be considered for compassionate appointment.

16. The mother of the petitioner also subsequently died on 19.3.1995. She was getting family pension in her lifetime. After her death, it was paid to the unmarried daughter, i.e. sister of the petitioner and after her marriage, the family pension was sanctioned to the minor sons through their legal guardian Sri Rajveer Sharma. The petitioner whose date of birth is 24.1.1983 passed his High School in 1997 and Intermediate in 2000 and has graduated in 2004 the appellant submitted an application on 28.2.2001 before the District Panchayat Raj Officer, Aligarh, claiming compassionate appointment under 1974 Rules due to death of his father on 2.8.1989 stating that as now he has attained age of majority, he should be considered for the said appointment. He submitted a reminder letter dated 4.8.2001 and thereafter approached this Court in writ petition no.

18812 of 2002 having received no response from the respondents.

17. The aforesaid writ petition was finally disposed of vide judgment dated 6.5.2002, permitting the petitioner to make a fresh representation before the Director, Panchayat Raj, U.P. Government who was further directed to decide the same within a period of three months. Pursuant to the said order, the petitioner submitted his representation dated 11.6.2002 to the Director, Panchayat Raj, Lucknow who rejected the same by order dated 18.9.2002 impugned in this writ petition. In order to complete the facts, Sri Singh, learned counsel for the petitioner has informed that the petitioner had obtained his graduation degree in Commerce from Agra University in 2004.

18. The contention of learned counsel for the respondents is that his claim after the death of father, the petitioner's mother Smt. Satyawati Devi submitted an application dated 30th August 1989 requesting to provide compassionate appointment to one Sri Kishan Lal who was younger brother of her deceased husband. The claim could not be accepted since the brother of the deceased employee was not entitled for compassionate appointment under 1974 Rules. In rebuttal it is submitted by the petitioner that it is not disputed that the claim of the petitioner's uncle for compassionate appointment was rejected by the respondents but it is said that thereafter his mother informed the respondents that after attaining majority one of her son may be provided compassionate appointment. It is stated that the petitioner and his family members are not getting any help from his uncle who is residing separately. It is also stated that in a number of cases, the State Government has made compassionate appointment after a long time relaxing five years requirement under 1974 Rules and, therefore, adherence to the said time schedule in the case of the petitioner is apparently arbitrary and discriminatory.

19. The contention of learned counsel for the petitioner appellant is that proviso to Rule 5 of 1974 Rules as amended vide notification dated 13.10.1993 by (Third Amendment) Rules, 1993, it was open to the State Government to relax limitation of five years for making appointment under 1974 Rules in appropriate cases but in the case of the petitioner, the said discretion has not been exercised as such the impugned order is liable to be set aside.

20. The point which requires consideration in this case is as to whether a minor dependent upon his father can be considered for appointment as compassionate grounds or after attaining majority can claim compassionate appointment and whether the authorities must relax the normal recruitment procedure in his favour though other eligible persons in the family of the deceased (mother of the petitioner in this case) did not accept the offer. Whether the offer of appointment in such a situation is a must even though the family has survived well for such a long time.

21. The purpose and objective of compassionate appointment is to provide immediate succour to the bereaved family whose sole bread earner has died in harness. It is not a source of recruitment. It only enables the family to tide over the sudden situation crisis and not to give a

member of such family a post much less a post held by the deceased. It is not a kind of right of succession in the service where the employee has died in harness. The compassionate appointment has always been considered to be an exception to the normal mode of recruitment to be exercised only in deserving cases where the family of the deceased is left in cold penury on death of bread earner. The Rules have been made for the family of the deceased employee in consideration of services rendered by him and legitimate expectations, change in status and affairs of the family endangered by the erstwhile employment which are suddenly upturned. It cannot be allowed as a matter of course. There is no question of reserving a vacancy for the Dependents of deceased employee so as to provide them as and when they claim the same after acquiring requisite qualification, age etc. If compassionate appointment is allowed after reasonably long time, it would defeat the very object of assisting the family of deceased employee to tide over the sudden crisis resulting due to the death of bread earner, leaving his/her family in penury and without any means of livelihood. The matter has been considered by the Apex Court as well as this Court time and again and it would be useful to have a bird's eye view on some of such authorities of Apex Court.

22. If the family has sufficient means to survive for years together and can take care of the minors who have turned into major after undergoing educational qualification etc. that itself would be evident to show that now the family is not in financial crises as it could have at the time of sudden demise of the deceased necessitating compassionate appointment at a late stage i.e. after several years.

23. In **State of Jammu & Kashmir and others Vs. Sajad Ahmed Mir AIR 2006 SC 2743** similar facts were involved and considering the same, the Apex Court held that when the deceased employee died in 1987 and his son approached the authorities in 1999, i.e., more than a decade, the same itself disentitles him to claim any benefit of compassionate appointment and observed that the view taken by the High Court in favour of the dependant of the deceased employee amounts to misplaced sympathy. It reiterated the objective of compassionate appointment as under:

" We may also observe that when the Division Bench of the High Court was considering the case of the applicant holding that he had sought 'compassion', the Bench ought to have considered the larger issue as well and it is that such an appointment is an exception to the general rule. 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 setback. 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 of India."

24. Admittedly, the petitioner's father died on 2.8.1989 when the old Rule 5 was in operation. At the relevant time application for compassionate appointment was to be submitted within a reasonable period of time. Therefore, there was no provision for relaxation of period of limitation by the State Government. On the contrary, a perusal of the then existing Rule 5 makes it clear that it stresses upon to offer employment on compassionate ground to the deserving persons of the family without any delay to enable it to survive . Meaning thereby that the application ought to have been submitted by the eligible dependent of the deceased employee without any undue delay and with utmost expediency. Any delayed application was liable to be dealt with as if the family has sufficient means to survive and, therefore, would make him disentitled for compassionate appointment. The amendment made by notification in 1993 is prospective and cannot help the petitioner to take any advantage of the new Rule since the cause of action in his case arose in 1989 when a different provision was in existence. Moreover, the discretion for condoning the delay is conferred by the proviso under Rule 5 as it stood after the amendment, gives a discretion to the State Government and that too is preceded by a condition for consideration of appointment on compassionate grounds in special cases i.e. where undue hardship has caused to the family of the deceased which is living in indigent circumstances and it is expedient and where it is in the deserving case it would be in the interest of justice that the provision pertaining to limitation of five years period needs to be relaxed and in other cases itt does not give any right to a person to claim relaxation thereafter. In the facts and circumstances of the case, in our considered view, Rule 5 as brought on the statute book by notification dated 13.10.1993 cannot help the petitioner for maintaining his application for compassionate appointment after more than 12 years.

25. Paragraphs 16 and 19 aforesaid do not give an impression that the family of the deceased was in immediate need of financial assistance as the petitioner has averred therein that he would be hand to mouth after his attaining 25 years of age. The argument that the petitioner is living separately with his uncle is also belied by paragraph 19 of the writ petition and even if he is living along with his uncle, it cannot be said that the family is living in indigent circumstances for the reasons given herein above in this judgment.

26. Admittedly, the mother of the appellant had requested the authorities to provide compassionate appointment to the brother of the deceased which was declined by the authorities and in that circumstances, she prayed for reservation of a post for one of her sons on compassionate ground. It is also an admitted fact that the family claims to be living separately from their uncle. Moreover, it has survived more than 22 years after the death of the deceased. The children have got education as the court has been informed that the appellant has graduated in 2004. What is his present status is not known to the counsel for the appellant i.e. as to whether he is serving any where or not and how is he maintain his family too.

27. The aforesaid admitted facts clearly establish that the family was not in indigent circumstances as the widow of the deceased has refused compassionate appointment for herself and instead desires appointment to be given to the brother of the deceased for she was compelled to do so by the circumstances as her children were minors at that time. She could have accepted the appointment if the family was in dire financial crisis. Even though the compassionate appointment was not accepted by the mother of the applicant and she has been able to raise her children and to give good education.

28. It may also be noted that the applicant did not submit any application for condonation of delay. The power to condone delay vests in the State Government.

29. There is also no provisions of keeping vacancy reserved for the minors of dependents of government servants who died in harness. The 51% appointments under compassionate appointments is to be made in the existing vacancies for minors in each year. If reservation of vacancies for minors in such manner is permitted, many a deserving dependents of government servants who have died in harness and living in indigent circumstances would be deprived of the benefit of dependents U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974. The Rule which is a beneficial piece of legislation would loose its beneficial part and turn into an unworkable Rule.

30. For all the reasons stated above, the respondents cannot be directed to give compassionate appointment to the appellant after the death of deceased employee on 2.8.89 and on attaining the majority on 28.2.2001 i.e. more than 22 years.

31. The writ petition is accordingly, dismissed. No order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.01.2012

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

Special Appeal No. 176 of 2012

Rameshwar Prasad Shukla ...Petitioner
Versus
The District Inspector of School and another ...Respondents

Counsel for the Petitioner:
Sri Ashok Kumar Srivastava

Counsel for the Respondents:
C.S.C.

Constitution of India-Article, 226-Writ Petition-claiming salary from state exchequer-without impleading State Government-petition itself not maintainable-working on basis of interim order-for considerable period-after dismissal of petition being merged with final judgment-equity can not prevail over statutory provision-view taken by Learned Single Judge-not suffer from any error.

Held: Para 8

In view of above, we are of the view that since the petitioner-appellant filed the writ petition claiming salary from the State exchequer, therefore, he ought to have impleaded the State as a party and in the absence of the State as a party in

the writ petition, the writ petition itself was not maintainable.

We, therefore, do not find any reason to differ with the view taken by the learned Single Judge. The appeal is, accordingly, dismissed.

Case law discussed:

(1997) 6 SCC 574; (1994) 2 SCC 718; (2007) 1 AWC 507 (SC); AIR 1977 SC 1701;AIR 2003 SC 1805

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

1. This intra-court has been preferred against the judgment and order dated 16.12.2011 passed by the learned Single Judge in Writ Petition No. 18190 of 1987 by which the appellant's appointment was found contrary to the provisions of law and the writ petition was dismissed.

2. Heard learned counsel for the appellant and also perused the order of the learned Single Judge impugned in this appeal.

3. We are of the view that the order of the learned Single Judge does not suffer from any error and, therefore, we have no reason to disagree with the view taken by him. The law in this regard is well settled. The Hon'ble Supreme Court in **State of Rajasthan Vs. Hitendra Kumar Bhatt, (1997) 6 SCC 574** has already held that an interim order passed in a pending proceeding merges into final order and, therefore, even if on the strength of the interim order passed in the writ petition, the appellant continued in service, that does not confer any right to claim continuance in service on the ground that a sympathetic view ought to have been taken since the appellant continued for a long period under the interim order of this Court.

4. It is well settled that justice has to be dispensed in accordance with law and equity and sympathy shall have no place or overriding effect over the statutory provisions. The Apex Court in the case of **Life Insurance Corporation of India Vs. Asha Ramchandra Ambedkar (Mrs.) & Anr., (1994) 2 SCC 718**, has held as under:-

"... Justice according to law is a principle as old as the hills. The courts are to administer law as they find it, however, inconvenient it may be.

... ...

The Courts should endeavour to find out whether a particular case which sympathetic considerations are to be weighed falls within the scope of law. Disregardful of law, however, hard the case may be, it should never be done..."

5. In the case of **Raghunath Rai Bareja Vs. Punjab National Bank, (2007) 1 AWC 507 (SC)**, the Apex Court has observed:-

"...It is well settled that when there is a conflict between law and equity, it is the law which has to prevail, in accordance with Latin maxim 'dura lex sed lex', which means 'the law is hard, but it is the law'. Equity can only supplement the law but it cannot supplant or override it.

... what is administered in the Courts is justice according to law, and considerations of fair play and equity however they may be, must yield to clear and express provision of the law."

6. The matter may be examined from another angle also. The petitioner-

appellant, claiming himself to be the Assistant Teacher in C.T. Grade in a recognized aided institution, has filed the writ petition for payment of salary. The salary of teachers and other employees of a recognized aided institution are payable under the provisions of the U.P. High School and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971. Under the aforesaid Act, it is the responsibility of the State Government to pay the salary of the teachers and employees of the aided recognised institution. The petitioner-appellant, without impleading the State Government, filed the writ petition. It is well settled that if an employee files a writ petition claiming salary from the State exchequer, then the State being a necessary party has to be impleaded and in the absence of impleadment of the State, no direction can be issued against the State and the writ petition would not be maintainable. The Apex Court in the case of **Ranjeet Mal Vs. General Manager, Northern Railway, New Delhi & Anr., AIR 1977 SC 1701,** has held as under:-

"It cannot be disputed that the appellant was a servant of the Union. It is equally indisputable that any order of removal is removal from service of the Union. The appellant challenged that order. Any order which can be passed by any Court would have to be enforced against the Union. The General Manager or any other authority acting in the Railway administration is as much a servant of the Union as the appellant was in the present case.

The Union of India represents the Railway administration. The Union carries administration through different servants. These servants all represent the Union in regard to activities whether in the matter of appointment or in the matter of removal. It cannot be denied that any order which will be passed on an application under Article 226 which will have the effect of setting aside the removal will fasten liability on the Union of India, and not on any servant of the Union. Therefore, from all points of view, the Union of India was rightly held by the High Court to be a necessary party. The petition was rightly rejected by the High Court."

7. A similar question with regard to impleading the State came up for consideration before the Apex Court in **Chief Conservator of Forests, Government of A.P. Vs. Collector & Ors., AIR 2003 SC 1805,** wherein it was held that in view of Article 200 of the Constitution of India, the Government of India and also the Government of State may sue or be sued by the name of Union of India or by the name of State respectively. The Apex Court had also considered the provisions of Section 79 of the Code of Civil Procedure and Rule 1 of Order 27 C.P.C. and held as under:-

"A plain reading of Section 79 shows that in a suit by or against the Government, the authority to be named as plaintiff or defendant, as the case may be, in the case of the Central Government, the Union of India and in the case of the State Government, the State, which is suing or is being sued.

Order 27 of Rule 1, as mentioned above, deals with suits by or against the Government or by officers in their official capacity. Rule 1 of Order 27 C.P.C. says that in any suit by or against the

Government, the plaint or the written statement shall be signed by such person as the Government may by general or special order appoint in that behalf and shall be verified by any person whom the Government may so appoint."

8. In view of above, we are of the view that since the petitioner-appellant filed the writ petition claiming salary from the State exchequer, therefore, he ought to have impleaded the State as a party and in the absence of the State as a party in the writ petition, the writ petition itself was not maintainable.

We, therefore, do not find any reason to differ with the view taken by the learned Single Judge. The appeal is, accordingly, dismissed.

9. At this stage, learned counsel for the appellant submits that the amount of G.P.F. and other dues payable to the appellant are still lying with the Department. He further submits that there is apprehension of initiation of a proceeding for recovery of the amount of salary already paid by the respondents. However, the aforesaid apprehension has not been substantiated by bringing any material on record. Besides that, in the event, if such proceedings are initiated, that will be a fresh cause of action and it will always be open to the appellant to approach the appropriate Court challenging such action/order but that cannot be a basis to interfere with the order of the learned Single Judge.

10. The appeal, therefore, being without merit, is dismissed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.01.2012

BEFORE
THE HON'BLE ASHOK SRIVASTAVA,J.

Criminal Revision No. - 260 of 2012

Kailash Singh ...Petitioner
Versus
State of U.P. ...Respondents

Counsel for the Petitioner:
Sri Pankaj Kumar Mishra

Counsel for the Respondents:
Pankaj Kumar Mishra
Govt. Advocate

Criminal Revision-against order taking cognizance-without going through case diary-expression "cognizance" means "became aware" or to take notice judicially-in view of law laid down by Apex Court in Dy. Chief Controller Export-import case-a detail reasoned discussion not required-revision dismissed.

Held: Para 4

In the instant case, fact wise, law as laid down in Dy. Chief Controller of Imports and Exports (supra) squarely applies. From perusal of the order impugned herein it does not transpire that before taking cognizance of the case and passing an order thereon the Magistrate had not seen the case diary or the charge sheet. It is needless to say that while taking cognizance of an offence no detailed order is required to be passed by the Magistrate.

Case law discussed:
2011-ADJ-5-690; 2009 AIR Jhar-1-355; 2003 (46) ACC 686 SC; 2000 (40) ACC 441 SC; 2011 (73) ACC 750 (Alld./Lko.); (2008) 2 SCC 492

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

1. This revision has been directed against the order passed by the learned Magistrate on 5.11.2011 through which he has taken cognizance of the offence regarding which a charge sheet was filed before him. It has been submitted from the side of the revisionist that from perusal of the order it is evident that the learned Magistrate passed the order without application of his mind and without considering the charge sheet and without going through the case diary.

2. In this connection my attention has been drawn from the side of the revisionist towards 2011-ADJ-5-690, Amit Garg Vs. State of U.P. & 2009 AIR Jhar-1-355, Fakhruddin Ahmad Vs. State of Uttranchal. On the other hand my attention has been drawn towards 2003 (46) ACC 686 SC, Dy. Chief Controller of Imports and Exports Vs. Roshan Lal Agrawal & Others, AIR 2000 SC-1456, U.P. Pollution Control Board Vs. M/S Mohan Meakins Ltd. & Others, 2000 (40) ACC 441 SC, Kanti Bhadra Singh Vs. State of West Bengal & 2011 (73) ACC 750 (Alld./Lko.) Bench, Mohd. Sayeed Vs. State of U.P., from the side of the State.

3. I have gone again through these case laws. In the case Dy. Chief Controller of Imports & Exports (Supra), the learned Magistrate had passed the following orders:-

"Cognizance taken, Register the case. Issue summons to the accused.? The Apex Court has held that this order by itself indicates that the learned Magistrate has applied his mind and had taken cognizance of the case. The Apex Court has discussed the term cognizance in the case of S.K.Sinha, Chief Enforcement Officer Vs. Videocon International Ltd. and Others (2008) 2 SCC 492 and has stated that expression ?cognizance? has not been defined in the Code. But the word (cognizance) is of indefinite 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.

4. In the instant case, fact wise, law as laid down in Dy. Chief Controller of Imports and Exports (supra) squarely applies. From perusal of the order impugned herein it does not transpire that before taking cognizance of the case and passing an order thereon the Magistrate had not seen the case diary or the charge sheet. It is needless to say that while taking cognizance of an offence no detailed order is required to be passed by the Magistrate.

5. In the above circumstances I do not find that there is any force in this revision and accordingly it is dismissed at the admission stage.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.01.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL,J.

Civil Misc. Writ Petition No. 1181 of 2012

Upma Srivastava ...Petitioner
Versus
State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri Manish Chand Umrao

Counsel for the Respondents:
C.S.C.
Sri Neeraj Mishra
Sri Shamsher Maurya
Sri P.D.Tripathi

Constitution of India, Article 226-prolong suspension-without any progress in disciplinary action for considerable period of 4 years-non payment of subsistence allowance without discharging any duty-highly derogatory, arbitrary and impertinent-arrears of salary from date of suspension till reinstatement be recovered from personal benefit of Basic Education Officer-petition allowed with cost of Rs. 25000.

Held: Para 5

This inaction, in my view, cannot be without any reason or indeliberate. In fact no justification, explanation or reason whatsoever has been given for this kind of inaction on the part of respondents. The Court is thus justified in believing that it is deliberate and surpasses the territory of arbitrariness, unreasonableness and irrationality. Such an official cannot be allowed to go scot-free without accounting for the public funds.

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

1. Pursuant to this Court's order dated 10.01.2012, Sri J.K.Verma, presently working as Basic Shiksha Adhikari, Shahjahanpur, as identified by Sri P.D.Tripathi, Advodate is present. It is admitted by him that after suspension order dated 8.9.2008 no further action was taken against the petitioner and no charge sheet was ever issued. However, he submitted that after receiving the order dated 10.01.2012 passed by this Court inquiring as to what action has been taken in the matter and why petitioner has been kept under suspension for such a long time without any inquiry in the matter, an order has been passed revoking suspension on 13.1.2012 pursuant whereto the petitioner has joined.

2. In the affidavit filed by respondent No.3 nothing has been said as to why suspension of the petitioner continued for more than 3 years and what disciplinary action proceeded in the meanwhile.

3. In the short counter affidavit sworn by Sri J.K.Verma, Basic Shiksha Adhikari, Shahjahanpur (hereinafter referred to as "BSA") he has said that petitioner was placed under suspension on account of her unauthorized absence and Deputy Basic Shiksha Adhikari was appointed as enquiry officer. A report was submitted by Finance and Accounts Officer, Basic Shiksha 16.10.2008 wherein he has endorsed observation made by Additional District Magistrate and has also approved the proposed action against responsible persons. However even this affidavit nowhere shows as to when the petitioner was

issued any charge sheet, whether any oral enquiry was ever conducted or not and what happened after order of suspension was passed on 8.9.2008 whereafter Deputy District Basic Education Officer, Shahjahanpur was appointed as enquiry officer.

4. Apparently it appears that after placing the petitioner under suspension, Educational authorities slept over the matter, allowed the petitioner to enjoy subsistence allowance for more than three years without any enquiry whatsoever creating a legal lacuna in her favour so that as an when she comes to this Court against inaction on the part of respondent, she may get an order in her favour.

5. This Court, however, when summoned respondents No.2 and 3 with a clear direction to show as to what action was taken in this matter and why petitioner has been kept under suspension for such a long time without any inquiry, in order to cover up entire inaction and wastage of public revenue in the shape of payment of subsistence allowance and later on full salary, passed revocation order on 13.01.2012 reinstating the petitioner. This kind of attitude on the part of respondent No.3, which has also gone unmonitored by respondent No.2 is really highly derogatory, arbitrary and impertinent. They are holding public office and custodian of public funds. They cannot meddle with public funds by simply distributing it to the persons not doing any work at all. Basic education has been given a very important role in our Constitution also. Earlier directive principles requires that State shall take steps for providing free primary education to young people, but later on realizing its importance, which may reflect in the literacy rate of the country, right to primary education has been made a fundamental right vide Article 21-A of Constitution. Even the parents are under a constitutional duty to ensure primary education to their wards. This constitutional obligation cannot be discharged unless effective machinery and infrastructure is made available. This includes availability of competent teaching staff in the schools, their regular presence and devoted attendance for duty. Judicial cognizance can be taken, (particularly in the light of a large number of cases pending before this Court in which State Government has taken a stand) that thousands and thousands vacancies of primary teachers are lying. It is more shameful that primary institutions, which already have a teacher, are made without him/her on account of an action of educational authority for which he does not feel any accountability or responsibility. He made the institution without teacher by placing the petitioner under suspension and then allow that situation to continue for years together. If the petitioner was not performing her job, it was a case of urgent attention and action so that another teacher could have been appointed to do the job but on the one hand educational authorities, the respondent No.3 shown as he intends to take action for ensuring proper presence of teacher in the school but in effect he failed in entirety. This inaction, in my view, cannot be without any reason or indeliberate. In fact no justification, explanation or reason whatsoever has been given for this kind of inaction on the part of respondents. The Court is thus justified in believing that it is deliberate

and surpasses the territory of arbitrariness, unreasonableness and irrationality. Such an official cannot be allowed to go scot-free without accounting for the public funds.

6. In view of the above discussion, this writ petition is disposed of with the following direction:

i. For the entire period the petitioner remained under suspension she shall be entitled for full salary since suspension is wholly unjustified as no departmental enquiry was ever conducted against her.

ii. The amount of salary paid to the petitioner without actual discharge of duty on and after 8.9.2008 i.e. after suspension till reinstatement shall be realized from respondent No.3 i.e. the officer presently holding the office who is admittedly working in the said office since 2007.

iii. The Secretary, Basic Education shall also initiate departmental enquiry against respondent No.3 as to why and in what circumstances, though petitioner was placed under suspension, but no enquiry was conducted against her, and thereafter a situation was created in which she got reinstated without any liability or responsibility. The aforesaid enquiry shall be completed by Secretary, Basic Education within three months and the ultimate order passed by it shall be placed before this Court after three months. This case will be listed in the week commencing 14th May, 2012 only for this purpose and nothing else.

iv. The petitioner shall also be entitled to cost which I quantify to Rs.25,000/- which shall be paid at the first instance by respondent No.1 but it would have liberty to recover the same from respondent No.3, the present incumbent holding the said office.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 17.01.2012

BEFORE
THE HON'BLE SHABIHUL HASNAIN,J.

Consolidation No. - 1393 of 1980

Dwarika Prasad and others ...Petitioner
Versus
Shesh Narain and others ...Respondents

Counsel for the Petitioner:
Sri P.L. Misra
Sri A.K. Verma
Sri Jagdish Singh
Sri R.S. Tripathi

Counsel for the Respondents:
C.S.C.
Sri G.P. Tripathi
Sri Rakesh Kumar
Sri Satish Tripathi
Sri Ved Prakesh Shukla.

Constitution of India, Article 226-Practice and Procedure-Dismissal of Writ Petition in Default-once restored on original number the status on date of dismissal automatically revived-no need of passing specific order-admitted petition-confirmed interim order-never vacated prior to dismissal of default-automatically revived-no need of passing further extension order.

Held: Para 11

In view of what has been discussed above, there appears no need to pass any fresh orders. I have already held that when a petition is restored to its original number, it gets the status which

was being enjoyed by it on the date it was dismissed. Accordingly, I hold that the interim orders I passed in the writ petitions are continuing today. The stay is not time bound hence, there is no need to extend it for any specified time.

Case law discussed:

AIR 1968 Mys 283:(1967) 1 Mys LJ 414; AIR 1934 Mad. 49:ILR 57 Mad 308; AIR 1956 Pat 271; AIR 1978 AP 30

(Delivered by Hon'ble Shabihul Hasnain,J.)

C.M.Application No.100661/2011 (For extension of the stay order)

1. This application has been moved for extension of the interim order granted by this Court on 19.5.1980.

2. The brief facts leading to filing of this application is as under:-

3. The petitioners being aggrieved by the judgment dated 28.8.1986 upholding the judgment dated 18.3.1981, filed the above noted writ petition in which an order was passed on the application for stay on 19.5.1980 staying the operation of the order dated 15.1.1980. The writ petition was listed for order on 24.8.1987 and further proceedings pending before the Settlement Officer Consolidation were stayed. The writ petition was listed on 25.5.2010 and dismissed for want of prosecution, whereupon an application was made by the petitioners which was allowed and the writ petition was restored to its original number. While restoring the petition to its original number, the stay order granted earlier was not specifically revived. It is being interpreted by the opposite parties as if the stay has not been extended. Hence, this application has been moved.

4. From a perusal of the record it appears that following orders were passed on 19.5.1980:

"Hon' S. C. Mathur, J.

Put up along with the writ petition. Meanwhile operation of the order dated 11.1.1980 contained in Annexure-15 passed by teh Deputy Director of Consolidation, Pratapgarh shall remain stayed."

19.5.80. Sign. Illegible"

On 2.7.1980 the following orders were passed:

"Hon'ble K. N. Goyal, J.

Admit. Issue notice to opposite parties 1 to 10. In the meantime, the interim order dated 19.5.80 shall continue.

Sign. Illegible.

2.7.80"

An application for vacation of stay was moved on 20.11.1980 in which following orders were passed:

"Hon' U.C.Srivastava, J.

No good ground for vacating the interim order has been made out. The interim order dated 19.5.80 is confirmed.

Sign. Illegible.

20.11.80."

On 29.11.2005 this writ petition was dismissed for non-prosecution by Hon'ble

R. P. Yadav, J. and following orders were passed:

Hon. R. P. Yadav, J.

List has been revised.

None appears for the parties.

The writ petition is dismissed for non-prosecution.

29.11.05 Sign. Illegible."

The petition was restored by Hon'ble R. P.Yadav on 28.2.2006 passing following orders:

"Hon'ble R. P. Yadav, J.

Heard Learned Counsel for the parties. This is an application for setting aside the order dated 29.11.05 dismissing the petition for non prosecution.

No objection filed.

Perused the affidavit.

Sufficient ground has been disclosed. The application is within time.

It is, therefore, allowed. The order dated 29.11.05 is recalled and the writ petition is restored to its original number.

List the case in the next cause list for final hearing.

28.2.06 Sign. Illegible".

5. It is clear that Hon'ble R. P. Yadav, J. had restored the petition to its original number and it can safely be presumed that the petition was restored to its original number. Meaning thereby that the petition will obtain the same status which was being contained in the writ petition on the date of dismissal for non-prosecution. It is clear that the the confirmed stay order was operating in favour of the petitioner on 29.11.2005 as aforementioned. The restoration of a petition to its original number will mean that stay has also revived. The petition was again dismissed in default by Hon'ble Y. K. Sangal, J. on 25.5.2010 by passing the following orders:

Hon'ble Yogendra Kumar Sangal, J.

List revised. None is present on behalf of the petitioners.

Matter is quite old of the year, 1980 and listed in the old case.

The writ petition is hereby dismissed.

25.5.2010 Sign. Illegible."

The petition was later on restored by me to its original number on 4.2.2011 by passing the following order by the same analogy:-

Hon'ble Shabihul Hasnain, J.

C.M.Application No.77910 of 2010.

This is an application for recall of the order dated 25.5.2010.

Cause shown is sufficient.

Application is allowed.

Order dated 25.5.2010 is recalled.

Petition is restored to its original number.

4.2.2011. Sign. illegible. "

6. The confirmed interim order shall become operative on the restoration of the petition to its original number. The position is very clear. The interim order granted on 19.5.1980 and confirmed on. 20.11.1980 has never been vacated. It came under eclipse for some time by the dismissal of the writ petition in default but when the shadow of dismissal was removed by the order of this Court, the interim order will again emerge and its existence can not be denied.

7. I draw strength from the observations in the case of *Shivaraya Vs. Sharnappa, AIR 1968 Mys 283: (1967) 1 Mys LJ 414* wherein it has been held that the question whether the restoration of the suit revives ancillary orders passed before the dismissal of the suit depends upon the terms in which the order of dismissal is passed and the terms in which the suit is restored. If the Court dismisses the suit for default, without any reference to the ancillary orders passed earlier, then the interim orders shall revive as and when the suit is restored. However, if the Court dismisses the suit specifically vacating the ancillary orders, then restoration will not revive such ancillary orders.

8. In the case of *Saranatha Ayyangar V. Muthiah Moopanar, AIR 1934 Mad 49: ILR 57 Mad 308,* it has been held that on restoration of the suit dismissed for default all interlocutory matters shall stand restored, unless the order of restoration says to the contrary. That as a matter of general rule on restoration of the suit dismissed for default, all interlocutory orders shall stand revived unless during the interregnum between the dismissal of the suit and restoration, there is any alienation in favour of a third party.

9. A similar view has been taken by teh Patna High Court in the case of *Bankim Chandra V. Chandi Prasad, AIR 1956 Pat 271* in which it has been held that orders of stay pending disposal of the suit are ancillary orders and they are all meant to supplement the ultimate decision arrived at in the main suit and, therefore, when the suit, dismissed for default, is restored by the order of the Court all ancillary orders passed in the suit shall revive, unless there is any other factor on record or in the order of dismissal to show to the contrary. This was also a matter under Order 39.

10. In the case of *Nandipati Ram Reddi V. Nandipati Padma Reddy, AIR 1978 AP 30* it has been held by the Division Bench of the Andhra Pradsh high Court that when the suit is restored, all interlocutory orders and their operation during the period between dismissal of the suit for default and restoration shall stand revived. That once the dismissal is set aside, the plaintiff must be restored to the position in which he was situated, when the Court dismissed the suit for default. Therefore, it follows that interlocutory orders which have been passed before the dismissal would stand revived along with the suit when the dismissal is set aside and the suit is restored unless the Court expressly or by implication excludes the operation of interlocutory orders passed during the period between dismissal of the suit and the restoration.

11. In view of what has been discussed above, there appears no need to pass any fresh orders. I have already held that when a petition is restored to its original number, it gets the status which was being enjoyed by it on the date it was dismissed. Accordingly, I hold that the interim orders I passed in the writ petitions are continuing today. The stay is not time bound hence, there is no need to extend it for any specified time.

12. List after two weeks for final hearing.

ORIGINAL JURISDICITION
CIVIL SIDE
DATED: ALLAHABAD 11.01.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL,J.

Civil Misc. Writ Petition NO. 1629 of 2012

Vikas Kumar & others ...Petitioners
Versus
State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri Aditya Kumar Yadav
Sri Mrityunjay Dwivedi

Counsel for the Respondents:
C.S.C.
Sri Ramendra Pratap Singh

Constitution of India, Article 14, 16- Regularization-Daily wagers appointment made without following procedure-long time working can not be ground for regularization.

Held: Para 6

The Apex Court consistently since then has held that in absence of any statutory provision if a person has been engaged in a wholly illegal manner without following procedure prescribed in statute and in violation of Article 16 of the Constitution, such person cannot be allowed to be regularised as that would amount to commanding the respondents to commit a patent illegality which is unconstitutional also.

Case law discussed:
(2006) 4 SCC 1; (2007) 1 SCC 575; (2008) 3 SCC 505; (2009) 4 SCC 342; (2010) 2 SCC 422; (2010) 4 SCC 179; 2011 (2) SCC 429

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

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

2. Petitioners are challenging the advertisement dated 08.12.2011 (Annexure-13 to the writ petition) published by New Okhla Industrial Development Authority *(hereinafter referred to as "NOIDA")*, respondent no. 3 for making recruitment on various Class III and IV posts.

3. Learned counsel for the petitioners contended that petitioners are working for a long time and, therefore, are entitled to be considered for regularisation and so long as they are not considered for regularisation, the post on which they are working, no recruitment by advertisement of vacancies can be made.

4. Learned counsel for the petitioners, however, could not dispute that none of petitioners were ever engaged by respondent-authority by following procedure prescribed in statute consistent with Article 16 of the Constitution of India, i.e., by advertisement of vacancy giving opportunity of consideration to all other eligible persons. The petitioners in a wholly illegal manner without following any procedure of selection were engaged abruptly by officials of NOIDA in a whimsical manner and they have been

allowed to continue obviously with cooperation of authorities who did not admittedly follow prescribed procedure in law for making recruitment. Such appointments are in the teeth of Article 16 of the Constitution particularly when the authority is "State" under Article 12 of the Constitution. Considering such types of appointments the Constitution Bench of Apex Court in **Secretary, State of Karnataka Vs. Uma Devi (2006) 4 SCC 1** held:

"The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularization or permanent continuance unless the recruitment itself was made regularly and in terms of the Constitutional Scheme."

5. Subsequently in some matters the observations made by Apex Court in para 53 of the judgment of **Uma Devi (supra)** were sought to be construed as if the persons even if their engagement made without following procedure prescribed in statute but continued for some times are entitled for regularisation but this misconstruction was clarified by Apex Court in subsequent decisions, some of which are, **State of M.P. And others Vs. Lalit Kumar Verma (2007) 1 SCC 575; Rajasthan Krishi Vishva Vidyalaya, Bikaner Vs. Devi Singh, (2008) 3 SCC 505; State of Karnataka Vs. G.V. Chandrashekhar (2009) 4 SCC 342; Harminder Kaur and others Vs. Union of India and others (2009) 13 SCC 90; Union of India & another Vs. Kartick Chandra Mondal & another (2010) 2 SCC 422; Satya Prakash & others Vs. State of Bihar & others (2010) 4 SCC 179; and, State of Rajasthan and others Vs. Daya Lal & others, 2011(2) SCC 429.**

6. The Apex Court consistently since then has held that in absence of any statutory provision if a person has been engaged in a wholly illegal manner without following procedure prescribed in statute and in violation of Article 16 of the Constitution, such person cannot be allowed to be regularised as that would amount to commanding the respondents to commit a patent illegality which is unconstitutional also.

7. In the circumstances, I do not find any right of petitioners to claim regularisation and the process adopted by respondents for filling up the vacancies by advertisement cannot be faulted legally or otherwise.

8. Dismissed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.01.2012

BEFORE
THE HON'BLE SURENDRA KUMAR,J.

Criminal Revision No. 1712 of 1993

Manoj Kumar Gupta ...Petitioner
Versus
Smt. Kamlesh Kumari and another ...Respondents

Counsel for the Petitioner:
Sri R.C. Gupta

Counsel for the Respondent:
A.G.A.

Code of Criminal Procedure-Section-125(3)-Recovery Warrant-for arrears of unpaid maintenance amount-husband inspite of having capacity failed to deposit-order passed by Magistrate perfectly justified-warrant no interference.

Held: Para 29

In view of the aforesaid discussions and case law on the point in hand, the submissions of the learned counsel for the revisionist can not be accepted. On consideration of the facts and circumstances of the case of the instant revision and case law cited above, it is held that the impugned order dated 27.9.1993 passed by the Magistrate is perfectly just and legal and the same suffers from no illegality or infirmity of any kind. Since the husband/revisionist herein failed to pay the complete outstanding amount of maintenance as ordered by the learned Magistrate vide order dated 18.8.1989 inspite of having financial capacity and sufficient means to pay the same had knowingly made default in payment of the said amount, the Magistrate is fully competent to recover the maintenance amount remaining unpaid from the husband and to pay the same to Smt. Kamlesh Kumari, wife of the revisionist.

Case law discussed;

A.I.R. 1938 Allahabad 386 (Full Bench); AIR 1958 Bombay 99 (Full Bench) in paragraph 2; AIR 1967 Calcutta 136 (DB); 1999 CRI.L.J. 5060; 2005 CRI.L.J. 2615 (Supreme Court); 2009 CRI.L.J. 920 (Full Bench); AIR 1919 Lahore, 197; AIR 1935 Lahore, 758; AIR 1941 Rangoon, 135; AIR 1949 Nagpur, 269; AIR 1967 Mysore 81; 1982 Cr.L.J. 2365; 1988 (2) Crimes 33; 2000 Cri.L.J. 3893 (2000 All.L.J. 1812).

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

1. Heard learned counsel for the revisionist and learned A.G.A.

2. The husband Manoj Kumar Gupta, who is revisionist, has filed this revision petition in this Court, impleading his wife Smt. Kamlesh Kumari as opposite party no. 1 and II Additional Chief Judicial Magistrate, Banda as opposite party no. 2, against the order dated 27.9.1993 passed by the II Additional Chief Judicial Magistrate, Banda in Case No. 243/IX/1990-Smt. Kamlesh Kumari Vs. Manoj Kumar Gupta, under Section 125(3) Cr.P.C., Police Station Kotwali Nagar, Banda, District Banda, by which recovery warrant for the interim maintenance amount remaining unpaid was directed to be issued against the husband and 16.10.1993 was fixed for further orders in the matter.

3. It appears that the wife was awarded interim maintenance since 18.8.1989 at the rate of Rs. 400/- per month in the petition under Section 125 Cr.P.C. and the husband was directed to pay the amount of maintenance to his wife. The amount of maintenance became due from 18.8.1989 to 31.7.1992, hence the wife moved an application dated 31.7.1992 before the court below under Section 125(3) Cr.P.C. with the prayer that a recovery warrant for Rs. 14,195/- be issued against the husband. The husband filed objections on 23.9.1993 against the said application in the court below saying that the said application was not maintainable because the amount of maintenance only up to the period of one year could be recovered and recovery warrant could not be issued for recovery of maintenance for a period exceeding one year. The husband also took plea that his suit for decree of restitution of conjugal rights in the court at Amarawati, the State of Maharshtra, was decreed long back and by virtue of the said decree, the wife was directed to live with her husband and to perform conjugal rights and duties with her husband but the wife did not obey the decree without any sufficient reason and the wife had deserted him without any reasonable and sufficient cause. The husband inter-alia took the plea by way of filing objections that he

ultimately filed a divorce petition under Section 13 of the Hindu Marriage Act, 1955 which was allowed by the competent court and the decree of divorce was passed on 17.6.1986 dissolving the marriage. On these grounds, the husband claimed that he was not liable to pay any interim maintenance to his wife as she had ceased to his wife. He had deposited Rs.4,800/- as interim maintenance for a period of one year and he prayed for cancelling the recovery warrant issued for recovery of remaining sum. The wife in the lower court moved another application stating therein that the objections by the husband on the wrong grounds were filed and the case of maintenance is still pending against the husband and the order dated 18.8.1989 awarding interim maintenance was in existence and is still in existence. The husband challenged the order of interim maintenance by way of filing Criminal Revision No. 121 of 1990 in the revisional court, which was also dismissed by the learned Sessions Judge, Banda vide judgment and order dated 23.5.1992. The husband in the court below clearly admitted that the Sessions Judge neither stayed the operation of the order by which interim maintenance was allowed to the wife nor the lower court proceedings were stayed. It is evident from the impugned order itself that the husband deposited a sum of Rs. 4,800/- which was due for a period of one year but he did not deposit the remaining unpaid amount of maintenance just on the ground that a decree for restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955 by the court at Amarawati (Maharastra) was passed against his wife, which was not obeyed by the wife.

4. The main submission of the learned counsel for the revisionist husband is that by virtue of provisions of Section 125(3) of Criminal Procedure Code, 1973 if the husband failed without sufficient cause to comply with the order of the maintenance, then the Magistrate may, for every breach of the order can issue a warrant for levying the amount due in the manner provided for levying fines and can sentence the husband for whole or any part of each month's allowance remaining unpaid after the execution of the warrant to imprisonment for a term which can extend to one month or until payment if sooner made. No warrant could be issued for recovery of the amount due unless the application was made to the court to levy such amount within a period of one year from the date on which it became due. On this ground, the impugned order is illegal, unjust, improper and against the provisions of law.

5. Learned A.G.A. taking me through the impugned order and other material, has submitted that this is a case of awarding maintenance to the wife and the husband in part compliance of the impugned order, deposited only maintenance amount up to the period of one year. The order of interim maintenance was passed in the year 1989 and when the husband did not pay the same within reasonable time, then the wife had to move an application under Section 125(3) of the Criminal Procedure Code, 1973 with the prayer that the recovery warrant for recovery of the aforesaid amount for the aforesaid period against her husband be issued. It was after the impugned order dated 27.9.1993 that the husband made only part payment namely up to the period of one year to his wife. He did not pay the remaining amount of maintenance on the ground that a decree for restitution of conjugal rights was passed in his favour against his wife by the

District Court, Amarawati, State of Maharashtra on 17.6.1986 and the wife did not comply with that decree. Learned A.G.A. has further submitted that since the order awarding interim maintenance to the wife and also the impugned order were in existence against the husband revisionist, he was bound to make payment of the whole amount of interim maintenance so as to prevent her from starvation but it was the husband revisionist who had driven his wife to the stage of starvation.

6. This criminal revision was filed in this Court on 28.10.1993. This was presented before the Court and this Court on 3.11.1993 passed the following interim order:-

"On steps issue notices to the respondent No. 1 to show-cause against the applicant. Summon the records of the courts below.

In the meanwhile and till further orders operation of the impugned order dated 27.9.1993 shall remain stayed for a period of 20 days from today. If within this period the applicant deposits with the Court below a sum of Rs.5600/- and continues to deposit a sum of Rs. 400/- every month as directed in the basic order of the trial Court, the operation of the order shall remain stayed till the disposal of the stay application. In the event of failure, there shall be no stay order.

3.11.93.

On the same day, the same Hon'ble Judge passed the following order:-

After the above order, the learned counsel stated that he does not press his prayer for interim stay. The part of the order "In the meanwhile....." shall be no stay order" and shall be deemed to have been deleted."

7. Before coming to the point involved in this case, I think it proper to discuss the various case law on this point.

8. The Full Bench of this Court in the case of ***Emperor Vs. Beni reported in A.I.R. 1938 Allahabad 386 (Full Bench)*** observed that the intention of the Legislature was to empower the Magistrate after execution of one warrant only to sentence a person, who has defaulted in the payment of maintenance ordered under Section 488 of the Criminal Procedure Code, 1898 to imprisonment for a period of one month in respect of each month's default. The Section does not enjoin that there should be a separate warrant in respect of each term of imprisonment for one month. In other words, where arrears have been allowed to accumulate, the Court can issue one warrant and impose a cumulative sentence of imprisonment.

9. The Full Bench of Bombay High Court in the case of ***Karson Ramji Chawda Vs. The State of Bombay reported in AIR 1958 Bombay 99 (Full Bench) in paragraph 2*** observed that Sub-section (3) of Section 488 of the Criminal Procedure Code, 1898 confers upon the Magistrate two independent powers, one to issue a warrant which has to be executed in the manner laid down in the sub-section and the other to sentence the person also in the manner laid down in the sub-section. The power of the Magistrate to sentence the person failing to comply with the order is not dependent upon the issue of the warrant, or in other words, the issue of the warrant is not a condition precedent to the jurisdiction of the Magistrate to sentence

the applicant. Therefore when so read it is clear that the power to sentence is for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant to imprisonment for a term which may extend to one month or until payment if sooner made. These words clearly lay down the power of the Magistrate. The power of the Magistrate in respect of whole or any part of each month's allowance remaining unpaid to sentence the person for a term not exceeding one month.

10. In the reported case before the Full Bench of Bombay High Court, the petitioner was ordered by the Magistrate to pay maintenance to his wife and daughter. He made a default and failed to comply with this order. The wife made an application that there had been a default in the payment for four months. The Magistrate issued a warrant and the warrant could not be executed as the applicant had no property. The wife then made an application under Section 488 (3) of the Criminal Procedure Code, 1898 and on that application, the Magistrate passed an order sentencing the applicant to be imprisoned for a term of 15 days in respect of each month for which the allowance remained unpaid. The Full Bench held that the Magistrate was right in the order that he passed.

11. A Division Bench of Calcutta High Court in ***Moddari Bin Vs. Sukdeo Bin reported in AIR 1967 Calcutta 136 (DB)*** while interpreting Section 488 of the Criminal Procedure Code, 1898 in paragraphs 14 and 17 had observed as under:-

"(14) *The next point raised in the letter of reference is whether the punishment can be limited only to a period of one month as the maximum under Section 488 (3), Cri. P.C. The language of the section has been quoted above. It expressly provides that the Magistrate may sentence such person for the whole or in part of each months allowance to a term which may extend to one month or until payment if sooner made. The maximum of one month, in our view, in this context and on proper interpretation of the language of the section is relatable to a period of the arrear for one month. In other words, default of one month is punishable by one month's imprisonment and no more. If the default is more than one month then the imprisonment can be for as many months of default subject to a maximum of 12 months. The question here is whether a default of 9 months which had occurred could be punishable with six months' imprisonment which the Magistrate here has ordered. On the authorities and on the construction of Section 488 (3) Cri. P.C. We have come to the conclusion that the Magistrate can make an order for six months' imprisonment for nine months default. In fact the maximum imprisonment which he on the present facts could have given was 9 months, but he has given less. Section 488 (1) of the Criminal Procedure Code provides expressly for a monthly allowance for the wife or the child at such monthly rate not exceeding five hundred rupees in the whole as the Magistrate thinks fit. The second proviso to Section 488 (3) makes it clear that no warrant shall be issued for the recovery of any amount due under the section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due. That would indicate that at the most the wife could only accumulate twelve months' maintenance and no more and the*

Magistrate could give in such case at most twelve months' imprisonment and no more. The whole idea is to provide a speedy and expeditious remedy. The idea is not to permit unnecessary accumulation of maintenance for the simple reason that maintenance is a current necessity and is not to be used for making a claim in lump after a long delay.

(17) *Turning now to the question of interpretation of the expression "after the execution of the warrant in Section 488 (3), Cri. P.C. Mr. Sinha's contention cannot succeed on the facts of this case in challenging the Magistrate's order. No doubt before the execution of the warrant the Magistrate cannot sentence the defaulter. But on the facts as we have already recorded the distress warrant has been executed. Execution of the warrant in this case does not mean successful execution of the warrant. It also includes unsuccessful execution of the warrant yielding no fruits. If the execution of the warrant was always successful then obviously there would be no further question of sentencing the defaulter. Besides, the sentence can be awarded by the Magistrate under Section 488, Cri. P.C. Which expressly provides for the case even if the whole amount remains unpaid after the execution of the warrant. That must necessarily contemplate a case where the whole of the amount due remains unrealised after unsuccessful execution of the distress warrant or the other warrant under Section 386 (1) (b) of the Code of Criminal Procedure. On the facts we have come to the conclusion as already indicated that the distress warrant issued in this case has been unsuccessfully executed and was infructuous. Therefore, the Magistrate had the right to order a sentence of imprisonment. Mr. Sinha also suggested in argument that only the distress warrant could not be executed, but then the Magistrate should have followed this by another kind of warrant to the Collector under Section 386 (1) (b), Cri. P.C. and it is only after having exhausted both the warrants the Magistrate's right to sentence could arise. That argument is obviously unsound. The language of Section 386 (1) of the Criminal Procedure Code expressly uses the words:-*

"Whenever an offender has been sentenced to pay a fine, the Court passing the sentence may take action for the recovery of the fine in either or both of the following ways....." and then follows (a) method of issuing a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender; and (b) method of issuing a warrant to the Collector of the District authorising him to realise the amount by execution according to civil process against the movable or immovable property or both, of the defaulter. Having regard to the language "either or both of the following ways" it is plain that the Magistrate is not compelled to start the (b) method when the (a) method which he had adopted previously had failed before he could sentence a defaulter."

12. The Division Bench further observed that Section 488 (3) of the Criminal Procedure Code, 1898 does not expressly lay down any requirement for issuing a show cause notice. What is implicit or is required, is the Magistrate's satisfaction about the means of the defaulter to comply with the order for maintenance, where there are sufficient materials before the Magistrate to come to the conclusion that the defaulter had sufficient means, but he is wilfully

neglecting to comply with the order of maintenance. Such notice to the defaulter before issuing a warrant is not required under Section 488 (3) of the Criminal Procedure Code. The Division Bench relied upon a Full Bench decision reported in AIR 1958 Bombay 99 (FB) and AIR 1959 Allahabad 556.

13. The Hon'ble Supreme Court in the case of ***Shahada Khatoon and others Vs. Amjad Ali and others reported in 1999 CRI. L.J. 5060 (Supreme Court)*** while interpreting the provisions of Section 125(3) of the Criminal Procedure Code, 1973 (2 of 194 Cr.P.C.) held that the language of sub Section (3) of Section 125 Cr.P.C. is quite clear and it circumscribes the power of the Magistrate to impose imprisonment for a term which may extend to one month or until the payment, if sooner made. This power of the Magistrate cannot be enlarged and, therefore, the only remedy would be after expiry of one month, for breach of non-compliance of the order of the Magistrate the wife can approach again to the Magistrate for similar relief. By no stretch of imagination the Magistrate can be permitted to impose sentence for more than one month. The Hon'ble Apex Court did not accept the contention of the learned counsel for the appellant that the liability of the husband arising out of an order passed under Section 125 Cr.P.C. to make payment of maintenance is a continuing one and on account of non payment there has been a breach of the order and, therefore, the Magistrate would be entitled to impose sentence on such a person continuing him in custody until payment is made.

14. The Hon'ble Supreme Court in the case of ***Shantha alias Ushadevi and another Vs. B.G. Shivananjappa, 2005 CRI. L.J. 2615 (Supreme Court)*** in paragraph 8 observed that Section 125 Cr.P.C. is a measure of social legislation and it has to be construed liberally for the welfare and benefit of the wife and daughter. It is unreasonable to insist on filing successive applications when the liability to pay the maintenance as per the order passed under Section 125(1) is a continuing liability. The Hon'ble Supreme Court directed the Magistrate to take appropriate steps under Section 125(3) Cr.P.C. in case arrears of maintenance is not paid.

15. The Hon'ble Supreme Court further held that requirement of Section 125 Cr.P.C. is that the wife shall move an application within a period of one year from the date, the amount became due. It was further observed that in order to seek recovery of the amount due by issuance of warrant as provided under Section 125 Cr.P.C., the application shall be made within a period of one year from the date the amount became due and if the husband failed to pay maintenance.

16. The Full Bench of Gujarat High Court in the case of ***Suo Motu Vs. State of Gujarat reported in 2009 CRI. L.J. 920 (Full Bench)*** has observed in paragraphs 14 and 15 as under:-

14.*Sub-section (1) of section 125 thus provides for monthly allowance to be paid to the wife, children, mother or father, as the case may be, at such monthly rate as the Magistrate thinks fit. It can thus be seen that the maintenance that the Magistrate awards under section 125 (1) becomes payable every month.*

Sub-section (3) of section 125 provides for summary procedure for

recovery of such maintenance allowance so fixed by the Magistrate, if any person so ordered fails without sufficient cause to comply with the order. It is provided that in such a case, for every breach of the order, the Magistrate may issue warrant for levying the amount due in the manner provided for levying fines and may sentence such person for the whole or any part of each month's allowance for the maintenance including interim maintenance remaining unpaid to imprisonment for a term which may extend to one month or until payment if sooner made. Sub-section (3) of section 125 thus empowers the Magistrate to award sentence upto one month for the whole or part of each month's allowance remaining unpaid, Limitation on the power of the Magistrate to impose imprisonment for a term not exceeding one month, therefore, has to be viewed in the background of the purpose for which such imprisonment is provided. As already noticed, section 125 (1) refers to monthly allowance to be fixed by the Magistrate for maintenance of wife, child, father or mother on such monthly rate as the Magistrate thinks fit. Upon failure of a person to comply with such an order, it is open for the Magistrate for every beach of the order to issue warrant for levying the amount due and further to sentence such a person for the whole or any part of each month's allowance remaining unpaid to imprisonment for a term which may extend to one month, To our mind, therefore, the Legislature never intended that regardless of the extent of the default on the part of the husband, the Magistrate can impose sentence only upto one month. True interpretation of Section 125 (3), in our view, would be that for each month of default in payment of maintenance, it is open for the Magistrate to sentence the defaulting person to imprisonment for a period of one month or until payment if sooner made.

15.*The question can be looked from a slightly different angle. If for each month of default of payment of maintenance, the wife were to file separate applications before the Magistrate, surely, it would be open for the Magistrate to pass separate orders of sentences each not exceeding one month. If that be so, would it not be open for the wife to file one consolidated application for every month's default instead of filing separate application for each month of arrears and in such a situation, would it not be open for the Magistrate to pass one consolidated order of sentence upto a maximum one month for each month of default in payment of maintenance? The answer obviously is in the affirmative as long as the application is made by the wife within one year from the date on which the amount has become due as provided under sub-section (3) of section 125. To our mind, the Apex Court in the case of Shahada Khatoon did not lay down that for every month's default, it is not open for the Magistrate to sentence the defaulting husband for more than one month. It is well settled that the decisions of the Apex Court are not to be interpreted like statutes. In the case of P.S. Sathappan v. Andhra Bank Ltd., AIR 2004 SC 5152, it was held that judgment of the Supreme Court must be read as a whole and the ratio there from is required to be culled out from reading the same in its entirety and not only a part of it.*

17. The Full Bench of Gujarat High Court in this judgment in paragraph 16 has explained the provisions of the Criminal Procedure Code, 1861 and Criminal Procedure Code, 1882. The relevant

portion of the paragraph 16 is quoted below:-

16. One may notice that the provision of section 125 (3) of the Criminal Procedure Code insofar as the same is relevant for our purpose is similar to sub-section (3) of section 488 of the Criminal Procedure Code of 1882 which reads as follows:-

"The Magistrate may, for every breach of the order issue a warrant for levying the amount due in the manner hereinbefore provided for levying fines, and may sentence such person for whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month."

Criminal Procedure Code 1882 replaced the old Criminal Procedure Code 1861. Similar provisions were made in section 316 of the Code of 1861. However, there were certain significant differences - Section 316 of the Code of 1861 reads as follows:

"The Magistrate may, for every breach of the order by warrant, direct the amount due to be levied in the manner provided for levying fines: or many order such person to be imprisoned with or without hard labour for any term not exceeding one month."

Comparing the two provisions, it can be seen that in section 488 of the Code of 1882, the Legislature added the words; "may sentence such person for the whole or any part of each month's allowance remaining unpaid". Addition of words "of each month's allowance" are significant. Earlier provisions of section 316 of the Code of 1861 could have been interpreted as providing for the limitation on the power of the Magistrate to impose sentence for a term not exceeding one month regardless of the extent of the default. However, the Legislature made the position clear in the later enactment by adding words "each month's allowance", Modification in the provision was thus to remove a possible confusion. While understanding the existing provisions of section 125(3) which are in pari materia to section 488(3) of the Code of 1882, this important aspect has to be borne in mind. It may be noted that in the Criminal Procedure Code of 1898, these provisions were retained in same terms as in the Code of 1882.

18. The Full Bench of Gujarat High Court in the said judgment in paragraph 17 has clearly laid down that in the aforesaid decision of Shahada Khatoon, the Hon'ble Supreme Court did not lay down the proposition that under sub-section (3) of section 125 of the Criminal Procedure Code, it is not open for the Magistrate to pass a consolidated order of sentencing the defaulting husband in excess of one month for several months of defaults.

19. It has been noticed that almost unanimous view of all the High Courts before Shahada Khatoon's case (supra) was that it is open for the Magistrate to award sentence in excess of one month in case of several months of default. The learned Single Judge of Lahore High Court in the case of ***Emperor Vs. Budhu Ram reported in AIR 1919 Lahore, 197*** while interpreting pari materia provisions of Section 488 (3) of the Criminal Procedure Code, 1898 upheld the sentence of six months imposed on a husband for several months of default. The contention that

cumulative warrant for the whole arrears and cumulative sentence of six months was illegal, was turned down.

20. Once again the learned Single Judge of the Lahore High Court in the case of ***Emperor Vs. Sardar Muhammad, AIR 1935 Lahore, 758*** observed that the husband can be committed to prison for a term amounting to whole or any part of each month's allowance remaining unpaid, after execution of the warrant. In that case, six month's allowance was outstanding, it was observed that he could be committed to prison for six months.

21. A Division Bench of the Rangoon High Court in the case of ***Ma Tin Tin Vs. Maung Aye, AIR 1941 Rangoon, 135,*** observed that the Legislature introduced words capable of meaning that as many months imprisonment as there were defaults could be imposed and the Court should construe the Act as to make that remedy effective. The Division Bench upheld the power of the Magistrate to impose sentence in excess of one month for arrears exceeding a month.

22. The learned Single Judge of Nagpur High Court in the case of ***Emperor Vs. Badhoo Mandal, AIR 1949 Nagpur, 269*** held that one month's imprisonment is not the maximum sentence that can be awarded by the Magistrate and where more than one month's maintenance allowance remains unpaid, imprisonment for more than one month can be awarded by the Magistrate.

23. The learned Single Judge of Mysore High Court in the case of ***Kantappa Vs. Sharanamma, AIR 1967 Mysore 81,*** held that the Magistrate has to compute the term of imprisonment with reference to each month's imprisonment and then pass a cumulative sentence.

24. The Similar view was taken in ***G. Pratap Reddy Vs. G. Vijayalakshmi, 1982 Cr. L.J. 2365 and Kashmir Singh Vs. Kartar Kaur, 1988 (2) Crimes 33,*** observing that the Magistrate can pass sentence up to one month for each month's unpaid allowance.

25. Here it may be mentioned that it was after the decision of the Apex Court in the case of Shahada Khatoon (supra) 1999 AIR SCW 4880 the different High Courts have viewed the situation differently and then following the decision in the case of Shahada Khatoon (supra), some of the High Courts adopted the view that the Magistrate could not have awarded punishment for a period of 12 months at a time and that the detention and imprisonment for failure of the husband to pay maintenance can not exceed one month.

26. Adopting the same view one learned Single Judge of Allahabad High Court in the case of ***Dilip Kumar Vs. Family Court, Gorakhpur, 2000 Cri. L. J. 3893 (2000 All. L.J. 1812)*** held that for default of payment of maintenance, confinement can be only for a period of one month and no composite order for confinement can be passed.

27. It can thus be seen that prior to the decision of the Apex Court in Shahada Khatoon's case, almost unanimously different High Courts of the country had held that limitation on power of the Magistrate to impose sentence up to maximum of one month is relatable to each month of default in payment of maintenance and that subject to the

limitation prescribed in proviso to sub Section (3) of Section 125 of the Code of the Criminal Procedure, 1973, it is open for the Magistrate to impose sentence up to maximum of one month for each month of default and that a composite order of this nature can be passed by the Magistrate.

28. The Hon'ble Supreme Court in the case of Shahada Khatoon (supra) did not lay down the ratio that regardless of the extent of default on the part of the husband in paying maintenance, the Magistrate can impose imprisonment of maximum of one month.

29. In view of the aforesaid discussions and case law on the point in hand, the submissions of the learned counsel for the revisionist can not be accepted. On consideration of the facts and circumstances of the case of the instant revision and case law cited above, it is held that the impugned order dated 27.9.1993 passed by the Magistrate is perfectly just and legal and the same suffers from no illegality or infirmity of any kind. Since the husband/revisionist herein failed to pay the complete outstanding amount of maintenance as ordered by the learned Magistrate vide order dated 18.8.1989 inspite of having financial capacity and sufficient means to pay the same had knowingly made default in payment of the said amount, the Magistrate is fully competent to recover the maintenance amount remaining unpaid from the husband and to pay the same to Smt. Kamlesh Kumari, wife of the revisionist.

30. The learned Magistrate concerned is directed to issue recovery warrant for the maintenance amount remaining unpaid according to law discussed above and if the warrant remains unexecutable by any other reason, then to sentence the defaulting husband according to law.

31. The revision petition being devoid of merits is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.01.2012

BEFORE
THE HON'BLE KRISHNA MURARI, J.

Civil Misc. Writ Petition No. 1787 of 2012

Uttar Pradesh State Road Transport Corporation, Meerut ...Petitioner
Versus
Shouraj Singh and others ...Respondents

Counsel for the Petitioner:
Sri J.N. Singh

Counsel for the Respondents:
Sri S.M.N. Abbas Abedi
C.S.C.

U.P. Industrial Dispute Act-1942-Section 33-C-direction to give salary illegally with-held-order passed by prescribed authority-challenged on ground without adjudication-direction for salary-execution under section 33-C-not maintainable-where inspite of repeated direction of High Court work man not allowed light work-non payment of salary during intervening period-no dispute of employee-employer relationship-direction under section 33-C held-proper.

Held: Para 7

Admittedly, this Court vide order dated 21.04.2000 directed the Corporation to assign some lighter work to the respondent, which was not followed and another order dated 05.05.2000 was passed directing the respondent-workman to resume the duties of driver

and to run the bus from Meerut to Delhi. The said order was also quashed by this Court vide order dated 18.08.2000 and a categorical direction was issued that the workman may be assigned lighter work other than that of the driver. Even when this order was not complied with by the corporation, notices in the contempt proceedings were issued and then the petitioner-corporation directed the respondent-workman to resume the duties as Chowkidar on 01.01.2001.

Case law discussed:

(2008) 7 SCC 22; 2005 SCC (L&S) 1081

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

1. Heard Shri J.N. Singh, learned counsel for the petitioner and Shri S.M.N. Abbas Abedi for respondent no. 1.

2. Respondent-workman moved an application under Section 33-C (2) of the Industrial Disputes Act (for short the Act) with a prayer to direct the petitioner-employer to make payment of Rs.53,787.70/- along with interest as salary for the period 16.03.2000 to 03.01.2001, which was illegally not paid. Prescribed authority, Labour Court vide award dated 17.10.2011 allowed the claim of the respondent-workman. Aggrieved, the petitioner has approached this Court.

3. It is contended that without there being any adjudication with respect to entitlement of the workman for payment of salary during this period, the claim of the respondent-workman could not have been awarded in proceedings under Section 33-C (2) of the Act by the Prescribed authority, inasmuch as the said proceedings are in the nature of execution proceedings. Reliance in support of the contention has been placed on the judgment of the Hon'ble Apex Court in the case of **D. Krishnan & Anr. Vs. Special Officer, Vellore Cooperative Sugar Mill & Anr., (2008) 7 SCC 22.**

4. The facts as they emerge out from the pleadings of the parties are that respondent-workman, who was working on the post of driver in the petitioner-corporation, was declared unfit on medical grounds to work as a driver. When the petitioner-employer did not allot him any light work, respondent-workman filed Writ Petition No. 18757 of 2000. Vide order dated 21.04.2000, the corporation was directed to allow the workman to resume the duty and to allot him some light work. Even thereafter the petitioner-corporation instead of allotting him some light work, passed an order dated 05.05.2000 allocating him the duty to drive the bus from Meerut to Delhi and back treating it to be a light work. Respondent again approached this Court by seeking a review of the order dated 21.04.2000, which was allowed vide order dated 18.08.2000 and order dated 05.05.2000 passed by Regional Manager was quashed and the corporation was directed to assign lighter work to the respondent-workman other than that of the driver. Even thereafter, the order was not complied by the corporation, as a result, contempt proceedings were initiated, wherein notices were issued. Thereafter, vide order dated 01.01.2001, respondent-workman was allowed to resume duty as Chowkidar. Since the petitioner did not pay the salary from 16.03.2000 to 03.01.2001, respondent-workman moved an application under Section 3-C (2) of the Act claiming payment for the said period. Prescribed

authority finding that though the respondent-workman continued in employment of the petitioner-corporation and despite orders passed by this Court, petitioner did not allow him to work on any post other than that of driver, he was entitled for payment of salary for the said period, inasmuch as the respondent-workman was not at fault.

5. It is undisputed that without there being a pre-determination or adjudication, proceedings under Section 33-C (2) of the Act, which are in the nature of execution, cannot be initiated.

6. The question which arises for consideration in this case is whether there was any dispute with regard to the entitlement of the respondent-workman for wages during this period?

7. Admittedly, this Court vide order dated 21.04.2000 directed the Corporation to assign some lighter work to the respondent, which was not followed and another order dated 05.05.2000 was passed directing the respondent-workman to resume the duties of driver and to run the bus from Meerut to Delhi. The said order was also quashed by this Court vide order dated 18.08.2000 and a categorical direction was issued that the workman may be assigned lighter work other than that of the driver. Even when this order was not complied with by the corporation, notices in the contempt proceedings were issued and then the petitioner-corporation directed the respondent-workman to resume the duties as Chowkidar on 01.01.2001.

8. The narration of the above facts clearly goes to show that respondent-workman was not allowed to work despite orders passed by this Court by the petitioner-corporation itself and, thus, it cannot be said that there was any dispute with respect to right to wages for the said period, which requires any adjudication.

9. Hon'ble Apex Court in the case of **State of U.P. & Anr. Vs. Brijpal Singh, 2005 SCC (L&S) 1081**, has categorically held that right to money or benefit which is sought to be executed under Section 33-C (2) of the Act must be an existing one and must arise in course of and in relation to relationship between industrial workman and employer.

10. In the facts of the present case, there was an existing right vested in the respondent-workman for payment of wages which did not require any adjudication, hence, the argument advanced on behalf of the petitioner has no force as well as the case of **D. Krishnan & Anr.** (supra) relied upon by the petitioner in respect of his contention is not applicable and is clearly distinguishable on facts.

11. In view of above facts and discussions, there is no force in the writ petition and the same, accordingly, stands dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.01.2012

BEFORE
THE HON'BLE SABHAJEET YADAV,J.

Civil Misc. Writ Petition No. 2239 of 2008

Ram Shiromani Yadav ...Petitioner
Versus
The Conciliation Officer and others ...Respondents

Counsel for the Petitioner:
Sri Ajay Kumar Srivastava
Sri Manu Mishra

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

U.P. Industrial Dispute Act, 1947-Section 10 (1)-oral termination-without following statutory provision-without taking recourse of reconciliation proceeding-rejection of reference by Govt. apparent error-already 6 years elapsed-No fruitful purpose will serve by referring matter before the Govt. for considering to make reference-mandamus issued to refer the dispute before Industrial Tribunal for adjudication.

Held: Para 19

In instant case besides other assertions since petitioner has stated before the respondent no.1 that his services were terminated on 4.3.2006 without compliance of provisions of Industrial Dispute Act and since then a period of about six years have already passed, therefore, it would not be expedient in the interest of justice to relegate the matter before appropriate government for reconsideration of the issue for referring the dispute for industrial adjudication to the appropriate tribunal or labour court, which will again take some considerable time. In wake of facts and circumstances of the case, referred herein before, in my opinion, it is fit case where a writ of mandamus should be issued to the respondent no.1 to refer the dispute for industrial adjudication to the appropriate industrial tribunal or labour court forthwith. Accordingly, a writ of mandamus is issued directing the respondent no.1/appropriate government to refer the dispute raised by the petitioner for industrial adjudication before the appropriate industrial tribunal or labour court forthwith on receipt of certified copy of the order passed by this court.

(Delivered by Hon'ble Sabhajeet Yadav,J.)

1. Heard learned counsel for the parties.

2. By this petition, the petitioner has challenged the order dated 13.8.2007 passed by the respondent no.1 (Annexure-6 to the writ petition), whereby the petitioner's application for referring the industrial dispute to the Labour court has been rejected. A writ of mandamus is also sought for directing the respondents no. 2 and 3 to reinstate the petitioner in service as Peon in the institution in question and pay increments & salary for the period of illegal removal from the institution.

3. The brief facts leading to the case are that the petitioner was duly appointed as Peon (Paricharak) in the Allahabad Public School Subedarganj, Chaufatka, Allahabad (hereinafter referred to as the 'Institution') on 23.1.2001 but the respondents were taking work from him from morning 6.00 a.m. to evening 7.00 p.m. everyday and were compelled the petitioner to do 'Jhadu Pochha' work. It is stated that the respondents were paying

salary to the petitioner at the rate of Rs. 800/- per month in the year 2002, Rs. 1000/- per month in the year 2003, Rs. 1200/- per month in the year 2004, Rs. 1400/- per month since 2005 and thereafter Rs. 1500/- per month and were not paying salary to the petitioner as per Scheme of minimum wages at all. On 4.3.2006 the respondents have orally terminated the services of the petitioner. Against said oral termination the petitioner filed an application on 12.4.2006 before the respondent no.1 and prayed for constitution of reconciliation Board with regard to the industrial dispute and for grant of relief of continuity in service and for payment of his increased salary of entire period. Copy of the Memo of C.P. No. 49 of 2006 (Ram Shiromani Yadav Vs. Principal, Allahabad Public School & College and others) is on record as Annexure-1 to the writ petition.

4. It is further stated that the petitioner submitted before the respondent no. 1 various documents which are the basis of his claim on 22.1.2007 and 27.1.2007 from which it is fully proved that the petitioner was duly appointed Peon of the institution and he had worked in the institution continuously since date of his appointment i.e. from 23.1.2001 to 4.3.2006. The respondents no.2 and 3 filed their written statements on 4.1.2007 and denied the claim of the petitioner. Against the written statement of the respondents no. 2 and 3 the petitioner/ claimant filed his written statement/ replication on 27.1.2007 and given para wise reply of the same. But without considering the documents and evidence in respect of the petitioner's appointment and working in the Institution as Peon since 23.1.2001 to 04.3.2006 continuously without any break in service the respondent no. 1 rejected the claim petition of the petitioner holding that the petitioner could not prove his employment in the institution. The impugned order was published by the State Government on 13.8.2007. The copy of the impugned order dated 13.8.2007 passed by the opposite party no. 1 is on record as Annexure No. -6 to this writ petition. It is further stated that the petitioner is filing some documents and photographs which prove that the petitioner had worked in the Institution since 23.1.2001 to 4.3.2006. A true photostat copy of the character certificate issued by the respondent no.2 on 9.10.2001 and 22.1.2004 and some photographs of the petitioner which have been taken during service of the petitioner in the Institution as Peon are on record as Annexure No. 7 to the writ petition. The petitioner is ready to file several other documents and photo stat copy of the Attendance Register and Salary Register etc. before this Hon'ble Court which fully prove that the petitioner has worked in the Institution since 23.1.2001 to 4.3.2006 continuously without any break, if this Hon'ble Court requires the same.

5. It is further stated that since the petitioner has worked in the Institution continuously since 23.1.2001 to 4.3.2006 without any break in service and has completed 240 days in three calender years, therefore, his services could not be terminated orally without following the procedure laid down in the Industrial Disputes Act. But illegally and arbitrarily without following the procedure laid down in the Industrial Disputes Act, the respondents no.2 and 3 have orally terminated the petitioner's services on 4.3.2006 and ousted him from the Institution. It is stated that the petitioner is

entitled to be reinstated in continuity of his service and is entitled to get outstanding arrears of salary for the period in which he has been illegally and arbitrarily ousted from the employment of the Institution. The actions of the respondents are wholly arbitrary, illegal and against the provision of the Industrial Dispute Act, hence, the impugned order dated 13.8.2007 is liable to be set aside and the petitioner is entitled to be reinstated in service in continuity of his old services and entitled to get all consequential benefits.

6. Learned counsel for the petitioner has contended that impugned order dated 13.8.2007 passed by Dy. Labour Commissioner indicates that the application of petitioner for referring the industrial dispute to the Labour Court has been rejected on the ground that the petitioner could not prove his employment in the institution. Thus, the Dy. Labour Commissioner-respondent no.1 has finally adjudicated the relationship of employer and employee between the petitioner and institution on merit which was not within the province of Dy. Labour Commissioner working on behalf of State Government. While deciding the question as to whether reference should be made or not, the respondent no.1 has acted illegally and improperly. The relevant scheme of the Industrial Disputes Act as disclosed by Section 12 is clear. When any industrial dispute exists or is apprehended, the conciliation officer may hold conciliation proceeding in the manner prescribed in Section 12. If the conciliation officer's efforts to bring out a settlement of dispute failed then he makes a report under Section 12(4) and Section 12(5), provides inter alia that if on consideration of report referred to in Sub-section (4) the appropriate Government is satisfied that there is case for reference to the tribunal, it may make such reference. It however adds that where the appropriate government does not make such reference it shall record and communicate to the parties concerned its reason there for. But the respondent no.1 refused to make reference without recording any reason instead thereof final conclusion on merits of dispute has been communicated by respondent no.1 through impugned order, thus he has acted beyond his jurisdiction in proceeding to consider the merit of dispute while deciding whether the reference should be made or not.

7. It is further contended that although from the material placed before the respondent no.1, the petitioner has proved relation of master and servant, employer and employee between him and the institution and also proved the existence of industrial dispute between him and employer but respondent no.1 has failed to consider the same and without recording any reason as to why the petitioner could not establish the relationship of employer and employee between him and the institution and existence of dispute, has communicated merely his decision through the impugned order that petitioner did not prove his employment in the institution. Such finding arrived at by the respondent no.1 on disputed question of fact, was not within the province of respondent no.1/State Government, wherein the government is not supposed to reach final conclusion on merits of the case on disputed question of fact which is within provisions of industrial tribunal or Labour court. While elaborating his arguments, learned counsel for the petitioner has

submitted that while exercising the power under Section 10(1) of Industrial Disputes Act, the function of appropriate government is an administrative function and not a judicial or quasi judicial function, and that in performing this administrative function the government can not delve into the merits of the dispute and take upon itself the determination of the lis, which would certainly be in excess of the power conferred on it by Section 10 of the said Act.

8. Contrary to it, the submission of learned counsel appearing for respondents is that Section 10 of the Industrial Dispute Act confers discretion on the appropriate Government either to refer the dispute or not to refer it for industrial adjudication wherein it has to form opinion on factual basis as to whether an industrial dispute exists or apprehended and in its opinion, it is expedient to refer the industrial dispute or not and while doing so the appropriate government is not precluded from considering the prima facie merit of the dispute and refuse to refer the dispute to the Labour court or Industrial Tribunal when it is found that the claim made by the party is patently frivolous, or is clearly belated, and likewise if the impact of claim on general relations between the employer and employees in the region is likely to be adverse, the appropriate Government may take into account in deciding whether a reference should be made or not, therefore, it cannot be said that examination of prima facie merits of dispute is foreign to the inquiry which the appropriate Government is entitled to make in dealing with a dispute under Section 10(1).

9. Having considered the rival submissions of learned counsel for the parties, the question which arises for consideration of this court is that as to whether the government is precluded from considering the prima facie merit of the dispute and is precluded from refusing to refer the dispute under Section 10 of Industrial Disputes Act?

10. This question has been considered by Apex Court earlier at several occasions. In **Bombay Union of Journalists and others Vs. The State of Bombay and another, AIR 1964 S.C. 1617.** While dealing with the issue in para 6 of the decision the Apex Court observed that when the appropriate government considers the question as to whether a reference should be made under Section 12(5) it has to act under Section 10(1) of the Act which confers discretion on the appropriate government either to refer the dispute, or not to refer it, for industrial adjudication. In para-13 of the aforesaid decision, it was also observed that a writ of mandamus can be validly issued in such a case if it is established that it was the duty and obligation of the respondent no.1 to refer for adjudication an industrial dispute. For ready reference the pertinent observations made by Apex Court in aforesaid case in para 6 and 13 are extracted as under:

"6. When the appropriate Government considers the question as to whether a reference should be made under Section 12(5), it has to act under Section 10(1) of the Act, and Section 10(1) confers discretion on the appropriate Government either to refer the dispute, or not to refer it, for industrial adjudication according as it is of the opinion that it is expedient to do so

or not. In other words, in dealing with an industrial dispute in respect of which a failure report has been submitted under Section 12(4) the appropriate Government ultimately exercises its power under Section 10(1), subject to this that Section 12(5) imposes an obligation on it to record reasons for not making the reference when the dispute has gone through conciliation and a failure report has been made under Section 12(4). This question has been considered by this Court in the case of the ***State of Bombay V. K.P. Krishnan, (1961) 1 SCR 227:(AIR 1960 SC 1223).*** *The decision in that case clearly shows that when the appropriate Government considers the question as to whether any industrial dispute should be referred for adjudication or not, it may consider, prima facie the merits of the dispute and take into account other relevant considerations which would help it to decide whether making a reference would be expedient or not. It is true that if the dispute in question raises questions of law, the appropriate Government should not purport to reach a final decision on the said questions of law, because that would normally lie within the jurisdiction of the Industrial Tribunal. Similarly, on disputed questions of fact, the appropriate Government cannot purport to reach final conclusions, for that again would be the province of the Industrial Tribunal. But it would not be possible to accept the plea that the appropriate Government is precluded from considering even prima facie the merits of the dispute when it decides the question as to whether its power to make a reference should be exercised under Section 10(1) read with Section 12(5), or not. If the claim made is patently frivolous, or is clearly belated, the appropriate Government may refuse to make a reference. Likewise, if the impact of the claim on the general relations between the employer and the employees in the region is likely to be adverse, the appropriate Government may take that into account in deciding whether a reference should be made or not. It must, therefore be held that a prima facie examination of the merits cannot be said to be foreign to the enquiry which the appropriate Government is entitled to make in dealing with a dispute under Section 10(1)".*

13 . . . . .A writ of mandamus could be validly issued in such a case if it was established that it was the duty and the obligation of respondent no.1 to refer for adjudication an industrial dispute where the employee contends that the retrenchment effected by the employer contravenes the provisions of Section 25-F (c). Can it be said that the appropriate Government is bound to refer an industrial dispute even though one of the points raised in the dispute is in regard to the contravention of a mandatory provision of the Act? In our opinion, the answer to this question cannot be in the affirmative. Even if the employer retrenches the workman contrary to the provisions of Section 25-F (c), it does not follow that a dispute resulting from such retrenchment must necessarily be referred for industrial adjudication. The breach of Section 25-F is no doubt a serious matter and normally the appropriate Government would refer a dispute of this kind for industrial adjudication; but the provisions contained in Section 10(1) read with Section 12 (5) clearly show that even where a breach of Section 25-F is alleged, the appropriate Government may have to consider the expediency of making a reference and if after considering all the

relevant facts, the appropriate Government comes to the conclusion that it would be inexpedient to make the reference, it would be competent to it to refuse to make such a reference. We ought to add that when we are discussing this legal position, we are necessarily assuming that the appropriate Government acts honestly and bona fide. If the appropriate Government refuses to make a reference for irrelevant considerations, or on extraneous grounds, or acts mala fide, that, of course, would be another matter; in such a case a party would be entitled to move the High Court for a writ of mandamus."

11. In **M.P. Irrigation Karamchari Sangh Vs. State of M.P. and another, (1985) 2 SCC 103,** while dealing with the content and scope of Government's powers to examine frivolousness and perversity of workman's demand and to reach to a prima facie conclusion against making a reference in para 5 of the decision the Apex Court observed as under:

"5. . . . . Therefore, while conceding a very limited jurisdiction to the State Government to examine patent frivolousness of the demands, it is to be understood as a rule, that adjudication of demands made by workmen should be left to the Tribunal to decide. Section 10 permits appropriate Government to determine whether dispute 'exists or is apprehended' and then refer it for adjudication on merits. The demarcated functions are (1) reference, (2) adjudication. When a reference is rejected on the specious plea that the Government cannot bear the additional burden, it constitutes adjudication and thereby usurpation of the power of a quasi-judicial Tribunal by an administrative authority namely the appropriate Government.. . . .".

12. In **Ram Avtar Sharma and others Vs. State of Haryana and another, (1985) 3 SCC 189,** while considering the government powers to make or refuse the reference, the Apex Court observed that though the government can examine the frivolousness of the demand in order to reach to a prima facie conclusion, it is not competent to assume quasi judicial function of the tribunal by going into merits of the demand to decide whether or not to make reference. In para 5 and 7 of the decision the Apex Court observed as under:

"5. The first question to be posed is whether while exercising the power conferred by Section 10 to refer an industrial dispute to a Tribunal for adjudication, the appropriate Government is discharging an administrative function or a quasi-judicial function. This is no more res integra. In ***State of Madras V. C.P. Sarathy, 1953 SCR 334, 346: AIR 1953 SC 53: (1953) 1 LLJ 174: 4 FJR 431,*** *a Constitution Bench of this Court observed as under :*

But, it must be remembered that in making a reference under Section 10(1) the Government is doing an administrative act and the fact that it has to form an opinion as to the factual existence of an industrial dispute as a preliminary step to the discharge of its function does not make it any the less administrative in character. The Court cannot, therefore, canvass the order of reference closely to see if there was any material before the Government to

support its conclusion, as if it was a judicial or quasi-judicial determination.

Explaining the ratio of the decision in Sarathy case, in ***Western India Match Co. Ltd. V. Western India Match Co. Workers Union, (1970) 3 SCR 370:(1970) 1 SCC 225:(1970) 2 LLJ 256,*** *it was observed as under :*

In the State of Madras V. C.P. Sarathy this Court held on construction of Section 10(1) of the Central Act that the function of the appropriate Government thereunder is an administrative function. It was so held presumably because the Government cannot go into the merits of the dispute, its function being only to refer such a disute for adjudication so that the industrial relations between the employer and his employees may not continue to remain disturbed and the dispute may be resolved through a judicial process as speedily as possible.

After referring to the earlier decisions on the subject in ***Shambhu Nath Goyal Vs. Bank of Baroda, Jullunder, (1978) 2 SCR 793: (1978) 2 SCC 353: 1978 SCC (L&S) 357,*** *it was held that "in making a reference under Section 10(1), the appropriate Government is doing an administrative act and the fact that it has to form an opinion as to the factual existence of an industrial dipuste as a preliminary step to the discharge of its function does not make it any the less administrative in character". Thus, there is a considerable body of judicial opinion that while exercising power of making a reference under Section 10(1), the appropriate Government performs an administrative act and not a judicial or quasi-judicial act.*

7. Now if the Government performs an administrative act while either making or refusing to make a reference under Section 10(1), it cannot delve into the merits of the dispute and take upon itself the determination of lis. That would certainly be in excess of the power conferred by Section 10. Section 10 requires the appropriate Government to be satisfied that an industrial dispute exists or is apprehended. This may permit the appropriate Government to determine prima facie whether an industrial dispute exists or the claim is frivolous or bogus or put forth for extraneous and irrelevant reasons not for justice or industrial peace and harmony. Every administrative determination must be based on grounds relevant and germane to the exercise of power. If the administrative determination is based on the irrelevant, extraneous or grounds not germane to the exercise of power it is liable to be questioned in exercise of the power of judicial review. In ***State of Bombay V. K.P. Krishnan, (1961) 1 SCR 227, 243 : AIR 1960 SC 1223 : (1960) 2 LLJ 592 : 19 FJR 61****, it was held that a writ of mandamus would lie against the Government if the order passed by it under Section 10(1) is based or induced by reasons as given by the Government are extraneous, irrelevant and not germane to the determination. In such a situation the Court would be justified in issuing a writ of mandamus even in respect of an administrative order. May be, the Court may not issue writ of mandamus, directing the Government to make a reference but the Court can after examining the reasons given by the appropriate Government for refusing to make a reference come to a conclusion that they are irrelevant, extraneous or not germane to the*

determination and then can direct the Government to reconsider the matter. This legal position appears to be beyond the pale of controversy."

13. Again in **Telco Convoy Drivers Mazdoor Sangh and another Vs. State of Bihar and others, (1989) 3 S.C.C. 271**, the Apex Court observed that while considering the question of making a reference under Section 10(1) the government is entitled to form an opinion as to whether an industrial dispute "exists or is apprehended" but it is not entitled to adjudicate the dispute itself on merit. The formation of opinion as to whether industrial dispute exists or apprehended is not the same thing as to adjudicate the dispute itself on its merits. It was further observed that when government refusal to make reference is to be found unjustified, court can direct the government to make a reference to appropriate tribunal. The pertinent observation made by the Apex Court in this regard contained in para 11,15 and 16 of the decision are extracted as under:

"11. It is true that in considering the question of making a reference under Section 10(1), the government is entitled to from an opinion as to whether an industrial dispute "exists or is apprehended", as urged by Mr. Shanti Bhushan. The formation of opinion as to whether an industrial dispute "exists or is apprehended" is not the same thing as to adjudicate the dispute itself on its merits. In the instant case, as already stated, the dispute is as to whether the convoy drivers are employees or workmen of TELCO, that is to say, whether there is relationship of employer and employees between TELCO and the convoy drivers. In considering the question whether a reference should be made or not, the Deputy Labour Commissioner and/ or the government have held that the convoy drivers are not workmen and, accordingly, no reference can be made. Thus, the dispute has been decided by the government which is, undoubtedly, not permissible.

15. We are, therefore, of the view that the State government, which is the appropriate government, was not justified in adjudicating the dispute, namely, whether the convoy drivers are workmen or employees of TELCO or not and, accordingly, the impugned orders of the Deputy Labour Commissioner acting on behalf of the government and that of the government itself cannot be sustained.

16.....In several instances this Court had to direct the government to make a reference under Section10 (1) when the government had declined to make such a reference and this Court was of the view that such a reference should have been made. See ***Sankari Cement Alai Thozhilalar Munnetra Sangam Vs. Government of Tamil Nadu, (1983) 1 SCC 304:1983 SCC (L&S) 139:(1983) a Lab LJ 460; Ram Avtar Sharma V. State of Haryana, (1985) 3 SCC 189:1958 SCC (L&S) 623:(1985) 3 SCR 686; M.P. Irrigation Karamchari Sangh V. State of M.P., (1985) 2 SCC 103: 1985 SCC (L&S) 409 :(1985) 2 SCR 1019; Nirmal Singh V. State of Punjab, 1984 Supp SCC 407 : 1985 SCC (L&S) 38 : (1984) 2 Lab LJ 396".***

14. Similar view has also been taken by Apex Court in **Dhanbad Colliery Karamchari Sangh Vs. Union of India and others, 1991 Supp (2) S.C.C. 10.** The pertinent observations made by the

Apex Court contained in para 2 and 3 of the decision are extracted as under:

"2. The appellant Union raised a dispute that the workmen employed in the mines run and maintained by M/s Bharat Coking Coal Ltd., Lodhra Area, Dhanbad were engaged by a contractor without obtaining a licence and in fact the workmen were under the direct employment of the management of M/s Bharat Coking Coal Ltd. They claimed relief for a declaration to that effect. The workmen approached the Central Government for referring the dispute to Industrial Court under Section 10 of the Industrial Disputes Act, 1947. The Central Government by its order dated May 5, 1989 refused to refer the dispute on the ground that Union had failed to establish that the disputed workmen were engaged in prohibited categories of work under the Contract Labour (Regulation and Abolition) Act, 1970 and further that they were engaged by contractor and not by the management of the respondent Company. The government further held that there appeared to be no employer-employee relationship between the management of the respondent-company and the workmen involved in the dispute. The appellant challenged the government's order before the High Court by means of writ petition but the same was dismissed in limine. Hence this appeal.

3. After hearing learned counsel for the parties and having regard to the facts and circumstances of the case, we are of the opinion that this appeal must succeed. The Central Government instead of referring the dispute for adjudication to the appropriate Industrial Court under Section 10 of the Industrial Disputes Act, 1947, it itself decided the dispute which is not permissible under the law. We, accordingly, allow the appeal, set aside the order of the High Court and of the Central Government and direct the Central Government to refer the dispute for adjudication to the appropriate Industrial Court under Section 10 of the Industrial Disputes Act, 1947. We further direct the Central Government to make the reference within three months."

15. Again in **Sharad Kumar Vs. Government of NCT of Delhi and others, (2002) 4 S.C.C. 490,** after considering the entire case law on the point in para 31 of the decision the Apex Court observed as under:

"31. Testing the case in hand on the touchstone of the principles laid down in the decided cases, we have no hesitation to hold that the High Court was clearly in error in confirming the order of rejection of reference passed by the State Government merely taking note of the designation of the post held by the respondent i.e. Area Sales Executive. As noted earlier determination of this question depends on the types of duties assigned to or discharged by the employee and not merely on the designation of the post held by him. We do not find that the State Government or even the High Court has made any attempt to go into the different types of duties discharged by the appellant with a view to ascertain whether he came within the meaning of Section 2(s) of the Act. The State Government, as noted earlier, merely considered the designation of the post held by him, which is extraneous to the matters relevant for the purpose. From the appointment order dated 21.4.1983/22.4.1983 in which are

enumerated certain duties which the appellant may be required to discharge it cannot be held therefrom that he did not come within the first portion of Section 2(s) of the Act. We are of the view that determination of the question requires examination of factual matters for which materials including oral evidence will have to be considered. In such a matter the State Government could not arrogate on to itself the power to adjudicate on the question and hold that the respondent was not a workman within the meaning of Section 2(s) of the Act, thereby terminating the proceedings prematurely. Such a matter should be decided by the Industrial Tribunal or the Labour Court on the basis of the materials to be placed before it by the parties. Thus the rejection order passed by the State Government is clearly erroneous and the order passed by the High Court maintaining the same is unsustainable."

16. Thus, from the legal position stated by Apex Court from time to time, it is clear that when the appropriate government considers the question as to whether a reference should be made for industrial adjudication or not, it has to exercise its discretion conferred by Section 10 of the Act and while doing so it may consider prima facie merit of the dispute and take into account other relevant factors which would help it to decide whether making a reference would be expedient or not. If the dispute in question raises questions of law, the appropriate government should not purport to reach a final decision on the said questions of law, because that would normally lie within the jurisdiction of industrial tribunal. Similarly on disputed questions of fact, the appropriate government cannot purport to reach final conclusions, for that again would be the province of the Industrial Tribunal. But it would not be possible to accept the plea that the appropriate Government is precluded from considering even prima facie merits of the dispute when it decides the question as to whether its power to make reference should be exercised under Section 10(1) read with Section 12(5), or not. If the claim made is patently frivolous, or is clearly belated, the appropriate Government may refuse to make a reference. Likewise, if the impact of claim on the general relations between employer and employees in the region is likely to be adverse, the appropriate Government may take into account in deciding whether a reference should be made or not. It must, therefore be held that an examination of a prima facie merits cannot be said to be foreign to the inquiry which the appropriate Government is entitled to make in dealing with dispute under Section 10(1). However, when the Government decides not to make reference for industrial adjudication, it is under an obligation to record its reason for not making such reference.

17. While exercising the power conferred by Section 10 of the Act to refer an industrial dispute to a tribunal for adjudication, the appropriate Government is discharging an administrative function wherein it has to form an opinion as to factual existence of an industrial dispute as a preliminary step to the discharge of its function. If the Government performs an administrative function while either making or refusing to make a reference under Section 10(1), it cannot delve into the merits of the dispute and take upon itself the determination of lis. Section 10 requires the appropriate Government to be

satisfied that an industrial dispute exists or is apprehended. Such exercise permits the appropriate Government to examine prima facie merit of the dispute as whether an industrial dispute exists or the claim is frivolous or bogus or put forth for extraneous and irrelevant reasons not for justice or industrial peace or harmony. The formation of opinion as to whether an industrial dispute exists or is apprehended is not the same thing as to adjudicate the dispute itself on its merit. The adjudication of dispute on its merit requires examination of factual matters on the basis of documentary and oral evidence, as such appropriate Government cannot finally decide the dispute which is within a province of Industrial Tribunal or Labour Court.

18. Testing the case in hand on the touchstone of the principles laid down in the decided cases referred herein before, I have no hesitation to hold that the Government/respondent no.1 was clearly in error in rejecting the application of petitioner for reference of dispute to the industrial adjudication. As noted earlier the State Government instead of referring the dispute for adjudication to the appropriate industrial tribunal or Labour court under relevant provisions of Industrial Dispute Act, it itself decided the dispute holding that there appeared to be no employer-employee relationship between the management of respondents' institution and the petitioner-workman and while doing so, in my opinion, the State Government itself decided the dispute finally which is not permissible under law. The determination of such dispute finally depends upon examination and assessment of various oral and documentary evidence to be adduced by the parties before the Labour court or Industrial Tribunal, therefore, it could not have been decided by the appropriate government while forming opinion about the existence of industrial dispute between the employer and employee. If facts stated in the application moved by the petitioner before the appropriate government is taken to be correct, in my considered opinion, in that eventuality there exists prima facie merit in respect of relationship of employer and employee between the institution and the petitioner and also there exists an industrial dispute between them. Therefore, in such facts and circumstances of the case, the appropriate government was under legal obligation to refer the dispute for industrial adjudication either before the appropriate industrial tribunal or labour court but it could not refuse to refer the same as no reason has been communicated which is relevant for refusing to refer the dispute for industrial adjudication.

19. In instant case besides other assertions since petitioner has stated before the respondent no.1 that his services were terminated on 4.3.2006 without compliance of provisions of Industrial Dispute Act and since then a period of about six years have already passed, therefore, it would not be expedient in the interest of justice to relegate the matter before appropriate government for reconsideration of the issue for referring the dispute for industrial adjudication to the appropriate tribunal or labour court, which will again take some considerable time. In wake of facts and circumstances of the case, referred herein before, in my opinion, it is fit case where a writ of mandamus should be issued to the respondent no.1

to refer the dispute for industrial adjudication to the appropriate industrial tribunal or labour court forthwith. Accordingly, a writ of mandamus is issued directing the respondent no.1/appropriate government to refer the dispute raised by the petitioner for industrial adjudication before the appropriate industrial tribunal or labour court forthwith on receipt of certified copy of the order passed by this court.

20. With the aforesaid observation and direction, writ petition succeeds and is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2012

BEFORE
THE HON'BLE AMAR SARAN,J.
THE HON'BLE RAMESH SINHA,J.

Public Interest Litigation (PIL) No. - 3400 of 2012

Gauri Shankar Gupta ...Petitioner
Versus
The State of U.P. Thru Secy. and others ...Respondents

Counsel for the Petitioner:
Sri A.P. Tewari
Sri S.S. Tripathi

Counsel for the Respondent:
C.S.C.
Sri N.N. Mishra

Constitution of India, Article 226-Public Interest Litigation-Petitioner seeking direction-non eviction from Ponds, tanks situated over non-agricultural land-nothing whisper as to why those occupied such public Pond could not individually approach-before the Court-held-PIL on representative capacity-not maintainable

Held: Para 5

The petitioner has not been able to explain as to why he has filed this broad based PIL petition and why the persons, who are sought to be evicted from the said lands by declaring them to be ponds, have not themselves challenged their eviction.

Case law discussed:
2001 (RD) 689; (2010) 3 SCC 402; Rishab Dev Jain Vs. State of UP and others, (Writ B No. 57243 of 2011) decided on 20.10.2011

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

1. Heard learned counsel for the petitioner, Shri N.N. Mishra, learned counsel for respondent No. 5 and learned Standing Counsel representing the State.

2. This public interest litigation has been filed by the petitioner, who claims to be an advocate.

3. The prayer in this writ petition is that the lands in urban areas in UP have been shown as ponds even though the said areas have been declared to be non-agricultural areas.

4. It was contended by the learned counsel for the petitioner that the cases of the persons who are tenure holders or other persons, who are occupying ponds, Pokharas and water channels etc. in non-agricultural urban areas in district Gorakhpur should not be evicted from the said lands, which have been declared to be non-agricultural lands and their cases would not be covered by the decision of the Supreme Court in the case of ***Hinch Lal Tiwari Vs. Kamla Devi, 2001 (92) RD 689***. Another prayer is for a mandamus restraining the respondents from evicting the recorded tenure holders from the ponds, Pokharas and water

channels falling under the urban areas of district Gorakhpur.

5. The petitioner has not been able to explain as to why he has filed this broad based PIL petition and why the persons, who are sought to be evicted from the said lands by declaring them to be ponds, have not themselves challenged their eviction.

6. In the case of ***State of Utranchal Vs. Balwant Singh chaufal and others, (2010)3 SCC 402,*** it has been held that PIL can be filed in representative capacity only if the person concerned is unable to approach the Courts. No averment has been made that the persons who are being sought to be evicted are unable to approach the Courts.

7. Further, we do not understand as to what public cause would be advanced if the ratio of Hinch Lal Tiwari's case which sought to improve the ecological balance by ensuring that ponds etc. which are inlet for rain water and which facilitate re-charge of water may be cleared off obstructions, which have been created on it. If the vigour of the said judgement is reduced, we can only except more ecological damage and a falling water table which is becoming a common phenomena both in rural and urban areas.

8. The petitioner has also referred to a judgement of learned Single Judge of this Court in ***Rishab Dev Jain Vs. State of UP and others, (Writ B No. 57243 of 2011) decided on 20.10.2011*** where in an individual petition filed by the aggrieved person, the learned Single Judge after observing that in the case before him several judicial interventions had taken place declaring the rights of the petitioner therein and hence on the strength of Hinch Lal (Supra) case he could not be evicted therefrom without following the procedure of law.

9. The present petition, it may be noted, is not an individual petition filed by the aggrieved persons.

10. In view of what has been indicated herein above, we find no merit in this case. It is accordingly dismissed in limine.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.01.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL,J.

Civil Misc. Writ Petition no. 3670 of 2012

Km. Sandhya ...Petitioner
Versus
State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri Sanjay Kumar Srivastava

Counsel for the Respondents:
C.S.C

<u>Constitution of India, Article 226</u>- Compassionate Appointment can not be claimed as alternative mode of appointment-petitioner's father-died in harness on 08.12.2004-his mother was offered appointment on class 4th post on 29.09.2006-on refusal putting claim for appointment on class III post-accepted on 31.07.2007-again moved application on 10.08.2009 claiming appointment of the petitioner as became major-purpose of compassionate appointment to give immediate relief to meet out the family from distress-in case can manage to surprise for these considerable periods-without accepting appointment-can not

be an alternate appointment-petition dismissed.

Held: Para 20

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.

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; JT 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; Nagesh Chandra Vs. Chief Engineer, Vivasthan Ga Warg & Ors. decided on 7th January, 2011 in Special Appeal No.36 of 2011

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

1. The petitioner has sought a mandamus commanding the respondent to provide compassionate appointment.

2. It is admitted that petitioner's father, working as Assistant Teacher in Sri Shivdan Singh Inter College, Aligarh, died on 8.12.2004 whereafter petitioner's mother applied for compassionate appointment on the post of Assistant Clerk in the College. Considering the availability of vacancy and qualification etc. of petitioner's mother, District Inspector of Schools, Aligarh issued an order dated 26.9.2006 appointing petitioner's mother as a Class IV employee but she did not join and continued to insist upon offering appointment on the post of Assistant Clerk. Subsequently, letter dated 13.8.2007 was issued by District Inspector of Schools for absorbing/appointing/accommodating the petitioner on the post of Assistant Clerk w.e.f. 31.7.2007 in the above College but she did not take any interest in joining the post thereat by taking appropriate steps. On the contrary, on 10.8.2009, petitioner's mother sent a letter to the Management of the College that due to family circumstances she is not able to join the service and since her daughter i.e. petitioner has now attained majority and this is being informed to the Management. Thereafter petitioner made an application for compassionate appointment.

3. Learned counsel for the petitioner submitted that since no letter of appointment was issued to the petitioner's mother, she did not join. In fact she was not allowed to join and there is no fault on her part and hence now she is entitled for compassionate appointment.

4. From the record it is admitted that considering sudden hardship suffered by petitioner's family, if any, due to the death of her father, a letter was issued to petitioner's mother on 26.9.2006 appointing her as a Class IV employee but she did not join and insisted for appointment on a higher status post. A compassionate appointment is not meant for conferring status but to provide succour to the bereaved family which has suffered loss due to sudden demise of sole bread earner. Once appointment letter was issued and the legal heir of the deceased employee accept or failed to accept the same, he/she cannot be allowed to claim an appointment subsequently on a higher post. This would be against the very objective of

the scheme of compassionate appointment. Moreover, petitioner's mother did not find any financial scarcity compelling to join service in 2006 when letter of appointment was issued, in my view, at this belated stage claim of the petitioner for compassionate appointment cannot be accepted.

5. 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."

6. 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."

7. 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."

8. 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"

9. 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."

10 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."

11. 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."

12. 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 ...."

13. 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."

14. 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."

15. 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."

16. 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 Dependants 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."

17. The Court considered that father of appellant Santosh Kumar Dubey 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."

18. 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."

19. 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."

20. 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.** The decision in Vivek Yadav (supra) has been considered later on by another Division Bench in **Nagesh Chandra Vs. Chief Engineer, Vivasthan Ga Warg & Ors.** decided on **7th January, 2011** in **Special Appeal No.36 of 2011** and Court said:

"Though in the judgment it has been held that when the rules are prevailing for relaxation for making the application, a member of the family, on attaining majority, can file an application for due consideration but in the judgment itself it has been held that the law relating to compassionate appointment is no longer res integra. The right of compassionate appointment does not confer a right but it does give rise to the legitimate expectation in a person covered by the rules that his application should be considered, if otherwise he meets with the requirement."

21. In the light of the exposition of law, as discussed above, I do not find any reason to issue such a mandamus, as sought by the petitioner in the present writ petition.

22. The writ petition therefore lacks merit. Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.01.2012

BEFORE
THE HON'BLE AMAR SARAN,J.
THE HON'BLE RAMESH SINHA,J.

Public Interest Litigation (PIL) No. - 3782 of 2012

Madan ...Petitioner
Versus
State of U.P. Thru' Its Home Secy & others ...Respondents

Counsel for the Petitioner:
Sri Atul Kumar

Counsel for the Respondents:
Sri M.S. Pipersania (S.C.)
C.S.C.

Constitution of India, Article 226-Public Interest Litigation-claiming release from clutches of the owner of brick kiln-inspite of working from 18-22 hours not getting any salary, the family members denied medicines and hospitalization-district Legal Services directed to inquire and submit report-certain guide lines issued for proper implementation of Bounded Labour System Abolition Act.

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

1. We have heard learned counsel for the petitioner and Sri M.S. Pipersania, learned Standing Counsel for the respondents No. 1 and 2.

2. This is another case where a bunch of persons claiming themselves to be bonded labourers have approached this Court in a PIL, seeking to be freed from bondage.

3. We had occasion to explain the law on bonded labourers and how such matters and complaints are to be dealt with in a detailed judgment and order dated 5.1.12 in *Habeas Corpus Writ Petition No. 70403 of 2011 Sageer and others Vs. State of U.P. and others*

4. The present petition has been filed by one Madan, who states that his family members and a few other persons (26 in all) have been detained at the brick kiln of respondent No. 3 Brahampal, in village Kheratana, Police Station Sarurpur, district Baghpat and are unfree to leave the brick kiln or to work for any other person. In the petition as well as in the representation before the S.S.P. Baghpat dated 6.1.2012 it is stated, that the petitioners are made to work for as long as 18-20 hours, without payment and no medicine or hospitalization facility is provided to ill children. Significantly, in paragraph 5, it has been stated that some blank papers were got signed from the petitioners and with the aid of some criminal elements they are being forced to work at Brahmpal's *bhatta* as bonded labourers. They, however, deny having voluntarily filled up any bonds to work for the brick kiln owner and pray to be released from his clutches.

5. We think that although persons like the petitioners maybe working as bonded labourers in brick kilns, because of advances made to them, but these facts are not mentioned in the representations and the petitions because usually wrong legal advice or gratuitous advice from local barristers is tendered to such persons that if they concede that they have taken some advance, they would be unfree to leave the brick kiln until they have paid off their advance.

6. Obviously, this advise flows from a complete misunderstanding of the provisions of the Bonded Labour System (Abolition) Act, 1976 (in short the Bonded Labour Act). Bonded labour is usually extracted as a result of a "bonded debt," which is defined in section 2(d) of the Bonded Labour Act to mean an advance given to a labourer and in consideration of the said advance the bonded labourer is made to enter into the bonded labour system. The Bonded Labour System is defined in section 2 (g), and means a system whereby the debtor or his heirs and dependants in consideration of the advance have to render service to the creditors for a specified or unspecified period without wages or for nominal wages, forfeiting their freedom to seek employment elsewhere or to move about freely in the territory of India or to freely sell their labour at market value. After the enactment of the Bonded Labour Act, under section 6, the liability to repay the bonded debt stands extinguished, and under section 9, the creditor cannot accept payment against an extinguished debt, accepting which would invite a sentence of up to three years imprisonment and fine.

7. Factually also in the present case we find it hard to believe that the petitioners claim that they were made to work at the brick kiln for no wages without having received some advance. Situations are also not inconceivable, where labourers in need of a substantial advance for a marriage or because of illness in their family agree to work for a brick kiln owner, and after their emergency needs are met, in order to leave the employer and to avoid repaying the advance they file a bonded labour complaint. But looking to the economic condition of these poor persons, whose clout is no match to the clout of their employer, who usually live in tents in open sites without electricity or water and without medical and other facilities and education for their little children, such false cases are likely to be exceptional.

8. In accordance with the criteria set out in *Sageer and others Vs. State of U.P (supra)* for ascertaining whether a person is bonded or not, and the reliefs available to bonded labourers or vulnerable landless or resourceless persons the District Magistrate and the district level Deputy/Assistant Labour Commissioner may get an inquiry made for ascertaining whether the labourers at Brahmpal's brick kiln were bonded or not, and whether they may be provided any preventive relief or other socio-economic relief. We would also like the District Legal Services Authority (District Judge) Baghpat to get such an inquiry conducted by paralegals or legal aid lawyers attached to the Legal Services Authority at the local level.

9. The need for taking advances by labourers arises because there is no effective system, governmental or non-governmental for providing adequate credit without strings to such landless and resourceless persons. We therefore think that if the economic conditions of such poor, landless, resourceless and persons, wherever they may be residing are improved and credit from banks and other government or fair non-governmental agencies are made available to them to meet the shortfalls in their daily and emergency needs, they are less likely to look for advances and consequently their risk of becoming bonded to their employers would decline. The conditions of such workers need to be improved both in their home areas as also at the place of destination (as in the case of migrant labourers), where they are working in the unorganized sector. The employers should also be advised to increase wages and to improve working conditions of the labourers so that instead of trying to tie down labourers by raising advances, the employers succeed in obtaining labourers to work for them because of good wages and more humane working conditions.

10. Assistance at the place of origin as well as at the place of destination of the bonded labour, would require the involvement not only of the District Magistrate, and local labour department, but agencies which have a presence in both the areas. These could mean the U.P. State Ministry of Social Welfare and Women's and Child Development, Ministry of Labour and the State Human Rights Commission or the State Legal Services Authority, if the source and destination of the labourer fall within the same State, and the Ministry of Social Welfare and Women's and Child Development in the home State of the poor labourer, where he originates from another State, or the National Human Rights Commission, the Union Labour

Ministry, the National Legal Services Authority, which have jurisdiction over both the States.

We, therefore:

1.Direct the D.M. and S.S.P. Baghpat, and the local labour department to inquire into the matter and to give the bonded labourers appropriate reliefs including all the socio-economic benefits to which they maybe entitled as laid down in *Sageer and others vs. State of U.P (supra).*

2.We also direct the District Judge, Baghpat (District Legal Services Authority) to immediately get the matter examined, by the local Legal Services authority with the aid of para legals or legal aid panel or other lawyers for deciding whether the petitioner and others were kept in bondage and the socio-economic reliefs to which they are entitled.

3.We would also like the Principal Secretary Social Welfare and Women and Child Development, U.P., the State Human Rights Commission, the National Human Rights Commission, State Legal Services Authority, the Principal Secretary, Labour, U.P., Secretary, Labour, Government of India, National Legal Services Authority and State Legal Services Authority to oversee the matter and to give appropriate general directions, including enforcement of all labour related laws as well as socio-economic relief in the present case as also in other cases, and for preventive reliefs to check vulnerable persons from falling into bondage. The National Legal Services Authority, the National Human Rights Commission and the Union Ministry of Labour may also consider co-ordinating this matter, as also other bonded matters relating to bonded labour, and the provision of socio-economic reliefs in the present case and other cases as directed in *Sageer and others Vs. State of U.P. and others* with the International Labour Organization and the UNDP. All the aforesaid authorities may submit compliance reports by the next listing.

4.The copy of the present order along with earlier order dated 5.1.12 passed in Habeas Corpus Writ Petition No. 70403 of 2011 in *Sageer and others Vs. State of U.P. and others* may be forwarded to the D.M., Baghpat; S.S.P. Baghpat; Deputy/Assistant Labour Commissioner, Baghpat; District Judge, Baghpat; Registrar, National Human Rights Commission, New Delhi; Registrar, U.P. State Human Rights Commission, Lucknow; Member Secretary, National Legal Services Authority, New Delhi; Member Secretary, U.P. State Legal Services Authority, Lucknow; Principal Secretary, Social Welfare and Women and Child Development, U.P., Lucknow; Principal Secretary, Labour, U.P.,Lucknow; Secretary, Labour, Government of India, New Delhi, within 10 days by the Registry.

5.The copy of the present order along with copies of the earlier order in *Sageer and others Vs. State of U.P. and others* may be given to the learned A.G.A. within 10 days.

6.Issue notice to the respondent No. 3 returnable within four weeks.

7.The U.P. State Legal Services Authority may also furnish this Court with a progress report regarding setting up

Legal Aid Clinics and engaging paralegals, and Legal Aid 0.79"lawyers as was directed in the case of *Sageer & others vs State of U.P. (supra)* on 5.1.12

8.List on 21.2.2012. for submission of further compliance reports.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.01.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL,J.

Civil Misc. Writ Petition no. 5272 of 2012

Bal Krishna Awasthi & another
...Petitioner
Versus
Managing Director, U.P.S.R.T.C. and others ...Respondents

Counsel for the Petitioner:
Sri Venu Gopal
Sri B.N. Tiwari

Counsel for the Respondent:
Sri R.A. Gaur

U.P. State Roadways Transport Corporation Act, 1950-Section 45- Retirement Age Group "C" Employee- Notice to retire on 58 years-challenged on ground of G.O. Dated 20.12.11-by which Govt. directed for enhancement of age from 58 to 60 years-held-misconceived-mere direction for consideration without confirmation by Board of Director and approved by Govt. -accepting burden of financial expenses-such G.O. Can not over ride the statute-retirement at 58 years age-proper-petition dismissed.

Held: Para 14

Moreover, the Government order which is sought to be relied by petitioners also nowhere talks of any straightway grant of benefit of extension of age of retirement to employees of public corporations. Para 2 of Government Order dated 20.12.2011 says that respective corporations shall examine their matter to find out whether they are financially capable of bearing the burden likely to be caused by extension of age of retirement from 58 to 60 years. If they find that such a burden can be borne by them, the matter shall be placed before the Board of Directors and in case they pass a resolution to this effect for extension of age of retirement from 58 to 60 years, such proposal shall be forwarded to the Administrative department of the concerned corporation for its examination/ scrutiny and approval. It is only after obtaining approval of respective department of the concerned corporation, order for extending age of retirement from 58 to 60 years can be issued and not otherwise. It also says that its procedure shall be followed by every corporation separately and extension of age shall be made applicable only after approval of Government for which no financial burden shall be borne by State Government. Therefore, the Government order dated 20.12.2011 by itself does not talk of any suo motu extension of age of retirement from 58 to 60 years but provides a procedure to be followed by respective individual corporation and after following said procedure when approval of concerned department is obtained, only then requisite order can be issued.

Case law discussed:
1992 (Suppl) 3 SCC 217; JT 2001 (8) SC 171; 1998 (8) SCC 469; 1998 (8) SCC 154; AIR 1936 PC 253; 2001 (4) SCC 9; 2002 (1) SCC 633; 2005 (13) SCC 477; 2005(1) SCC 368; 2008 (2) ESC 1220

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

1. By means of impugned order, petitioners, who are admittedly Group 'C' employees, have been retired on attaining

the age of 58 years in accordance with Regulation 37 of U.P. State Road Transport Corporation Employees (other than Officers) Service Regulations, 1981 *(hereinafter referred to as "1981 Regulations").*

2. Learned counsel for the petitioners submitted that under Government Order dated 20.12.2011 the State Government has taken a policy decision in extending the age of retirement from 58 to 60 years and, therefore, petitioners are entitled to be retired at the age of 60 years and cannot be made to retire at 58 years.

3. The submission is thoroughly misconceived. It is admitted that statutory provision has not been amended so far. Government order, being an executive order cannot override a statutory provision. It is well settled that whenever Rules or Regulations provide something, it cannot be overridden by an executive order. An executive order can be issued and enforced only where the statutory provision is silent to fill in the gap but not to be supplemented. In **Indra Sawhney and others Vs. Union of India and others, 1992 (Suppl) 3 SCC 217** the Apex Court held that though the executive orders can be issued to fill up the gaps in the rules if the rules are silent on the subject but the executive orders cannot be issued which are inconsistent with the statutory rules already framed. In **Laxman Dundappa Dhamanekar and another Vs. Management of Vishwa Bharata Seva Smithi and another, JT 2001 (8) SC 171** also the same view was taken. In **K. Kuppusamy and another Vs. State of T.N. and others, 1998 (8) SCC 469** the Court said that statutory rules cannot be overridden by executive orders or executive practice and merely because the government has taken a decision to amend the rules does not mean that the rule stood obligated. So long as the rules are not amended in accordance with the procedure prescribed under law the same would continue to apply and would have to be observed in words and spirit. In Chandra Prakash Madhavrao Dadwa and others Vs. Union of India and others, 1998(8) SCC 154 also the Apex Court expressed the same view holding that the executive orders cannot be conflicted with the statutory rules of 1977.

4. Moreover, a policy decision even if taken by Government would not entitle an employee to enforce such policy decision ignoring the existing statutory provision inasmuch as the rights of employees are governed by existing statutory provision and not what is likely to be amended in future unless the amendment is made with retrospective effect which is not the case here.

5. The Regulations have been framed by exercising powers under Section 45 of U.P. State Road Transport Corporation Act, 1950. It reads as under:

"37. Retirement on attaining the age of superannuation.*-An employee of Group "C" shall retire on attaining the age of 58 years and that of Group "D" shall retire on attaining the age of 60 years:*

Provided that if the date of retirement falls on or after the second day of the month, the date of retirement shall be the last day of the month."

6. Admittedly it has not been amended so far. The mere executive decision conveyed by State Government that in principle it is agreeable for extension of age of retirement of employees of public corporations from 58 to 60 years by itself would not result in a deemed or automatic amendment in the statutory regulations unless it is done in accordance with procedure prescribed therefor. The regulations can be amended in the manner the same were framed and there is no question of an automatic amendment of regulations. Atleast to this extent even learned counsel for the petitioners has not disputed the exposition of law. That being so when a particular procedure is prescribed for amendment of regulations and said procedure has not been followed so far, the existing regulations have to be implemented.

7. The first principle applicable herein would be when a statute required a thing to be done in a particular manner, then it should be done in that manner alone and not otherwise. The principle was recognized in **Nazir Ahmad Vs. King-Emperor AIR 1936 PC 253** and, thereafter it has been reiterated and followed consistently by the Apex Court in a catena of judgements, which we do not propose to refer all but would like to refer a few recent one.

8. In **Dhananjaya Reddy Vs. State of Karnataka 2001 (4) SCC 9** in para 23 of the judgment the Court held :

"It is a settled principle of law that where a power is given to do a certain thing in a certain manner, the thing must be done in that way or not at all."

9. In **Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala 2002 (1) SCC 633,** it was held :

"It is a normal rule of construction that when a statute vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided in the statute itself."

10. The judgments in **Anjum M.H. Ghaswala (supra) and Dhananjaya Reddy (supra)** laying down the aforesaid principle have been followed in **Captain Sube Singh & others Vs. Lt. Governor of Delhi & others 2004 (6) SCC 440.**

11. In **Competent Authority Vs. Barangore Jute Factory & others 2005 (13) SCC 477,** it was held :

"It is settled law that where a statute requires a particular act to be done in a particular manner, the act has to be done in that manner alone. Every word of the statute has to be given its due meaning."

12. In **State of Jharkhand & others Vs. Ambay Cements & another 2005 (1) SCC 368** in para 26 of the judgment, the Court held :

"It is the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way."

13. In effect a similar question was considered by Division Bench of this Court [in which I was also a member with Hon'ble S.R. Alam, J., (as His Lordship then was)] in **Daya Shankar Singh Vs.**

State of U.P. and others, 2008(2) ESC 1220 and this Court has observed:

"A modification, amendment etc., therefore, is permissible by exercising the power in the like manner and subject to like sanction and conditions in which the main provision was made initially. Since, Staff Regulations were framed admittedly with the previous sanction of the State Government and by publication in the official Gazette, same can be amended only following the same procedure and not otherwise. Therefore, the proposal/resolution passed by the Board of Directors, UPSWC by no stretch of imagination can be said to have the effect of either amending Regulation 12 of Staff Regulations or to bind UPSWC and its employees to be governed by such resolution/proposal which are inconsistent with the existing provisions contained in Staff Regulations."

14. Moreover, the Government order which is sought to be relied by petitioners also nowhere talks of any straightway grant of benefit of extension of age of retirement to employees of public corporations. Para 2 of Government Order dated 20.12.2011 says that respective corporations shall examine their matter to find out whether they are financially capable of bearing the burden likely to be caused by extension of age of retirement from 58 to 60 years. If they find that such a burden can be borne by them, the matter shall be placed before the Board of Directors and in case they pass a resolution to this effect for extension of age of retirement from 58 to 60 years, such proposal shall be forwarded to the Administrative department of the concerned corporation for its examination/ scrutiny and approval. It is only after obtaining approval of respective department of the concerned corporation, order for extending age of retirement from 58 to 60 years can be issued and not otherwise. It also says that its procedure shall be followed by every corporation separately and extension of age shall be made applicable only after approval of Government for which no financial burden shall be borne by State Government. Therefore, the Government order dated 20.12.2011 by itself does not talk of any suo motu extension of age of retirement from 58 to 60 years but provides a procedure to be followed by respective individual corporation and after following said procedure when approval of concerned department is obtained, only then requisite order can be issued.

15. As already said this very aspect was also considered by this Court in **Daya Shankar Singh (supra)** and in the penaltimate paragraphs of the judgement, the Court said:

"Now we come to the writ petition pertaining to UPSAICL. There also, the Regulations though not statutory but being part of the conditions of service of the employees, it is not disputed by the petitioners that the same are binding upon the employees of UPSAICL. That being so, unless the same are also amended in accordance with the procedure prescribed therein, it cannot be said that there is any different condition of service providing a higher age of superannuation contrary to the existing Regulations entitling the petitioners to continue in service till 60 years of age. Regulation 26 specifically provides that the age of superannuation cannot be extended without prior approval of the State Government. Therefore, in the absence of any such

approval under Regulation 26, the age of superannuation continued to be 58 years, the petitioners are liable to retire on attaining the age of 58 years. Moreover, even under Regulation 4, before amending the Regulation, a procedure has been prescribed which has to be followed by UPSAICL and it is nobody's case that the said procedure has been followed having the effect of amending Regulation 26 in any manner. In view thereof, the petitioners, who are employees of UPSAICL are also not entitled to continue beyond 58 years merely on the basis of a resolution passed by the Board of Directors for increasing the age of retirement from 58 to 60 years.

However, it is made clear that in case, any employee has continued beyond 58 years under interim order passed by this Court and has been paid salary, it would not be equitable to recover the same from such employee and, therefore, respondent shall not make any recovery from any of the petitioners, but it is also made clear simultaneously that for all other purposes, the petitioners shall be deemed to have been retired on attaining the age of 58 years and their continuance, if any, beyond 58 years pursuant to the interim order of this Court would not confer any benefit upon them."

16. Since the impugned order of retirement has been passed strictly in accordance with statutory Regulations existing and operating on the date, the same cannot be faulted, legally or otherwise, and it warrants no interference.

17. The writ petition lacks merit. Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.01.2012

BEFORE
THE HON'BLE RAN VIJAI SINGH,J.)

Civil Misc. Writ Petition No. 6551 of 2008

Km. Gyanti ...Petitioner
Versus
State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri Ajay Kumar Srivastava

Counsel for the Respondents:
C.S.C.

U.P. Recruitment of Dependants of Govt. Servants) Dying in Harness Rule, 1974-Rule-2 (b)-readwith Section-108 of Evidence Act-Compassionate Appointment-Petitioner's father working as Police Constable-abducted during duty hours-F.I.R. Lodged by S.I. On 09.03.1998-claim for appointment although processed but subsequently in view of G.O. 27.08.2007-refused-held-case of civil death more bonafide than natural death-as the deceased family suffers mental , physical agony apart from financial crisis-entitled for appointment.

Held: Para 17

In view of foregoing discussions, I am of the view that if a dependant of deceased on account of civil death claims appointment under the provisions of 1974, he/she is entitled to be considered under the Rules and no distinction can be drawn in between the civil death or death otherwise.

Case law discussed:
(1984) 2 SCC 50; 2002 (2) ESC 37; 2005 (1) ESC 807; 2005 (3) AWC 2724; 2009 (4) ESC 2511

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

1. The petitioner, claiming herself to be unmarried daughter of late Ram Jhalak, who was appointed as Constable in U.P. Civil Police, approached this Court under Article 226 of the Constitution of India for redressal of her grievance with regard to the compassionate appointment. It is stated in the writ petition that the petitioner's father was constable in Civil Police and he was abducted while he was in the service. Consequently an F.I.R. was lodged by one Sub-Inspector namely Sri Chandra Dev Singh, which was registered as Case Crime No. 37/1998, under Section 364 I.P.C on 9.3.1998. In the aforesaid case, a final report was submitted to the effect that his whereabouts was not known.

2. It appears taking shelter of Section 108 of Indian Evidence Act, the petitioner filed an application for compassionate appointment in the year 2004 to be more specific 31.12.2004 claiming civil death of her father. At one point of time, the department has initiated proceedings for offering appointment on compassionate ground but later on taking note of the Government Order dated 9th December, 1998 and Circular of the Police Headquarter dated 27th August, 2007, the appointment was refused.

3. A counter affidavit has been filed by the State respondents in which the factum of lodging an F.I.R. under Section 364 I.P.C. on 9.3.1998, the submission of final report, the acceptance of the same by the Court and the petitioner's application seeking appointment on compassionate appointment in view of the provisions contained under Section 108 has not been disputed. What has been stated in the counter affidavit is that in view of the Government Order dated 9th December, 1998 and the Circular of the Police Headquarter dated 27th August, 2007, the dependent of the deceased on account of presumption of civil death are not entitled to get benefit of ***U.P. Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974*** (herein after referred to as Rules)

4. A rejoinder affidavit has also been filed stating therein that the petitioner falls in the ambit of the Rules of 1974 and the Government Order/Circular issued by the State Government or the Police Headquarter are ultravires to the Rules of 1974.

5. I have heard learned counsel for the petitioner and learned Standing Counsel.

6. For appreciating the controversy, the various provisions contained in the Rules are required to be looked into. The rule 2 (b) of the aforesaid Rules provides *"deceased Government servant" means a Government servant who dies while in service. "* Sub-rule (c) of Rule 2 provides the ***definition of family*** which shall include *(i) wife or husband (ii) sons, and (iii) unmarried and widowed daughters.* Rule 3 talks about the ***application of the rules*** according to which *these rules shall apply to recruitment of dependants of the deceased Government servants to public services and posts in connection with the affairs of State of Uttar Pradesh, except services and posts which are within the purview of the Uttar Pradesh Public Service Commission.* Rule 4 talks about the ***overriding effect of the rules*** *notwithstanding anything to the contrary contained in any rules, regulations or*

orders in force at the commencement of the rules. Rule 5 of the aforesaid Rule provides ***recruitment of a member of the family of the deceased*** which is reproduced below :-

In case, a government servant dies in harness after the commencement of these rules and the spouse of the deceased government servant is not already employed under the Central Government or a State Government or a Corporation owned or Controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall,on making an application for the purposes, be given a suitable employment in government service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules if such person - (i) fulfils the educational qualifications prescribed for the post (ii) is otherwise qualifier for government service and (iii) makes the application for employment within five years from the date of the death of the government servant.

Provided that where the State Government is satisfied that the times limit fixed for making the application for employment causes undue hardship in any particular case, it may dispense such or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner.

(2) As far as possible, such an employment should be given in the same department in which the deceased Government servant was employed prior to his death.

7. From the bare reading of the aforesaid Rule, it transpires that if a government servant dies in harness, one of his/her dependent of his family as given in Sub-Rule 2 (c) shall be entitled to be considered for employment subject to condition given in Rule 5.

8. Here in this case, the appointment has not been offered to the petitioner for the reason that in view of the Government order dated 9th December, 1998 and the Circular dated 27th August, 2007 the dependents of those government servants, whose death is presumed to be civil death, under Section 108 of the Evidence Act would not fall in the ambit of Rules of 1974.

For appreciation, Section 108 of the Evidence Act, 1872 is reproduced below :-

S.108. Burden of proving that person is alive who has not been heard of for seven years :- *Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have hard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.*

9. From going through the aforesaid Rules, now it is clear in view of the lodging of an F.I.R. and filing of the final report, no information about his whereabout for more than seven years and

its acceptance by the Court, further the father of the petitioner shall be treated to be dead which in legal terminology would be mentioned as civil death.

The word ***'Death'*** in ***The New Lexicon Webster's Dictionary of the English Language*** has been defined as under :-

Death means 'the end of life' and 'destruction'.

The word ***"Death"*** has been defined in The law Lexicon the Encyclopaedic Law Dictionary as below :

"Death" has been mentioned as ***"the end or termination of life".***

The word ***"Death"*** as defined in ***The Concise Oxford English Dictionary,*** means ***" the action or fact of dying or being killed," "the state of being dead",and "the end of something" : the death of hopes".***

10. From the bare reading of the meaning of word 'death' it would transpire that it means the end of life, termination of life meaning thereby the consequence of death is death of hopes of anything from that bodily entity.

11. In this rule, no exception has been carved out with respect to natural death, death otherwise or civil death. The word used in the aforesaid rules do not restrict that only on a particular type of death, a person shall be offered appointment. The death may be due to any reason, may be by illness, by an accident, in a natural calamity or under general law (the Evidence Act). The Government Order and the Circular have tried to draw a line of distinction in between the civil death and the death falling under other categories. Now the question would be as to whether this line of distinction is a legal line drawn on the basis of some statutory basis or it is merely an outcome of abrupt imagination of the State authorities particularly in the circumstances when the Government itself has issued a Government Order No. Sa-3-G-I- 88/ten-909-97 extending the benefit for payment of post retiral dues taking note of Section 108 of the Evidence Act.

12. For appreciating this controversy, the language used in the Rule 4 of the Rules would also be required to be looked into, which is reproduced below :-

Overriding effect of these rules :- *These rules and any orders issued thereunder shall, have effect notwithstanding anything to the contrary contained in any rules, regulations or orders in force at the commencement of these rules*

13. From the perusal of aforesaid Rule, it would transpire that this rule will have overriding effect notwithstanding anything to the contrary contained in any rules, regulations or orders in force.

14. It is not in dispute that this rule has been framed under Article 309 of the Constitution of India, therefore any Government Order which is in consistent with the provisions of these rules will be of no avail.

15. From the perusal of the Government Order which has been brought on record of the counter affidavit

it do not transpire that the said Government Order has been issued while invoking power either under Article 162 of the Constitution of India or under any other statutory provision, therefore it cannot be said to be a statutory Government Order and even if it be so, the rules framed under Article 309 will have overriding effect over the Government Order dated 9th December, 1998 and the Circular of the Police Headquarter dated 27th August, 2007. It is well settled that if there is any conflict in between the statutory rules and the government order it is the rule which shall prevail over the Government order.

16. The view taken by me find support from the judgment of the Apex Court in ***Babaji Kondaji Garad Vs. Nasik Merchants Coop. Bank Ltd. (1984) 2 SCC 50.***

17. The matter may be examined from another angle also the purpose of framing of the rules is to save out the family of the deceased employee from the financial crunch which has fallen upon the family after the death of an employee. The hardship which has fallen upon the family is to be mitigated at the earliest. The end of life or termination of life either because of the natural death or accidental death or death otherwise would result into the recurring financial loss to the family of the employee. It cannot be said that the death within the meaning of Section 108 in any way differentiable than the death otherwise where, whereabout of an employee for more than seven years is not known. In my considered opinion in the case of civil death the consequences would be more serious as here the family shall make its all endeavour to search out the person who has been disassociated from the family either because of his abduction or otherwise and naturally that would involve the finance and if after the continuance efforts of seven years the persons availability is not known, the family would not only suffer financial loss but otherwise also there would be mental distress and agony. Therefore also the distinction drawn by the State government is contrary to the object of the rules.

18. In view of foregoing discussions, I am of the view that if a dependant of deceased on account of civil death claims appointment under the provisions of 1974, he/she is entitled to be considered under the Rules and no distinction can be drawn in between the civil death or death otherwise.

19. This Court has also taken the same view in the case of ***Sima Devi Vs. Senior Superintendent of Police, Jhansi and others, 2002 (2) ESC 37, Ajay Kumar Shukla Vs. State of U.P. and others, 2005 (1) ESC 807, Sanjay Kumar Singh Vs. State of U.P. and others, 2005 (3) AWC 2724 and Amit Sharma Vs. State of U.P. and others, 2009 (4) ESC 2511.***

20. In the result, the writ petition succeeds and is allowed. The Government Order dated 9th December, 1998 and the Circular of the Police Headquarter dated 27th August, 2007 are hereby quashed. The D.I.G. Karmic Police Headquarter, Allahabad is directed to take an appropriate decision and consider the petitioner's case for appointment on compassionate ground within a period of two months from the date of receipt of certified copy of the order of this Court.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.01.2012

BEFORE
THE HON'BLE ARUN TANDON,J.

Civil Misc. Writ Petition No. 8301 of 1987

Smt.Akila & others ...Petitioner
Versus
Nisar Ahmad & others ...Respondents

Counsel for the Petitioner:
Sri Virendra Singh
Sri B. Dayal
Sri Vishnu Sahai

Counsel for the Respondents:
Sri Harish Chandra
Sri A.K.Jaiswal
S.C.

Small Cause Courts Act, Section 25- Revision-dismissed without considering-question whether possession by agent or servant is possession of owner or possession as tenant -Trail Court without evidence wrongly decided-held-committed patent illegality-revision to return on its original number-direction to decide this issue within time bound period-given.

Held: Para 12

In view of the law laid down by the Supreme Court in the case of Mahabir Prasad Jain (supra), the order passed by the revisional authority cannot be legally sustained. The revisional court is duty bound to examine as to whether in the facts of the case the plaintiff has been able to establish that he was the tenant of the premises in question or not.

Case law discussed:
1999 (37) ALR 742

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

1. Small Causes Suit No. 14 of 1982 was filed by the plaintiff-respondent under Section 6 of the Specific Relief Act for his possession being restored over the property in question. The suit was contested by the present petitioner.

2. It was admitted to the parties that the disputed property was owned by one Sri Abdul Rashid, the father of the present petitioner and further that Abdul Rashid had since shifted to Pakistan.

3. According to the petitioner she was tenant of the premises and illegally dispossessed, therefore the suit. The defendant in turn claimed title over the property on the basis of the gift executed by her father.

4. The Judge Small Causes framed 7 issues for determination including issue no. 6; as to whether the plaintiff was the tenant of the premises or not. After evidence was led by the parties, the trial court answered the issue, with regard the plaintiff being tenant of the premises as he had established his possession and his being illegally dispossessed, in favour of the plaintiff. The trial court further held that the defendant has failed to establish the gift deed. Accordingly, the suit was decreed vide order dated 22.08.1983.

5. The plaintiff filed the revision under Section 25 of the Small Causes Court's Act, 1987. The revision has also been dismissed under order dated 08.04.1987. The findings recorded by the court below have been found to be based on appreciation of evidence, which need

not be upset in revisional proceedings under Section 25 of the Small Causes Court's Act.

6. Challenging the order so passed counsel for the petitioner submitted that the Supreme Court of India in the case of ***Mahabir Prasad Jain vs. Ganga Singh, reported in 1999(37) ALR 742*** has laid down that the possession of a servant or an agent will not in itself give a presumption of tenancy and that the possession of a servant/agent is on behalf of the master and therefore a suit on behalf of agent/servant under Section 6 of the Specific Relief Act would not be maintainable. It is contended that in the facts of the case despite a specific issue being framed by the trial court qua the plaintiff being a tenant of the premises at the rate of Rs. 5/- per month, no conclusive finding has been recorded on the said issue, although issue no. 6 has been answered in favour of the plaintiff. He, therefore, submits that the orders impugned are illegal.

7. According to the counsel for the petitioner before the revisional court it had specifically been contended that the plaintiff was not the tenant and therefore mere possession would not entitle him to a decree under Section 6 of the Specific Relief Act. The revisional court, even noticing the said plea, only on the basis of possession his dismissed the appeal and maintained the decree without recording any conclusive opinion as to whether the plaintiff was tenant of the premises or not.

8. It is submitted that the revisional court has misdirected itself in recording a finding with regard to the right of the plaintiff to claim possession of the new house, which has been constructed in place of old house, without adverting to basic issue as to whether the plaintiff has been able to establish that he was tenant of the premises in question and therefore entitled to maintain the suit under Section 6.

9. I have heard learned counsel for the parties and have examined the records.

10. The Supreme Court of India in the case of ***Mahabir Prasad Jain (supra)*** has specifically held that mere exclusive possession itself will not give any presumption of tenancy and further that a suit by an agent or by the servant under Section 6 against the master would not be maintainable.

11. What logically follows is that a categorical finding had to be arrived at by the courts below as to whether in the facts of the case the plaintiff had been able to establish that he was the tenant of the premises in question. Mere possession will not lead to a presumption of tenancy. The revisional court has misdirected itself in coming to a conclusion that merely because the plaintiff has been able to establish his exclusive possession, he is deemed to be the tenant of the premises.

12. In view of the law laid down by the Supreme Court in the case of ***Mahabir Prasad Jain (supra)***, the order passed by the revisional authority cannot be legally sustained. The revisional court is duty bound to examine as to whether in the facts of the case the plaintiff has been able to establish that he was the tenant of the premises in question or not.

13. Since said aspect of the matter has completely been ignored by the revisional authority, the order passed by the revisional court dated 08.04.1987 is hereby set aside.

14. Revision no. 122 of 1983 is restored to its original number. Let the same be decided after affording opportunity of hearing to the parties concerned by means of a reasoned order, preferably within six months from the date a certified copy of this order is filed before the revisional court, specifically in light of the judgment of the Supreme Court in the case of ***Mahabir Prasad Jain (supra).***

15. Revision is allowed subject to the observations made.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.01.2012

BEFORE
THE HON'BLE RAN VIJAI SINGH,J.

Civil Misc. Writ Petition No. 8587 of 2008

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

Counsel for the Petitioner:
Sri Arvind Yadav
Sri Mithilesh Kumar Tiwari

Counsel for the Respondents:
C.S.C.

U.P. Recruitment to Services (Determination of Date of Birth) Rules , 1974-Rule 2-Petitioner's selection canceled-on ground in declaration form-Date of Birth shown as 05.07.1986-during verification from college Date of Birth found 02.08.1977-order passed without affording opportunity-original certificate produced with specific plea that there are two persons of similar name-one Sharma, the other one Yadav-petitioner is Yadav by caste-eventually a fit case for enquiry-order impugned entail civil consequences-can not be passed without taking recourse of the principle of Natural Justice.

Held: Para 11

It is not the case of respondent that High School certificate issued to the petitioner has either been cancelled or annulled by the Board or any other competent court. Therefore, I am of the view that as long as High School certificate issued in the year 2005 is there, the respondents were not justified to cancel the selection of the petitioner on the assumption that he has passed High School in the year 1992, particularly in the circumstances where the petitioner has come with specific case as stated in paragraph 2 of the supplementary rejoinder affidavit that there were two persons of the same name i.e. Promod Kumar of the same parentage one belonging to Sharma and another Yadav by caste. The petitioner belongs to Yadav by caste. In that eventuality also this was a case for inquiry and had the petitioner was ever offered an opportunity of hearing before passing the impugned order, this aspect of the matter ought to have been explained and considered before reaching the conclusion that the petitioner has played prayed fraud. I find that the impugned order has vice of principle of natural justice and it is well settled law that an order which involves civil consequences must be just, fair, reasonable, unarbitrary and in confirmity with the principles of natural justice.

Case law discussed:
1952 SCR 284; AIR 1952 SC 75:1952 Crl.L.J. 510; (1967) 2 SCR 625; AIR 1967 SC 1269; (1967) 2 LLJ 266; (1978) 1 SCC 405; (1978) 1 SCC 248; 1993 SCC 259; 2005 (6) SCC 321; (2007) 6 SCC 668; 2008 (3) ESC 433 (SC)

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

1. The petitioner, through this writ petition has prayed for issuing a writ of certiorari quashing the order dated 25.09.2007 passed by Superintendent of Police Baghpat by which he has cancelled the selection of the petitioner as recruit constable.

2. From the perusal of the impugned order, it transpires that the selection has been cancelled on the ground that the petitioner has shown his date of birth while entering into the service as 05.07.1986, which later on, after verification from the college was found as 02.08.1977 and therefore, in view of the declaration made to the effect that if during the verification any false declaration is found, the service shall be terminated without any notice.

3. The aforesaid order has been challenged on the ground that before passing the said order, no opportunity of hearing was given to the petitioner and had the opportunity was given, the petitioner would have been able to explain the situation. The petitioner is still pressing that his real date of birth is 05.07.1986 and not 02.08.1977.

4. A counter affidavit has been filed in which it is stated that the petitioner namely Pramod Kumar S/o Sri Amar Singh has passed High School some where in between 1990-1992 from Sri Kisan Vidyapeeth Inter College Dalipur, Auraiya and passed Intermediate examination in the year 1998 from Rastriya Inter College Udarkot and again in the year 2005 has passed the High School examination after reducing the date of birth from Sant M.S.Madhyamik Vidyalaya, Phool Sahai Nagar (Barauni Kalan) District Auraiya which fact has been revealed during the verification.

5. I have heard learned counsel for the petitioner and learned Standing Counsel.

6. The petitioner has brought on record the High School certificate. According to him, he has passed High School examination in the year 2005 with Roll No. 1318375 and there the date of birth is recorded as 05.07.1986. The petitioner has entered into the service on the basis of High School certificate. It appears that some complaint has been made and on that basis an exparte inquiry was conducted by the Superintendent of Police and on the basis of aforesaid exparte inquiry report, petitioner's service has been terminated. It is not in dispute when the services of the petitioner was terminated, he was holding a post under the government and was government servant, as such the date of birth of the government servant is to be determined on the basis of the Uttar Pradesh Recruitment to Services Determination of Date of Birth Rules, 1974 (herein after referred to as 1974 Rule).

7. For better appreciation the relevant Rule 2 of the 1974 Rule as amended by first amendment in the year 1980 is reproduced below by splitting it into three parts.

(a) The date of birth of a Government servant as recorded in the certificate of his having passed the High School or equivalent examination at the time of his entry into the Government service.

(b) Where a Government servant has not passed any such examination as aforesaid or has passed such examination after joining the service, the date of birth or the age recorded in his service book at the time of his entry into the Government **service shall be deemed to be his correct date of birth or age, as the case may be, for all purposes in relation to his service, including eligibility for promotion, superannuation, premature retirement or retirement benefits and,**

(c) No application or representation shall be entertained for correction of such date or age in any circumstances whatsoever.

8. The aforesaid rules provide that for determination of the date of birth if an employee entered into the government service after passing high school examination then the date of birth as recorded in the High School certificate shall be deemed to be correct and if he has entered into the service before passing the High School examination then the date of birth recorded in the service book shall be deemed to be correct. The deeming provisions is a legal friction provided under the aforesaid rules, meaning thereby even if the same is not the actual one even then in view of legal friction that will be deemed to be correct.

9. Here it is not in dispute that the petitioner has entered into service after passing High School, therefore, for the purpose of determination of date of birth, the date of birth as recorded in the service book shall be treated to be correct for all purposes unless that is cancelled or annulled either by the Board or by the competent court.

10. Here in the present case on a complaint of private individual the High School certificate which is the sheet anchor of the petitioner's case has been ignored on the ground that the petitioner has earlier passed High School Examination and he has played fraud not only on the department but also on the Board.

11. Suffice it to say, where any action is taken on the basis of fraud then in that eventuality mere allegations of fraud is not sufficient for taking action against a person unless it is pleaded and proved. I am of the view that once the authorities have come to the conclusion that the petitioner has second time appeared in the High School Examination with a view to get reduce his date of birth and passed High School in the year 2005 then certainly it was a case of fraud but for that it was to be somewhere pleaded and proved either by way of lodging criminal proceeding or through disciplinary proceeding under the Rules governing the petitioner service. It is not the case of respondent that High School certificate issued to the petitioner has either been cancelled or annulled by the Board or any other competent court. Therefore, I am of the view that as long as High School certificate issued in the year 2005 is there, the respondents were not justified to cancel the selection of the petitioner on the assumption that he has passed High School in the year 1992, particularly in the circumstances where the petitioner has come with specific case as stated in paragraph 2 of the supplementary rejoinder affidavit that

there were two persons of the same name i.e. Promod Kumar of the same parentage one belonging to Sharma and another Yadav by caste. The petitioner belongs to Yadav by caste. In that eventuality also this was a case for inquiry and had the petitioner was ever offered an opportunity of hearing before passing the impugned order, this aspect of the matter ought to have been explained and considered before reaching the conclusion that the petitioner has played prayed fraud. I find that the impugned order has vice of principle of natural justice and it is well settled law that an order which involves civil consequences must be just, fair, reasonable, unarbitrary and in confirmity with the principles of natural justice. The main aim of the principle of natural justice is to secure justice or to put it negatively to prevent miscarriage of the justice.

The Apex Court in the case of **State of W.B. v. Anwar Ali Sarkar, 1952 SCR 284; AIR 1952 SC 75: 1952 Crl.L.J. 510; per majority**, a seven judge Bench held that the rule of procedure laid down by law comes as much within the purview of Article 14 of the Constitution.

In **State of Orissa v Dr. (Miss) Binapani Dei,** (1967) 2 SCR 625; AIR 1967 SC 1269'; (1967) 2 LLJ 266. It is observed that **even an administrative order which involves civil consequences must be made consistently with the rules of natural justice.** The person concerned must be informed of the case, the evidence in support thereof supplied and must be given a fair opportunity to meet the case before an adverse decision is taken. Since no such opportunity was given it was held that superannuation was in violation of principles of natural justice.

In **Mohinder Singh Gill v. Chief Election Commissioner,** (1978) 1 SCC 405; the Constitution Bench held that 'civil consequences' covers infraction of not merely property or personal right but of civil liberties, material deprivations and non- pecuniary damages. In its comprehensive connotation everything that affects a citizen in his civil life inflicts a civil consequence.

In **Maneka Gandhi Vs. Union of India(1978)1 SCC 248;** another Bench of seven judges held that the substantive and procedural laws and action taken under them will have to pass the test under article 14. The test of reasons and justice cannot be abstract. They cannot be divorced from the needs of the nation. The tests have to be pragmatic otherwise they would cease to be reasonable. **The procedure prescribed must be just, fair and reasonable even though there is no specific provision in a statute or rules made thereunder for showing cause against action proposed to be taken against an individual, which affects the right of that individual. The duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority whichhas the power to take punitive or damaging action**. Even executive authorities which take administrative action involving any deprivation of or restriction on inherent fundamental rights of citizens, must take care to see that justice is not only done but manifestly appears to be done. They have a duty to proceed in a way which is free from even the appearance of arbitrariness, unreasonableness or

unfairness. They have to act in a manner which is patently impartial and meets the requirement of natural justice.

The law must therefore be now taken to be well settled that procedure prescribed for depriving a person of livelihood must meet the challenge of Article 14 and such law would be liable to be tested on the anvil of Article 14 and the procedure prescribed by a statute or statutory rule or rules or orders affecting the civil right or result in civil consequences would have to answer the requirement of Article 14. So it must be right, just and fair and not arbitrary, fanciful or oppressive. There can be no distinction between a quasi-judicial function and an administrative function for the purpose of principles of natural justice. The aim of both administrative inquiry as well as the quasi judicial inquiry is to arrive at a just decision and if a rule or natural justice is calculated to secure justice or to put in negatively, to prevent miscarriage of justice, it is difficult to see why it should be applicable only to quasi- judicial inquiry and not to administrative inquiry. It must logically apply to both.

Therefore, fair play in action requires that the procedure adopted must be just, fair and reasonable. The manner of exercise of the power and its impact on the rights of the person affected would be in conformity with the principles of natural justice. Article 21 clubs life with liberty, dignity of person with means of livelihood without which the glorious content of dignity of person would be reduced to animal existence. When it is interpreted that the colour and content of procedure established by law must be in conformity with the minimum fairness and processual justice, it would relieve legislative callousness despising opportunity of being heard and fair opportunities of defence. Article 14 has a pervasive processual potency and versatile quality, equalitarian in its soul and allergic to discriminatory dictates. Equality is the antithesis of arbitrariness. It is thereby, conclusively held by this Court that the principles of natural justice are part of Article 14 and the procedure prescribed by law must be just, fair and reasonable.

12. The Apex Court in the case of ***D.K.Yadav Vs. J.M.A. Industries Ltd.*** Reported in ***1993,SCC 259*** has made the following observations:

The cardinal point that has to be borne in mind, in every case, is whether the person concerned should have a reasonable opportunity of presenting his case and the authority should act fairly, justly, reasonably and impartially. It is not so much to act judicially but is to act fairly, namely, the procedure adopted must be just, fair and reasonable in the particular circumstances of the case. In other words application of the principles of natural justice that no man should be condemned unheard intends to prevent the authority from acting arbitrarily effecting the rights of the concerned person.

It is fundamental rule of law that no decision must be taken which will affect the right of any person without first being informed of the case and giving him/her an opportunity of putting forward his/her case. An order involving civil consequences must be made consistently with the rules of natural justice.

13. Same view has been reiterated in the cases of **Canara Bank Vs. V.K. Awasthy,** 2005 (6) SCC 321; **Bidhannagar (Salt Lake) Welfare Assn. Vs. Central Valuation Board and others,** (2007) 6 SCC 668; and **Devdutt Vs. Union of India and others,** 2008 (3) ESC 433 (SC). The basic idea of observing the principles of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. The aforesaid decisions still hold field and have been followed in numerous cases, decided thereafter, which need not to be detailed here.

14. In view of the foregoing discussions the writ petition succeeds and is allowed The impugned order dated 25.09.2007 passed by Superintendent of Police Baghpat is hereby quashed. The respondents are directed to reinstate the petitioner forthwith in service. It is also provided that this order will not preclude the respondents to pass fresh order in accordance with law. It is also clarified that the petitioner shall be entitled only current salary and the payment of back wages will depend on the fate of the inquiry, if any. In case the department do not hold any inquiry the petitioner shall be entitled only 50% of the back wages. It is further provided the final decision in this regard be taken by the department expeditiously preferably within six months from the date of receipt of certified copy of the order of this Court.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.01.2012

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

MISC. BENCH No. - 8925 of 2011

Badka and others ...Petitioner
Versus
District Magistrate Bahraich and others ...Respondent

Counsel for the Petitioner:
Mohd. Nafees
Sri V.P.Nagaur

Counsel for the Respondents:
C.S.C.
Sri D.R.Misra

Constitution of India, Article 226-non supply of essential commodities to BPL card holder-only reason disclosed on certain irregularity committed by dealer-supply could not be made-shocking state of affairs-general Mandamus issued-the secretary to issue guide lines circular-all concern authorities at the time of passing suspension-cancellation order simultaneously alternative arrangement for un-interrupted distribution-and allotment order must be passed.

Held: Para 10

Let the Chief Secretary of the State of U.P. issue appropriate order or circular keeping in view the aforesaid observations to safeguard the interest of B.P.L. card holders and other persons belonging to below poverty line for continuance supply of essential commodities during the pendency of enquiry against the fair price shop dealer or in the event of stoppage of supply of essential commodities by the fair price shop dealers.

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

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

2. Inspite of this Court's order dated 09.09.2011, no counter affidavit has been filed by learned Standing Counsel. Keeping in view the material available on record, we proceed to decide the writ petition finally at the admission stage with the consent of parties.

3. The petitioners are villagers belonging to lower cadre of society, possessing B.P.L. Cards. Their grievance is that they are not being extended the benefit in term of Government Orders available to the B.P.L. card holders. According to Sri V.P. Nagaur, learned counsel for the petitioners, the fair price shop dealer located in the locality of the petitioners, is not providing the essential commodities to the petitioners' family. Hence, the family members of the petitioners are suffering with great hardship.

4. On the other hand, learned Standing Counsel, as per instruction received, submits that the enquiry was held and fair price shop dealer has been found to be indulged in corrupt practice and appropriate action is likely to be taken against him. What action, the Government took, against the fair price shop dealer, is not concerned of the petitioners, but they are concerned with few kg. of rice, wheat and sugar for which they are entitled on account of B.P.L. card.

5. In case, some enquiry is pending, then the District Magistrate/Sub-Divisional Magistrate concerned should have made alternative arrangement for supply of uninterrupted supply of the essential commodities to the petitioners and other similarly situated B.P.L. card holders.

6. Right to life is a fundamental right and it is bounden duty of the State Government to ensure that the persons of the lower cadre of the society are being provided necessary essential commodities in accordance to rules. The entitlement of the petitioners or other B.P.L. card holders could not be withheld by the district authorities merely because certain enquiry is pending against the fair price shop dealer. The District Magistrate concerned should have taken appropriate steps during the course of pendency of enquiry to ensure that the essential commodities are being supplied to the citizens or the B.P.L. card holders and other persons of the lower cadre of the society whose livelihood is based on supply of food grains and essential commodities through fair price shops licenced by the Government.

7. In the present case, it appears that after receipt of complaint, the Sub-Divisional Magistrate, Kaiserganj, District-Bahraich, has initiated an enquiry against the fair price shop dealer, but, has forgotten his responsibility to make some alternative arrangement for supply of the essential commodities to the B.P.L. card holders and others belonging to below the poverty line during the pendency of the enquiry.

8. In the aforesaid situation, it shall always be appropriate for the District Magistrates to ensure that the alternative arrangement must be made for continuous supply of essential

commodities in accordance to rules. Whenever, fair price shop is suspended or license is cancelled, simultaneous alternative arrangement should be made for continuance supply of essential commodities not only to B.P.L. card holders but, also to other citizens who are passing life below the poverty line.

9. Reply given by learned Standing Counsel on the basis of instructions received that the petitioners are not being supplied essential commodities because of action taken against the fair price shop dealer, is not satisfactory. After receipt of complaint, simultaneous decision should have been taken to make alternative arrangement. We may take note of the fact that almost every day the writ petitions are being filed in this Court by the B.P.L. card holders and other persons falling below the poverty line for supply of essential commodities on one or other grounds. The supply of essential commodities are being stopped because of action taken against the fair price shop dealer. It is unfortunate and disturbing that the persons who are passing life below the poverty line and are the foundational section of society in constituting Government through their valuable votes and anyhow are maintaining their family members have been compelled to approach this Court on account of inaction on the part of the authorities, to make a prayer for supply of food grains by the fair price shop dealer. The State Government must look into the matter and appropriate order or direction may be issued providing necessary safeguard to the persons belonging to below poverty line/B.P.L. card holders for uninterrupted supply of food grains and other essential commodities, during the pendency of the enquiry/suspension of license of the fair price shop dealers. Alternative arrangement must be made immediately and order should be passed on the same date when the license of the fair price shop is suspended, revoked or for any reason its supply is stopped.

10. Let the Chief Secretary of the State of U.P. issue appropriate order or circular keeping in view the aforesaid observations to safeguard the interest of B.P.L. card holders and other persons belonging to below poverty line for continuance supply of essential commodities during the pendency of enquiry against the fair price shop dealer or in the event of stoppage of supply of essential commodities by the fair price shop dealers.

11. The copy of the present order shall be sent to the State Government as well as to the Principal Secretary, Food and Civil Supply by Registry forthwith. Let the compliance report of this order be submitted by the State Government within one month. The case shall be listed immediately after one month for monitoring.. Learned Standing Counsel shall also communicate the order passed today immediately to the State Government.

12. The writ petition is allowed accordingly.

13. The certified copy of the present order shall also be sent by Registry to the District Magistrate, Bahraich, who shall take immediate action keeping in view the aforesaid observation for supply of essential commodities to the petitioners and other similarly situated persons.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.01.2012

BEFORE
THE HON'BLE VINEET SARAN,J.
THE HON'BLE ASHOK PAL SINGH,J.

Civil Misc. Writ Petition No. 32716 of 2011

Smt. Asha Sharma ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ramesh Chand Tiwari
Sri P.S. Baghel
Sri R.C. Dwivedi

Counsel for the Respondents:
C.S.C.

Constitution of India,Article 226- Allotment of Fair Price Shop license-on compassionate ground-rejected on ground-when cancellation order got finality in the life time of dealer-no question of compassionate allotments-misconceived-when cancellation order affecting 22 other persons including husband of petitioner restored automatically-was no occasion for challenging the same-admittedly till the date of death her husband run the shop-allotment on compassionate ground in view of G.O. 17.08.2002 can not be denied.

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

1. The brief facts of the case are that husband of the petitioner Late Bhupendra Sharma who was a fair price dealer was appointed on 20.9.1997 along with 22 other persons who were also aggrieved by the same order. Then by order dated 2.7.1998 the appointment of the petitioner as well as the other 22 persons had been cancelled. Challenging the same, one of such persons whose appointment had been cancelled filed a writ petition before Lucknow Bench of this Court being Writ Petition No.2105(MB) of 1998 in which an interim order was granted. Pursuant thereto the respondent authorities restored the fair price shop of the husband of the petitioner Late Bhupendra Sharma also. Husband of the petitioner continued to run the shop till his death on 1.10.2010. After the death of her husband, the petitioner filed an application on 14.10.2010 for appointment of the fair price shop dealer in place of her husband on compassionate ground, in terms of the Government Order dated 17.8.2002 which provides for such appointment to the dependents of the deceased fair price shop dealers on fulfillment of the conditions mentioned in the said Government Order. The said application of the petitioner had been rejected by order dated 28.4.2011 passed by the District Supply Officer, Agra. By a subsequent order dated 19.5.2011 passed by the District Supply Officer, Agra, the petitioner has been given liberty to file a fresh application for grant of fair price shop dealer on the basis of merits on the vacancy created on the death of husband of the petitioner. Challenging the aforesaid orders dated 28.4.2011 and 19.5.2011 passed by the District Supply Officer, this writ petition has been filed.

2. We have heard Sri R.C.Tiwari, learned counsel for the petitioner as well as learned standing counsel appearing for the petitioner. Pleadings between the parties have been exchanged and with consent of learned counsel for the parties this petition is being disposed of at the admission stage.

3. The ground on which the application for grant of fair price shop

dealership on compassionate ground has been rejected is that after cancellation of the fair price shop of husband of the petitioner on 2.7.1998 he had not filed any writ petition and as such even though the fair price shop of the husband of the petitioner was restored, he would not be entitled to the benefit of continuance of such dealership and consequently the benefit of the Government Order dated 17.8.2002 could not be available to the petitioner.

4. The respondents do not deny that the petitioner is a dependent of the deceased fair price shop dealer. Merely because after the suspension of the fair price shop of husband of the petitioner her husband had not filed the writ petition, the petitioner cannot be denied the benefit of the Government Order dated 17.8.2002 specially when the respondent authorities had themselves restored the dealership of the husband of the petitioner. The contention of the petitioner has force that her husband had no occasion to approach the High Court when his dealership had already been restored. It is admitted that the authorities themselves had withdrawn the order of suspension and restored the shop of husband of the petitioner, meaning thereby that the dealership of the husband of the petitioner continued till his death on 1.10.2010. The petitioner had thereafter on 14.10.2010 applied for the fair price dealership on compassionate ground in terms of the Government Order dated 17.8.2002 which should have been considered on merits instead of having been rejected on technical grounds.

5. In view of the aforesaid, we allow this writ petition and quash the orders dated 28.4.2010 and 19.5.2010 passed by the District Supply Officer. The respondents are directed to consider the application of the petitioner dated 14.10.2011 in terms of the Government Order dated 17.8.2002 and in the light of the observations made herein above, as expeditiously as possible, preferably within two months from the date of filing of a certified copy of this order before respondent no.3.

6. No order as to cost.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.01.2012

BEFORE
THE HON'BLE SURENDRA SINGH,J.

Criminal Misc. Application No. 33210 of 2011

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

Counsel for the Petitioner:
Sri Vikram D. Chauhan
Sri Anil Kumar Tiwari

Counsel for the Respondents:
Govt. Advocate

Code of Criminal Procedure-Section-210-trail of two different cases with different accused persons-against same incident-one by taking cognizance on investigation under Section 173-the other one by issuing process on compliant case-can not be consolidated but can be decided simultaneously on basis of evidence adduced separately-held-impugned summoning order-justified-needs no interference.

Held: Para 13

In the facts and circumstances of this particular case and the view expressed by the Hon'ble Apex Court in the cases

mentioned hereinabove, I am of the view that since complaint presents a different picture altogether and the prosecution case has set out in the complaint is at complete variance with that in the police challan, proper course to adopt is to direct that two cases should be tried together by the appropriate court but not consolidated i.e. the evidence should be recorded separately in both the cases one after the other except to the incident that the witnesses for the prosecution who are common to both the cases be examined in one case and their evidence be read as evidence in the other.

Case law discussed:

2011 (2) CCSC 817 SC; 1985 SCC (crl.) 93; 1981 SCC (Crl.) 438

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

1 The applicants by way of filing this application under section 482 Cr.P.C. have sought to quash the impugned order dated 06.07.2011 passed in case no. 1167/2010, Brij Lal vs. Lala Ram and others, under sections 302, 201 and 120B IPC passed by Chief Judicial Magistrate, Shahjahanpur.

2. Shorn of unnecessary details, the fact leading to the filing of this application, in brief, are:

3. On 18.02.2010 the opposite party no.2 Brij Lal lodged the first information report at police station Mirzapur, District Shahjahanpur under section 304A IPC in regard to the offence alleged to have committed by applicant no.1 Lala Ram on 17.02.2010 at 12.00 in the mid night when wedding ceremony was alleged to be going on the applicant no.1 is said to have taken out his revolver and fired which incidently hit the son of opposite party no.2 Megh Pal as a result of which son of opposite party no.2 died.

4. The opposite party no.2 on 11.03.2010 moved an application under section 156(3) Cr.P.C. for the issuance of direction to the police concerned to register the offence under sections 302, 201, 120B IPC before the Chief Judicial Magistrate, Shahjahanpur but the same was dismissed for want of prosecution by order dated 11.08.2010. In the meantime the prosecuting agency submitted the charge sheet dated 17.03.2010 under section 304 IPC and section 27 of Arms Act against accused Lala Ram applicant no.1 in respect of first information report lodged against him at crime no. 62/2010. The cognizance was also taken by the learned Magistrate vide order dated 24.04.2010. The opposite party no.2 Brij Pal thereafter instituted a complaint dated 07.04.2010 before the Chief Judicial Magistrate, Shahjahanpur in respect of the same incident dated 17.02.2010 against four persons on materially different, contradictory and mutually exclusive version what was alleged in the FIR.

5. The statement of the complainant Brij Pal, opposite party no.2 as well as Dhermendra and one Satendra were recorded under sections 200, 202 Cr.P.C. respectively by the court below in the above mentioned complaint case. In the meantime, the applicant no.1 Lala Ram was released on bail by this Hon'ble Court by order dated 26.05.2010 under section 304 IPC. The Chief Judicial Magistrate having considered the allegation contained in the complaint as well as statements of the witnesses recorded under sections 200 and 202 Cr.P.C. took cognizance and issued process against the applicants under section 302, 201, 120B IPC. The order dated 06.07.2011 taking of cognizance and summoning the applicants is the subject matter of challenge before

this Court in the present application under section 482 Cr.P.C.

6. It is submitted by the learned counsel for the applicants that learned Magistrate while passing the impugned order dated 06.07.2011 has completely failed to apply his judicial mind to the materials before him and issued process in an arbitrary and routine manner. It was further submitted that under the law the duty imposed on the magistrate concerned to record his opinion on the basis of the facts and material on record showing the sufficiency of grounds for proceeding against the applicants.

7. It is submitted that section 210(2) Cr.P.C. makes it clear that if the magistrate takes cognizance of an offence on a report filed by the investigating officer under section 173 Cr.P.C. against any person, who is also an accused in a complaint case, the magistrate shall inquire into or try the two cases together, as if both the case had been instituted on a police report. It was further alleged that sub-section 3 of section 210 Cr.P.C. was not attracted to the facts of this case since it deals with a procedure where, if the police report did not relate to any accused in the complaint case or the magistrate did not take cognizance of any offence on the police report he would proceed with the inquiry or trial, which might have been stayed by him under sub-section (1) in accordance with the provisions of the code. According to the counsel for the applicants both the cases have to be clubbed and consolidated and the evidence recorded in one be read as evidence in other case.

8. Per contra, learned AGA has opposed this application and submitted that the fact situation does not attract the provisions contemplated in section 210 Cr.P.C. Since the accused are different in the two separate proceedings and the situation has, in fact, arisen where prejudice in all possibility is likely to be caused in a single trial. Hence this is a case where two trials should be held simultaneously but not as single trial. The facts of the case also warrant that the trials should be conducted by the same presiding officer in order to avoid a conflict of decisions.

9. Taking note of the submissions made by counsel for the parties and having perused the material placed on record, I am of the view that since the version in the police challan case and the complaint case were in conflict and the number of accused and prosecution witnesses were also different the trial of the two cases should not be held together. Both the cases cannot be clubbed and consolidated, particularly when the prosecution version in the police challan case and the complaint case are materially different and the accused persons are also not the same.

10. Section 210 Cr.P.C. provides that procedure to be followed when there is a complaint case and police investigation in respect of the same offence. Sub-section (1) of section 210 Cr.P.C. provides that when in a case instituted otherwise than on a police report namely a complaint case the magistrate is informed during the course of inquiry or trial that a investigation by the police is in progress in relation to the offence which is the subject matter of inquiry or trial held by him the magistrate is required to stay the proceeding of such inquiry or trial and to call for report on

the matter from the police officer conducting the investigation. Sub-section (2) provides that if a report is made by the investigating officer under section 173 Cr.P.C. and on such report cognizance of any offence is taken by the magistrate against any person, who is an accused in a complaint case the magistrate shall inquire into or try the two cases together as if both the cases had been instituted on a police report. Sub-section (3) further provides that if police report does not relate to any accused in the complaint case or if the magistrate does not take cognizance of any offence on a police report he shall proceed with the inquiry or trial which was stayed by him in accordance with the provisions of the code. Thus in view of section 210 Cr.P.C. both the cases arising out of the police report and private complaint can be tried together provide the fact and cases are not materially different, by a magistrate when the cognizance of an offence in respect of an accused in a complaint case as well as in the police investigation such a person is already made an accused then only the magistrate may inquire into or try together the complaint case and the case arising out of the police report as both the cases were instituted on a police report, but in the present case the situation is different as the prosecution version in the police challan case and the complaint case were materially different and the number of accused and prosecution witnesses were also different the trial of the two cases cannot be consolidated and held together. Therefore the version in the complaint case and the police report are totally since materially different though arising out of the same incident cannot be consolidated or clubbed together and the provisions of sub-section (2) of section 210 Cr.P.C. would not come into play.

11. In my view, this is a case where the two trials should be held simultaneously but not as a single trial by the appropriate court. This view has been highlighted in the recent pronouncement of the Hon'ble Apex Court in the case of Pal @ Palla vs. State of U.P., 2011 (2) CCSC 817 SC and in the case of Harjinder Singh vs. State of Punjab and others, 1985 SCC (crl.) 93, it was observed by the Hon'ble Apex Court in the case mentioned hereinabove that clubbing and consolidating the cases one on a police challan and the other on a complaint if the prosecution version in the two cases are materially different, contradictory and mutually exclusive, then both the cases should not be consolidated but should be tried together with the evidence in the two cases being recorded separately so that both the cases could be disposed of simultaneously. It was further observed that in such an unusual situation and facts of the case the trial court is required to hear the two cases together though separately and take evidence separately except in respect of all the witnesses who would not affect either by the provision of Article 20(2) of the Constitution or section 300 Cr.P.C.

12. The Hon'ble Apex Court in the case of Kewal Krishan, 1981 SCC(Crl.) 438 had dealt with a similar situation as the present, where two cases exclusively triable by the court of sessions one instituted on a police report under section 173 Cr.P.C. and the other on a criminal complaint arose out of the same transaction. The Hon'ble Apex Court observed that to obviate the risk of two courts coming to conflicting findings it was desirable that the two cases should be tried separately but by the same court.

13. In the facts and circumstances of this particular case and the view expressed by the Hon'ble Apex Court in the cases mentioned hereinabove, I am of the view that since complaint presents a different picture altogether and the prosecution case has set out in the complaint is at complete variance with that in the police challan, proper course to adopt is to direct that two cases should be tried together by the appropriate court but not consolidated i.e. the evidence should be recorded separately in both the cases one after the other except to the incident that the witnesses for the prosecution who are common to both the cases be examined in one case and their evidence be read as evidence in the other.

14. In view of the matter, the impugned order dated 06.07.2011 passed by the learned Magistrate issuing process and summoning the applicants under sections 302, 201, 120B IPC is well in conformity in law and does not suffer from any material illegality or irregularity and therefore does not warrant any interference in this application.

15. This application is finally disposed of with the observation mentioned hereinabove.

16. Let a copy of this order be send to the Chief Judicial Magistrate, Shahjahanpur for its communication and necessary compliance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.01.2012

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

Civil Misc. Writ Petition No. 33410 of 2002

Smt. Geeta Varshney ...Petitioner
Versus
Allabahad Bank Thru' M.D. H.O. Calcutta and others ...Respondents

Counsel for he Petitioner:
Sri G.S. Srivastava
Sri Sharad Kumar
Sri V.P. Varshney

Counsel for the Respondents:
Sri Himanshu Tiwari
C.S.C.

Allahabad Bank Employees (Pension) Regulation 1993-Regulation-3-Family Pension Scheme introduced w.e.f.06.09.1994-husband of petitioner died on 09.07.1991in accident-after 20 years continuous services-petitioner applied for pension on 27.11.1997-rejected on ground of delay-and not applied in prescribed format within 120 days-admittedly such format or scheme never supplied by Bank-held-entitled for family pension in view of Smt. Shushila Rai case.

Held: Para 17

In the present case also the facts are similar to the above case and even on a better footing. If the argument of the Bank is also accepted that no application was moved by the petitioner as alleged in the writ petition on 16.11.1995 or in December, 1995, moving of an application along with form on 27.11.1997 is not denied. In the case of Smt. Sushila Rai (supra) the application was moved on 16.06.1998 after lapse of

almost three years while in the present case it was moved on 27.11.1997 and the only ground taken by the respondents also is of delay in moving the aforesaid application and also of not complying the conditions given therein. The petitioner has also stated that she was not supplied with the copy of the said scheme inspite of the clear instructions of the Bank. It is also not the case of the Bank that the petitioner was supplied with the said scheme or the said scheme was sent at her permanent address. The Bank has also not taken any other ground to reject the claim of the petitioner. Therefore, the case of the petitioner is fully covered by the decision in the case of Smt. Sushila Rai (supra).

Case law discussed:

(2007) 3 UPLBEC (Sum) 110; (2003) 1 UPLBEC 247; (2003) 2 UPLBEC 1474

(Delivered by Hon'ble Dinesh Gupta, J)

1. The instant writ petition has been filed for a writ of certiorari quashing the order dated 12.05.2002 passed by respondent no. 4 as also a writ of mandamus commanding the respondents to decide, fix and pay the monthly family pension and also pay the arrears of pension along with 18% interest from 18.7.1991.

2. The facts in brief are that the husband of the petitioner late Sharad Chandra Varshney was appointed as clerk in the Allahabad Bank (hereinafter referred to as 'Bank') on a permanent post on 21.05.1971 and later on he was promoted as Branch Manager and worked on the said post till 19.07.1991when unfortunately he met with an accident and died; that after the death of the husband of the petitioner the Bank appointed the petitioner on compassionate ground on the post of Clerk-cum-Cashier and she is still in the service of the Bank; that prior to 1993, there was no provision for pension to the employees of the Bank and after great pursuation the Allahabad Bank Pension Scheme was announced under the settlement with the employees union and the Bank to provide benefit of pension to the employees; that the said scheme was named as 'Allahabad Bank Employees (Pension) Regulation, 1993' (hereinafter referred to as 'Pension Regulation') which was circulated amongst the branch offices by instruction circular no.3904 dated 06.09.1994 inviting option on the prescribed form; that the husband of the petitioner served continuously for more than 20 years and as such under the provisions of the Pension Regulation, the petitioner being widow of the deceased employee, is entitled for the family pension; that Regulation 3 provided eligibility criteria for the employees willing to exercise the option; that the aforesaid scheme was not applicable to petitioner's husband and the petitioner was not eligible for getting family pension as her husband had admittedly expired before the stipulated date of 01.11.1993; that in the year 1994-95 a new pension scheme was introduced which is applicable to the petitioner. In the new pension scheme known as 'Allahabad Bank (Employees) Pension Regulation, 1995 ' (hereinafter referred to as '1995 Pension Regulations') a comprehensive scheme was formulated widening the scope for exercising option of pension by the employees concerned or by his widow in the event of the death of the employee. The petitioner quoted the provisions of Regulation 7 of 1995 Pension Regulations which are reproduced below:-

" 7. Where in the service of the Bank during any time on or after the Ist day of January 1986 and had died while in service on or before the 31st day of October, 1993 or had retired on or before

the 31st day of October 1993 but died before the notified date in which case their family shall be entitled to the pension or the family pension as the case may be under these regulations, if the family of the deceased:

(a) exercises an option in writing within one hundred twenty days from the notified date to become member of the fund; and

(b) refunds within sixty days of the expiry of the said period of one hundred and twenty days specified in clause 'a' above the entire amount of the Bank's contribution to the provident fund and interest accrued thereon together with a further simple interest at the rate of six per cent per annum from the date of settlement of the provident fund account till the date of refund of the aforesaid amount to the Bank.

Chapter V Regulation No.34

34.Payment of pension or family pension in respect of employees who retired or died between 1.1.1986 to 31.10.1993:-

'1' - Employees who have retired from the service of the Bank between the Ist day of January, 1986 and the 31st day of October, 1993 shall be eligible for pension with effect from the Ist day of November, 1993.

'2'- The family of a deceased employee governed by the provisions contained in sub regulation 7 of Regulation 3 shall be eligible for family pension with effect from the Ist day of November, 1993."

3. The petitioner further submitted that the husband of the petitioner had died on 19.07.1991 i.e. between 1.1.1986 and 31.10.1993 , as such the petitioner is entitled for family pension w.e.f. 1.11.1993 under the provisions of Pension Regulation, 1995; that the petitioner after the death of her husband submitted an application and the form for pension duly filled on 28.11.1994 and also made several representations but she was not given the family pension; that when the new Pension Regulation, 1995 was enforced the petitioner, apart from her earlier option, again submitted her option being widow of the deceased employee but the Bank did not consider her case; that the Bank on third occasion on 27.11.1997 got filled another form of the family pension with the assurance that she will get the family pension after completion of all the formalities; that the petitioner made several representations and reminders, but the Bank authorities deliberately did not settle the family pension of the petitioner and the petitioner was left with no option but to file Civil Misc. Writ Petition No.14881 of 2001 before this court and the said writ petition was finally disposed of vide order dated 20.04.2001 directing the respondents to decide the representation of the petitioner; that when the respondents inspite of the order of the court, did not decide her representation she moved a Contempt Petition against the respondent and when the notices were issued and served on the respondents in the contempt petition, without applying their mind and without giving an opportunity of hearing, the respondents illegally decided the representation of the petitioner rejecting the same vide order dated 12.05.2002.

4. The respondents filed counter affidavit and stated that the Bank had taken

sympathetic view after death of the petitioner's husband and she was appointed as Clerk-cum-Cashier on compassionate ground and further her dues of provident fund and gratuity were also released; that under the settlement between the Employees' Union and the Bank and to provide benefit of pension to the intending employees who were agreeable to exercise their option in place of contributory fund system a new Pension Regulation was formulated and the same was circulated amongst the branch offices of the Bank inviting option on the prescribed format for the different categories of intending employees; that it is vehemently denied that the respondents had not given said circular to the petitioner or other employees.

5. The submission made by the respondents in paragraph 7 of the counter affidavit are quoted below:-

" 7(a) That the said Pension Regulation, 1993 vide its Regulation 3 provided eligibility criteria for the employees concerned willing to exercise the option and stipulated that the Regulation shall apply to-

(I) Employees who joined service of the Bank on or after 1st. November, 1993.;

(II) Employees in service of the bank as on 31st October, 1993 and who exercise an option in writing in response to the bank's notice to this effect to become members of the pension scheme and to cease to be members of the Contributory Provident Fund scheme with effect from 1st November, 1993 and irrevocably authorize the bank or the trustee of the contributory provident fund to transfer the entire contribution of the bank along with entire interest accrued thereon to the credit of pension fund to be created for this purpose.

(III) By way of special dispensation to the employee who retired on or after 1st January 1986 but before 1st November, 1993 provided that such employees apply for it and on the format prescribed by the bank and refund by the date decided by the bank, the bank's entire contribution to the provident fund including interest received with further simple interest at the rate of 6 per cent per annum from the date of withdrawal of the provident fund amount till the date of refund.

7(b). That in view of the eligibility criteria stipulated in Regulation 1993 and as stated herein above in paragraph 7 (a), the family pension format on which the petitioner purportedly made a representation to the respondent bank was irrelevant to the context since petitioner was not eligible for getting family pension in terms of the aforesaid eligibility criteria inasmuch as the husband of the petitioner admittedly expired before the stipulated date of 1st November, 1993 as well as he was not retired on or after 1st January, 1986 so in no way he could be considered to be eligible for pension under any of the eligibility criteria of the said scheme, at the same time the scope of the "special dispensation" to the employee is also not applicable to his case as he was not retired on or after 1986, rather he died in the year 1991."

6. It is further contended by the respondents that in the year 1994-95 a comprehensive pension regulation applicable to all the nationalized banks was formulated widening the scope for exercising option for pension by the

employees concerned or by his widow in the event of death of the employees; that amongst other Regulation 3(7) of the Pension Regulations is relevant for the purposes of the present controversy and the petitioner's case is covered as it provided that it shall apply to all employees who were in the service of the bank on or before the 31st day of October, 1993. Sub paragraph (a) of Regulation 3(7) provided for exercising an option in writing within one hundred and twenty days from the notified date to become a member of the Fund and sub paragraph (b) thereof provided for refund within sixty days on the expiry of the said period of one hundred and twenty days the entire amount of the Bank's contribution to the Provident Fund and interest accrued thereon together with a further simple interest at the rate of six per cent per annum from the date of settlement of the Provident Fund account till the date of refund of the aforesaid amount to the Bank.

7. The contention of the respondents as made in sub paragraphs 4, 5, 6 and 7 of paragraph 8 of the counter affidavit are quoted below:-

"4. That thus option has to be exercised within 120 days from the notified date i.e. 29.09.1995 to become a member of the fund viz. 27.01.1996 and further refund of the entire amount of the Bank's contribution to the Provident Fund was to be made within sixty days of the expiry of the said period of one hundred twenty days with interest accrued thereon together with a further simple interest at the rate of six per cent per annum from the date of settlement of the Provident Fund account till the date of refund of the aforesaid amount to the Bank.

5. That the said mandatory condition of the Regulation 3(7) was not complied with by the petitioner, inasmuch as neither the option was made before 27.1.1996 nor the entire amount of the Bank's contribution to the Provident Fund was refunded by her.

6. That it is also relevant to mention here that "Allahabad Bank (Employees) Pension Regulations 1995" was framed in the exercise of the power conferred by clause (f) of sub section (2) of Section 19 of the Banking Companies Act No.5 of 1970. It has thus statutory force and its effects could not be diluted nor amendment could be made to it for bringing those persons who have not complied with the mandatory provisions given therein and not given their option within the time provided in terms of Regulations.

7. That the aforesaid "Allahabad Bank (Employees) Pension Regulations, 1995" was duly circularized by the respondent bank vide its instruction circular no.4318 dated 16.11.1995 amongst all branches and offices; the petitioner at the relevant point of time was posted at Maharajganj branch, Aligarh of the respondent bank and despite having full knowledge of the said circular the petitioner did not submit her option being the widow of late Sharad Chandra Varshney for the family pension within the time provided in terms of Regulation i.e. 27.1.1996."

8. The respondents further contended that from the aforesaid propositions, it is very much clear that the petitioner is not entitled for family pension under Regulation 1995 because she had not complied with the mandatory provisions of the said Regulations; that she submitted

her option in the last week of December, 1995 and that the petitioner has set up a new case by making an allegation that she had submitted her option for family pension in the last week of December, 1995 which is patently false.

9. The petitioner filed rejoinder affidavit denying the allegations made in the counter affidavit and reiterating her stand taken in the writ petition.

10. We have heard learned counsel for the parties.

11. Learned counsel for the petitioner submits that the respondents while considering the case of the petitioner rejecting her claim on the ground that Regulations, 1993 are not applicable to the petitioner and she is not eligible for the pension. It is not the case of the petitioner that her case is covered under Pension Scheme, 1993 and on the contrary her case is fully covered by 1995 Pension Regulations; that while considering the applicability of Regulations 1995 the respondents recorded a finding that the petitioner did not submit application for family pension by the stipulated cut off date i.e. 27.1.1996 and as such the request for family pension vide application dated 27.11.1997 could not be considered, which is against the law and the facts; that while deciding the representation the respondents did not consider the earlier application dated 16.11.1995 submitted by the petitioner deliberately ignoring the fact that the said application was submitted within the stipulated time and as such the order passed by the respondents rejecting the representation of the petitioner is illegal and without jurisdiction; that the respondents had not disputed the fact that the petitioner would have been entitled to the benefit for grant of family pension under 1995 Pension Regulations had her application been filed within the stipulated time and the only ground for rejecting her representation is that the application was moved only after expire of 120 days from the date commencement of the pension scheme; that the respondents have failed to consider that the petitioner is the widow of a deceased employee who expired on duty in an accident and she had also earlier given an application and filled the proforma on 16.11.1995; that the circular issued by the Bank on 16.11.1995 wherein it has been provided that the concerned Branch Manager of the Bank would be obliged to send a copy of the Regulations, 1995 to each retired employee or family member of the deceased employee was never sent to the petitioner at her address and the petitioner has been deprived from opting for family pension though she had given undertaking for refund of GPF contribution with interest to the Bank and that in cases of other employees the Bank had informed them the calculated amount of GPF contribution, but the petitioner was not given any such information by the Bank.

12. Learned counsel for the petitioner has relied on ***Smt. Sushila Rai vs. Regional Manager, Allahabad Bank & others (2007) 3 UPLBEC (Sum) 110, S.K.Mastan Bee Vs. General Manager, South Central Railway & another (2003) 1 UPLBEC 247 and Triloki Nath Yadav Vs. Allahabad Bank and others (2003) 2 UPLBEC 1474.***

13. Learned counsel for the respondents submits that the petitioner had not applied on the prescribed format within the stipulated period of 120 days under the 1995 Pension Regulations and the

allegation of filing an application dated 16,11,1995 in December, 1995 is incorrect and as such the Bank has rightly rejected her representation; that the petitioner is in service of the Bank as a Cashier-cum-Clerk and she was fully aware of the new pension scheme and she failed to submit the application in the prescribed format within the stipulated time and as such she is not entitled to family pension and that the petitioner has also failed to undertake to refund the GPF contribution to the Bank.

14. We are unable to accept the contention raised by the learned counsel for the respondents and we find force in the contention raised by learned counsel for the petitioner.

15. It is not disputed that the petitioner's case is fully covered under the new pension scheme which was introduced in the year 1995 (1995 Pension Regulations). The only ground of rejection of claim of the petitioner was delay in filing the application in the prescribed format. The respondents have vehemently denied the receipt of the application of the petitioner in December, 1995. However, there is no denial that an application was got filled by the Bank on 27.11.1997. The statement made by the petitioner in paragraph 11 of the writ petition was not denied by the Bank and on the contrary it was admitted to the extent that the application was given, however the bank had not given any assurance that she will get the family pension.

16. The decision in the case **of Smt. Sushila Rai (supra)** has considered the effect of delay in moving the application by an employee. The facts of this case are very much similar to the facts of the present case. In that case the husband of the petitioner Smt. Sushila Rai died in harness on 26.01.1994. The Bank came out with a scheme (1995 Pension Regulations) which came into force on 29.09.1995, beside other things, it provided for grant of family pension one of the conditions whereof was that only such employees would be entitled to the benefit of the 1995 Regulations who had been in service of the Bank on or before 01.01.1986 and the last date for opting such scheme was 120 days from the date of enforcement of the 1995 Pension Regulations. The widow of the employee applied under the said Regulations on 16.06.1998 for grant of family pension and the respondent bank refused to grant the said benefit on the ground that the application was not filled within the stipulated period of 120 days. After hearing counsel for both the parties the court observed as under:-

"Having heard learned counsel for the parties and on perusal of the record and considering the facts and circumstances of this case, in my view, the petitioner would be entitled to the grant of family pension under the Regulations of 1995 on the basis of her application filed on 16.6.1998. The submission of Sri Tewari that individual intimation was not required to be given, would not be acceptable. There was no direction by the Indian Banks' Association vide its letter dated 21.11.1995 for not intimating the individual retired employees or family members of the deceased employees. In the said letter, it had only been stated that the individual Banks need not notify the same through press. As such the Bank was obliged to carry out the requirement of intimation by the Bank in terms of the circular dated 16.11.1995.

In the case of Jai Singh B. Chauhan (supra), the Supreme Court was dealing with the case of a serving employee who did not opt for the pension scheme within the stipulated period of 120 days and had thereafter made representation only on 4.5.1998 with a request to be covered under the pension scheme and that too not on the requisite form. When the same was rejected by the Bank, the employee filed a writ petition, which was dismissed and ultimately the Apex Court also dismissed the claim of the employee on the ground that the publication of the scheme in the official gazette would be construed as sufficient notice to the employee of the Bank. The case of a serving employee opting for pension scheme in the year 1998, when the scheme had been issued in 1995 which provided for giving of option within 120 days, would be distinct from that of a widow of a deceased employee. The circular dated 16.11.1995, as had been issued by the respondent-Bank, was neither placed before the Apex Court nor was it applicable, as the claimant there was a serving employee. By the circular dated 16.11.1995, the Bank itself required the issuance of notice to each retired employee or family members of the deceased employee, which was admittedly not sent to the petitioner in this particular case. Such requirement must have been found necessary by the respondent-Bank as a retired employee or family members of the deceased employees could not be having information of the scheme promulgated by the Bank. On the contrary, as publicity of the scheme was given in the bank offices, there was no such requirement of individual intimation to the serving employees, as they would have, in any case, come to know of the scheme of the bank in the normal course. In such view of the matter, the ratio of the decision in Jai Singh B. Chauhan's case would not be applicable to the facts of the present case.

In the case of S.K. Mastan Bee (supra), the Apex Court was dealing with the case of grant of family pension to the widow of a retired employee. In the said case also, the claim of the widow was rejected by the employer on the ground of delay. In such facts, the Apex Court directed payment of the entire arrears of pension within three months and allowed the writ petition with costs of Rs. 10,000/-. While allowing the writ petition, the Apex Court made the following observations:-

"6. We notice that the appellant's husband was working as a Gangman who died while in service. It is on record that the appellant is an illiterate who at that time did not know of her legal right and had no access to any information as to her right to family pension and to enforce her such right. On the death of the husband of the appellant, it was obligatory for her husband's employee, viz., railways, in this case to have computed the family pension payable to the appellant and offered the same to her without her having to make a claim or without driving her to a litigation. The very denial of her right to family pension as held by the learned Single Judge as well as the Division Bench is an erroneous decision on the part of the railways and in fact amounting to a violation of the guarantee assured to the appellant under Article 21 of the Constitution. The factum of the appellant's lack of resource to approach by the legal forum timely is not disputed by the railways. Question then arises on facts and circumstances of this case, the Appellate Bench was justified in

restricting the past arrears of pension to a period much subsequent to the death of appellant's husband on which date she had legally become entitled to the grant of pension? In this case as noticed by us herein above, the learned Single Judge had rejected the contention of delay put forth by the railways and taking note of the appellant's right to pension and the denial of the same by the railways illegally considered it appropriate to grant the pension with retrospective effect from the date on which it became due to her. The Division Bench also while agreeing with the learned Single Judge observed that the delay in approaching the railways by the appellant for the grant of family pension was not fatal inspite of the same it restricted the payment of family pension from a date on which the appellant issued a local notice to the railways i.e. on 1.4.1992. We think on the facts of this case inasmuch as it was an obligation of the railways to have computed the family pension and offered the same to the widow of its employee as soon as it became due to her and also in view of the fact her husband was only a Gangman in the railways who might not have left behind sufficient resources for the appellant to agitate her rights and also in view of the fact that the appellant is an illiterate. The learned Single Judge, in our opinion, was justified in granting the relief to the appellant from the date from which it became due to her, that is the date of the death of her husband.

Consequently, we are of the considered opinion that the Division Bench fell in error in restricting that period to a date subsequent to 1.4.1992." (emphasis supplied)

In the present case also, the entitlement of the petitioner for grant of family pension is not denied by the respondent-Bank. The sole reason for refusing such benefit to the petitioner is because of delay on behalf of the petitioner in making such application opting for the pension scheme. This Court is of the clear view that in terms of their own circular dated 16.11.1995, it was obligatory on the part of the respondent-Bank to inform the retired employees or family members of the deceased employees, of the pension scheme at their last known permanent address. In the absence of the respondent-Bank having fulfilled such obligation, in my view, the respondent-Bank cannot refuse to grant the benefit of the pension scheme to the petitioner merely on the ground of delay. In equity as well as under law, the petitioner would be entitled to the benefit of the family pension scheme under the Regulations of 1995.

For the foregoing reasons, this writ petition is allowed and it is directed that the respondents shall give the petitioner the benefit of the family pension under the Allahabad Bank (Employees') Pension Regulations, 1995 on the basis of the application filed by the petitioner on 16.6.1998. The arrears of pension shall be computed by the respondent-Bank within three months from the date of filing of a certified copy of this order before the respondent no. 1, the Regional Manager, Allahabad Bank, Regional Office, Mohaddipur, Gorakhpur and the entire arrears shall be paid to the petitioner within one month thereafter. The petitioner shall also be entitled to payment of future family pension regularly month by month. In case of default in making the payments within the

aforesaid time schedule, the petitioner would be entitled to 9% interest from the date she is found entitled to such payment, till actual payment. It is made clear that if the payment is made within the stipulated time, the respondent-Bank shall not be liable to pay any interest. No order as to costs."

17. In the present case also the facts are similar to the above case and even on a better footing. If the argument of the Bank is also accepted that no application was moved by the petitioner as alleged in the writ petition on 16.11.1995 or in December, 1995, moving of an application along with form on 27.11.1997 is not denied. In the case of Smt. Sushila Rai (supra) the application was moved on 16.06.1998 after lapse of almost three years while in the present case it was moved on 27.11.1997 and the only ground taken by the respondents also is of delay in moving the aforesaid application and also of not complying the conditions given therein. The petitioner has also stated that she was not supplied with the copy of the said scheme inspite of the clear instructions of the Bank. It is also not the case of the Bank that the petitioner was supplied with the said scheme or the said scheme was sent at her permanent address. The Bank has also not taken any other ground to reject the claim of the petitioner. Therefore, the case of the petitioner is fully covered by the decision in the case of **Smt. Sushila Rai** (supra).

18. In view of the above discussions, the writ petition succeeds and is allowed. The order dated 12.05.2002 passed by respondent no.4 (Annexure-7 to the writ petition) is quashed. It is directed that the respondent shall give benefit of family pension to the petitioner under the Allahabad Bank (Employees) Pension Regulation, 1995 on the basis the application filed by her on 27.11.1997.

19. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.01.2012

BEFORE
THE HON'BLE RAN VIJAI SINGH,J.

Civil Misc. Writ Petition No. 37206 of 2000

Prem Singh ...Petitioner
Versus
XIIth Adj,Agra & others ...Respondents

Counsel for the Petitioner:
Sri Ranjit Saxena
Sri Anupam Kulshreshtha,
Sri H.N.Singh
Sri R.S.Kushwaha
Sri R.S.Kulshreshtha
Sri S.K.Kulshreshth
Smt. Anita Tripathi
Sri Sharat Chandra Upadhyay

Counsel for the Respondents:
Sri Pradeep kumar
Sri R. Kumar
C.S.C.

Code of Civil Procedure-Order 41 Rule-19-Application to re-admit and condone delay in filing such application-rejected on ground after transfer of appeal the counsel put appearance-can not be allowed to say absence knowledge-held-when counsel made endorsement that his client not responding -court below not justified in drawing inference of knowledge-word-sufficient cause-to be applied meaningful manner to sub serves the end of justice and not to close the door of justice-direction issued to decide

the appeal itself on its merit within time bound period.

Held: Para 20

On the cost of repetition, it may be observed that once the court has issued notice to the appellant, then without there being any prima facie satisfaction with regard to service of notice, the court should not have proceeded on the assumption that the counsel is appearing when the counsel himself endorsed that his client is not responding. Coupled with the fact that the counsel who was appearing in suit has subsequently been changed while filing appeal in the High Court, taking that into consideration, I find that there was sufficient explanation to condone the delay in filing the restoration application. Otherwise also, if the court below was of the opinion that there was no sufficient explanation to condone the delay and to restore the appeal to its original number, in that eventuality, the court below ought to have examined the matter with a view to see the purpose of establishment of courts, which certainly are established to impart the substantial justice to parties. While considering the matter of condonation of delay, the merit of the case was also to be taken into consideration.

Case law discussed:

A.I.R. 1987 SC 1353; JT 2000 (5) 389; 1978 ARC 496; First Appeal From Order No. 2023 of 2010 (Ram Garib and another Vs Ram Prasad Mishra), decided on 11.02.2011; 2011 (8) ADJ 511

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

1. This writ petition has been filed for issuing writ of certiorari quashing the order dated 20.07.2000, passed by XIIth Additional District Judge, Agra in Misc. Case No. 82 of 1990 (**Prem Singh** Vs. **Roshan Singh**), by which the petitioner's application, filed under Section 5 of Limitation Act, for condoning the delay, in filing application under Order XLI, Rule 19 of the Code of Civil Procedure (hereinafter referred to as CPC), has been rejected.

2. The facts giving rise to this case are that it appears that an agreement was entered in between the petitioner and the respondent No. 3 for execution of sale deed of 1/3rd share in disputed plot No. 208, measuring about 1 bigha 4 biswa, Khasra No. 209, area 6 bigha 1 biswa 10 biswansi, total 7 bigha 7 biswa 10 biswansi for consideration of Rs.35,000.00, out of which Rs.10,000.00 was alleged to have been paid as an earnest money. However, the sale deed was not executed, in the time, stipulated in the agreement, therefore, the defendant-respondent No. 3 had filed Original Suit No. 328 of 1988 for Specific Performance of Contract to execute the sale deed. The suit was decreed on 20.07.1990.

3. Aggrieved by the aforesaid judgment, the defendant-petitioner filed appeal before this Court. Thereafter, because of change of pecuniary jurisdiction, the aforesaid appeal was transferred before the court below. After transfer on 30.08.1996, a notice was issued by the court below to the appellant, fixing 31.10.1996. On 31.10.1996, it appears, another date was fixed. The appellant did not appear and the case was adjourned for 15.02.1998. Thereafter, it was again adjourned for 29.03.1998. On 29.03.1998, the counsel, who was appearing in the suit, was informed by the court concerned to appear in the court. Pursuant thereto, he appeared before the court below and made an endorsement on the order-sheet

that appellant is not responding, hence notice be issued to the appellant.

4. The court below, taking the service of notice on the appellant sufficient through counsel, on 08.07.1997 dismissed the appeal for want of prosecution.

5. It appears that an application was filed by the appellant thereafter, under Order XLI, Rule 19 CPC, to re-admit the appeal along with an application for condonation of delay. In the application it was stated that, at no point of time, the petitioner/appellant was informed about the transfer of the appeal before the court below and the date fixed in the matter, and he came to know about the same only on 09.04.1999 when he had taken a copy of khatauni from the Lekhpal. It is also stated that since 09.04.1999 to 14.04.1999 the appellant was busy in filing objection in execution case of the suit property, therefore could not file the aforesaid application.

6. The lower appellate court, taking note of the fact that the service of notice was sufficient as the counsel had already appeared, rejected the application for condonation of delay. The learned counsel for the petitioner while assailing this order has contended that once the notice was issued to the appellant, a specific report ought to have been there that the notice issued by the court was served on the appellant. He has also drawn attention of the Court towards the provisions contained in Order III, Rule 4 (3) (b) CPC. In the submission of the learned counsel for the petitioner, the service of notice upon the counsel who was appearing before the court below in the suit proceeding was not sufficient, as the appeal was filed before the High Court through different counsel, meaning thereby, the earlier Vakalatnama executed in favour of the counsel appearing in the suit proceeding has been terminated. He has also submitted that there may not be sufficient explanation for condoning the delay in filing the application under Order XLI, Rule 19, but on that count, the application should not have been rejected.

7. Refuting the submissions of the learned counsel for the petitioner, Shri Pradeep Kumar, learned counsel appearing for respondent has submitted that the provisions contained under Order III, Rule 4 (c) are mandatory in nature, and unless the vakalatnama i.e. authorisation to appear in the case is specifically withdrawn or some order is passed by the Court to that effect, that will continue and mere engagement of another counsel will not mean that the earlier counsel has been disengaged. He has also submitted that the petitioner has contested the execution matter and filed objection there and the objection was rejected, and ultimately, the sale deed was executed in favour of the respondent-plaintiff on 07.11.1998 through court, and the plaintiff-respondent has been in possession throughout thereafter. In the submission of the learned counsel for the respondents, the writ petition lacks merit and deserves to be dismissed.

8. I have heard Shri H.N. Singh, Ms. Anita Tripathi, Shri Sharat Chandra Upadhyay, learned counsel for the petitioner and Shri Pradeep Kumar, learned counsel appearing for contesting respondents and perused the record.

9. From the perusal of the impugned order it transpires that the court below has proceeded on the assumption that the appellant was having knowledge of the pendency of the appeal and participated in the proceeding and deliberately not made the submission on merit. While coming to this conclusion, learned Judge has recorded that notice was issued to the appellant in the appeal as well as in the execution proceeding, but he has not chosen to appear in the appeal. The Court found that the service of notice was sufficient as the counsel who had appeared in the suit proceeding was informed and he appeared before the court.

10. Shri H.N. Singh, learned counsel appearing for the petitioner has invited attention of the Court towards sub-rule (3) (b) of Rule 4 of Order III C.P.C. which reads as under:-

"O. III, R. 4 (3) (b) as authorising service on the pleader of any notice or document issued by any Court other than the Court for which the pleader was engaged, except where such service was expressly agreed to by the client in the document referred to in sub-rule (1)."

11. In the submission of the learned counsel for the petitioner, from perusal of the aforesaid rule, it transpires that the knowledge of the suit proceeding will only be material when the proceeding has commenced in that very court. In his submission, after the decree in the suit, the petitioner/defendant has filed an appeal before High Court and there a different counsel was engaged. The appeal was admitted and interim order was also granted, therefore, by any stretch of imagination, it cannot be said that the earlier counsel, who was prosecuting the suit proceeding, shall continue even after transfer of the appeal from High Court to the court below. In his submission, after engagement of another counsel in the High Court, the authorisation/power given in the suit proceeding by the defendant-petitioner would cease to operate and it cannot revive automatically unless fresh authorisation is given by the appellant.

12. Shri Pradeep Kumar, learned counsel appearing for respondent has submitted that as soon as the appeal has been transferred to the court below, the appeal pending before the court below will be treated as continuation of the suit proceeding in view of sub-section (2) (c) of Rule 4 of Order III, and therefore, the counsel who has put in appearance in the suit proceeding shall continue to be the counsel on behalf of the defendant.

13. The argument advanced by the learned counsel for the petitioner appears to be misconceived for the reason that if the sub-rule (2) and sub-rule (3) (b) of Rule 4, Order III C.P.C. is read together, it would transpire that appointment of the pleader shall be deemed to be in force until determined with leave of the Court by writing signed by the client or pleader, as case may be, and filed in Court, or until the client or the pleader dies or until all the proceedings in dispute are ended so far as regards the client. Sub-rule (2) (c) of Rule 4 provides that the authorisation will continue in appeal from any decree or order in the suit. The sub-rule (3) (b) provides nothing in sub-rule (2) shall be construed as authorising service on the pleader of any notice or document issued by any Court other than the Court for which

pleader was engaged, except where such service was specially agreed to by the client in the document referred to in sub-rule (1).

14. Here, in this case, although the appeal was filed before the High Court, and later on transferred before the court below, but at no point of time, the client has withdrawn the authorisation or the Court has determined such authorisation, and here the proceeding after transfer was going on before the court below and there was a valid engagement of the counsel in the suit. Therefore, in view of the legal proposition that the appeal is the continuation of the suit proceeding, the authorisation of the counsel shall be treated to be valid one. The only question remains as to whether on the specific statement of the counsel that he has no instructions and client is not responding in the matter, was it proper on the part of the court below to proceed with the matter in absence of the counsel, particularly, under the circumstances when the file was taken away and matter was brought before the High Court.

15. From perusal of the impugned order, it transpires that the notice was also issued to the appellant, but it has not been recorded by the learned judge deciding the application that that notice was ever served upon the appellant, and this could also not be pointed out by the learned counsel appearing for the respondent that the notice issued by the court below was served personally on the defendant-petitioner.

16. On the contrary, a document has been shown, which has been brought on record through supplementary affidavit with report of the process server, which reads as under:-

ष्श्रीमान जी

दि. 4.12.96 को ग्राम बसई आगरा जाकर प्रेम सिंह को तलाश किया नही मिले मौजूदा व्यक्तियों ने जुबानी बताया शादी में गये हुये है। आने का कोई पता नही चला अतः एक किता नोटिस उनके मकान से लगा दिया। गवाही किसी ने नही दी। रिपोर्ट व हल्फ सही है।

ह0 गोविन्द सिंह
आ.ता.
4.12.96''

17. From the perusal of report of the process server, it transpires that the notice was not served personally and the same was pasted on the door of the petitioner/appellant as he was not available there. It also transpires that while this pasting was done, nobody has witnessed it. In such circumstances, I am of the view that in absence of any concrete proof, for recording the satisfaction of the court, with regard to the service of notice on the petitioner/appellant, the court below should not to have proceeded with the matter, and the only course open was to issue a fresh notice to the appellant and not to proceed on the assumption that, the counsel had knowledge, and in spite of the positive assertion of the learned counsel (who appeared before the court) that the appellant was not responding.

18. So far as the knowledge of the petitioner with regard to the filing of the application under Order XLI, Rule 19 is concerned, it was filed on 24th April, 1999 with the positive assertion that the defendant had acquired knowledge of the aforesaid order only on 09.04.1999, and after coming to know he had also filed

objection on 26.04.1999 in the execution case. The court below has taken the view that the application filed by the appellant was highly barred by time and there was no proper explanation for not filing the application well within time. The court had also proceeded with the assumption that in spite of the knowledge of the proceeding, the restoration application was not filed.

19. From the perusal of the record, it transpires that there is no material on the record to establish this fact that the petitioner has got knowledge about the order of the dismissal of the appeal prior to 09.04.1999. The court below has proceeded only on the assumption that since the petitioner has filed objection in the execution case and his counsel has also appeared in execution as well as in appeal proceedings, therefore, it was very well in the knowledge of the petitioner and he ought to have filed the recall application promptly without any delay.

20. On the cost of repetition, it may be observed that once the court has issued notice to the appellant, then without there being any prima facie satisfaction with regard to service of notice, the court should not have proceeded on the assumption that the counsel is appearing when the counsel himself endorsed that his client is not responding. Coupled with the fact that the counsel who was appearing in suit has subsequently been changed while filing appeal in the High Court, taking that into consideration, I find that there was sufficient explanation to condone the delay in filing the restoration application. Otherwise also, if the court below was of the opinion that there was no sufficient explanation to condone the delay and to restore the appeal to its original number, in that eventuality, the court below ought to have examined the matter with a view to see the purpose of establishment of courts, which certainly are established to impart the substantial justice to parties. While considering the matter of condonation of delay, the merit of the case was also to be taken into consideration.

21. In ***Collector, Land Acquisition, Anantnag & Anr. Vs. Mst. Katiji & Ors.,*** A.I.R. 1987 SC 1353, the Apex Court, while dealing with the expression 'sufficient cause', for the purposes of condonation of delay, has observed as under:-

The expression "sufficient cause" employed by the legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which subserves the ends of justice, that being the life-purpose for the existence of the institution of Courts. It must be grasped that judiciary is respected not on account of its power to legalise injustice on technical grounds, but because it is capable for removing injustice and is expected to do so.

22. Further, in the case of ***State of Bihar & Ors. Vs. Kameshwar Prasad Singh & Anr.,*** JT 2000 (5) 389, the Apex Court, while dealing with the word 'sufficient cause', has observed as under:-

"Para 12..... The expression 'sufficient cause' should, therefore, be considered with pragmatism in justice-oriented process approach rather than the technical detention of sufficient case for explaining every day's delay. The factors

which are peculiar to and characteristic of the functioning of pragmatic approach in justice-oriented process. The court should decide the matters on merits unless the case is hopelessly without merit. No separate standards to determine the cause laid by the State vis-a-vis private litigant could be laid to prove strict standards of sufficient cause."

23. Further in the case of ***Ramji Dass & Ors. Vs. Mohan Singh,*** 1978 ARC 496, the Apex Court has held, "we are inclined to the view that, as far as possible, Courts' discretion should be exercised in favour of hearing and not to shut out hearing."

24. A Division Bench of this Court in First Appeal From Order No. 2023 of 2010 (**Ram Garib and another** Vs **Ram Prasad Mishra**), decided on 11.02.2011, while dealing with the appeal filed against an order of rejection of application under Order IX, Rule 13 C.P.C. has also taken the same view and set aside the ex parte decree.

25. While dealing with an application filed under Section 5 of the Indian Limitation Act, this Court in the case of ***Hindalco Industries Limited Vs. Brijesh Kumar Agarwal & Anr.,*** 2011 (8) ADJ 511, has observed that the court should decide the cases on merit instead of scuttling the process of justice on technicalities. Taking note of that, I find that the order passed by the court below is contrary to the settled provisions of law, and there was sufficient cause to condone the delay.

26. In view of that, the impugned order dated 20.07.2000 is hereby quashed. The writ petition succeeds and is allowed. I would also like to allow the restoration application as well and restore the appeal to its original number. Of course, the inconvenience caused to the plaintiff-petitioner is to be compensated, and for that, I impose a cost of Rs.5000.00 on the petitioner which is to be paid to the defendant-respondent through his counsel, or directly. The lower appellate court is directed to decide the appeal on merits, if possible, within a period of one year from the date of receipt of certified copy of the order of this Court along with receipt of payment of cost to the plaintiff/opposite party, without granting any unnecessary adjournments to the learned counsel for the parties.

27. Shri Pradeep Kumar, learned counsel appearing for respondent has submitted that since the sale deed has already been executed and the applicant is in possession, therefore, the allowing of this appeal may affect his possession. I am of the view that nothing would turn by allowing of the restoration, unless the appeal is allowed and decree, passed by the court below, is set aside, everything, which has been done by the executing court, that shall continue.

28. It may be clarified that I have not addressed myself on the merits of the case and the learned court below shall proceed with the appeal independently without being influenced by any of the observations made by me in this judgment.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED; ALLAHABAD 19.01.2012

BEFORE
THE HON'BLE RAN VIJAI SINGH,J.

Civil Misc Writ Petition No. 45303 of 2006

Munish Kumar Sharma and another
...Petitioner
Versus
State Of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Prabhakar Sinha
Sri Swarn Kumar Srivastava
Sri Kamal Kumar Singh
Sri Indra Raj Singh

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 226-salary-Bifurcation of Pay Scale by G.O. 16.03.1998-Quashed-became final-subsequent G.O. Dated 03.06.2000-again bifurication in garb of 5th Pay Commission-automatically became lifeless-held-petitioner entitled for every consequential benefits of salary from the date of his substantive appointment-within specified period.

Held: Para 16 and 17

It is also notable that it is not the stand of the state government that against the order dated 22.11.2001 quashing the order dated 16.3.1998 bifurcating the cadre, the State government has taken legal recourse by way of filing special appeal or special leave to appeal meaning thereby the said order has become final.

Taking note of that, the writ petition succeeds and is allowed and writ of mandamus is issued directing the respondent no. 1 to ensure the payment of salary to the petitioner in the scale of 950-1500 with further revision of this scale in view of the subsequent report of Pay Commission. The entire exercise has to be done within a period of four months from the date of receipt of certified copy of the order of this Court

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

1. Initially this writ petition was filed with by the two petitioners out of which petitioner no. 1 has passed away on 23.1.2010. The abatement application has been allowed and the writ petition stands abated so far as it relates to the petitioner no.1.

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

(a) Issue a writ order or direction in the nature of mandamus commanding the respondent no. 3 to grant revised pay scale to the petitioner Rs. 3050-75-3950-80-4590.

(b) Issue a writ order or direction in the nature of mandamus commanding the respondents to pay arrears of revised pay scale.

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

(d) Award the cost of the petition to the petitioner.

3. The petitioner was working on daily wage basis with the respondents since 1980 and on 1st November, 1984 he was made member of the work charge establishment and thereafter his services were regularised on the post of Amin/Surveyor vide order dated 20th

January, 1998 passed by Superintendent Engineer, Public Work Department, Rampur Division, Rampur in the scale of Rs. 950 to 1500.

4. It appears after Fifth Pay Commission report, the salaries of the State government employees were revised with effect from 1.1.1996 and it is thereafter a government order dated 16.3.1998 was issued by the State government bifurcating the cadre of Class III employees in two categories, one in the scale of Rs.825 to Rs.1200 and another Rs.950 to Rs.1500. On revision of pay scale of 950-1500 changed Rs.3050 to 4590 whereas pay scale of Rs.825 to Rs.1200 was changed from Rs.2750 to Rs.4400. The post of amin has been categorised under the scale of Rs.825-Rs.1200. In pursuance of the aforesaid government order, the salary of the petitioner was reduced vide order dated 3.6.2000.

5. Learned counsel for the petitioner submits that the validity of the government order dated 16.3.1998 was challenged through various writ petitions and those writ petitions were allowed after quashing the Government Order dated 16.3.1998, copy of one such order has been brought on record of this writ petition as Annexure 5. It is contended by learned counsel for the petitioner that once the government order which was the basis for bifurcating the cadre of Class III employees and reducing their pay scale was quashed by this Court, the order dated 3.6.2000 has automatically come to an end. He has also submitted that in this regard, various representations have been filed before the competent authority but no decision has been taken thereon. Hence the petitioner has filed present writ petition.

6. In the submissions of learned counsel for the petitioner, the action of the State government is violative of Article 14 of the Constitution of India as the government cannot discriminate its own employees working in the same cadre. In his further submissions, the stand taken in the counter affidavit that the petitioner has not challenged the order dated 3.6.2000 by which the salary was reduced therefore no relief can be granted to the petitioner, is unsustainable in the eye of law.

7. Refuting the submission of learned counsel for the petitioner, learned Standing Counsel has submitted that this writ petition has been filed in the year 2006 much after the order dated 3.6.2000 in persuance whereof his salary was refixed, therefore it ought to have been challenged by the petitioner while filing the present writ petition. In his submissions, without challenging the order dated 3.6.2000 by which the salary of the petitioner was reduced, no relief can be granted to the petitioner unless the order dated 3.6.2000 is quashed by this Court.

8. I have heard Sri Indra Raj Singh, learned counsel for the petitioner and learned Standing Counsel for the State respondents and considered their submissions after perusing the record.

9. The controversy in this case is to consider, the effect of bifurcation of the cadre, after the Fifth Pay Commission and the consequential order of State Government dated 16.3.1998. It is not in dispute that the petitioner was appointed in substantive capacity against the post of

amin/surveyor and in the year 1998 and his salary was paid in scale of 950-1500. However after the revision of pay scale with effect from 1.1.1996, the State government bifurcated the cadre of Class III employee in two scales Rs.950 - Rs.1500 and Rs.825- Rs.1200 through government order dated 16.3.1998, which later on has been quashed by this Court on 22.11.2001 passed in Writ Petition No. 34315 of 1999. The order dated 3.6.2000 admittedly was passed in consequence of the order dated 16.3.1998.

10. The meaning of word **'quash'** in **The New Lexicon Webster's Dictionary Encyclopedic Edition** has been given as under :-

Quash means to annual and to put down.

11. In **Concise Oxford English Dictionary, Indian Edition** the meaning of word quash has been defined as under :-

Quash means reject as not valid and suppress.

12. Looking into the meaning of word 'quash' it is apparent that the order dated 16.3.1998 has been annulled/put down/declared as invalid by this Court. Meaning thereby whatever its existence was prior to its quashing has now become ineffective and infact disappeared. Therefore, any order passed on the ineffective/annulled, order has become meaningless and has died to its automatic death.

13. The matter may be examined from another angle also. The Pay Commission has submitted its report with regard to the revision of the pay scale of the particular categories of the employees considering their conditions of service and needs for revision of pay scale, therefore after the submission of Pay Commission report, it was not open to the State government to bifurcate the cadre, which submitted its report after considering the necessary major for revision of salary. Needless to say that although the report of the Pay Commission is not binding upon the State Government but once it has been accepted then it was to be given effect in full swing and not to bifurcate the cadre, which in fact would amount the circumventing of the report adversely affecting the right of a particular category of employees.

14. I am of the view that once the basis of bifurcation of cadre and refixation salary i.e. the government order 6.3.1998 was quashed by this Court, the leg of the 16.3.2000 has broken and it fallen down on earth and has died to its automatic death as the life of government order dated 6.3.2000 was the order dated 16.3.1998. Therefore the stand of State government that since the petitioner has not challenged the order dated 6.3.2000 therefore he cannot be given benefit of quashing of the order dated 16.3.1998 become unsustainable in the eye of law.

15. The matter may be examined from another angle also. The State government is the biggest employment generating agency and it has got number of category of employees who are getting their salaries from the State exchequer in lieu their performance of duty and if any government order applicable to the employees becomes subject matter of challenge before the Court of law and the Court quashes the same, in that eventuality, the pious duty of the State government is to treat all the

employees/incumbent on equal footing without there being any discrimination. Otherwise it will lead to dissatisfaction amongst the employees and inspire the litigation and it is none else except the State Exchequer which will be burdened to meet out litigation expense, apart the engagement of its officers in contesting the litigation. The State government being modle employer is expected to act fairly without any discrimination. Further it should not promote the litigation and drag its employees in litigation unless it is very necessary and the payment is going to be made contrary to the rules, no chance should be given to employee to knock the door of Courts.

16. It is also notable that it is not the stand of the state government that against the order dated 22.11.2001 quashing the order dated 16.3.1998 bifurcating the cadre, the State government has taken legal recourse by way of filing special appeal or special leave to appeal meaning thereby the said order has become final.

17. Taking note of that, the writ petition succeeds and is allowed and writ of mandamus is issued directing the respondent no. 1 to ensure the payment of salary to the petitioner in the scale of 950-1500 with further revision of this scale in view of the subsequent report of Pay Commission. The entire exercise has to be done within a period of four months from the date of receipt of certified copy of the order of this Court

18. Needless to say that the petitioner shall be paid salary from the date of his entitlement subject to his working in the department.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.01.2012

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

Civil Misc. Writ Petition No. 65428 of 2006

Harijinder Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri U.K. Purwar
Sri Pramod Kumar Srivastava
Sri Abhishek Misra
Sri Ravindra Kumar
Sri Manoj Saxena
Sri Vishnu Sahai
Sri B.Dayal

Counsel for the Respondents:
Sri A.P. Srivastava
Sri Vivek Saran
Sri Ashish Kumar Singh
Sri Ajay Kumar Singh
Sri A.S. Rana
Sri M.K. Gupta
C.S.C.

Land Acquisition Act-Section-48-Land Acquired for housing Scheme by Awas Vikas Parishad-compensation determined-symbolic possession taken-.reference proceeding for enhancement going on-adjoining plot exempted-representation by petition rejected-held-not proper-direction to consider and decide representation for exemption within time bound consideration-till then stay in terms of SLP to continue.

Held: Para 32 and 33

In view of the law as laid down by the Apex Court as above, the respondents are obliged to consider the claim of land holders for exemption uniformly on a

rational policy and the respondents cannot take decision regarding exemption of land from acquisition arbitrarily and discriminately.

In view of the fact that all relevant materials including proceedings of the Board have not been brought on the record by the respondents, it is not possible for this Court to examine such decision and to decide the claim of the petitioner, hence it is in the interest of justice that the Board be directed to consider the claim of the petitioner for exemption of Plot No.368/1 from the housing scheme.

Case law discussed:

2010 (3) SCC 621; A.I.R. 1975 SC 1767

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

1. Heard Sri Pramod Kumar Srivastava, learned counsel for the petitioner, Sri A.P. Srivastava, learned counsel appearing for respondents No.2, 3 and 4, Sri M.K. Gupta, assisted by Sri Ashish Kumar Singh for respondent No.5 and learned Standing Counsel.

2. Counter affidavit and two supplementary counter affidavits have been filed by the U.P. Avas Evam Vikas Parishad to which rejoinder affidavit and supplementary rejoinder affidavits have also been filed by the petitioner. With the consent of learned counsel for the parties, the writ petition is being finally disposed of.

3. Brief facts of the case, as emerge from pleadings of the parties, are; a notification dated 26th June, 1982 under Section 28 of the U.P. Avas Vikas Parishad Adhiniyam, 1965 (hereinafter referred to as the 1965 Act) was issued notifying various plots which were proposed to be acquired for a housing scheme including Plot No.368/1 situate in village Prahlad Garhi, district Ghaziabad. Objections against the proposed acquisition were filed by various tenure holders. The Niyojan Samiti of the U.P.Avas Evam Vikas Parishad held its meetings on 6th, 7th and 8th of April, 1993 and considered various objections. The Niyojan Samiti recommended for exempting portion of various plots including certain plots, which were in the vicinity of Plot No.368/1, namely, Plot No. 373 area 0.02 acres, Plot No.374 area 0.03 acre, Plot No.375 area 0.02 acres and Plot No.368 area 0.09 acre. A notice under Section 32(1) of the 1965 Act was issued on 28th February, 1987. The award was declared on 27th February, 1989 and possession of certain plots were claimed to be taken by the U.P. Avas Evam Vikas Parishad (hereinafter referred to as the Board) on 8th August, 1989. Plot No.368/1 was owned by petitioner's father after whose death name of petitioner's mother has been recorded in the revenue record. Petitioner's father late Swarn Singh filed a writ petition being Writ Petition No.17057 of 1987 challenging the acquisition of Plot No.368/1 which writ petition was dismissed by this Court vide judgment and order dated 8th September, 1988. In the years 1992, 1994 and 1995, the Board took decisions to exempt plots belonging to Daya Nand and others which was noted in the letter dated 10th February, 1995 issued by the Prabhari Adhikari (Bhumi) of the Board. The petitioner's father died in the year 1991. Petitioner's mother made a reference for enhancement of the compensation being Land Acquisition Reference Case No.64 of 2000, which is said to be pending. Petitioner's mother made an application on 16th February, 2005 addressed to the Chairman of the Board praying that Plot No.368/1 be exempted from acquisition. It was stated in the application that the land of agriculturists of adjoining area has already been exempted by the Board. Copy of the

letter dated 10th February, 1995 was enclosed along with the application dated 16th February, 2005. The petitioner filed a writ petition being Writ Petition No.71083 of 2005 which writ petition was disposed of on 18th November, 2005 directing the Chairman of the Board to decide the representation dated 16th February, 2005 in accordance with law within a period of four months and for a period of four months parties were directed to maintain status quo. After the order of this Court dated 18th November, 2005 a contempt petition being Contempt Petition No.1867 of 2006 was filed by the petitioner stating that in spite of the judgment and order dated 18th November, 2005, no decision has yet been taken. The contempt petition was disposed of on 4th May, 2006 directing the Chairman to decide the claim and intimate the petitioner the order so passed. The Chairman of the Board by letter dated 26th June, 2006 forwarded the decision dated 13th March, 2006 issued by the Housing Commissioner by which order petitioner's representation dated 16th February, 1995 was rejected. The petitioner filed this writ petition in this Court on 28th November, 2006 praying for following relief:-

"It is, therefore most respectfully prayed that this Hon'ble Court may graciously be pleased to allow this writ petition and to issue a writ, order or direction:-

(a)- in the nature of certiorari quashing the order dated 13.3.2006 and 26.6.2006 passed by the respondent no.3 and communicated by the respondent no.2 respectively [Annexure 8 to the writ petition].

(b)- in the nature of mandamus directing the respondents to exempt the Plot No.368/I situated in village Prahlad Garhi, District Ghaziabad on payment of such charges as have been levied against similarly situated persons.

(B-1) to declare the notice dated 26.6.1982 under Section 28 and notice dated 19.2.1982 under Section 32 of the Act as illegal and inoperative.

(B-2) a writ order or direction in the nature of certiorari quash the auction sale held in favour of respondent No.5."

4. The Board subsequent to filing of the writ petition proceeded to hold auction sale of the plots which were acquired which auction was fixed for 15th December, 2007. The petitioner filed a writ petition being Writ Petition No.61270 of 2007 (Harijinder Singh vs. State of U.P. and others) challenging the advertisement published by the Board for settlement of the land in question by way of auction. The said writ petition was dismissed on 12th December, 2007 by a Division Bench of this Court noticing the fact that since petitioner's earlier writ petition challenging the order rejecting the application for exemption of the land is still pending in which no interim order has been granted, it is open for the petitioner to seek interim protection as he may be advised in the pending writ petition. The petitioner filed Special Leave to Appeal (Civil) No.24761 of 2007 against the judgment and order dated 12th December, 2007 which was disposed of by the Apex Court on 9th November, 2009. It is useful to quote the order of the Apex Court dated 9th November, 2009 which is as under:-

"According to the impugned judgment petitioner herein had approached the Allahabad High Court by filing writ petition No.65428 of 2006 challenging the order of

the State Government rejecting his application for exemption of the land from acquisition, which is pending.

We request the Division Bench of the High Court to take up the pending writ petition and decide the matter by 31st December, 2009. We make it clear that the High Court will decide the said writ petition uninfluenced by the observations made in the impugned judgment. We further clarify that till the hearing and final disposal of the said writ petition No. 65428/06, proceedings concerning sale confirmation in the connected matter shall not proceed.

The special leave petition is disposed of."

5. An impleadment application was filed by the petitioner to implead respondent No.5 in whose favour one of the commercial plots was auctioned which impleadment application was allowed by this Court on 8th March, 2010. This writ petition was placed before this Bench, the Bench presided over by one of us (Justice Ashok Bhushan) under nomination of Hon'ble the Chief Justice dated 27th July, 2011 and thereafter the matter has been heard and is being decided.

6. Learned counsel for the petitioner, challenging the order dated 13th March, 2006 passed by the Housing Commissioner, contended that this Court vide its judgment and order dated 18th November, 2005 directed the Chairman of the Board to decide the representation but the representation has been rejected by the Housing Commissioner which order is not in accordance with the order of this Court and is liable to be set-aside on this ground alone. He further contended that over Plot No.368/1 there was abadi of the petitioner and although plots adjoining to Plot No.368/1 have been exempted by the Board but the petitioner's representation has been rejected. It is submitted that Plot Nos. 373, 374, 375 and 368 were exempted, which were adjoining plots, but petitioner's prayer for exemption has been refused, which is discriminatory, arbitrary and violative of Article 14 of the Constitution of India. It is submitted that petitioner is still in possession of Plot No.368/1 and the possession was never taken from the petitioner. The petitioner is running a business of "Thinner" in the plot in question and the petitioner is entitled for exemption of the plot as similar relief has already been granted to adjoining plot holders. The petitioner has placed reliance on a judgment of the Apex Court in the case of ***Hari Ram and another vs. State of Haryana and others*** reported in 2010(3) SCC 621. The learned counsel for the petitioner further submits that actual possession has not been taken from the petitioners at any point of time and the petitioner continues in possession. It is further submitted that as per the law laid down by the Apex Court in the case of ***Balwant Narayan Bhagde vs. M.D. Bhagwat and others*** reported in A.I.R. 1975 SC 1767, the actual physical possession was required to be taken which has never been taken and petitioner continues in possession.

7. Learned counsel for the Board, refuting the submissions of learned counsel for the petitioner, contended that portion of petitioner's plot measuring 364.16 square meters has already been exempted by the Niyojan Samiti, hence the petitioner's case for exemption has already been considered and partly allowed and there is no occasion to consider the prayer of the petitioner any further for exemption. It is submitted that in adjoining plots to the petitioner's plot only

small area on which abadi was existing, has been exempted, hence the petitioner cannot claim discrimination. It is submitted that petitioner's plot is situate on 100 feet wide road and is a valuable plot for commercial utility of the Board, hence decision has been taken not to exempt the petitioner's plot from the scheme. It is further submitted that Chairman under the 1965 Act has no jurisdiction or authority to decide such representations. Petitioner's mother has already filed a Land Acquisition Reference No.64 of 2000 for enhancement of compensation and a notice dated 7th December, 2004 was served on the petitioner's mother for demolition of unauthorised constructions raised over the land of the Board which notice was challenged by the petitioner's mother by means of a writ petition being Writ Petition No.3055 of 2005 which was dismissed on 24th January, 2005 with the observation that petitioner of that writ petition may file objection against the show cause notice. The Housing Commissioner has considered the representation of the petitioner and passed an order on 13th March, 2006 and the land of the petitioner was not considered fit for exemption. Referring to the report of the Niyojan Samiti dated 9th November, 1993, it is stated that no exemption was granted to the petitioner's land. The exemption of land was granted by the Niyojan Samiti in favour of other tenure holders i.e. adjoining neighbourers of the petitioner. The writ petition filed by the petitioner's father being Writ Petition No. 17057 of 1987 having been dismissed on 8th September, 1988, the acquisition proceedings have become final.

8. Sri M.K. Gupta, learned counsel appearing for respondent No.5, submitted that the land in question was earmarked for community centre. The Board has full jurisdiction and authority to auction the plots in favour of respondent No.5 which includes plot of the petitioner as well as other tenure holders. He further objected the locus of the petitioner to file this writ petition. He submits that the land in question, according to petitioner's case, was recorded in the name of petitioner's mother, hence the petitioner has no locus to challenge the order passed by the Housing Commissioner on the representation submitted by the petitioner's mother.

9. Learned counsel for the petitioner, in rejoinder, reiterated his submissions. It is further contended that authority competent having not decided the representation, the order dated 13th March, 2006 deserves to be set-aside. It is submitted that the Board in its counter affidavit has not raised any objection regarding locus of the petitioner to file the writ petition, hence it is not open for the respondent No.5, who has not even filed any counter affidavit, to raise any objection regarding locus that too at the time of hearing. It is further submitted that petitioner's mother is an old lady who has authorised the petitioner to take all legal proceedings. Along with the brief arguments submitted on behalf of the petitioner a xerox copy of the special power of attorney dated 13th November, 2005 by Mrs. Gurdev Kaur has been enclosed. It is further submitted by learned counsel for the petitioner that earlier petition filed by the petitioner being Writ Petition No.71083 of 2005 having been disposed of by this Court directing for deciding the representation dated 16th February, 2005, it is not open for the respondents, at this stage, to raise any objection regarding locus of the petitioner.

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

11. Before we proceed to consider the respective submissions of learned counsel for the parties, it is necessary to first consider the objection raised by learned counsel for respondent No.5 regarding locus of the petitioner to file this writ petition.

12. In the writ petition although a counter affidavit and two supplementary counter affidavits have been filed by the Board but in none of the affidavits any objection regarding locus of the petitioner has been taken, rather in the supplementary counter affidavit dated 3rd September, 2011 sworn by Sri S.K. Srivastava, Executive Engineer of the Board it has been mentioned in paragraph 4 that Gobern Singh was the original owner of the land and after his death property came in the name of Swarn Singh. Paragraph 4 of the supplementary counter affidavit dated 3rd September, 2011 is as under:-

*"**4.** That it would not be out of place to mention here that Govern Singh was original owner of the land Khasra No.368 and after his death the property came in the name of his son Swarn Singyh, and the petitioner inherited the property after the death of Swarn Singh. The objection filed for exemption of the land was duly considered by the Niyojan Samiti and 364.16 sq. mtrs land from Khasra No.368 was already exempted."*

13. From the above stand taken by the Board, it is clear that the Board never raised any objection regarding locus of the petitioner to file this writ petition, rather the right of the petitioner has been accepted in the land. The Board having not raised any objection regarding locus of the petitioner, we do not deem it fit to entertain the objection raised by respondent No.5 who claims to be subsequent auction purchaser.

14. The petitioner although in the writ petition has prayed that notice dated 26th June, 1982 issued under Section 28 of the 1965 Act and notice issued under Section 32 of the 1965 Act be declared illegal, void and inoperative, the said prayer is liable to be rejected in view of the fact that petitioner's father had earlier filed Writ Petition No.17057 of 1987 challenging the acquisition proceedings which writ petition was dismissed by this Court on 8th September, 1988. The said fact has been stated by the petitioner himself in paragraph 6 of the writ petition. Thus challenge to the acquisition raised by the petitioner's father having already been rejected, the prayer of the petitioner challenging the aforesaid notices cannot be accepted.

15. The first submission of learned counsel for the petitioner is that the order impugned dated 13th March, 2006 passed by the Housing Commissioner deserves to be quashed on the ground that this Court had directed the Chairman of the Board to consider the representation by its judgment and order dated 18th November, 2005 and the Chairman having not decided the issue, the decision by the Housing Commissioner is meaningless.

16. Sri A.P. Srivastava, learned counsel for the Board, in reply to the above submission, contended that Chairman of the Board has no authority or jurisdiction to decide any claim for exemption and the Housing Commissioner being an authority to take decision regarding scheme has rightly rejected the representation. Sri Srivastava, however, could not explain as to when this Court directed the Chairman of the Board to decide representation, how come the Housing Commissioner decided the representation.

17. It is useful to look into the direction of this Court dated 18th November, 2005, which was to the following effect:-

"Heard learned counsel for the parties.

In the facts and circumstances of the case, the respondent no.2 is directed to decide the representation dated 16.2.2005 (Annexure 5 to the writ petition) in accordance with law within a period of 4 months from the date of filing of a certified copy of this order.

For a period of 4 months from today, parties shall maintain status-quo.

With these directions, the writ petition is disposed of."

18. The provisions of the 1965 Act, which are relevant in this context, are necessary to be looked into. Under Section 3 of the 1965 Act, the State Government is empowered to establish a Board by gazette notification which is a body corporate. Section 3(5) provides for constitution of the Board. Section 3(5), as existed at the time when this Court passed the order dated 18th November, 2005, was as follows:-

"3. Constitution of the Board.- *(1) .....*

(2) .....

.....

(5)The Board shall consist of an Adhyaksha, who shall ordinarily be a non-official, appointed by the State Government, and the following members:

(a) six non-official members, appointed by the State Government, of whom one shall be the Mayor of a Municipal Corporation and two shall be members of the State Legislature, one from each House thereof;

(b) the Secretary, Finance Department, Government of Uttar Pradesh, ex-officio;

(c)the Secretary, Housing Department, Government of Uttar Pradesh, ex-officio;

(d)the Secretary, Local Self-Government Department, Government of Uttar Pradesh, ex-officio, unless he has been appointed as Secretary, Housing Department;

(e) the Chief Engineer, Town and Village Planning Department, Uttar Pradesh, ex-officio;

(f) the Chief Engineer, Local Self Government Engineering Department, Uttar Pradesh, ex-officio; and

(g) the Housing Commissioner, ex-officio, unless he has been appointed as Adhyaksha."

19. It is relevant to note that Section 3(5) of the 1965 Act was amended by U.P. Act No.11 of 2007 and again by U.P. Act No.7 of 2010. By U.P. Act No.11 of 2007, the sub-section (5) of Section 3 was substituted as follows:-

"3. ***Constitution of the Board.-*** *(1) .....*

(2) .....

.....

(5) The Board shall consist of ,-

(a) the Principal Secretary/Secretary to the Government of Uttar Pradesh in Housing and Urban Planning Department - Adhyaksha ex officio;

(b) three Upadhyakshas who shall be the non-official members appointed by the State Government;

(c) the Principal Secretary/Secretary to the Government of Uttar Pradesh in the Finance Department - ex officio member;

(d) The Principal Secretary/Secretary to the Government of Uttar Pradesh in the Urban Development Department - ex officio member;

(e) the Principal Secretary/Secretary to the Government of Uttar Pradesh in the Bureau of Public Enterprises Department - ex officio member;

(f) the Chief Town and Country Planner Uttar Pradesh - ex officio member;

(g) the Director, Central Building Research Institute, Roorkee - ex-officio member;

(h) the Housing Commissioner, Uttar Pradesh Awas Evam Vikas Parishad - ex officio member;

(i) the Chief Engineer, Uttar Pradesh Awas Evam Vikas Parishad - ex officio member;

(j) the Finance Controller, Uttar Pradesh Awas Evam Vikas Parishad - ex officio member;

(k) the Chief Architect Planner, Uttar Pradesh Awas Evam Vikas Parishad - ex officio member."

20. Again by U.P. Act No.7 of 2010 in sub-section (5) of Section 3 of the 1965 Act, following clauses were substituted:-

"(a) The Minister, Housing and Urban Planning Department, Uttar Pradesh - Adhyaksha-exofficio;

(a-1) The Principal Secretary, Secretary to the Government of Uttar Pradesh in Housing and Urban Planning Department- Karyakari Adhyaksha/Sadasya ex-ffocio."

21. Section 15 of the 1965 Act provides for functions of the Board. Clause (a) to Clause (p) of Section 15(1) specifically enumerate functions of the Board. It is relevant to refer Clause (o), which is to the following effect:-

"(o) to fulfil any other obligation imposed by or under this Act or any other law for the time being in force; and"

22. Section 18 of the 1965 Act provides for types of housing and improvement schemes. Section 28 provides for notice of housing and improvement schemes. Section 30 provides for objections against the scheme. Section 31 provides for abandonment, modification or sanction of scheme and Section 32 provides for commencement of scheme. Section 33 provides for alteration of scheme after commencement. Sections 31, 32 and 33 of the 1965 Act, are quoted below:-

"31. Abandonment, modification or sanction of scheme.- *(1) After considering the objections, if any, received in pursuance of the foregoing provisions and after giving an opportunity of being heard to the objectors, the Board may, so for as may be, within six months from the date of receipt of*

the last such objection, either abandon the scheme, or, if the estimated cost of the scheme does not exceed twenty lakhs of rupees, sanction it with or without modifications, and if the estimated cost of the scheme exceeds twenty lakhs of rupees, submit it to the State Government for sanction with such modifications, if any, as the Board may suggest.

(2) The State Government any sanction with or without modifications, or refuse to sanction, or return for reconsideration, any scheme submitted to it under sub-section (1).

(3) If a scheme returned for reconsideration under sub-section (2) is modified by the Board it shall be republished in accordance with Section 28-

(a) if the modification affects the boundaries of the area comprised in the scheme or involves acquisition of any land or building not previously proposed to be acquired; or

(b) if the modification is in the opinion of the Board of sufficient importance to require republication,

and on such republication the procedure prescribed in Sections 29 and 30 shall, so for as may be applicable, be followed as if the republication were an original publication under Section 28.

32. Commencement of scheme.- *(1) Whenever the Board or the State Government sanctions a housing or improvement scheme, it shall be notified in the Gazette.*

(2) The notification under sub-section (1) in respect of any scheme shall be conclusive evidence that the scheme has been duly framed and sanctioned.

(3) Any person who, or a local authority which had filed objections under Section 30, aggrieved by the decision of the Board sanctioning a housing or improvement scheme may, within thirty days from the date of the notification under sub-section (1), appeal to the State Government whose decisions thereon shall be final.

(4) If the State Government cancels or alter the scheme as a result of an appeal filed under sub-section (3), the conciliation or alteration shall be notified in the Gazette.

(5) The scheme shall come into force-

(a) if sanctioned by the State Government, on the date the notification under sub-section (1);

(b) if sanctioned by the Board-

(i) where no appeal is preferred under sub-section (3), on the expiry of thirty days from the date of the notification under sub-section (1), and

(ii) where an appeal is preferred and the scheme is on appeal maintained with or without alteration, on the date of the decision of the appeals and where more appeals than one are preferred, on the date of the decision of the appeal last decided.

33. Alteration of scheme after commencement.- *(1) At any time after a housing or improvement scheme has come into force and before it has been fully executed, the Board may for reasons to be recorded alter or cancel it:*

Provided that-

(a) if any alteration is likely to increase the estimated cost of executing a scheme by more than ten percent or if any altered scheme is estimated to cost more than twenty lakhs of rupees, the alteration shall not be made without the previous sanction of the Government;

(b) before making any alteration which involves acquisition, otherwise than by agreement, of building not proposed to be acquired in the original scheme, or owing to which any land not previously liable under the scheme to payment of betterment fee becomes liable to such payment, the Board shall serve a notice, in such form, on such persons or classes of persons and in such manner, as may be prescribed, of classes of persons and in such manner, as may be prescribed, of the proposed alteration, and consider the objections, if any, received in pursuance of the notice within thirty days from the service of the notice or within such further time as the Board may, for sufficient cause, allow, and give an opportunity of being heard to the objectors;

(c) no scheme estimated to cost over twenty lakhs of rupees shall be altered or cancelled without the previous sanction of the State Government.

(2) any alteration or cancellation of a scheme under sub-section(1) shall be notified in the Gazatte and have effect from the date of such notification, so however, that any such modification shall be without prejudice to the validity of anything previously done under the original scheme."

23. Section 49 of the 1965 Act empowers the State Government to call for the records of the Board and to modify or annul any scheme. Section 55 provides for power to acquire land. Under Section 55 any land or any interest therein required by the Board for any of the purposes of the Act, may be acquired under the provisions of the Land Acquisition Act, 1984 as amended in its application to Uttar Pradesh, which for this purpose shall be subject to the modifications specified in the Schedule of the 1965 Act.

24. From the scheme of the 1965 Act, as noticed above, it is clear that after the scheme has commenced, it can be altered by the Board subject to conditions mentioned therein. The State Government has been specifically conferred with the power to call for and examine the records of the Board relating to any housing or improvement scheme which is proposed to be or has been framed by the Board or which is being executed by it and modify, annul or remit for reconsideration to the Board. Thus after the commencement of the scheme, it is only the Board and the State Government which have been statutorily empowered to amend or modify any scheme.

25. In the present case the notification under Section 32 has already been issued on 28th February, 1987 from which date the scheme has commenced. Thus the representation dated 16th February, 2005 submitted for exemption of Plot No.368/1 could have only been considered by the Board. This Court on 18th November, 2008 directed the Chairman of the Board to consider the representation dated 16th February, 2005. The order has to mean that the Chairman was to take appropriate steps for consideration and the appropriate steps for consideration of the scheme can be no other than placing the matter for consideration of the Board as per Section 33

of the 1965 Act. It is true that Chairman himself could not have taken any decision regarding exemption of the land since no such power is vested in the Chairman under the scheme of the1965 Act. It is useful to note that direction issued by this Court to the respondent No.2, who was the Chairman, was to the following effect:-

"The respondent No.2 is directed to decide representation dated 16th February, 2005 (Annexure-5 to the writ petition) in accordance with law...."

26. The aforesaid order has to mean that Chairman was to take steps that the representation be decided in accordance with law. The decision on the representation in accordance with law has to be decision on the representation by the Board.

27. In the present case, the order impugned has been passed by the Housing Commissioner, who under the scheme of the 1965 Act, has no jurisdiction to exempt any land from the scheme after its commencement under Section 32. Although there is provision for delegation of power under Section 12 of the 1965 Act by the Board but there is nothing on the record to come to a conclusion that Housing Commissioner was delegated the power by the Board to exempt any land from its scheme which has already commenced. We are thus fully satisfied that Housing Commissioner had no jurisdiction to decide the representation for exemption of Plot No.368/1 and the order rejecting the representation deserves to be set-aside on this ground alone.

28. The submission, which has been pressed by the learned counsel for the petitioner is that although the land of tenure holders adjoining to the petitioner's land have been exempted from acquisition but petitioner's land has not been exempted, which is discriminatory and arbitrary. In this context it is necessary to refer to the materials brought on the record and the pleadings made on behalf of the Board. In the order of the Housing Commissioner dated 13th March, 2006 reference to the proceedings of the Board dated 19th November, 1994, 10th February, 1995 and 17th June, 2005 have been made in which proceedings decisions regarding exemption of land were taken but the said proceedings have not been brought on the record. In the supplementary affidavit dated 26th July, 2010 filed by the petitioner reference has been made to the letter dated 26th November, 1997 issued by the Executive Engineer of the Board addressed to Daya Nand and Soraj and others of village Prahlad Garhi. In the said letter it has been mentioned that land of Plots No.360, 361, 366, 364, 365, 369, 370, 373, 374, 375, 376, 380, 381, 383, 384 and 386M, total area 13 bigha, 13 biswa and 5 biswansi have been exempted by resolution dated 1.10.1992. Reply to the supplementary affidavit has been filed by filing supplementary counter affidavit sworn by Nagesh Chandra, Executive Engineer of the Board dated 26th September, 2010 in which issuance of the letter dated 26th November, 1997 and exemption of the land as mentioned therein has not been denied. It has been stated that plots shown in yellow colour in the map submitted by the petitioner had been exempted by the Niyojan Samiti itself on hearing of the objections of the land holders and since the petitioner's land was considered important for the Board, the same was not exempted. It has further been stated that possession of the land was taken by possession memo which was filed along with the supplementary counter affidavit. The plots, which were exempted from the

acquisition as was contained in the letter dated 26th November, 1997 were all adjoining plots to the petitioner's plot and although it is pleaded in the supplementary counter affidavit that exemption was granted by the Niyojan Samiti itself but a perusal of the plot numbers as mentioned in the letter dated 26th November, 1997 and perusal of the plot numbers as mentioned in the proceedings of the Niyojan Samiti, which held its meeting on 6th, 7th and 8th of April, 1983, indicate that certain plots, which are mentioned in the letter dated 26th November, 1997, were not mentioned in the proceedings of the Niyojan Samiti and further the area of the plots, which were exempted in the proceedings of the Niyojan Samiti, copy of which has been brought on the record along with the supplementary counter affidavit of the Board dated 13th September, 2011, defers from the area mentioned in the letter dated 26th November, 1997. Further Plot Nos.366, 364, 369 and 370 were not mentioned in the report of the Niyojan Samiti although the same were mentioned in letter dated 26th November, 1997 and area of the aforesaid plots also defers. For example, in Plot No.360 only an area of 0.03 acre was exempted by the Niyojan Samiti whereas in the aforesaid letter the area mentioned is 10 biswa, which is much more than the area mentioned in the report of the Niyojan Samiti. One of the dates of the proceedings of the Board has been mentioned as 1st October, 1992 in the letter dated 26th November, 1997 which proceedings have also not been brought on the record.

29. From the pleadings and the materials brought on the record, it is clear that after the commencement of the scheme under Board's resolution certain other plots were exempted which were in the vicinity of the petitioner's plot. In the counter affidavits and the supplementary counter affidavits relevant details and proceedings regarding exemption of the land subsequent to commencement of the scheme have not been brought on the record nor relevant facts have been clearly pleaded. The petitioner in paragraph 11 of the writ petition referring to the order dated 10th February, 1995 has specifically pleaded that in the year 1995 the respondents have exempted the adjoining plots of similarly situated persons, namely, Daya Nand and others from acquisition. The said submissions have been replied in the counter affidavit filed by the Board in paragraph 17 in which only this much has been stated that exemption was granted by the Niyojan Samiti. There is no categorical statement in the counter affidavit and the supplementary counter affidavits that no exemption was granted after commencement of the scheme whereas the materials brought on the record clearly indicate that Board also has taken decision for exemption of land subsequent to commencement of the scheme.

30. In view of the above facts, it is necessary that petitioner's case for exemption of Plot No.368/1 be considered by the Board afresh and the Board after considering the petitioner's claim may take appropriate decision.

31. The judgment in ***Hari Ram's*** case (supra) relied by the learned counsel for the petitioner supports the submission of the petitioner that the State Government/competent authority cannot discriminatingly exempt land of certain tenure holders and refuse exemption to others. It is useful to quote paragraph 24 of the said judgment which is to the following effect:-

*"**24.** As a matter of fact, lands of more than 40 landowners out of the same acquisition proceedings have been released by the State Government under Section 48 of the Act. Some of the release orders have been passed in respect of landowners who had not challenged the acquisition proceedings and some of them had challenged the acquisition proceedings before the High Court and whose cases were not recommended by Joint Inspection Committee for withdrawal from acquisition and whose writ petitions were dismissed. Some of these landowners had only vacant plots of land and there was no construction at all. In most of these cases, the award has been passed and, thereafter, the State Government has withdrawn from acquisition. It is not the case of the respondents that withdrawal from acquisition in favour of such landowners has been in violation of any statutory provision or contrary to law. It is also not their case that the release of land from acquisition in favour of such landowners was wrong action on their part or it was done due to some mistake or a result of fraud or corrupt motive. There is nothing to even remotely suggest that the persons whose lands have been released have derived the benefit illegally. As noticed above, prior to October 26, 2007, the State Government did not have uniform policy concerning withdrawal from acquisition. As regards the guidelines provided in the letter dated June 26, 1991, this Court has already held that classification on the basis of nature of construction cannot be validly made and such policy is not based on intelligible differentia and a rational basis. What appears from the available material is that for release of the lands under the subject acquisition, no policy has been adhered to. This leads to an irresistible conclusion that no firm policy with regard to release of land from acquisition existed. It is true that any action or order contrary to law does not confer any right upon any person for similar treatment. It is equally true that a landowner whose land has been acquired for public purpose by following the prescribed procedure cannot claim as a matter of right for release of his/her land from acquisition but where the State Government exercises its power under Section 48 of the Act for withdrawal from acquisition in respect of a particular land, the landowners who are similarly situated have right of similar treatment by the State Government. Equality of citizens' rights is one of the fundamental pillars on which edifice of rule of law rests. All actions of the State have to be fair and for legitimate reasons. The Government has obligation of acting with substantial fairness and consistency in considering the representations of the landowners for withdrawal from acquisition whose lands have been acquired under the same acquisition proceedings. The State Government cannot pick and choose some landowners and release their land from acquisition and deny the same benefit to other landowners by creating artificial distinction. Passing different orders in exercise of its power under Section 48 of the Act in respect of persons similarly situated relating to same acquisition proceedings and for same public purpose is definitely violative of Article 14 of the Constitution and must be held to be discriminatory. More so, it is not even the case of the respondents that release of land from acquisition in favour of various landowners, as noticed above, was in violation of any statutory provision or actuated with ulterior motive or done due to some mistake or contrary to any public interest. As a matter of fact, vide order dated August 19, 2008, this Court gave an opportunity to the State*

Government to consider the representations of the appellants for release of their land and pass appropriate order but the State Government considered their representations in light of the policy dated October 26, 2007 ignoring and overlooking the fact that for none of the landowners whose lands have been released from acquisition, the policy dated October 26, 2007 was applied. The State Government has sought to set up make believe grounds to justify its action that development planning has been kept into consideration and that the appellants have been offered developed plots of double the area of construction while the fact of the matter is that in some cases where the plots were vacant and had no construction, the entire plot has been released from acquisition and also the cases where one room or two rooms construction was existing, the whole of plot has been released. While releasing land of more than 40 landowners having plots of size from 150 sq. yards to 1500 sq. yards, if development plan did not get materially disturbed in the opinion of the State Government, the same opinion must hold good for the appellants' lands as well. It is unfair on the part of the State Government in not considering representations of the appellants by applying the same standards which were applied to other landowners while withdrawing from acquisition of their land under the same acquisition proceedings. If this Court does not correct the wrong action of the State Government, it may leave citizens with the belief that what counts for the citizens is right contacts with right persons in the State Government and that judicial proceedings are not efficacious. The action of State Government in treating the present appellants differently although they are situated similar to the landowners whose lands have been released can not be countenanced and has to be declared bad in law."

32. In view of the law as laid down by the Apex Court as above, the respondents are obliged to consider the claim of land holders for exemption uniformly on a rational policy and the respondents cannot take decision regarding exemption of land from acquisition arbitrarily and discriminately.

33. In view of the fact that all relevant materials including proceedings of the Board have not been brought on the record by the respondents, it is not possible for this Court to examine such decision and to decide the claim of the petitioner, hence it is in the interest of justice that the Board be directed to consider the claim of the petitioner for exemption of Plot No.368/1 from the housing scheme.

34. In view of the aforesaid, the Principal Secretary/Secretary to the Government of Uttar Pradesh in the Housing and Urban Planning Department is directed to take appropriate steps so that the Board may consider the claim of the petitioner for exemption of land as submitted by letter dated 16th February, 2005 (Annexure-5 to the writ petition). Looking to the fact that sufficient time has elapsed, we direct that the aforesaid exercise may be completed expeditiously preferably within a period of four months from the date a certified copy of this order is produced before the Principal Secretary. With regard to auction of plot in question and other plots in favour of respondent No.5, the protection as granted by the Apex Court vide its order dated 9th November, 2009 shall continue till the decision is taken by the Board and the said auction shall abide by the decision of the Board so taken.

35. The writ petition is disposed of accordingly.

36. Parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.01.2012

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI,J.

Civil Misc. Writ Petition No. 74746 of 2011

Jai Ram ...Petitioner
Versus
D.D.C. and others ...Respondents

Counsel for the Petitioner:
Sri M.D. Misra

Counsel for the Respondents:
C.S.C.
Sri A.P. Tewari
Sri S.S. Tripathi

U.P. Consolidation of holding Act-Section 48-D.D.C. While entertaining revision-without considering plausible explanation about 36 years unreasonable delay-and remanding matter before S.O.C.-ignoring the aspect that record of C.O. already weeded out-order of remand-held-unsustainable.

Held: Para 7

Having heard learned counsel for the parties, the first issue is in relation to the delay of 36 years being explained by respondent No.2. The Deputy Director of Consolidation, in my opinion, could not have proceeded to remit the matter before the Settlement Officer Consolidation to decide the case on merits without recording a clear finding as to what was the justification for condoning the delay of 36 years. This was not a routine matter and the issue of delay could not have been dealt with casually treating it to be irrelevant on a prima facie inference of a theory of alleged fraud. Fraud has to be established on record, and without any firm finding on cogent material or ignoring relevant material like the Goswara on record, the Deputy Director ought not to have passed an order of remand. An enquiry could have been made about the proceedings before the Assistant Consolidation Officer. This having not been done, the order impugned falls within the disrepute of surmises and conjectures. In the absence of any such finding having been recorded by the Deputy Director of Consolidation, the order of remand cannot be passed in order to fill up the gaps and the lacuna in the explanation, which according to the petitioner, was very much evident in the delay condonation application preferred before the Settlement Officer Consolidation.

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

1. Heard Sri M.D. Misra, learned counsel for the petitioner, Sri A.P. Tewari for respondent No.2 and the learned Standing Counsel for respondent No.1.

2. Learned counsel for respondents submit that since the issues involved are purely legal, therefore, they do not propose to file any counter-affidavit at this stage and the matter be disposed of finally on the basis of the documents already on record with the consent of the parties. Accordingly, the matter is being disposed of finally at this stage.

3. A supplementary-affidavit has been filed bringing on record certain averments including the pedigree by which the parties are governed. Kamta, son of Govind, was the recorded tenure holder. The petitioner - Jairam is the

grand son of Ram Patti, sister of Govind. The claim of Jairam is to the effect that the said property came to be settled between the petitioner and Late Kamta during consolidation operations under an order of the Assistant Consolidation Officer dated 20.11.1969. The village was de-notified under Section 52 sometimes in the year 1976, after the death of Kamta in 1975. The name of the petitioner continued to be recorded thereafter and the petitioner claims continuous cultivatory possession over the land in dispute since then.

4. After 36 years, a time-barred appeal came to be filed by the respondent - Radhey Shyam and another appeal came to be filed by one of the sons of Kamta, Jawahar. These two appeals were dismissed by the Settlement Officer Consolidation vide order dated 25.11.2005. One of the appellants Jawahar did not prefer any revision against the said order. It is only the respondent No.2 - Radhey Shyam, who preferred a revision, which has been allowed on 15.11.2011 giving rise to the present petition.

5. Sri M.D. Misra submits that there is no valid explanation for the delay of 36 years and the Deputy Director of Consolidation, without adverting himself to the aforesaid issue in correct perspective and condoning the delay in filing of the appeal, has proceeded to remand the matter to the Settlement Officer Consolidation after recording findings on the merits of the claim of Respondent No.2. He submits that this two fold approach of the Deputy Director of Consolidation is erroneous and ignores all relevant issues relating to the existence of the order of the Assistant Consolidation Officer dated 20.11.1979. He submits that the file relating to the order of the Assistant Consolidation Officer did exist for which reliance is being placed on the extract of a Goswara, copy whereof is Annexure-1 to the writ petition, which indicates that the said file has been weeded out in the year 1977. Sri Misra submits that no appropriate finding has been recorded by the Deputy Director of Consolidation before passing the remand order and further the Deputy Director of Consolidation has entered into the merits of the order of the Assistant Consolidation Officer by making comments in order to create an impression by drawing an inference of fraud without there being any evidence to that effect. He, therefore, submits that on both the counts, the order of Deputy Director of Consolidation is erroneous.

6. Sri Tewari, on the other hand, submits that as a matter of fact the order of the Assistant Consolidation Officer if at all in existence is an order without jurisdiction and is an outcome of a fake proceeding. For this, the Deputy Director of Consolidation has recorded findings indicating that the order of the Assistant Consolidation Officer suffers from procedural defects as well and the endorsement does not bear the date or the appropriate verification in relation to the said order. He, therefore, contends that Deputy Director of Consolidation was justified in remanding the matter to the Settlement Officer Consolidation for decision afresh.

7. Having heard learned counsel for the parties, the first issue is in relation to the delay of 36 years being explained by respondent No.2. The Deputy Director of Consolidation, in my opinion, could not

have proceeded to remit the matter before the Settlement Officer Consolidation to decide the case on merits without recording a clear finding as to what was the justification for condoning the delay of 36 years. This was not a routine matter and the issue of delay could not have been dealt with casually treating it to be irrelevant on a prima facie inference of a theory of alleged fraud. Fraud has to be established on record, and without any firm finding on cogent material or ignoring relevant material like the Goswara on record, the Deputy Director ought not to have passed an order of remand. An enquiry could have been made about the proceedings before the Assistant Consolidation Officer. This having not been done, the order impugned falls within the disrepute of surmises and conjectures. In the absence of any such finding having been recorded by the Deputy Director of Consolidation, the order of remand cannot be passed in order to fill up the gaps and the lacuna in the explanation, which according to the petitioner, was very much evident in the delay condonation application preferred before the Settlement Officer Consolidation.

8. Secondly, even on merits the manner in which the finding has been recorded by the Deputy Director of Consolidation, there remains hardly any scope for the Settlement Officer Consolidation to comment otherwise and in my view the said order of remand, therefore, suffers from gross infirmities. Accordingly, the order dated 15.11.2011 is unsustainable.

9. The writ petition is, therefore, allowed and the order dated 15.11.2011 is hereby quashed. The matter is remitted to the District Deputy Director of Consolidation/ Collector, Gorakhpur, to himself decide the matter in the light of the observations made herein above as expeditiously as possible preferably within a period of 3 months from the date of production of a certified copy of this order before him.
