ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.05.2012

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No. 167 of 2011

O.P. Sharma (Magician/Jadugar)
...Petitioner
Versus
State of U.P. Thru' Principal Secretary Entertainment and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Kumar
Sri Praveen Kumar
Sri Vinod Kumar Sharma

Counsel for the Respondents:
C.S.C.

U.P. Entertainment and Betting Tax Act 1979-Section-11-Demand of Entertainment Tax-on magic shows-allegation on refusal of free pass to District Authorities-the annoyance resulted demand of Entertainment Tax-while none of condition of permission ever breached-performance of dance and music-necessary and integral part of magic shows-in other part of country in other regional shows never such tax imposed-no specific denial-held-demand of Entertainment Tax wholly arbitrary-non sustainable.

Held: Para 32 and 36

The case of the petitioner is that performance of music and dance of short duration is necessary and integral part of such magic show. It is prevalent all over the country. In the other part of the country where a different language other than Hindi is popular, the Magicians perform dances of the regional popular films. At no point of time, District Administration of any District all over the country has raised any objection to such dance or music. There is no specific denial in the counter affidavit except a general denial.

In view of above discussions, we are of the opinion that the action of the respondents demanding the Entertainment Tax is wholly arbitrary and cannot be sustained. The impugned show cause notice and the order passed thereon are hereby quashed.

Case law discussed:
2005 NTN (28)- 71; (2008) 3 SCC 582; AIR 2008 SC 592

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

1. The petitioner Shri O.P Sharma who is Magician has by means of the present writ petition challenged the orders dated 28.1.2011 and 29.1.2011 whereby the District Magistrate, Gorakhpur has directed the petitioner to pay a sum of Rs.2,71,800.00 towards Entertainment Tax and Rs.20,000/-, as penalty.

2. The petitioner applied for and was granted permission subject to certain conditions to perform magic shows for a period 6.1.2011 to 28.2.2011 from 9.00 AM to 9.00 PM at 'Shree Talkies, Mohaddipur without payment of any entertainment tax. Armed with the aforesaid permission, the petitoner started giving his performance of magic show at Shree Talkies, Mohaddipur. The further allegation is that there was some dispute between the petitioner and the District officials with regard to issuance of free passes to the viewers. Resultantly, the District Magistrate issued a notice dated 22.1.2011 with the allegations that the petitioner is carrying on dance shows instead of showing magic to the public and was required to show cause as to why the Entertainment Tax under the provision of

U.P.Entertainment & Betting Tax Act 1979, may not be levied.

3. The cause was shown which was not found satisfactory by the District Magistrate who ultimately passed the impugned order demanding the payment of Entertainment Tax and also levied the penalty. Feeling aggrieved, the present petition has been filed. A counter affidavit which is a short document has been filed by the respondents through Shri Mahendra Singh, Assistant Entertainment Commissioner.

4. In the counter affidavit, the averments made in the writ petition have been denied by making general allegations. It has been stated that in the magic show, live dance programme was also shown. In the advertisement poster pasted in different parts of the District, dancers in dancing pose have been shown which clearly belies the case of the petitioner, vide paragraph 17 of the counter affidavit. In paragraph 23 of the counter affidavit an usual plea of availability of alternative remedy under the said Act has been set out.

5. The petitioner has reiterated his stand taken in the writ petition, in the rejoinder affidavit.

6. Heard Shri Ashok Kumar, learned counsel for the petitioner and Shri A.C.Tripathi, learned standing counsel for the respondents.

7. The learned counsel for the petitioner submits that there is general exemption from payment of Entertainment Tax on magic shows. The State Government has issued exemption notification in exercise of its power under section 11 of the Act, exempting the magic shows from payment of entertainment tax. One such notification was issued on 11.10.1995 vide (annexure 3-A to the writ petition). In pursuance thereof, the petitioner applied for and was granted permission to hold magic shows subject to the conditions specified in the order passed by the Additional District Magistrate, Kanpur Nagar. None of the conditions having been violated, there was no question of realisation of any Entertainment Tax from the petitioner on such shows. In the show cause notice dated 22.1.2011, the only material allegation against the petitioner is that on two occasions, after interval, two dances were performed on the pre recorded tune, by the dancers. The submission is that the period of one magic show is of two and half hours. In the said slot, a magician has to give many programmes of magic. Background music tune is an essential part of such performances. One or two dance performances on pre recorded tune for a total period of 5 to 7 minutes would not change the nature and character of magic show in any manner. Elaborating the argument, it was submitted that even classical and non classical dances have been exempted from payment of Entertainment Tax by the State Government by issuing notification under Section 11 of the Act, from payment of Entertainment Tax. With regard to the question of availability of alternative remedy, it was submitted that the petitioner is challenging the very essential jurisdictional facts to levy Entertainment Tax and as such, the availbility of alternative remedy has no bar to entertain the writ petition. Reliance was placed on certain decisions of Apex Court such as ***State of H.P and others versus Gujarat Ambuja Cement Ltd. and Anr. 2005 NTN (28)- 71 and State of Kerala and others versus Kurian Abraham (P) Ltd and another (2008) 3 SCC 582.***

8. In reply, the learned standing counsel submits that in view of the fact that dances were performed during the course of magic show, the petitioner is liable to pay entertainment tax. The exemption was granted to exihibit magic shows and not to exhibit shows of dances. In the guise of magic show, the petitioner got performed dances on the stage on the pre recorded hit cinema films songs and as such has violated the conditions of the exemption from entertainment tax. He also raised the plea relating to availability of alternative remedy by way of an appeal to the State Government.

9. Considered the respective submissions of the learned counsel for the parties and also pursued the record.

10. On the facts of the present case, we are not impressed by the submissions of the learned standing counsel to relegate the petitioner to the statutory remedy by way of appeal to the State Government. The said remedy is not an adequate and efficacious on the facts of the present case as the petitioner was permitted to perform magic shows for a limited period i.e 6.1.2011 to 28.2.2011. Even otherwise also, the jurisdictional facts to initiate and levy Entertainment Tax being absent as found in the later part of this judgment, the interest of justice will not be served by dismissing the writ petition on the ground of availability of alternative remedy. The objection raised by the learned standing counsel is therefore, rejected.

11. The U.P Entertainments and Betting Tax Act 1979 has been enacted to consolidate and amend the law relating to tax on entertainments, amusements and on certain forms of betting. In the State of U.P. Entertainment has been defined in the definition clause namely Section 2(g). It includes any exihibition, performance, amusement, game, sport or race (including horse race) to which persons are admitted for payment and in the case of cinematograph exhibitions, includes exhibition of news-reels, documentaries, cartoons, advertisement shorts or slides, whether before or during the exhibition of a feature film or separately.

12. Section 3 of the Act is charging section. It levies entertainment tax on admission to entertainment. Payment for admission has been defined by giving an inclusive definition in Section 2(l) of the Act. The levy of Entertainment Tax is on all 'payment for admission' to any entertainment. The taxable event therefore, is payment for admission to any entertainment.

13. Section 11 of the Act empowers State Government to grant exemption from Entertainment Tax for promotion of peace, international good will, arts, sports or other public interest, by general or special order. Under sub section(4), the District Magistrate has been authorised to grant exemption if he is satisfied that the entire gross proceeds of an entertainment are to be devoted to philanthropic, religious or charitable purposes, without any deduction whatsoever on account of the expenses of the entertainment, he may subject to the rules made under the Act, grant exemption to such entertainment from payment of tax under this Act on such terms and conditions as he may deem fit to impose.

14. It is not in dispute that element of entertainment is therefore in the magic shows also, that is the reason the State Government has issued notification granting exemption from payment of entertainment

tax to such shows. Proviso to section 11 provides that the State Government may cancel such exemption if it is satisfied that the exemption was obtained through fraud or misrepresentation, or that the proprietor of such entertainment has failed to comply with any of the terms or conditions imposed or directions issued in this behalf.

15. A copy of the permission granted to the petitioner has been annexed as annexure-1 to the writ petition. It contains as many as 12 conditions. It is not the case of the respondents that any of the conditions subject to which the permission to perform magic show was granted, has been violated by the petitioner. The only ground raised in the show cause notice dated 22.1.2011 is that the District Magistrate (Entertainment Tax Department) has received information that while performing the magic show, together with the magic show, two filmy dances were also performed. One such instance dated 18.1.2011 in the show of 6.00 PM has been mentioned therein. It was found in the said show that after interval, two dances of Hindi feature films namely 'Slum Dog Millionaire' and 'Dabang' were performed with pre recorded music by the dancers. Further in the newspaper, namely 'Amarujala Compact' dated 20.1.2011, a news item under the heading 'Munni Ka Jadu' was published which shows that the alleged magic show is not a magic show but it is an ordinary entertainment programme and the entertainment tax @ 25% of the total collection was proposed to be levied. In reply, it was stated that the magic show is being performed after taking the permission from the District Magistrate office and magic show is totally exempt from entertainment tax by the notification dated 11.10.1995. Magic and only magic show was performed.

16. The question which we are required to adjudicate upon is whether the allegations made in the show cause notice are sufficient to establish that the petitioner performed the ordinary entertainment programme instead of magic show.

17. The facts are not much in dispute, we take the facts as are founded in the show cause notice.

18. A magic is nothing but a trick. Dictionary meaning of magic is 1. the secret power of appearing to make impossible things happen by saying special words or doing special things. 2. The art of doing tricks that seems impossible in order to entertain people. 3. A special quality or ability that seems too wonderful to be real.

19. Adj.1. having or using special powers to make impossible things happen or seem to happen: a ***magic spell/charm/potion/trick.*** There is no magic formula for passing exams- only hard work. 2. (informal) having a special quality that makes sth seem wonderful: It was a magic moment when the two sisters were reunited after 30 years. She has a ***magic touch*** with the children and they do everything she asks. Trust is the magic ingredient in our relationship. 3. [not before noun] (BrE, informal) very good or enjoyable: 'what was the trip like?' Magic! '

20. **Magic** (sometimes referred to as **stage magic** to distinguish it from paranormal or ritual magic) is a performing art that entertains audiences by staging tricks or creating illusions of seemingly impossible or supernatural feats using natural means. These feats are called *magic tricks,* effects, or *illusions.*

21. Performances we would now recognize as conjuring have probably been practiced throughout history. The same level of ingenuity that was used to produce famous ancient deceptions such as the Trojan Horse would also have been used for entertainment, or at least for cheating in money games, since time immemorial.

22. Various steps are taken by a Magician to destract the attention of public from one point and to get focused attention of all the viewers to a particular point so that he may successfully perform his trick. It is not in issue that duration of a show of magic is generally in between two and half hours to three hours with interval. During a show, a Magician is required to present various items of magic one after the other. He has to prepare himself and his assistants while performing one item and while switching to the next one. A swift action is required to shift to the next item, after the completion of earlier one, so that the continuity is maintained. During the intervening period, music etc. is played. In all such performances light music plays an important role. The department has not raised any objection with regard to the music played during such performances. The only objection is that during the show of about two and half hours to three hours, two live dances were performed on the stage by the dancers. The respondents thus are treating the magic show, a show of general entertainment. The issue is whether such understanding of the department is legally justified or not. Its answer depends upon the viewers' point of view. Whether they made the payment for admission to such show to enjoy magic show or to enjoy the two dances which were performed. In our considered opinion, answer is very obvious. The viewers paid for admission to the show to enjoy magic show and not to enjoy the dances which were of 5 to 7 minutes in all. A man of ordinary prudence will not go to such show just to see the live performance of two dances on filmy songs, not even performed by an extra ordinary or a renowed performer. The dances were just ordinary dances, performed by the ordinary artist. The yardstick for judging the reaction on the viewers of the show has to be of prudent, reasonable person.

23. The department has not placed any evidence to show that the viewers coming to the show, made the payments for admission to see dances performed there.

24. By no stretch of imagination, it can be said that in a show of two and half hours to three hours duration, if two dances of 5 to 7 minutes are performed, the show would become dance show instead of magic show. The allegation in this regard is in paragraph 17 of the Counter affidavit wherein it has been stated that from the inspection of magic show it was found that live dance was shown during magic show. An advertisement poster pasted in different parts of the district shows the dancers in dancing pose which clearly proves the case against the petitioner. The said paragraph 17 of the counter affidavit is reproduced below:

17. That the contents of paragraph no.29 of the writ petition are incorrect hence denied. From the inspection of magic show it was found that Live dance programme was shown during magic show. An advertisement poster pasted in different part of the district shown the dancers on dancing pose which clearly proves the case against the petitioner. A true copy of the extract of relevant poster is being filed herewith and marked as Annexure no.CA-1 to this counter affidavit.

25. Except the aforesaid paragraph, there is no pleading and proof to the effect that the show performed by the petitioner was not a magic show. A judicial notice can be taken of the fact that even in the programmes telecasted on television may be of news, music, interviews, commercial breaks, intervene. The Commercial breaks and their frequency depends upon the popularity and their durations knows as T.R.P.. But the facts remains that such programmes are never treated as programme other than the programme telecasted. A music programme or exhibition of feature film remains the same notwithstanding the commercial breaks. If the logic of the respondents is imported, then all such programmes will become programmes of advertisements instead the programme being telecasted. On the basis of the said analogy also, it is difficult to hold that the show performed by the petitioner on the stage to amuse the public with help of music and dances is other than a magic show.

26. There is yet another angle to the issue. Attention of the Court was invited to a notification dated 22.7.1981 issued by the State Government in exercise of its power under section 11(1) of the Act. By the said notification, the Governor is pleased to order that the Drama, Nautanki, Kawwali, Kavi Sammelan, Mushaira, Classical and Non Classical Dance, shall be exempt from payment of entertainment tax. The said notification is reproduced below:

"In exercise of the powers under sub-section (1) of Section 11 of the Uttar Pradesh Entertainments and Betting Tax Act, 1979 (U.P Act No.28 of 1979) and in supersession of all previous orders on the subject, the Governor is pleased to order that the following classes of entertainments shall be exempted from payment of entertainment tax with effect from August 16, 1981:

(1) Drama

(2) Nautanki

(3) Qauwali,

(4) Kavi Sammelan,

(5) Mushaira

(6) Classical and Non-classical Music

(7) Classical and Non-classical Dance

(8) Variety programmes consisting exclusively of two or more of items 1 to 7 above.

(9) Games and sports whether held by registered sports associations or by any other body (excluding games of Skill and Video games or any other game of electronic devices by whatever name called)

(10) Skating

(11) Dangals and wrestling bouts including free style wrestling and

(12) Circus including acrobatic feats."

27. It was argued and rightly so that under the said notification, Classical and Non-Classical dances are exempt from payment of Entertainment Tax with effect from August 16, 1981. It follows that no Entertainment Tax is payable on dances Classical and non Classical. The natural corollary is that even if one or two dances of hit Hindi films were performed during the course of magic show, these dances

themselves are exempt from payment of Entertainment Tax under the aforesaid notification dated 22.7.1981. This also supports the petitioner's case against the levy of Entertainment Tax on him.

28. It was also argued that there is no allegation of breach of any of the conditions granting exemption, from payment of entertainment tax. One of the conditions for grant of exemption is that during the course of programme, no obscene dance shall be performed. Neither it is proved nor alleged that any obscene dance was performed during the magic show. There being no violation of the conditions of grant of exemption from payment of Entertainment Tax, the levy of Entertainment Tax cannot be justified. The said argument has got substance and cannot be brushed aside.

29. Along with the counter affidavit, a photo copy of the advertisement poster pasted in the different parts of the District has been filed as annexure CA-1 to show that dancers on dancing pose were shown therein vide para 17, already quoted above, it is difficult to decipher any such thing from the copy of the said poster. On the contrary in the major portion of the poster, it is mentioned that come with family to see the show of Magician O.P. Sharma and in the right side of the poster, a photograph of a girl has been shown who occupies a very small fraction of the poster. The said photograph is not in a dancing pose nor it can be inferred that it is a show of dance. The said advertisement poster negates the stand of the respondents. There is no invitation to the public to come to dance show. It is ingenuity of the advertisers to show a female figure invariably in almost in all the advertisements to attract the attention of the public, even in respect of such products exclusively meant for men.

30. It is useful to notice a recent decision of the Apex Court under the Act in ***Amit Kumar v. State of U.P. & others***, AIR 2008 SC592, wherein a fashion show was held at Gorakhpur for selection of 'Mr. Gorakhpur' and 'Miss Gorakhpur'. Entertainment tax was not paid on the aforesaid fashion show, by the organizer. A show cause notice was issued to the organizer. The organizer took the stand that programme was of competitive nature and there was no element of entertainment involved. It was stated that no fee was charged as admission was permitted on the basis of invitation card. The Supreme Court on these facts has held that fashion show was held with full knowledge that entertainment tax was payable in respect thereof and that though tickets may not have been issued in respect of the programme and only invitation cards had been issued, the same was merely a subterfuge for the purpose of evading and/or avoiding payment of entertainment tax. Contention that fashion show was held with the object of educating prospective students who would be interested in joining the Institute of Art, Fashion Designing and Modelling and was, therefore, exempt under Section 11(3) of the Act was rejected. Reliance was placed on the advertisement indicating that the object of the show was to invite people to come and watch the new world of glamour and modelling and to see the world of exotic fashion in Gorakhpur itself, vide para-15. Emphasis has been laid therein on object of the show, and if the said principle is invoked herein, the object of the show was of magic show and not of dance show.

31. Before parting with the case, it may be stated that a grievance has been raised by the petitioner that the proceedings giving rise to the present writ petition were

set to motion as the petitioner refused to give free passes beyond a limit to the District Administration. The District Administration got annoyed and by way of revenge, the impugned notice and order have been passed. Be that as it may, it is not necessary for us to say anything in this regard.

32. The case of the petitioner is that performance of music and dance of short duration is necessary and integral part of such magic show. It is prevalent all over the country. In the other part of the country where a different language other than Hindi is popular, the Magicians perform dances of the regional popular films. At no point of time, District Administration of any District all over the country has raised any objection to such dance or music. There is no specific denial in the counter affidavit except a general denial.

33. Before parting with the case, we may make general observations.

34. Until the last decade i.e 1990s, the street performer was a common feature of the rural and the urban landscape which has now completely vanished from the horizon. The street performer was an integral part of the traditional Indian source of entertainment of the masses. However, the advent of other sources of entertainment notably cable, television and internet have dwindled the interest of the public from such street performances. This has forced the street performer to leave this avocation and to find new sources of livelihood. Among those hardest hit by this change of interest, is the traditional Indian Magician or jadugar. Magic is now a dying art in India with performances running to unsold tickets and empty seats. The zenith achieved by Indian magicians like P.C.Sarkar on the world stage has now reached its lowest ebb. Time has come for every Indian to feel concern. India is country of rich traditions. We value over traditional art. Article 51A of the constitution, under clause(f) states that it shall be the duty of every citizen of India to value and preserve the rich heritage of our composite culture.

35. It should be the priority of the Government to prevent this art from dying out by providing monetary assistance as well as educating the people about the science behind this art. Life of a magician and his junior artists is always in danger while giving the performances. They are dare devil persons. A small miscalculation may bring their lives to the end in a fraction of a second. Such persons need protective hands.

36. In view of above discussions, we are of the opinion that the action of the respondents demanding the Entertainment Tax is wholly arbitrary and cannot be sustained. The impugned show cause notice and the order passed thereon are hereby quashed.

37. This Court on 7.2.2011 had passed a conditional stay order directing the petitioner to deposit security for the amount demanded in the form of NSC or fixed deposit to the tune of Rs.one lac and of the remaining amount of demand by other than cash or bank guarantee or fixed deposit.

38. In view of the success of the writ petition, the security furnished by the petitioner stands released forthwith and the respondents are required to issue necessary order in this regard and refund the security if so, deposited within a period not later than 15 days from the date of production of certified copy of this order.

39. The writ petition succeeds and is allowed with cost of Rs.5,000/- payable by the respondents, respondent no. 3 in particular, within a period of one month.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.05.2012

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN, J.

Second Appeal No. - 214 of 2012

Guljar Ahmed ...Petitioner
Versus
Smt. Akhtari ...Respondents

Counsel for the Appellant:
Sri Nipun Singh

Counsel for the Respondents:
.....

Code of Civil Procedure-Section 100-Malicious Prosecution-suit for cancellation of sale deed executed in favor of his own mother-to defraud creditors-dismissed by Trail Court-direction to lodge FIR-Lower 1st appellate Court-dismissed the Appeal-argument that in view of Section 53 of Transfer of property Act such sale deed can be canceled at instance of creditors and not by plaintiff-Appeal dismissed with cost of Rs. 25000/-for frivolous, fraudulent suit-payable to Bar Association within 3 month.

Held: Para 7

Accordingly, second appeal is dismissed on merit. However the directions given by the courts below for issuing notice or lodging FIR against plaintiff and his counsel are quashed. However plaintiff is saddled with the penalty of Rs.25,000/- for instituting frivolous, fraudulent suit and consuming time of the Court. This amount shall be paid by him to the Bar Association of Kairana, District Muzaffarnagar within three months failing which the Collector shall recover the same from him like arrears of land revenue and pay to the Bar Association. The Bar Association shall utilise the amount only for purchasing the Books.

Case law discussed:
AIR 1946 PC 177; AIR 1954 Nagpur 129(DB); AIR 1939 Madras 894; AIR 1961 Punjab 423; AIR 1954 Madras 173; AIR 1963 Mysore 257; AIR 1935 All. 529 (FB)

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

1. Heard learned counsel for the appellant at the admission stage.

2. This second appeal arises out of O.S. No.177 of 2005 filed by appellant against his mother defendant respondent for declaring the sale deed dated 20.07.2002 executed by him in favour of his mother/ defendant as void on the ground that it was executed to defraud the creditors by the plaintiff. Even the defendant did not appear but the suit was dismissed ex parte on 15.07.2006 by Civil Judge, Senior Division, Kairana, District Muzaffarnagar. Not only the suit was dismissed but show cause notice was also issued to the plaintiff and his learned counsel to show cause within seven days as to why FIR should not be lodged against them. Against the said decree, plaintiff appellant filed Civil Appeal No.30 of 2006, which was dismissed by A.D.J. Court No.9, Muzaffarnagar on 24.01.2012 hence this Second Appeal. Plaintiff further stated in the plaint that after execution of the sale deed, he had cleared his debts.

3. According to the Section 53, Transfer of Property Act:

"Every transfer of immovable property made with intent to defeat or

delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed."

4. Accordingly, the transfer made by the plaintiff in favour of his mother was not void on the ground mentioned in the plaint but only voidable and that also at the option of the creditor but not at the option of the plaintiff himself. The Privy Council in **Zafrul Hasan vs. Farid Ud-Din AIR 1946 PC 177** has held that as between the parties to such transfer, the transfer cannot be avoided by either of them. In **AIR 1954 Nagpur 129 (DB)** it has been held that the effect of the declaration under Section 53, T.P. Act leaves the sale deed operative between the parties thereto and does not amount to cancelling or setting aside the same. In **AIR 1939 Madras 894, AIR 1961 Panjab 423 and AIR 1954 Madras 173** it has been held that "as between the parties to such transfer, the transfer stands subject only to the right of the creditors to enforce their claim as if the transfer has not been made. It has further been held that the result of declaration under Section 53 is only to render the transfer inoperative as against creditors and that too only to the extent necessary to satisfy their claims and subject to their claims, the transaction is valid and enforceable. In **AIR 1963 Mysore 257,** it has been held that if transfer is avoided under Section 53 still transaction is not wiped out but has no effect on creditors defeated or delayed. In **Mohammad Taki Khan Vs. Jang Singh, AIR 1935 All. 529 (FB),** it has been held that where the fraud intended to be affected has been carried out substantially the court will not allow any party to allege his own fraud in order to avoid his own deed.

5. In view of the above authorities, the suit was not maintainable and has rightly been dismissed.

6. However, in my opinion, there was no occasion to issue notice or direct lodging of FIR against plaintiff or his counsel.

7. Accordingly, second appeal is dismissed on merit. However the directions given by the courts below for issuing notice or lodging FIR against plaintiff and his counsel are quashed. However plaintiff is saddled with the penalty of Rs.25,000/- for instituting frivolous, fraudulent suit and consuming time of the Court. This amount shall be paid by him to the Bar Association of Kairana, District Muzaffarnagar within three months failing which the Collector shall recover the same from him like arrears of land revenue and pay to the Bar Association. The Bar Association shall utilise the amount only for purchasing the Books.

8. Office is directed to supply a copy of this order free of cost to Shri S.P.Mishra, learned standing counsel for sending the same to the Collector, Muzaffarnagar and President/Secretary Bar Association, Mairana, Muzaffarnagar. Office shall also send a copy of this order to President/ Secretary Bar Association, Kairana District Muzaffarnagar.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.07.2012

BEFORE
THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.

Consolidation NO. 241 of 2006

Laxman & 9 Ors. ...Petitioner
Versus
D.D.C., Gonda & 6 Ors. ...Respondents

Counsel for the Petitioner:
Sri B.L.Mishra

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

U.P. Consolidation of Holdings Act-Section 11-Appeal with Section 5 application-S.O.C. While condoning delay decided appeal on merit and remanded back for fresh consideration-interference by D.D.C. under wrong assumption to decide delay application first-thereafter ought to have decide the appeal on merit-held-wholly misconceived-considering law laid down by Apex Court in State of Bihar Vs Kamleshwar Prasda Singh-question of limitation and merit-both can be considered simultaneously-it can not be interfered-order passed by D.D.C.-held-illegal-quashed.

Held: Para 17 and 18

So far as the power to condone the delay conferred to the courts is concerned, regard may be had to the judgment of the Hon'ble Supreme Court in the case of State of Bihar and others Versus Kameshwar Prasad Singh and another with other connected Civil Appeals (Supra) wherein, it has inter-alia been observed that the power to condone the delay in approaching the court has been conferred to do substantial justice to the parties by disposing the matter on merits.

Looking into over all circumstances of the case and the general legal principles regarding condonation of delay laid down by the Hon'ble Apex Court in the case of State of Bihar and others Versus Kameshwar Prasad Singh and another with other connected Civil Appeals (Supra) and also in the case of N.Balakrishnan Versus M.Krishnamurthy (Supra), this Court is of the definite view that the order passed by the Assistant Settlement Officer Consolidation, Gonda could not have been interferred with by the learned Deputy Director of Consolidation, Gonda.

Case law discussed:
2006 (101) RD 69; 2003 (94) RD 186; 2001 (92) RD 596; 1998 (89) RD 607 (SC); (2000) 9 SCC 94; 1996 (87) RD 465; 1990 RD 162; (2003) SCC 257; (2002) 1 SCC 633

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.)

1. Heard Shri B.L.Mishra, learned counsel for the petitioners and Shri B.R.Singh, learned counsel appearing for the respondents and have perused the record.

2. The facts of the case as culled from the pleadings available on record are that the land in dispute was recorded in the name of the predecessor-in-interest of the petitioners, Arjun in the basic year khatauni. On commencement of the consolidation operations by issuance of Notification under Section 4(2) of the U.P.Consolidation of Holdings Act (hereinafter to be referred as " Act"), objections were filed by the respondents under Section 9 of the Act claiming their right over the land in dispute. The case under Section 9-A (2) of the Act was allegedly decided by the Consolidation Officer by means of order dated 11.11.1979.

Against the aforesaid order dated 11.11.1979 passed by the Consolidation Officer, Gonda deciding the case on the basis of the alleged compromise, an appeal was preferred by the petitioners before the Assistant Settlement Officer Consolidation, Gonda. Taking therein various grounds, the petitioners assailed the order dated 11.11.1979 passed by the Consolidation Officer, Gonda. The appeal filed by the petitioners was delayed. It has been submitted by the learned counsel for the petitioners that the petitioners had never entered into compromise with the respondents and also that the petitioners did not have any information about the order dated 11.11.1979 passed on the basis of the alleged compromise by the Consolidation Officer, Gonda. The appeal was allowed by the Assistant Settlement Officer, Consolidation vide his order dated 23.11.2005 whereby while condoning the delay in filing the appeal, the case was remanded to the court of the Consolidation Officer, Gonda with a direction to give appropriate opportunity of leading evidence and hearing to both the parties and decide the matter on merits. The appellate court has set aside the dated 11.11.1979 passed by the Consolidation Officer, Gonda.

3. Feeling aggrieved by the aforesaid order 23.11.2005 passed by the Assistant Settlement Officer, Consolidation, Gonda, the respondents preferred a revision petition before the Deputy Director of Consolidation under Section 48 of the Act which was allowed by means of order dated 17.02.2006 whereby, the appellate order dated 23.11.2005 was set aside and the matter was remanded back to the appellate court for hearing the matter afresh.

4. It is the aforesaid order dated 17.02.2006 passed by the Deputy Director of Consolidation, Gonda which has been challenged by means of the instant writ petition.

5. Learned counsel for the petitioners, Shri B.L.Mishra has submitted that the alleged compromise on the basis of which the Consolidation Officer, Gonda passed the order dated 11.11.1979, on the face of it, is forged, that the same was not signed by all the parties in the case before the Consolidation Officer, Gonda and that the parties and their signatures/thumb impressions were not verified as required under law. He further states that a perusal of the compromise, which has been annexed as Annexure no.2 to the writ petition, itself shows that the order, on the basis of the said compromise, was not transcribed on a separate order sheet , neither was it transcribed on the running order sheet of the trial court. He further stated that the appellate court in it's order dated 30.11.2005 has elaborately discussed the issue and has rightly set aside the order passed by the Consolidation Officer, Gonda. He further stated that the order dated 11.11.1979 passed by the Consolidation Officer was passed on a Holiday (11.11.1979, being Sunday).

6. Learned counsel for the petitioners, Shri B.L.Mishra has further argued that the appeal was allowed by the appellate court condoning the delay in preferring the same and since the matter was remanded to the Consolidation Officer, Gonda to decide the same on merits, there was no illegality in the order of the appellate court which would have called for any interference by the learned Deputy Director of Consolidation. He has also stated that the finding recorded by the Deputy Director of Consolidation in his order that the appellate court had decided the appeal on merit without

condoning the delay is factually wrong and the fact that the appeal was decided on merit while the delay in preferring the appeal was condoned, can be gathered from a bare perusal of the order dated 30.11.2005 passed by the appellate court. Learned counsel for the petitioners has also stated that any order condoning the delay in filing appeal could not have been interferred with by the revisional court in exercise of its revisonal jurisdiction under Section 48 of the Act.

7. In support of his contention, Shri B.L.Mishra, learned counsel for the petitioners has placed reliance on the cases of ***Chikhuri Versus ,Joint Director of Consolidation and others reported in 2006(101) RD 69, Abdul Karim Versus Deputy Director Consolidation, Basti and others reported in 2003(94) RD 186, Mulajim and others Versus Deputy Director of Consolidation, Deoria and others, reported in 2001(92) RD 596, N.Balakrishnan Versus M.Krishnamurthy reported in 1998 (89) RD 607 (SC) and State of Bihar and others Versus Kameshwar Prasad Singh and another with other connected Civil Appeals reported in (2000) 9 SCC 94.***

8. On the other hand, learned counsel for the respondents, Shri B.R.Singh, in his valiant attempt to convince the Court about the lawfulness of the judgment and order dated 17.02.2006 passed by the Deputy Director of Consolidation, submitted that the course adopted by the appellate court while deciding the appeal on merit and condoning the delay simultaneously is legally not tenable. He has further submitted that the application for condonation of delay ought to have been decided first by the learned appellate court and thereafter, the matter should have been listed for its disposal on merit. In support of his contention, learned counsel for the respondents has placed reliance on the judgment of this Court in the case of ***Girja Shanker and another Versus Deputy Director of Consolidation Bhadoi, Camp at Gyanpur and others reported in 1996(87) RD 465,*** He submitted that this Court in the said case of **Girja Shanker and another Versus Deputy Director of Consolidation Bhadoi, Camp at Gyanpur and others (Supra)** has categorically held that the matter relating to Section 5 of the Limitation Act is to be disposed of first and further if, the application under Section 5 of Limitation Act is allowed, the appeal is to be listed for disposal on merit and in case, the application under Section 5 of Limitation Act is rejected, the appeal shall also be dismissed as barred by time. Learned counsel for the respondents has further argued that there can not be a composite order allowing the application moved for condonation of delay in preferring appeal and deciding the appeal on merit. He also placed reliance in support of his contention on another judgment of this Court in the case of ***Bhagwat and others Versus Deputy Director of Consolidation and others reported in 1990 RD 162.***

9. I have considered the rival submissions made by learned counsels appearing for the parties and have also gone through the material available on record.

10. The argument on behalf of learned counsel for the petitioners primarily is that the judgment of the Deputy Director of Consolidation is based on absolutely incorrect appreciation of the finding available on record, in as much as though the Deputy Director of Consolidation has recorded a finding that the appellate court

allowed the appeal without condoning the delay but in fact the delay was condoned and the appeal was allowed.

11. Per contra, the submission of the learned counsel appearing for the respondents centres around the judgment of this Court in the case of Girja Shanker and another Versus Deputy Director of Consolidation Bhadoi, Camp at Gyanpur and others (Supra). On the basis of the said judgment, as noted above, it has been submitted on behalf of the respondents that after disposal of the application moved by the petitioner under Section 5 of Limitation Act, the appellate authority ought to have given an opportunity to argue the case and not by doing so, the appellate authority has not followed the established legal procedure.

12. While taking into consideration the aforesaid arguments made by the learned counsels for the parties , it is to be noted that condonation of delay is, in fact, a matter of discretion of the Court and once the explanation submitted by a litigant for moving the Court after some time, is found sufficient by the court concerned, it is the result of the positive exercise of discretion which should normally not be disturbed by a superior court. Regard can be had to the observations made by the Hon'ble Supreme Court in the case of N.Balakrishnan Versus M.Krishnamurthy (Supra) in this regard, which has been relied upon by learned counsel for the petitioners. The relevant extract of the said judgment in respect of exercise of discretion by the court while considering an application for condonation of delay in the case of N.Balakrishnan Versus M.Krishnamurthy (Supra) runs as under :-

"Once the Court accepts the explanation as sufficient it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse."

13. It is also to be noticed that the Deputy Director of Consolidation while passing the impugned order has clearly recorded a wrong finding that the appellate court has decided the appeal on merit without condoning the delay. A perusal of the appellate order clearly reveals that the appeal was allowed after condoning the delay by the appellate court. As regards the emphasis of the learned counsel appearing for the respondents on the argument that the application for condoning the delay ought to have been decided first and thereafter the appeal should have been fixed further for hearing on merits, reference may be made to a judgment of this Court reported in the case of Abdul Karim Versus Deputy Director Consolidation, Basti and others (Supra) wherein it has been held that there does not appear to be any harm if the appellate authority is permitted to hear arguments on both aspects together i.e. the question of limitation as well as merits. The judgment in the case of Abdul Karim Versus Deputy Director Consolidation, Basti and others (Supra) is by Hon'ble Single Judge and the judgment being relied upon in the case of Girja Shanker and another Versus Deputy Director of Consolidation Bhadoi, Camp at Gyanpur and others (Supra) by the learned counsel for the respondents is also by Hon'ble Single Judge. However, it is noticeable that the judgment in the case of Abdul Karim Versus Deputy Director Consolidation, Basti and others (Supra) has been rendered

at a later point of time, as such, as per settled law of precedence, the later judgment of a Co-ordinate Bench is to be followed. Accordingly, I am in agreement with the law laid down by the Hon'ble Single Judge in the case of Abdul Karim Versus Deputy Director Consolidation, Basti and others (Supra) . In this view, the contention of the learned counsel for the opposite parties does not merit acceptance and hence, the same is rejected.

14. Further, it is to be noticed that the alleged compromise , a copy of which has been annexed as Annexure no.2 to the writ petition, does not contain either thumb impression or the signatures of all the persons who were parties before the Consolidation Officer. The order of the Consolidation Officer is also transcribed on the said compromise itself where no satisfaction of the Consolidation Officer has been recorded that the parties of the case are signatories to the compromise.

15. The Assistant Settlement Officer, Consolidation has gone into the evidence and material available on record while passing order dated 23.11.2005 and has recorded the finding that the order by the Consolidation Officer on the basis of the compromise was passed on 11.11.1979, which being a Sunday, was a Holiday and further that on the said Sunday no Lok Adalat was organized. After discussing the material available on record at length, the order by the appellate authority was passed on 23.11.2005 whereby the matter has been remanded to the trial court for decision of the case afresh after affording opportunity to the parties concerned to lead their evidence and thereafter, to give opportunity of hearing. However, learned Deputy Director of Consolidation, without making any comment or without upsetting the finding recorded by the learned Assistant Settlement Officer, Consolidation in the appellate order, has only observed in the impugned order dated 17.02.2006 that the appeal was decided by the appellate court without condoning the delay.

16. As observed above, the aforesaid finding recorded by the Deputy Director of Consolidation is against the record which is explicit from a bare perusal of the order passed by the Assistant Settlement Officer Consolidation, Gonda. The order by the appellate court, in the instant, case was passed while condoning the delay in moving the appeal and as such in view of the law laid down by this Court in the case of Chikhuri Versus Joint Director of Consolidation and others (Supra), this Court, in the instant case, is of the view that the Deputy Director of Consolidation, Gonda ought not have interferred with the order passed by the Assistant Settlement Officer, Consolidation, Gonda.

17. So far as the power to condone the delay conferred to the courts is concerned, regard may be had to the judgment of the Hon'ble Supreme Court in the case of State of Bihar and others Versus Kameshwar Prasad Singh and another with other connected Civil Appeals (Supra) wherein, it has inter-alia been observed that the power to condone the delay in approaching the court has been conferred to do substantial justice to the parties by disposing the matter on merits.

18. Looking into over all circumstances of the case and the general legal principles regarding condonation of delay laid down by the Hon'ble Apex Court in the case of State of Bihar and others Versus Kameshwar Prasad Singh and another with other connected Civil Appeals

(Supra) and also in the case of N.Balakrishnan Versus M.Krishnamurthy (Supra), this Court is of the definite view that the order passed by the Assistant Settlement Officer Consolidation, Gonda could not have been interferred with by the learned Deputy Director of Consolidation, Gonda.

19. Learned counsel for the respondents has also placed reliance on the judgments reported in (2003)SCC 257, Jamal Uddin Ahmad Versus Abu Saleh Najmuddin and another and (2002) 1 SCC 633, Commissioner of Income Tax, Mumbai Versus Anjum M.H.Ghaswala and others. The said judgments do not come to the rescue of the respondents as the case of Jamal Uddin Ahmad (Supra) pertains to Representation of People Act, 1951 and discusses the principles of Exercise of Statutory Power in a manner prescribed by the Statute. As regards the case of Anjum M.H.Ghaswala (Supra) it may be noted that the said case also only lays emphasis on the well accepted legal principle that where a statute vests certain power in an authority to be exercised in a particular manner, that power has to be exercised only in that manner. In view of the Court, these judgments, thus have no application to the present case.

20. In view of above, the writ petition is allowed and the judgment and order dated 17.02.2006 passed by the Deputy Director of Consolidation, Gonda in Revision No.911 (Madhao and others Versus Luxman and others), under Section 48 of the U.P.Consolidation of Holdings Act, pertaining to Village Tulsipur Manjha, Pargana Nawabganj, Tehsil-Tarabganj, District Gonda is hereby, quashed. The Consolidation Officer, Gonda shall decide the matter afresh as per terms of remand order dated 23.11.2005 passed by the Assistant Settlement Officer Consolidation, Gonda. The matter by the Consolidation Officer, Gonda shall be decided expeditiously, say within a period of six months from the date of production of a certified copy of this order before him.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.07.2012

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE DEVENDRA KUMAR UPADHYAYA, J.

Misc. Bench No. 397 of 2012

Smt. Manju ...Petitioner
Versus
State of U.P. Through Prin. Secy. Urban Development Deptt. L ...Respondents

Counsel for the Petitioner:
Sri Sharad Pathak

Counsel for the Respondents:
C.S.C.
Sri Hemant Kumar Mishra
Sri Ram Kumar Singh

Constitution of India. Article 243-E (243-4) tenure of chairperson of Nagar panchayat-first date of meeting-administrating oath of Chairperson-can not be treated starting point for the period of tenure-but subsequent adjourned date for want of Quorum-shall be taken into consideration-as such the period of 5 years-expire on 15.01.2012-any suggestion apart from that-held misconceived.

Held: Para 19

In the instant case, admittedly a meeting was held on 17.11.2006 and in the said meeting only the oath was administered to the members and the Chairperson of the Nagar Panchayat. As has been held by the

Division Bench of this Court in its judgment dated 05.12.2011 in the case of Writ Petition No. 11226(M/B) of 2011 Sandeep Alias Sandeep Mehrotra and another Versus State of U.P. and others alongwith other connected matters, taking oath of office is the condition precedent and entitles a member to participate in the meeting of the Municipal Board or the Municipal Corporation. Thus, so far as the arguments being raised by Shri Sharad Pathak, learned counsel for the petitioner to the effect that the meeting in which only oath is administered to the members and Chairperson of the Nagar Panchayat should not be treated to be the first meeting for the purpose of determining the term as provided in Article 243-U of the Constitution of India and Section 10-A of the Uttar Pradesh Municipalities Act, 1916 is concerned, the Court is in complete agreement with the said argument in view of the law laid down by this Court in its judgment dated 05.12.2011 in the case of Writ Petition No. 11226 (M/B) of 2011 Sandeep Alias Sandeep Mehrotra (Supra). Thus, the meeting of Nagar Panchayat held on 17.11.2006 cannot be said to be the first meeting of the Nagar Panchayat so as to reckon its term of five years. To this extent the argument advanced by learned counsel for the petitioner, Shri Sharad Pathak is accepted.

Case law discussed:

1988 (Supp) SCC 562; (1976) 3 SCC 344; (1988) 4 SCC 577; (1989) 2 SCC 484; Writ Petition No. 11226(M/B) of 2011 Sandeep Alias Sandeep Mehrotra and another Versus State of U.P. and others alongwith other connected matters

(Delivered by Hon'ble Devendra Kumar Upadhyaya, J.)

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

2. By means of present writ petition, the petitioner who was elected as Chairperson of Nagar Panchayat, Fatehpur Chaurasi, District Unnao (hereinafter referred to as "Nagar Panchayat") in the election held in the month of October, 2006, has prayed that the order passed by the District Magistrate, Unnao appointing the Executive Officer of the Nagar Panchayat as Administrator be quashed and she be allowed to function and discharge her duties as Chairperson till 24.06.2012.

3. The facts of the case as narrated by the learned counsel for the petitioner are that the last election of Chairperson of Nagar Panchayat was held in the month of October, 2006 in which the petitioner, Smt.Manjoo emerged as winner and accordingly, in a meeting held on 17.11.2006 she was administered oath of the office of the Chairperson of Nagar Panchayat . Learned counsel for the petitioner further stated that the first meeting of the Nagar Panchayat was held on 25.06.2007, as such in terms of the provisions contained in Article 243-E (243-U) of the Constitution of India, her term as Chairperson of Nagar Panchayat would come to an end only on 24.06.2012. In this view, the learned counsel for the petitioner argued further that any order appointing Administrator in place of the petitioner would amount to illegal curtailment of term of the petitioner to which she is legally and constitutionally entitled to avail.

4. Learned counsel for the petitioner, Shri Sharad Pathak in his valiant attempt to establish the case in favour of the petitioner has argued that since the term of Chairperson of Nagar Panchayat as per provisions of Article 243-E (243-U) of the Constitution of India is five years as such any order passed by any authority which has the effect of curtailing the said term of five years will be unconstitutional. He has further stated that for the purpose of computing five years in reference to the provisions of Article 243-E (243-U) of

Constitution of India, in the instant case, the first meeting of Nagar Panchayat will be deemed to have taken place only on 25.6.2007 and not the earlier alleged meetings for the reason that in the meetings allegedly held prior to the meeting dated 25.06.2007, no business was transacted for want of quorum.

5. Placing heavy reliance on the judgment of the Hon'ble Apex Court in the case of ***State of Andhra Pradesh and another Versus Dr.Mohan Jeet Singh and another reported in 1988 (Supp) SCC 562, The Punjab University Chandigarh Versus Vijay Singh Lamba and others reported in (1976) 3 SCC, 344, Chandra Kant Khaire Versus Dr.Shanta Ram Kale and others reported in (1988) 4 SCC 577 and Jayant Bhai Manu Bhai Patel and others Versus Arun Subodh Bhai Mehta and others reported in (1989) 2 SCC 484*** , Shri Sharad Pathak, learned counsel for the petitioner has painstakingly tried to bring-home a case in favour of the petitioner and argued that in absence of quorum, no meeting can be said to have taken place at all and hence for the purpose of calculating the term of the petitioner, the meetings held prior to 25.06.2007 are meaningless. He has referred to certain documents annexed with the writ petition in the shape of certain certificates and reports submitted by the authorities and has tried to impress upon the Court that even the authorities admit that the first meeting was held only on 25.06.2007 and not before that.

6. Shri Pathak has further placed reliance on a Division Bench Judgment of this Court in a Bunch of writ petitions, leading Writ Petition being Writ Petition No.11226(M/B) of 2011 decided on 05.12.2011 wherein it has been held that after taking oath of the office, the first meeting convened and held, shall be treated as the first meeting for the purpose of Article 243-U of the Constitution of India.

7. Shri Pathak, learned counsel for the petitioner has also brought to the notice of the court that against the judgment of the Division Bench dated 05.12.2011 in the aforesaid Bunch of the writ petitions, no interference was made, so far as the aforesaid finding regarding the first meeting of the Nagar Panchayat is concerned, by the Hon'ble Apex Court in its order dated 13.12.2011.

8. Shri Pathak, further argued for the petitioner and heavily relied on the Government Order dated 17.12.2011 issued in regard to taking appropriate steps for managing the affairs of the local bodies on account of the fact that the elections of the local bodies could not be held before expiry of their term. Shri Pathak says that even the aforesaid Government Order dated 17.12.2011 provides that the term of the local body concerned shall commence from the first meeting of the local body after the date on which the oath is administered to the Chairperson and other members.

9. On the other hand, learned counsels appearing for the opposite parties have submitted that the first meeting of the Nagar Panchayat, after the oath was administered to its Chairperson and members, was convened on 16.01.2007 and the first meeting for the purpose of Article 243-U of the Constitution of India or for the purpose of determination of term of the Nagar Panchayat should be taken to be 16.01.2007 and not 25.06.2007, as is being asserted on behalf of the petitioner.

10. A counter affidavit on behalf of the opposite party no.3 has been filed

wherein, it has been stated that after oath was administered to the Chairperson and members of the Nagar Panchayat on 17.11.2006, an agenda was circulated to convene the meeting of Nagar Panchayat on 16.01.2007. In the counter affidavit the agenda of the meeting and minutes of the meeting dated 16.01.2007 have been annexed as Annexure No.CA-2. It has further been argued that thereafter another meeting was convened to be held on 15.06.2007 and then the meeting was held on 25.06.2007. The submission of behalf of the opposite parties is that though the quorum in the meetings held on 16.01.2007 and 15.06.2007 was not complete, however, the meetings were convened though no business could be transacted in these two meetings, namely; in the meetings dated 16.01.2007 and 15.06.2007.

11. It has been argued by the learned counsel for the opposite parties that since the first meeting, after the oath was administered, was convened on 16.01.2007 for which agenda was also circulated amongst the members of the Nagar Panchayat, as such 16.01.2006 is the date of the first meeting for the purpose of computing and determining the term of Nagar Panchayat.

12. We have carefully considered the contentions made and arguments advanced by learned counsels appearing for respective parties and have also gone through the material available on record of the case.

13. The sole question which falls for consideration in the instant writ petition is as to whether the term of Nagar Panchayat and of its Chairperson would come to an end on 24.06.2007 treating the meeting dated 25.06.2007 as the first meeting of Nagar Panchayat or prior to that, i.e. treating the meeting convened on 16.01.2007 as the first meeting of Nagar Panchayat.

14. After 74th Constitutional amendment, Part IX-A was introduced in the Constitution by way of enactment of The Constitution (74th Amendments) Act,1992.The said provisions came into operation with effect from First of June, 1993. By introduction of Part IX-A of the Constitution of India, the Municipalities were given constitutional status with a view to strengthen the urban local bodies to promote the concept of and implement the idea of better and stronger Local-Self Governments in the urban areas of the country. Article 243-U(1) of the Constitution of India provides the duration of the urban local bodies according to which every municipality shall continue for five years from the date appointed for its first meeting and no longer. Article 243-U (1) of the Constitution of India is being quoted hereunder for ready reference :-

"243U. Duration of Municipalities, etc.--

(1) Every Municipality, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer.

Provided that a Municipality shall be given a reasonable opportunity of being heard before its dissolution.

15. So far as the duration of rural local bodies namely; Village Panchayats, Kshetra Panchayats and District Panchayats is concerned, provisions similar to the provisions of Article 243U of the Constitution exists in Article 243-E of the

Constitution of India. It may be noted that Article 243-E falls in Part IX which was introduced in the Constitution by way of enacting the Constitution(Seventy third Amendment) Act, 1992 which came into force with effect from 01.06.1993. Part IX was added in the Constitution with a view to promote and strengthen Local Self Governments in the rural areas. However, the provisions of Article 243-U of the Constitution which are in respect of urban local bodies and those of Article 243-E which are in respect of rural urban bodies are akin to each other.

16. Section 10-A of the Uttar Pradesh Municipalities Act, 1916 also provides that every municipality shall continue for five years from the date appointed for its first meeting and no longer. Section 10-A (1) of the Uttar Pradesh Municipalities Act, 1916 runs as under :-

"10-A. Term of municipality.--(1) Every municipality shall, unless sooner dissolved under Section 39, continue for five years from the date appointed for its first meeting and no longer. "

17. The fate of the instant writ petition, thus, depends on the decision on the issue as to whether the period of the Nagar Panchayat for the purpose of determining its term shall start running from the date appointed for its first meeting dated 16.01.2007, though no business could be transacted for want of quorum.

18. A careful reading of the provisions contained in Article 243U of the Constitution of India and Section 10-A of the Uttar Pradesh Municipalities Act, 1916 makes it clear that the phrase occurring in both these provisions is ***"from the date appointed for its first meeting"*** .Thus, the term of the Nagar Panchayat will start running from the date appointed for its first meeting.

19. In the instant case, admittedly a meeting was held on 17.11.2006 and in the said meeting only the oath was administered to the members and the Chairperson of the Nagar Panchayat. As has been held by the Division Bench of this Court in its judgment dated 05.12.2011 in the case of **Writ Petition No. 11226(M/B) of 2011 Sandeep Alias Sandeep Mehrotra and another Versus State of U.P. and others alongwith other connected matters,** taking oath of office is the condition precedent and entitles a member to participate in the meeting of the Municipal Board or the Municipal Corporation. Thus, so far as the arguments being raised by Shri Sharad Pathak, learned counsel for the petitioner to the effect that the meeting in which only oath is administered to the members and Chairperson of the Nagar Panchayat should not be treated to be the first meeting for the purpose of determining the term as provided in Article 243-U of the Constitution of India and Section 10-A of the Uttar Pradesh Municipalities Act, 1916 is concerned, the Court is in complete agreement with the said argument in view of the law laid down by this Court in its judgment dated 05.12.2011 in the case of **Writ Petition No. 11226 (M/B) of 2011 Sandeep Alias Sandeep Mehrotra (Supra)**. Thus, the meeting of Nagar Panchayat held on 17.11.2006 cannot be said to be the first meeting of the Nagar Panchayat so as to reckon its term of five years. To this extent the argument advanced by learned counsel for the petitioner, Shri Sharad Pathak is accepted.

20. However, the contention raised on behalf of the petitioner to the effect that

since in the meetings dated 16.01.2007 and 15.06.2007 no business was transacted for want of quorum of the Nagar Panchayat, as such either of these two meetings should not be treated to be the first meeting of the Nagar Panchayat does not appear to be sound and merits rejection for the reasons discussed below.

21. There is no dispute as to the fact that in the meetings dated 16.01.2007 and 15.06.2007 no business by the members of the Nagar Panchayat could be transacted for want of quorum. However, it is also noted at this juncture that there is also no denial of the fact that the meetings on 16.01.2007 and 15.06.2007 were convened by circulating agenda for the said meetings . Admittedly, on 16.01.2007 the members of the Nagar Panchayat assembled in pursuance of the agenda circulated for the said meeting dated 16.01.2007 and no business except the business of postponing the meeting for want of quorum was transacted by the members of the Nagar Panchayat. In this view, it cannot be said that on 16.01.2007 no meeting was convened. As a matter of fact, meeting was held as appointed earlier by way of circulating the agenda but no business transaction could be made on the said date. The agenda for the meeting to be held on 16.01.2007 was circulated for the purpose of transaction of certain business by the members of the Nagar Panchayat and hence, it cannot be held that what occurred on 16.01.2007 was merely a gathering or an assembly of members of Nagar Panchayat. As a matter of fact, it was a meeting of members of Nagar Panchayat who had gathered for holding the meeting on a pre-appointed day i.e. on 16.01.2007 specified and fixed for the said purpose. The purpose was to transact the business by the Nagar Panchayat as per the agenda circulated for the meeting. Thus, it was not a sudden gathering or assembly of the members; rather it was a meeting held as appointed earlier.

22. As regards the judgments cited by the learned counsel for the petitioner, it is observed that none of the judgments is of any help to the petitioner.

23. In the case of ***State of Andhra Pradesh and another Versus Dr.Mohan Jeet Singh and another reported in 1988 (Supp) SCC 562 i***t has been held by the Hon'ble Apex Court that in absence of quorum any meeting is not entitled to transact any business. The question as to whether the business could be or was transacted does not appear to be relevant in the instant case for the reason that what is the material is not the transaction of business but the date appointed for the first meeting of the Nagar Panchayat as is apparent from a perusal of the provisions contained in Article 243-U of the Constitution of India and Section 10-A of the Uttar Pradesh Municipalities Act, 1916 . Thus, so far as the legal proposition laid down in the judgment of State of Andhra Pradesh and another (Supra) is concerned, the same does not have any application to the instant case.

24. The other judgment cited by learned counsel for the petitioner namely; ***The Punjab University Chandigarh Versus Vijay Singh Lamba and others reported in (1976) 3 SCC, 344*** only defines the quorum to mean minimum number of members of any body of persons whose presence is necessary to transact its business. So far as the meaning of quorum is concerned, there is no dispute in the instant case and hence, the said judgment cited by learned counsel for the petitioner in the case of The Punjab

University Chandigarh (Supra) is also of no avail to him.

25. As regards the judgment reported in ***Chandra Kant Khaire Versus Dr.Shanta Ram Kale and others reported in (1988) 4 SCC 577*** which has been relied upon by learned counsel for the petitioner, it would suffice to note that there Lordships in the aforesaid judgment have only held that the Municipal Commissioner under Bombay Provincial Municipal Corporation Act, 1949 could not adjourn the meeting for another day or adjourn it sine die. The aforesaid interpretation as regards the power of the Municipal Commissioner to adjourn or not to adjourn the first meeting is based on the provisions of Maharashtra Act. However, it is noteworthy that the interpretation to Section 6(2) of Bombay Provincial Municipal Corporation Act, 1949 has been given by their Lordships of Hon'ble Supreme Court in the case of ***Chandra Kant Khaire (Supra)*** keeping in view the fact that the term of the elected Councillors of the Municipal Corporation in Maharashtra also commences on the date of the first meeting. It is in this background that their Lordships have held in the said judgment that since the term of the said Councillors will start from the date of first meeting , hence the Chairman could not adjourn the meeting for another day or Sine die.

26. The last judgment relied upon by learned counsel for the petitioner is ***Jayant Bhai Manu Bhai Patel and others Versus Arun Subodh Bhai Mehta and others reported in (1989) 2 SCC 484*** . The said judgment only holds the judgment in ***Chandra Kant Khaire (Supra)*** as ***per incurium*** and further that the Mayor has the power under the relevant provisions of Maharashtra Act to hold, cancel or postpone the first meeting before commencement of the meeting. The judgment in this case thus, only interprets the powers under Maharashtra enactment regarding postponement or cancellation of first meeting before it is held and as such in this view , this judgment also does not have any application to the facts of the case.

27. As discussed above, the phrase occurring in Article 243-U of the Constitution of India and Section 10-A of the Uttar Pradesh Municipalities Act, 1916 is ***"from the date appointed for its first meeting".*** The word **"date appointed"** in our view would mean the date fixed i.e. to say the date fixed for the first meeting of the Nagar Panchayat. On the **"date appointed"** or on the date fixed, if for some valid reason no business could be transacted (as in the present case, for want of quorum), it cannot be said that the meeting held on 16.012007 was not the first meeting for the purpose of determining the term of Nagar Panchayat in question. Admittedly, there is no dispute that on 16.01.2007, a meeting was scheduled i.e. to say 16.01.2007 was the day appointed for the meeting of the Nagar Panchayat. In view of the admitted position that an agenda was circulated and a day i.e. 16.01.2007 for holding the meeting was fixed, in other words, the meeting was scheduled to be held on 16.01.2007 , the Court is of the opinion that the said date shall be the **"date appointed"** for first meeting of the Nagar Panchayat and as such it is 16.01.2007 which will be the date from which the term of the Nagar Panchayat concerned would commence.

28. For the discussions made and the reasons given above, the Court comes to the definite conclusion that the date appointed for the first meeting of the Nagar Panchayat, Fatehpur Chaurasi, District Unnao was

16.01.2007, hence, the term of the said Nagar Panchayat as also that of the petitioner being its Chairperson would come to an end on 15.01.2012.

29. In view of the aforesaid, the writ petition fails and is hereby dismissed. However, there will be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.07.2012

BEFORE
THE HON'BLE RAJIV SHARMA, J.,
THE HON'BLE S.V.S.RATHORE, J.

Writ Petition No. 575 (SB) of 2002

Akhtar Ali ...Petitioner
Versus
State of U.P. & others ...Opposite Parties

Constitution of India, Article 226- Dismissal order-passed on basis of enquiry report-form of question-answer of examination-in-chief and cross examinations without supply of documents-held in utter disregard of procedure as well as principle of Natural Justice-dismissal order as well as order of Appellate authority-not sustainable-quashed with all consequential benefits.

Held: Para 12

Taking the holistic view of the matter, we have no hesitation in saying that the inquiry has been conducted in utter disregard to the principles of natural justice. Since the impugned order has been passed on the basis of the inquiry report, which suffers from procedural illegality and violative of principles of natural justice, the order of punishment vitiates. The Appellate Authority has also not dealt with the pleas raised by the petitioner but rejected the appeal in a cursory manner. The Appellate Authority ought to have applied its independent mind and should have recorded reasons for rejecting the pleas/submissions raised by the petitioner in his appeal.

Case law discussed:
AIR 2010 SC 3131; Writ Petition No. 8876 (SB) of 1987; (1986) 3 SCC 229; [2003] (21) LCD 610; JT 2008 (9) SC 205

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

1. Heard learned Counsel for the parties.

2. Petitioner was initially appointed on the post of Cashier/Clerk in the Aryavrat Grameen Bank in the year 1981. Later on, due to his good conduct and work performance, he was promoted as an Officer in the Bank. While the petitioner was posted as an Officer in Kursi Branch of the Bank, he was placed under suspension vide order dated 12.2.2000 for certain irregularities. On the basis of the enquiry report, the petitioner was awarded punishment of dismissal from service vide order dated 3.8.2001. The validity of the said punishment order was questioned by the petitioner in appeal but the same was also rejected vide order dated 13.2.2002. Hence the petitioner has filed the instant writ petition, assailing the aforesaid two orders.

3. Learned Counsel for the petitioner has vehemently contended that the order, impugned in the petition, imposing the punishment of dismissal from service is nullity having been passed in utter disregard of the principles of natural justice inasmuch as the petitioner has not been furnished with a copy of audit compliance report, copy of the covering schedule credit note 2400 and the copy of the stationary delivery register from Head Office of Credit No. 2400 through the said credit note no. 2400 though the said credit note 2400 is the basis of charge. He also clarified that even the

petitioner was not allowed to inspect the aforesaid documents though all the said documents were cited in the charge-sheet as evidence and were utilized against him. Thus, non-furnishing of documents, which were relied upon in the charge-sheet, the petitioner has been materially prejudiced.

4. As regard the defect in the disciplinary proceedings, learned Counsel for the petitioner vehemently asserted that instead of recording examination-in-chief of witnesses and leaving the cross examination to the petitioner, the Inquiry Officer himself concluded the examination in chief of witnesses and cross examination in question and answer form and, therefore, the entire proceedings are vitiated. To substantiate the aforesaid arguments, reliance has been placed upon **State of U.P. and others v. Saroj Kumar Sinha;** AIR 2010 SC 3131 and Division Bench's decision of this Court in **Vidya Prasad Rao vs. State of U.P. and others;** rendered in writ petition no. 8876 (SB) of 1987; Vidya Prasad Rao vs. State of U.P. and others decided on 16.3.2010.

5. Lastly, learned Counsel for the petitioner contended that the points raised by the petitioner in his reply to the charge-sheet and in reply to the show cause notice were not considered in its correct prospective by the Disciplinary Authority. The Disciplinary Authority also has not dealt with the points raised by the petitioner but summarily rejected the appeal without assigning any reasons.

6. On the other hand, in the counter affidavit filed by the Bank it has been indicated that there is no illegality or infirmity in the impugned orders. Whatever pleas have been raised by the petitioner, same were considered by the Appellate Authority but were not found tenable. As regard the disciplinary proceeding, it has been indicated that after giving reasonable opportunity of hearing the order of punishment was passed.

7. Before dealing with the merits of the instant case, it would be useful to refer few decisions of the Apex Court rendered with regard to procedure to be adopted during disciplinary proceedings. In ***Kashinath Dikshita versus Union of India and others;*** (1986)3 SCC 229 the Hon'ble Supreme Court emphasized that the delinquent employee facing a departmental enquiry cannot effectively meet the charges unless the copies of the relevant statements and documents to be used against him are made available to him. In the absence of such copies the concerned employee cannot prepare his defence, cross examine the witnesses and point out the inconsistencies with a view to show that the allegations are incredible. Observance of natural justice and due opportunity has been held to be an essential ingredient in disciplinary proceedings.

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

required to answer the charge must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross-examination, as he desires. Then he must be given a chance to rebut the evidence led against him.

9. In ***State of Uttaranchal & ors. V. Kharak Singh,*** JT 2008(9) SC 205, the Apex Court has enumerated some of the basic principles to be observed while conducting the departmental inquiries and consequences in the event, if these basic principles are not adhered to, the order is to be quashed. The principles enunciated are reproduced herein:

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

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

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

10. In *Saroj Kumar's case* (supra) the Apex Court reiterated that departmental enquiry conducted against the Government servant cannot be treated as a casual exercise. The enquiry proceedings also cannot be conducted with a closed mind. The enquiry officer has to be wholly unbiased. The Supreme Court further observed that the object of rules of natural justice is to ensure that a government servant is treated fairly in proceedings which may culminate in imposition of punishment including dismissal/removal from service. At this juncture it is relevant to point out that some of the documents which were demanded by the petitioner were not supplied to him on the ground that they were having no relevancy with the charges levelled against him. On the other hand, credit note no. 2400 of covering schedule is the basis of charge and the facts in this regard were utilized by the Enquiry Officer against the petitioner. The law is well settled that if a document has been utilized against a delinquent employee without furnishing the copy of the same to him, it would vitiate the entire disciplinary proceedings. Moreover, such lapse would vitiate the departmental proceedings unless it was shown and established as a fact that non-supply of copies of those documents had not caused any prejudice to the delinquent in his defence.

11. In the instant case, the main thrust of submission of learned Counsel for the petitioner is that the procedure adopted during the course of inquiry is totally defective and it is a drastic deviation from the established procedure generally adopted in departmental inquiries. A glance on the enquiry report indicates that the Inquiry Officer has concluded the examination in chief and cross examination of witnesses in question and answer form. We find force in

the submissions advanced by the learned Counsel for the petitioner. The Enquiry Officer instead of recording examination in chief of witnesses and leaving the cross-examination to the delinquent employee/petitioner, himself completed the examination of witnesses in question-answer form. Thus, the petitioner could not get opportunity to cross-examine witnesses. Thus, the assertion of the petitioner that disciplinary proceedings suffer from legal infirmities, can easily be accepted.

12. Taking the holistic view of the matter, we have no hesitation in saying that the inquiry has been conducted in utter disregard to the principles of natural justice. Since the impugned order has been passed on the basis of the inquiry report, which suffers from procedural illegality and violative of principles of natural justice, the order of punishment vitiates. The Appellate Authority has also not dealt with the pleas raised by the petitioner but rejected the appeal in a cursory manner. The Appellate Authority ought to have applied its independent mind and should have recorded reasons for rejecting the pleas/submissions raised by the petitioner in his appeal.

13. In the result, the impugned order of dismissal dated 3.8.2001 and the appellate order dated 13.2.2002 passed by the respondents nos. 3 and 2 are hereby quashed. The petitioner shall be reinstated in service forthwith and will be entitled for all consequential benefits. In the event, if the petitioner has attained the age of superannuation, he shall be entitled for all post-retiral benefits treating him to be in service till the date of attaining the age of superannuation and all admissible dues shall be paid to him in a maximum period of four months. As the punishment order was passed way back in 2001 and since the petitioner has undergone a series of harassments on account of the departmental inquiry, we are not inclined to give any liberty to the department for initiating fresh inquiry as it would amount to further harassment of the petitioner, who either would have attained the age of superannuation or would be at the fag end of his service.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.05.2012

BEFORE
THE HON'BLE SATYA POOT MEHROTRA, J.
THE HON'BLE MAHENDRA DAYAL, J.

Special Appeal No. - 1089 of 2009

Prahlad ...Petitioner
Versus
Suraj Pal & Others ...Respondents

Counsel for the Petitioner:
Sri M.A. Abbasi
Sri Hemant Kumar

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

High Court Rules-Chapter VIII rule 5-Special Appeal arises out from order passed by Single Judge-quashing cancellation of Fair Price Shop and the appellate order-held-Special Appeal not maintainable.

Held: Para 10 and 11

In view of the aforesaid facts, it is evident that the Full Bench Decision in Sheet Gupta case (supra) is applicable to the present Special Appeal, and the present Special Appeal is not maintainable.

The present Special Appeal is, therefore, liable to be dismissed as not maintainable, and the same is accordingly dismissed as not maintainable.

Case law discussed:
2010 (1) ADJ 1 (F.B.); (2011) 2 SCC 212

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

1. It appears that the licence of the petitioner -respondent no.1 in respect of the Fair-Price Shop was cancelled by the order dated 6.10.1998 passed by the Sub-Divisional Magistrate, Patiyali, Etah. The petitioner -respondent no.1 , thereupon, filed an Appeal before the Divisional Commissioner, Agra Region, Agra.

2. By the order dated 10.8.2005, the said Divisional Commissioner dismissed the said Appeal . The petitioner-respondent no. 1 filed a Writ Petition being Civil Misc Writ Petition No. 74096 of 2005 before this Court.

3. By the Judgment and Order dated 20.3.2009, the Learned Single Judge allowed the said Writ Petition, and quashed the said order dated 6.10.1998 and the said order dated 10.8.2005. The appellant, who was respondent no. 5 in the said Writ Petition, thereupon filed the present Special Appeal against the said Judgment and Order dated 20.3.2009 passed by the Learned Single Judge.

4. The case has been taken -up in the revised cause-list. None is present for the appellant.

5. Learned Standing Counsel appearing for the respondent nos. 2, 3 and 4 has raised a Preliminary Objection that the present Special Appeal filed by the appellant under Chapter VIII, Rule 5 of the Rules of the Court is not maintainable in view of the Full Bench decision of this Court in ***Sheet Gupta Vs. State of U.P. and others, 2010(1) ADJ 1 (F.B.).***

6. In ***Sheet Gupta Vs. State of U.P. and others, 2010(1) ADJ 1 (F.B.),*** the following question was referred for decision by a Larger Bench:

"Whether a special appeal under the provisions of Rule 5 of Chapter VIII of the Rules of the Court lies in a case where the judgment has been given by a learned single Judge in a writ petition directed against an order passed in an appeal under paragraph 28 of the U.P. Scheduled Commodities Distribution Order, 2004?"

7. A Full Bench of this Court answered the question as under:

" A special appeal would not lie under the provisions of Rule 5 of the Chapter VIII of the Rules where the judgment has been given by a learned single Judge in a writ petition directed against an order passed in an appeal under paragraph 28 of the Distribution Order,2004."

8. The Supreme Court has taken similar view in the case of ***State of U.P. & others Vs. Madhav Prasad Sharma, (2011) 2 SCC 212.***

9. As noted above, the present Special Appeal has been filed under Rule 5 of Chapter VIII of the Rules of the Court against the judgment and order dated 20.3.2009 passed by the learned Single Judge whereby , the learned Single Judge quashed the order dated

6.10.1998 whereby the licence of the petitioner -respondent no. 1 in respect of the Fair -Price Shop was cancelled and the order dated 10.8.2005 passed by the Divisional Commissioner dismissing the Appeal filed by the appellant.

10. In view of the aforesaid facts, it is evident that the Full Bench Decision in ***Sheet Gupta case (supra)*** is applicable to the present Special Appeal, and the present Special Appeal is not maintainable.

11. The present Special Appeal is, therefore, liable to be dismissed as not maintainable, and the same is accordingly dismissed as not maintainable.

12. However, on the facts and in the circumstances of the case, there will be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.05.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 2076 of 1998

State of U.P. Thrugh Executive Engineer, and Ors ...Petitioners
Versus
P.O., Industrial Tribunal (V) Meerut and anr ...Respondents

Counsel for the Petitioners:
Sri Ashok Mehta

Counsel for the Respondents:
S.C.
Sri H.C. Dwivedi
Sri P.K. Singhal
Sri P.K. Srivastava
Sri Rajiv Gupta
Sri Shyam Narain
Sri Gopal narain
Sri Sudhanshu Narain

Constitution of India, Article 226-Labor Court Award-in favor of workman-burden of proof regarding continuous working of 240 days-wrongly shifted upon employer-tribunal decided on most cursory and illegal manner-award not sustainable.

Held: Para 6

The issues no. 1 and 3 are such which were the responsibility of the workman to prove. The nature of employment/appointment of the workman was to be proved by him as also he has to prove that he has worked for 240 days and more in the preceding 12 months. There is nothing in the award to show that except mere assumption on the part of Tribunal, workman, in any manner discharged the above burden. It is true that the record must be available with the employer but if the workman intended to rely upon certain document which were in the possession of the employer, he could have summoned the same but there is nothing evident from the record that any such attempt was made by the workman and the employer having failed to produced the document, the Tribunal has drawn an adverse inference thereagainst. In fact the Tribunal has placed onus in a reverse manner on the employer and has answered the issues by observing that the employer failed to prove the pleadings of the employer and very categorically and specific and in order to dislodge thereto, it was incumbent upon the workman to adduce evidence and prove his case otherwise he was bound to suffer.

Case law discussed:
JT 2005 (3) SC 248; 2002 (3) SCC 25; 2004 (8) SCC 195; 2006 (1) SCC 106; 2008 (3) SCC 474; 2007 (3) SCALE 436; 2010 (12) SCALE 536

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

1. Heard learned Standing Counsel for the petitioner and Sri Gopal Narain, learned counsel for respondent No.2.

2. Writ petition is directed against award dated 29th August, 1997 given by Industrial Tribunal, (V) U.P. Meerut in Adjudication Case No.156/94 declaring termination of workman respondent No.2 w.e.f. 11.10.1991 as illegal and unjustified and holding him entitled for relief of reinstatement with backwages and continuity of service.

3. The case set up by the employer is that the workman was a Seasonal daily wage employee and has not worked for 240 days in preceding 12 months, inasmuch as, as per the record of department has worked only for 218 days, therefore, allegation that he has been retrenched illegally are incorrect. The Tribunal formulated the following three issues:

Issue No.1:- "Whether the workman was a seasonal workman as alleged in para 12 of the employers written statement?"

Issue No.2:- "Whether the workman concerned was a daily wager or he was getting monthly salary, Either way, its effect?"

Issue No.3:- "Whether the workman concerned had completed more than 240 days of service in last year of his service? If so, its effect?"

4. So far as evidence is concerned, the award shows that the workman examined himself and filed four documents which are said to have been proved by him. These documents are exhibited as W.W.-1/1A, Ext.W.-1/1C, Ext. W.W./1/1B and Ext. W.W.-1/1D. The nature of these documents is not very clear except of a letter said to have been submitted by workman himself stating that he has worked in the year 1991 and 1992 as Beldar and therefore, his name be forwarded to higher authorities for regularization. It was also claimed that some other workers were also recommended for regularization in the similar circumstances. The petitioner said to have filed photocopies of muster roll but since the original record was not produced, Tribunal did not place any reliance thereon. Having said so, this Court find it really strange that all the issues have been answered in favour of the workman by simply observing that employer has failed to prove otherwise, without discussing any evidence, any material etc. The findings recorded by Tribunal in respect to three issues, it would be appropriate to reproduce hereat:

"Issue No.1:- *The version of the employer that the workman was a seasonal workman and used to be employed casually as and when work demanded is not proved by the employer's evidence. In fact, the employer's witness stated that the workman was continuously employed for more than 240 days and was paid as such and that nature of his work was of permanent nature. Nowhere, the employer has mentioned the nature of casual work for the period when such work arose. In order to support his version, the employers should have shown exactly what work and when such work was done casually by the workman concerned. Therefore, the issue is decided in negative.*

Issue No.2:- *From the evidence of the parties discussed earlier, it is clear that the workman was getting his wages on monthly basis, though he was treated as daily wager*

by the employer. Since the witness of employer confirmed that the workman was paid on monthly basis and that nature of his work was of a regular basis, I hold that the workman was paid on monthly basis and though he was shown as daily wager, in fact, he was a regular workman.

Issue No.3.:- *As to the question whether the workman concerned had completed more than 240 days of service in the last year of his service is clear from the evidence on record that he had completed continuous service of 240 days. In view of the facts and evidence which has been discussed above, which need not be required to be repeated. I hold that the workman had completed more than 240 days of service in the last year of his service and his services could not have been terminated without giving him due notice and compensation as per requirement of Sec.6-N of the U.P. Industrial Disputes Act, 1947. Issue is decided accordingly.*

The employer's version that the workman was a daily wager and worked casually is not supported by the evidence tendered by them. On the other side, the workman has proved that he worked for more than 240 days in the last year of his service and that his services were terminated without following legal procedure. Since the termination of Shri Suresh Giri, the workman concerned was illegal, he is entitled to reinstatement and to get benefits of continuous service as well as the wages."

5. To my mind, the approach of Tribunal is clearly erroneous and shows patent error of law apparent on the face of record on account whereof the impugned award cannot sustain.

6. The issues no. 1 and 3 are such which were the responsibility of the workman to prove. The nature of employment/appointment of the workman was to be proved by him as also he has to prove that he has worked for 240 days and more in the preceding 12 months. There is nothing in the award to show that except mere assumption on the part of Tribunal, workman, in any manner discharged the above burden. It is true that the record must be available with the employer but if the workman intended to rely upon certain document which were in the possession of the employer, he could have summoned the same but there is nothing evident from the record that any such attempt was made by the workman and the employer having failed to produced the document, the Tribunal has drawn an adverse inference thereagainst. In fact the Tribunal has placed onus in a reverse manner on the employer and has answered the issues by observing that the employer failed to prove the pleadings of the employer and very categorically and specific and in order to dislodge thereto, it was incumbent upon the workman to adduce evidence and prove his case otherwise he was bound to suffer.

7. In **Manager, Reserve Bank of India, Bangalore Vs. S.Mani & Ors. JT 2005 (3) SC 248**, it is said:

"The initial burden of proof was on the workmen to show that they had completed 240 days of service."

8. In **Range Foresh Officer Vs. S.T. Hadimani 2002(3) SCC 25**, the Court said:

"In our opinion the Tribunal was not right in placing the onus on the Management without first determining on the basis of cogent evidence that the

respondent had worked for more than 240 days in the year preceding his termination. It was the case of the claimant that he had so worked but this claim was denied by the appellant. It was then for the claimant to lead evidence to show that he had in fact worked for 240 days in the year preceding his termination. Filing of an affidavit is only his own statement in his favour and that cannot be regarded as sufficient evidence for any Court or Tribunal to come to the conclusion that a workman had, in fact, worked for 240 days in a year. No proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period was produced by the workman. On this ground alone, the award is liable to be set aside."

9. Reiterating it in **Municipal Corporation, Faridabad Vs. Siri Niwas 2004(8) SCC 195,** the Court said:

"The provisions of the Indian Evidence Act per se are not applicable in an industrial adjudication. The general principles of it are, however applicable. It is also imperative for the Industrial Tribunal to see that the principles of natural justice are complied with. The burden of proof was on the respondent herein to show that he had worked for 240 days in preceding twelve months prior to his alleged retrenchment."

10. This decision has been followed in **R.M.Yellatti Vs. The Asst. Executive Engineer 2006(1) SCC 106.**

11. The above view has also been reiterated in **G.M., BSNL & Ors. Vs. Mahesh Chand 2008(3) SCC 474, Ranip Nagar Palika Vs. Bahuji Gabhaji Thakore & Ors.2007(3)SCALE 436 and Amar Chakraverti & Ors. Vs. Maruti Suzuki 2010 (12) SCALE 536.**

12. In the present case the Tribunal has decided the matter in most cursory and illegal manner. The impugned award cannot sustain.

13. The writ petition is allowed. The impugned award dated 29th August, 1997 (Annexure 1 to the writ petition), is hereby set aside. The matter is remanded to the Industrial Tribunal (V) U.P., Meerut to reconsider the matter and pass a fresh order in accordance with law after giving due opportunity of hearing to all concerned parties.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.07.2012

BEFORE
THE HON'BLE VINOD PRASAD, J.
THE HON'BLE SURENDRA KUMAR, J.

Criminal Appeal U/S 374 Cr.P.C. No. - 2466 of 1982

Satish ...Petitioner
Versus
State of U.P. ...Respondents

Counsel for the Petitioner:
Sri P.N.Misra
Sri Ajatshatru Pandey

Counsel for the Respondents:
D.G.A.

Criminal Appeal-against conviction of offence under section 302 I.P.C.-mainly on ground-when occurrence took place-appellant was minor-as such-maintaining conviction sentence be quashed-following dictum of Apex Court and from scrutiny of records-appellants

was juvenile hence entitled for protection of his juvenility.

Held: Para 20

There is no report of an unimpeachable character contrary to the report submitted by the inquiry officer/Additional session's Judge, court no.9, Aligarh refuting conclusions arrived at by the inquiry officer and consequently, we are option-less than to accept the said report as correct, which has not even been disputed by the informant. Thus from the report submitted by the inquiry officer/ Additional Session's Judge, court no. 9, conclusively, it is established that appellant, on the date of the incident was a juvenile and hence is entitled to the protection of his juvenility.

Case law discussed:

AIR 1984 SC 104; AIR 1982 SC 685; Vaneet Kumar Gupta @ Dharminder versus State of Punjab(Cr.Appeal No. 475 of 2009); Dharambir VS State(NCT of Delhi) & another: (Cr.Appeal No. 860 of 2010); and Bhoop Ram Vs State of U.P.: AIR 1989 SC 1329

(Delivered by Hon'ble Vinod Prasad, J.)

1. The sole appellant Satish, through instant appeal, has challenged his conviction under section 302 I.P.C. and imposed sentence of life imprisonment therefor, recorded in S.T. No.33 of 1982, State versus Satish and another, relating to P.S. Pisawa, district Aligarh, by learned Session's Judge, Aligarh, vide judgment and order dated 30.9.1982. Noted here is the fact that another accused Kishan was acquitted by the learned trial court by the same decision.

2. Perusal of the record of the appeal informs us that incident in question had occurred on 14.5.1980 at about 5.30 P.M. According to the informant Rajvir Singh's allegations, which he had scribed in his FIR, Ext. Ka1, he was an army personnel and had come to his house on leave. On 14.5.80, in the evening at 5.30 p.m., his brothers Shri Pal and Suresh were returning to their house from a well, after supplying water to their live stocks and no sooner they reached in the vicinity of a *'Chaamad'* (small open piece of land devoted to Goddess), accused appellant Satish arrived there armed with the licensed gun of his brother acquitted accused Kishan Kumar and accosted Shri Pal that he would teach him a lesson for surveillancing him and immediately shot at him, casing him gunshot injury. This incident was witnessed by Shri Suresh, Smt. Sukhbiri, Devi Ram, as well as other co- villagers. Injured Shri Pal, while being transported to the police station on a cot, lost the battle of his life in midway.

3. FIR, Ext. Ka.1, about the incident, came to be scribed by the informant Rajvir Singh, who then carried it to the police station Pisawa, where he lodged it the same day at 8 p.m. The chik report, Ext. Ka.2 and GD entry, Ext. Ka.3 were prepared. S.O. R.C. Singh Bhukesh,PW4, engineered the investigation, conducted inquest on the corpse of the deceased and prepared inquest report and other connected papers, Ext's. Ka. 4 to Ka. 7 and then sealing the dead-body dispatched it to mortuary through constables Shiv Narayan Prasad P.W.5 and Jhadon Singh for autopsy. I.O. had collected blood stained 'chadar' which was wrapped around deceased wound to stop oozing of blood by preparing it's seizure memo Ext. Ka.8. Thereafter, I.O., PW.4, interrogated the witnesses and recorded their statements and conducting spot inspection had prepared site plan Ext. Ka.9.Investigating Officer also endeavoured to apprehend the culprits but they were at large. On

completion of investigation, PW.4 had submitted charge sheet Ext. Ka.11 against accused appellant Satish and Ext. Ka.12 against acquitted accused Kishan Kumar.

4. The post mortem on the corpse of the deceased was performed by Dr. S.C. Agarwal, PW 6, on 15.5.1980 at 3.45 P.M. According to the doctor, following ante mortem physical injury was sustained by the deceased:-

"(I) Multiple gunshot wound of entry over the right side chest lower part and right abdomen, the maximum size 4 mm. x 4 mm. x variable dept. Minimum size was 3 mm. x mm. x variable dept. scattered in an area of 10 c.m. x 5.5 c.m. The margins were inverted. blood clots were present over these wounds. These wounds were situated very close to each other. Few gunshot wounds coalesced each other and formed a big wound, from which three pieces of wedding material were removed and three shots were also removed from pectoral muscle area."

On internal examination, doctor, PW6, had noted in the post mortem examination report, Ext. Ka.14 that there was *" fracture of 7th and 8th ribs. The right pleura were lacerated at many places. The right pleural cavity contained fluid blood and five shots. The right lung was lacerated and two shots were removed. Liver was lacerated and six shots were removed. Similarly 11 shots were removed from the intestines. The stomach contained partially digested food material about 4 0z. and the stomach was lacerated. Eight shots were removed."*

5. In the opinion of Dr. Agarwal, PW.6, death had occurred due to shock and hemorrhage on account of the gun shot injury, which was sufficient in the ordinary course of nature to cause death. He further opined that the death could have taken place at about 6 P.M. on 14.5.1980.

6. On the basis of above to referred charge sheets, both the accused were summoned and finding their offence triable by Session's Court, their cases were committed to Session's court, where it were registered as one S.T. No. 33 of 1982, State versus Satish and another.

7. Learned trial Judge charged the accused with their respective offences, which charges, after being read out and explained to the accused were abjured by them, who both claimed to be tried and hence to prove their committed offence session's Trial procedure was adopted.

8. To establish appellant's guilt, prosecution examined six witnesses besides relying upon several above to referred documentary evidences. Tendered witnesses included informant Rajvir Singh PW1, Suresh P.W.2, Surendra P.W.3, I.O.(S.O.) R.C. Singh Bhukesh PW4,Constable Shiv Narayan Prasad P.W.5 and Dr. S.C. Agawala P.W. 6.

9. Both the accused denied their involvement in the incident and appellant stated that he was not in the village but he had gone to his sister's place on the date of the occurrence.

10. Learned trial court after going through prosecution evidences, both oral and documentary, and after critically analyzing facts and circumstances of the case held that prosecution had failed to establish it's charge against accused Kishan Kumar and therefore, by the impugned judgment, acquitted him. However, it

concluded that so far as the appellant Satish is concerned, it has been established by the prosecution, conclusively, beyond any reasonable doubt, that he had committed the murder and therefore, by same impugned judgment, convicted him under section 302 I.P.C. and sentenced him to life imprisonment which conviction and sentence is under-challenge in the instant appeal.

11. The appeal was admitted in this Court on 4.10.1982 and the appellant was released on bail.

12. In the factual matrix narrated above that We have heard Sri G.S. Chaturvedi for the appellant and learned AGA for respondent prosecutor State.

13. It was urged on behalf of appellant that the appellant was juvenile on the date of the incident and hence, while his conviction be maintained but his sentence be quashed.

14. Learned AGA, submitted that the mater be sent to the juvenile Board, as in his statement under section 313 Cr.P.C., appellant had disclosed his age as 20 years.

15. We have perused the record and from such a perusal it is evident that this appeal was heard previously on 3.5.2010, and one of the appellant's contentions was that the appellant was a juvenile on the date of the incident and hence this court had directed an inquiry to be conducted on that aspect to determine juvenility of the appellant and, for that end, had directed the appellant to present himself before the Session's Judge, Aligarh, along with the relevant evidences and documents in support of his such a plea. It was further directed that, after conducting the inquiry, Session's Judge shall submit his report to this court as to *"whether on the date of incident the appellant was juvenile or not"*. In the later portion of that order paper book of the appeal was also directed to be sent to the session's Judge and it was left open for him to conduct the inquiry himself or get it done by another Additional Session's Judge. In pursuance of that order by this court, an inquiry was conducted by Additional session's Judge, court no.9, under the directions of the Session's Judge, Aligarh. Inquiry Officer/Additional session's Judge, court No.9, after completing that inquiry concluded, vide his report dated 12.7.2010, that appellant, on the date of the incident 14.5.80, was more than 14 but less than 15 years of age and hence was a juvenile offender on the date of the incident. This report was forwarded by the Session's Judge, to this court, but this court further directed the said report to be furnished to the informant Rajvir Singh to invite his objections regarding such a determination of appellant's age as juvenile. In follow up action copy of report of inquiry officer/ Additional Session's Judge, court no.9, was furnished to the informant, who, through his affidavit, filed no objection in declaring appellant accused to be a juvenile on the date of the incident and hence a supplementary report dated 2.6.12 was sent to this court, wherein it was again affirmed that on the date of the incident appellant was juvenile being more than 14 but less than 15 years of age. Both these reports, submitted by the inquiry Officer/Additional Session's Judge, Court No.9, Aligarh are on the record of this appeal in original and we direct that they will form the part of the record.

16. Since under the Juvenile Justice (Care and Protection of Children) Act, 2000, the benefit of age has to be accorded

to a juvenile offender below 18 years of age, therefore, without entering into the discussion on merits of the appeal and without elaborating the evidences, we are of the view, that though the conviction of the appellant cannot be set aside, but his sentence has to be quashed, which view we adopt , because of various apex court decisions, some of which are referred to herein below:-

17. In **Pradeep Kumar vs. State of U.P.:AIR 1984 SC 104** it has been observed by the apex court as under:-

"3. It is thus proved to the satisfaction of this Court that on the date of occurrence, the appellants had not completed 16 years of age and as such they should have been dealt with under the U.P. Children Act instead of being sentenced to imprisonment on conviction under Section 302/34 of the Act.

4. Since the appellants are now aged more than 30 years, there is no question of sending them to an approved school under the U. P. Children Act for detention. Accordingly, while sustaining the conviction of the appellants under all the charges framed against them, we quash the sentences awarded to them and direct their release forthwith. The appeals are partly allowed in the above terms."

18. In **Jayendra and another vs. State of U.P.:AIR 1982 SC 685** it has been held by the apex court as under:-

"3. Section 2 (4) of the Uttar Pradesh Children Act, 1951 (U. P. Act No. 1 of 1952) defines a child to mean a person under the age of 16 years. Taking into account the various circumstances on the record of the case we are of the opinion that the appellant Jayendra was a child within the meaning of this provision on the date of the offence. S. 27 of the aforesaid Act says that notwithstanding anything to the contrary in any law, no court shall sentence a child to imprisonment for life or to any term of imprisonment. S. 2 provides, in so far as it is material, that if a child is found to have committed an offence punishable with imprisonment, the court may order him to be sent to an approved school for such period of stay as will not exceed the attainment by the child of the age of 18 years. In the normal course, we would have directed that the appellant Jayendra should be sent to an approved school but in view of the fact that he is now nearly 23 years of age, we cannot do so.

4. For these reasons, though the conviction of the appellant Jayendra has to be upheld, we quash the sentence imposed upon him and direct that he shall be released forthwith."

19. The same view was taken in **Vaneet Kumar Gupta @ Dharminder versus State of Punjab(Cr.Appeal No. 475 of 2009); Dharambir VS State(NCT of Delhi) & another: (Cr.Appeal No. 860 of 2010); and Bhoop Ram Vs State of U.P. :AIR 1989 SC 1329.**

20. There is no report of an unimpeachable character contrary to the report submitted by the inquiry officer/Additional session's Judge, court no.9, Aligarh refuting conclusions arrived at by the inquiry officer and consequently, we are option-less than to accept the said report as correct, which has not even been disputed by the informant. Thus from the report submitted by the inquiry officer/ Additional Session's Judge, court no. 9, conclusively, it is established that

appellant, on the date of the incident was a juvenile and hence is entitled to the protection of his juvenility.

21. Residue of our discussion is that the appeal is **allowed in part.** While conviction of the appellant u/s 302 I.P.C. recorded in the impugned judgment dated 30.9.1982, passed in S.T. No.33 of 1982, State versus Satish and another, relating to P.S. Pisawa, district Aligarh, by Session's Judge, Aligarh, is hereby maintained, but the sentence of life imprisonment awarded to the appellant therefor is quashed.

22. Appellant is on bail, he need not surrender, his bail bonds and surety bonds are hereby discharged.

23. Copy of the judgment be certified to the trial court for it's intimation.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.05.2012

BEFORE
THE HON'BLE SUNIL HALI, J.

Civil Misc. Writ Petition No. 2942 of 2007

Radhey Shyam ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri S.K. Pal
Sri Ashok Mehata

Counsel for the Respondents:
C.S.C.
Sri Dashrath Prasad
Sri Vijendra Singh

Constitution of India, Article 311 (2)-readwith CCA Rules 1999-Rule 7 (iv)-Dismissal-without giving the copy of supported documents-without issuing show cause notice before inflicting punishment-utter disregard of Principle of Natural Justice-held-illegal-dismissal order quashed.

Held: Para 19 and 29

In the present case, this procedural safe-guard has been violated by the respondents. The disclosure of the proposed documents and the evidence to be adduced in support of the charges, are required to be disclosed to the petitioner. Mere endorsement in the charge sheet that it is accompanied by 47 leaves, without disclosing the particulars of such enclosures, would not be sufficient compliance of the rules.

In view of this, I find that no opportunity has been given to the petitioner to show-cause against the proposed punishment. It clearly not only violates Rule 7(iv) of the Rules but also the mandates of Constitution of India under Article 311(2) which contemplates that reasonable opportunity is required to be given to the employee to defend himself. The word reasonable opportunity has been interpreted to me natural justice. Article 311(2) gives constitutional mandate to the principles of natural justice and once it is proved from the record that reasonable opportunity to defend himself has not been provided, the rules of natural justice would be violated.

Case law discussed:
AIR 2010 SC 3131; (1986) 3 SCC 229

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

1. While serving as Chief Revenue Accountant at District Etawah, a departmental enquiry was initiated against the petitioner. Ten charges were levelled against him vide order dated 16.6.2006. He was called up on to submit his reply to the said charge sheet within 15 days from the date of receipt of the communication. It was mentioned in the charge sheet that in

case, he wants to examine any witness, the name of said witness be also submitted to the Enquiry Officer.

2. Vide communication dated 7.3.2006 the petitioner requested the Enquiry Officer to furnish him documents so as to enable him to file a reply to the charge sheet. The aforesaid communication dated 7.3.2006 gave details of the documents which were sought by the petitioner. The documents sought by the petitioner were in respect of the allegations levelled against him in the charge sheet. The disability was shown by the petitioner in filing reply in absence of the documents sought to be supplied to him. A reply was sent by the District Magistrate in pursuance of the communication sent by the petitioner dated 7.3.2006 communicating that the documents have been supplied to him. It was replied by the petitioner vide his communication dated 20.3.2006 in which he has clearly stated that no such documents have been supplied to him. It was informed by this communication that in case the request for supplying the documents is rejected, the same may be communicated to him.

3. Vide communication dated 24.3.2006, the petitioner again informed the Enquiry Officer to supply the documents details of which have been mentioned in the letter dated 7.3.2006 and also to provide an opportunity to cross-examine the witnesses who are likely to be examined in support of the charges levelled against him. Another communication was addressed by the petitioner in which it was again requested to supply the documents sought by him.

4. Having failed to receive any response from the respondents, the petitioner filed an application before the Board of Revenue, U.P. seeking its assistance and direction to the District Magistrate and Enquiry Officer to supply the requisite documents, details of which were given in the letter dated 7.3.2006.

5. While the petitioner was awaiting a response of his communications, the Enquiry Officer went ahead with the enquiry and prepared an exparte report dated 4.5.2006 and sent the same to appointing authority. This was proceeded by a notice dated 11.5.2006. It was communicated through this notice that the petitioner has not filed his reply to the charge sheet despite opportunity being granted to him. It was communicated to the petitioner that the documents sought by him were served along with the charge sheet. While submitting his reply, vide communication dated 14.2.2006, the petitioner had denied the allegations levelled against him. He had also sought further documents in relation to the misappropriation of funds by the concerned Revenue officials of the district which were necessary for filing reply to the charge sheet.

6. The finding recorded by the Enquiry Officer was that the charges were proved against the petitioner, as a result of which, it was proposed to dismiss him from service. He was required to submit his reply to the show-cause notice within a period of 15 days. The respondents after receipt of reply to the charge sheet served show cause notice by publishing in the newspaper on 27.5.2006. He was informed that despite efforts notice could not be served upon him, as a result of which, he was required now through this press

release to file his reply within seven days. The petitioner in his communication dated 2.6.2006 informed that he was out of station w.e.f. 17th of May 2006 on account of his illness and returned back on 2.6.2006. Immediately thereafter he came to know about the issuance of the press release and sought 15 days time to submit his reply.

7. The respondents acknowledged the communication of the petitioner and extended period of submission of the reply up to 17th of June, 2006. The petitioner in his communication dated 16.6.2006 stated that he has received the reply on 13.6.2006 and as such, sought 15 days time to file his reply. Without acknowledging the communication dated 16.6.2006 submitted by the petitioner for extension of time to submit his reply to respondents, the District Magistrate, Etawah passed the impugned order dated 23.6.2006 dismissing him from service. The order of dismissal has been questioned by the petitioner in this petition.

8. The petitioner has questioned the impugned order of dismissal on the following grounds; that the charge sheet was not accompanied by the documents. The request for supplying documents was declined by the respondents which disabled him to file his reply to the charge sheet; that the show-cause notice issued to the petitioner was published on 27.5.2006 and no personal service of show-cause was effected on him; the petitioner received show-cause notice along with copy of the enquiry report on 12.6.2006. The request of the petitioner to submit reply within 15 days was not rejected and before awaiting for the reply submitted by the petitioner, the impugned order was passed on 17.6.2006. The charges levelled against the petitioner were vague and incorrect and not supported by documents. Dominant purpose of initiating enquiry against the petitioner was motivated by the fact that the petitioner had sought accounts from the officials of Tehsil Barthana in respect of disbursement of Rs.6,04,63,220/- as provided by the District Magistrate Etawah for the persons effected by the natural calamities. In order to avoid submission of the requisite vouchers in respect of disbursement of the said amount, the charges were levelled against the petitioner so as to implicate him falsely, on charges which were trivial in nature. No reason or opportunity was provided to the petitioner under the rules which is violative of Rule 7(iv) of the Rules of 1999 and also violative of Article 311 of the Constitution of India.

9. The stand of the respondents is that the petitioner is habitual in flouting the orders of his superiors and was also negligent in performing his duties. He used unparliamentary language against his superiors which is in violation of the CCA rules. The petitioner was given adequate opportunity to file his reply to the charge sheet, which he failed to do so and instead he levelled counter allegations against the respondents. All the requisite documents were supplied to the petitioner. The intended purpose of seeking documents was to delay the departmental proceedings. The show cause notice was served upon the petitioner through the Tehsildar. However, the petitioner was not available there. It was in this context the notice was published in the newspaper on 27.5.2006.

10. I have heard learned counsel for the parties.

11. Every appointments made by the Central Government or the State Government in the name of the President or the Governor are pleasure appointments. Such appointments are held at the pleasure of the Governor which are terminable at its will. This right of the Governor is subject to restrictions imposed by Articles 310(2) and Article 311(1) (2) of the Constitution of India. The office being terminable at the pleasure of the State, there is no limit as to the grounds upon which the services of the Government servant will be terminated. Once the procedure under Article 311(2) has been complied with, the Courts are not entitled to determine whether the ground or the charge upon which Government has proceeded against a Government servant is sufficient to warrant a dismissal. Article 311 does not in any way alter or effect the principle that a Government servant holds office at the pleasure of the President or the Governor, as the case may. Article 311 only subjects the exercise of that pleasure to the two conditions laid down in this Article. In other words, the provisions of Article 311 operates as a proviso to Article 310(1) in relation to persons holding civil posts. These two conditions are-

(i) that such an employee shall not be dismissed or removed by any authority subordinate to that by which he was appointed;

(ii) that such an employee shall not be dismissed or removed or reduced in rank without any inquiry into the charges against him and without offering him an opportunity of showing cause against the action proposed to be taken in regard to him.

In terms of the said legal procedure, the requirement which were required to be followed are as under:-

(i) opportunity to the officer concerned to deny his guilt and establish his innocence which means he must be told that what the charges against him are and the allegations on which such charges are based;

(ii) he must be given a reasonable opportunity to cross-examine the witnesses produced against him and examine himself or other witnesses on his behalf; and

(iii) he must be given opportunity to show-cause that the proposed punishment would not be proper punishment to inflict which means that the tentative determination of the competent authority to inflict one of the three punishments must be communicated to him.

12. The mode and manner in which an enquiry is to be conducted is provided under the rules. The rule making power rests with the appropriate legislature for regulating the conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State. In absence of any such legislation, Governor or the President, as the case may be, makes rules regulating the recruitment and conditions of service of persons as provided on such service or posts until provisions in that behalf is made by an Act of the appropriate legislature. The State Government has also framed rules namely, U.P. Government Servant (Discipline & Appeal Rules, 1999.

13. Before adverting to the facts, it is necessary to see the rule position in order to find out if any procedural impropriety

has been committed by the respondents while holding the enquiry against the petitioner. The petitioner is governed by the U.P. Government Servant (Discipline & Appeal Rules, 1999. Rule-7 provides procedure for imposing major penalties which is quoted below :-

"7-Procedure for imposing major penalties- Before imposing any major penalty on a Government Servant, an inquiry shall be held in the following manner :

(i) The Disciplinary Authority may himself inquiry into the charges or appoint an Authority Subordinate to him as Inquiry Officer to inquire into the charges.

(ii) The facts constituting the misconduct on which it is proposed to take action shall be reduced in the from of definite charge or charges to be called charge -sheet. The charge-sheet shall be approved by the Disciplinary Authority.

Provided that where the Appointing Authority is Governor, the charge -sheet may be approved by the Principal Secretary or the Secretary, as the case may be, of the concerned department.

(iii) The charge farmed shall be so precise and clear as to give sufficient indication to the charged Government Servant of the facts and circumstances against him. The proposed documentary evidences and the name of the witnesses proposed to prove the same along with oral evidence, if any, shall be mentioned in the charge-sheet.

(iv) The charge Government Servant shall be required to put in a written statement of his defence in person on a specified date which shall not be less than 15 days from the date of issue of charge-sheet and to state whether he desires to cross-examine any witness mentioned in the charge-sheet and whether desires to give or produce evidence in his defence . He shall also be informed that in case he does not appear or file written statement on the specified date, it will be presumed that he has none to furnish and inquiry officer shall proceed to complete the inquiry ex-parte.

(v) The charge-sheet, along with the copy of the documentary evidences mentioned therein and list of witnesses and their statements, if any shall be served on the charged Government Servant personally or by registered post at the address mentioned in the official records in case the charge-sheet could not be served in aforesaid manner, the charge- sheet shall be served by publication in a daily newspaper having wide circulation :

Provided that where the documentary evidence is voluminous, instead of furnishing its copy with charge-sheet, the charge Government servant shall be permitted to inspect the same before the Inquiry Officer.

(vi) Where the charged Government Servant appears and admits charges, the Inquiry Officer shall submit his report to the Disciplinary Authority on the basis of such admission.

(vii) Where the charged Government Servant denies the charge the Inquiry Officer shall proceed to call the witnesses proposed in the charge-sheet and record their oral evidence in presence of the charge Government Servant who shall be given opportunity to cross-examine such

witnesses. After recording the aforesaid evidences, the Inquiry officer shall call and record the oral evidence which the charged Government Servant desired in his written statement to be produced in his defence :

Provided that the Inquiry Officer may for reasons to be recorded in writing refuse to call a witness.

(viii) The inquiry officer may summon any witnesses to give evidence or require any person to produce documents before him in accordance with the provisions of the Uttar Pradesh Departmental inquiries (Enforcement of Attendance of witnesses and production of documents) Act 1976.

(ix) The Inquiry Officer may ask any question he pleases, at any time of any witness or from person charged with a view to discover the truth or to obtain proper proof of facts relevant to charges.

(x) Where the charged Government Servant does not appear on the date fixed in the inquiry or at any stage of the proceeding inspite of the service of the notice on him or having knowledge of the date the Inquiry Officer shall proceed with the inquiry exparte. In such a case the Inquiry Officer shall record the statement of witnesses mentioned in the charge-sheet in absence of the charged Government Servant.

(xi) The disciplinary Authority, if it considers if necessary to do so, may by an order appoint a Government Servant or a legal practitioner to be known as "Presenting Officer" to present on its behalf the case in support of the charge.

(xii) The Government servant may take the assistance of any other Government Servant to present the case on this behalf but not engage a legal practitioner for the purpose unless the presenting office appointed by the Disciplinary Authority is a legal practitioner of the disciplinary Authority having regard to the circumstance of the case so permits.

Provided that the rule shall not apply in following cases :

(i) Where any major penalty is imposed on a person on the ground of conduct which has led to his conviction on a criminal charge.

or

(ii) Where the Disciplinary Authority is satisfied, that for reason to be recorded by it in writing, that it is not reasonably practicable to held an inquiry in the manner provided in these rules; or

(iii) Where the Governor satisfied that, in the interest of the security of the state, it is not expedient to hold an inquiry in the manner provided in these rules."

14. The aforementioned rules provide a complete mechanism and procedure in the matter of holding an enquiry in the cases where the major penalties are imposed. Rule 7(iii) provides that the charges framed shall be so precise and clear as to give sufficient indication to the charged Government servant of the facts and circumstances against him. The proposed documentary evidences and the name of the witnesses proposed to prove the same along with oral evidence, if any, shall be mentioned in the charge sheet. The charged Government servant will be

required to put in written statement of his defence in person on a specified date, which shall not be less than 15 days from the date of issue of charge sheet. He shall indicate as to whether he desires to cross examine the witnesses mentioned in the charge sheet and whether desires to give or produce evidence in his defence. The charge-sheet, along with the copy of the documentary evidences mentioned therein and list of witnesses and their statements, if any shall be served on the charged Government Servant personally or by registered post at the address mentioned in the official records in case the charge-sheet could not be served in aforesaid manner, the charge- sheet shall be served by publication in a daily newspaper having wide circulation. Where the charged Government Servant denies the charge the Inquiry Officer shall proceed to call the witnesses proposed in the charge-sheet and record their oral evidence in presence of the charged Government Servant who shall be given opportunity to cross-examine such witnesses. On failure of the charged Government Servant to appear on the date fixed in the inquiry or at any stage of the proceeding inspite of the service of the notice on him or having knowledge of the date the Inquiry Officer shall proceed with the inquiry exparte. In such a case the Inquiry Officer shall record the statement of witnesses mentioned in the charge-sheet in absence of the charged Government Servant. The disciplinary Authority, if it considers necessary to do so, may by an order appoint a Government Servant or a legal practitioner to be known as "Presenting Officer" to present on its behalf the case in support of the charge.

15. The import of the aforementioned rules clearly indicates that the procedural proprietary has to be adhered to by the respondents while holding enquiry against the petitioner. In the background of the aforementioned rules, it is to be seen as to whether respondents have complied with the same in the present case.

16. The learned counsel for the petitioner contended that after service of the charge sheet, he had in his communication dated 7.3.2006 requested for supply of the documents directly related to the charges levelled against him. Details of the documents sought by the petitioner are clearly visible in his communication. The respondents maintained complete silence in this behalf except indicating that the charge sheet was accompanied by the relevant documents in this behalf.

17. The first contention raised by the learned counsel for the petitioner is that the charges are vague and do not disclose the allegation on the basis of which such charges are based. The specific stand taken is that documents on the basis of which the charges have been framed have not been supplied to the petitioner. In order to substantiate his plea, stress has been laid on various communications sent by the petitioner to the respondents to furnish the documents on the basis of which charges have been framed. Various correspondence have been exchanged by the petitioner with the respondents in this behalf, in which persistently it has been emphasized that he is unable to file reply in absence of documents allegedly supporting the charges framed against him. The respondents in their communications have consistently stated that the charge sheet was accompanied by the documents. While scanning through the charge sheet served upon the petitioner, there is an endorsement that the charge sheet is

accompanied by 47 leaves. It is not disclosed in the charge sheet as to what are these leaves furnished along with the charge sheet.

18. The question arises for consideration is as to whether it will be presumed to be sufficient compliance once it is shown in the charge sheet was accompanied by documents without disclosing the details of documents which are appended to it. The requirement of the rule is that the charge sheet must reflect the allegation on which the charges have been framed along with oral as well as documentary evidence which are required to be proved by the department. Disclosure of the proposed documentary evidence and name of the witnesses proposed to prove the charge have to be mentioned in the charge sheet. Not only this, the disciplinary authority is duty bound to make available all other documents which are sought to be relied against the delinquent employee to prove the charge. The intended purpose of this is to furnish to the delinquent employee the substance of the charges along with the supporting documents in order to put him to notice as to what he is requires to meet in the enquiry. It is his constitutional right to deny his guilt and prove his innocence. Non-supply of the documents, as also the witnesses proposed to be examined is likely to prejudice his defence. In order to obviate this, necessary protection has been given to the employee so that he is not found guilty without disclosing the charges supported by evidence proposed to be adduced against him.

19. In the present case, this procedural safe-guard has been violated by the respondents. The disclosure of the proposed documents and the evidence to be adduced in support of the charges, are required to be disclosed to the petitioner. Mere endorsement in the charge sheet that it is accompanied by 47 leaves, without disclosing the particulars of such enclosures, would not be sufficient compliance of the rules.

20. Second contention raised by the learned counsel for the petitioner is that the list of witnesses proposed to be examined have also not been disclosed in the charge sheet. This is an essential feature of Rule-7(iii) of the Rules. Rule clearly shows that the charge sheet must be accompanied by proposed documentary evidence and the name of the witnesses proposed to prove the same along with oral evidence shall be mentioned in the charge sheet. No such disclosure has been made in the charge sheet which clearly violates the aforesaid rules.

21. Reliance has been placed by the learned counsel for the petitioner on a decision of the Apex Court **State of U.P. & others versus Saroj Kumar Sinha AIR 2010 SC 3131,** in which Apex Court has observed that :

" The affect of non disclosure of relevant documents has been stated in Judicial Review of Administrative Action by DeSmith, Woolf and Jowell, Fifth Edition, Pg.442 as follows:

If relevant evidential material is not disclosed at all to a party who is potentially prejudiced by it, there is prima facie unfairness, irrespective of whether the material in question arose before, during or after the hearing. This proposition can be illustrated by a large number of modern cases involving the use of undisclosed reports by administrative tribunals and

other adjudicating bodies. If the deciding body is or has the trappings of a judicial tribunal and receives or appears to receive evidence ex parte which is not fully disclosed, or holds ex parte inspections during the course or after the conclusion of the hearing, the case for setting the decision aside is obviously very strong; the maxim that justice must be seen to be done can readily be invoked."

22. Reliance has also been placed by the learned counsel for the petitioner on a decision of the Apex Court in **Kashinath Dikshita versus Union of India (1986) 3 SCC 229.** The following observations have been made by the Apex Court :-

"When a government servant is facing a disciplinary proceeding, he is entitled to be afforded a reasonable opportunity to meet the charges against him in an effective manner. And no one facing a departmental enquiry can effectively meet the charges unless the copies of the relevant statements and documents to be used against him are made available to him. In the absence of such copies, how can the concerned employee prepare his defence, cross- examine the witnesses, and point out the inconsistencies with a view to show that the allegations are incredible? It is difficult to comprehend why the disciplinary authority assumed an intransigent posture and refused to furnish the copies notwithstanding the specific request made by the appellant in this behalf. Perhaps the disciplinary authority made it a prestige issue. If only the disciplinary authority had asked itself the question: What is the harm in making available the material? and weighed the pros and cons, the disciplinary authority could not reasonably have adopted such a rigid and adamant attitude. On the one hand there was the risk of the time and effort invested in the departmental enquiry being wasted if the courts came to the conclusion that failure to supply these materials would be tantamount to denial of reasonable opportunity to the appellant to defend himself. On the other hand by making available the copies of the documents and statements the disciplinary authority was not running any risk. There was nothing confidential or privileged in it."

23. The second ground contended by the learned counsel for the petitioner is that after exparte enquiry was concluded, a report was submitted to the appointing authority. After submissions of the report, it was proposed to dismiss the petitioner from service, as a result of which, show-cause notice was issued to him which was to be served upon the petitioner. The said show-cause notice was not served upon the petitioner till 13.6.2006.

24. The stand of the respondents is that the notice could not be served upon the petitioner personally as he was not at his home on the said date. It was decided to publish the notice in the newspaper and accordingly the said notice was published in the newspaper on 27.5.2006. The petitioner came to know about the same on 2.6.2006 and submitted his reply by stating that 15 days time time be extended to file his reply. The notice along with enquiry report was served upon the petitioner on 13.6.2006. He was asked to submit his reply by 17.6.2006.

25. The petitioner by his communication dated 16.6.2006 requested the respondents that notice was received by him on 13.6.2006 and he requires 15 days time to file his reply. Without rejecting the

request of the petitioner, the impugned order was passed by respondent no. 2 on 23.6.2006.

26. From the aforesaid facts, following things clearly emerges that (i) the show-cause notice was not personally served upon the petitioner till 13.6.2006 along with report; (ii) the extension of time was sought by the petitioner vide his communication dated 2.6.2006 which was accepted by the respondents through their communication received by the petitioner on 13.6.2006 by extending date up to 17.6.2012; (iii) petitioner further required grant of extension of 15 days' which was not rejected and without informing the petitioner about the date of his request for extension, the impugned order has been passed by respondent no. 2.

27. It is mandatory that the opportunity was required to be given to the petitioner to the show-cause against the proposed punishment. The petitioner would be entitled not only to question the proposed punishment but also the manner in which the enquiry has been conducted against him. The enquiry which has been conducted against the petitioner without supplying him the relevant documents and name of the witnesses vitiates the said enquiry. Asking the respondents to give reply to the enquiry report without supply of the documents is to add insult to injury.

28. The other aspect of the matter is that even while asking reply from the petitioner against the proposed punishment, it be seen that no opportunity was given to him in this behalf. Once the petitioner had sought extension of time vide his communication dated 2.6.2006, the respondents granted extension of time to the petitioner to file his reply by 17.6.2006. Mere extension of time in itself was not sufficient, inasmuch as, the petitioner was to be served with the proposed show-cause notice along with the show-cause notice and enquiry report. Both the show-cause notice and the enquiry report were received by the petitioner on 13.6.2006. It is from that date 15 days time would start running i.e. after receipt of the show-cause notice. The reply could not be submitted by the petitioner against the proposed show-cause notice unless it was actually received by him. He had rightly sought extension of time vide his communication dated 2.6.2006. The respondents without waiting for the same passed the impugned order. It clearly emerges from the aforementioned disclosures that no opportunity has been given to the petitioner to file reply to the show-cause notice. I say so because admittedly the proposed show-cause notice and the enquiry report were received by the petitioner on 13.6.2006 and not on 2.6.2006 when the request was made by the petitioner for extension of time.

29. In view of this, I find that no opportunity has been given to the petitioner to show-cause against the proposed punishment. It clearly not only violates Rule 7(iv) of the Rules but also the mandates of Constitution of India under Article 311(2) which contemplates that reasonable opportunity is required to be given to the employee to defend himself. The word reasonable opportunity has been interpreted to me natural justice. Article 311(2) gives constitutional mandate to the principles of natural justice and once it is proved from the record that reasonable opportunity to defend himself has not been provided, the rules of natural justice would be violated.

30. In view of above, I allow the writ petition and set aside the order impugned

dated 23.6.2006 passed by respondent no. 2 and order dated 8.11.2006 passed by respondent no. 3 and direct the respondents to re-instate the petitioner in service within three months from the date a certified copy of this order is produced before them.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.07.2012

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.

Civil Misc. Writ Petition No. 3422 of 2008

Dharam Singh & Others ...Petitioner
Versus
Commissioner, Meerut Division, Meerut & Others ...Respondents

Counsel for the petitioner:
Sri S.D. Kautilya
Sri Anil Kumar
Sri G.N. Tiwari
Sri Raghubir Singh
Sri S.R.Singh

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

U.P.Z.A.&L.R. Act 1950-Section 198-Cancellation of Patta on ground-authority granting approval-lacks jurisdiction as S.D.O. Has no authority-after 25.07.2002-while after amended provision Tehsildar processed and recommended for allotment-as such recommendation be treated as approval-well within jurisdiction-further putting signature by S.D.O. is superfluous-cancellation-held-illegal.

Held: Para 9

In the circumstances, it cannot be said that the approval was bereft of any orders of the Tehsildar who was the authority competent to grant the approval. Putting of signatures by the Sub Divisional Magistrate might therefore be superfluous, but the exercise of the discretion by the Tehsildar in supporting the recommendations cannot be said to be an act either without authority or without jurisdiction. In the opinion of the Court, the recommendation made by the Tehsildar will amount to his approval and in the aforesaid circumstances the findings recorded by the authorities below on that count cannot be sustained. The impugned orders dated 29.8.2007 and 31.12.2007 are hereby quashed for the aforesaid reasons.

(Delivered by Hon'ble Amreshwar Pratap Sahi, J.)

1. Heard learned counsel for the petitioners, Sri S.K. Purwar for the contesting respondent no. 4 and the learned Standing Counsel for the respondent nos. 1 and 2. Learned counsel for the Gaon Sabha is not present. None of the other respondents have put forth any contest to this petition.

2. The petitioners are allottees of certain land by the Gaon Sabha under the provisions of Section 198 of the U.P. Z.A. & L.R. Act, 1950. The respondent no. 4 who is the erstwhile gram pradhan appears to have complained against the said allotment proceedings as being without authority in law and one of the major grounds raised was that the Sub Divisional Magistrate had no authority to approve the said allotments after 20th July, 2002, inasmuch as, the said power had been conferred on the Assistant Collector (Tehsildar) of the area concerned. It is undisputed that by a subsequent amendment the powers have again now been vested in the Sub Divisional Magistrate. The fact remains

that in the present case the Sub Divisional Magistrate has passed the order of approving the lease on 25th July, 2002 which is during the period when the amendment was operating.

3. This complaint of the respondent no. 4 has been accepted and the lease of the petitioner has been cancelled as the impugned orders clearly recite that the lease has been approved by an incompetent authority. The petitioners have come up before this Court challenging the said orders on the ground that the aforesaid orders proceed on a misconception of law and also on erroneous assumptions of fact, inasmuch as, the amending Act did confer powers on the Tehsildar, but a subsequent approval by the Sub Divisional Magistrate does not entirely annul the allotment proceedings. At the most, the Tehsildar may be required to reconsider the matter with regard to approval in the event it is found that there is no approval of the Tehsildar.

4. Sri Purwar on the other hand contends that apart from this ground there were several other infirmities in the grant of lease, inasmuch as, the petitioners were not eligible persons entitled to get the lease. He therefore contends that there were other grounds available for cancellation of the lease even though no finding has been recorded in the impugned orders as it proceeds simply on the ground that the Sub Divisional Magistrate had no authority to grant approval. Sri Purwar submits that once the Amendment Act has been brought in force, the order of approval passed by the Sub Divisional Magistrate is void ab-initio and as such the petitioners cannot be permitted to place reliance thereon or take any advantage of the approval by the Sub Divisional Magistrate.

5. No counter affidavit has been filed on behalf of the State or the Gaon Sabha. Having heard learned counsel for the parties, it is evident from a perusal of the impugned order and the documents on record that the entire file relating to allotment was again processed through the Tehsildar on 20th October, 2002. The fact that the file was processed by the Tehsildar has not been denied and which is also evident from the impugned orders itself. The main ground of cancellation therefore appears to be the exercise of powers of approval by an incompetent authority, namely, the Sub Divisional Magistrate, instead of by the Tehsildar.

6. The aforesaid argument of the respondent that the Sub Divisional Magistrate had no authority to formally approve the lease is debatable as in view of the date of the enforcement of the amendment as indicated hereinabove, it was the Tehsildar who was empowered to accept the recommendations of the Land Management Committee for allotment of the land to the petitioners. However it is to be noticed that even though the powers were conferred on the Tehsildar with effect from 20.7.2002, yet the said amendment was published and notified in the gazette on 10.9.2002. The Sub Divisional Magistrate therefore had no such inkling of any alteration of powers when he passed the orders on 25.7.2002. The said order may on subsequent scrutiny be classified as being hit by a latent lack of jurisdiction but the allotments were ratified by the Tehsildar through his report and recommendation dated 20.10.2002 (Annexure-4 to the petition).

7. Nonetheless as noticed above, and which is evident from the records, the Tehsildar himself processed the file and recommended that the leases were valid and did not suffer from any infirmity. In essence, and in pith and substance, the Tehsildar applied his mind to the said allotments and accordingly made a recommendation that the petitioners were eligible to receive the said allotment of lease from the Gaon Sabha. In the opinion of the Court, once the Tehsildar had applied his mind being the competent authority for approval, then in that view of the matter the Tehsildar will be presumed to have approved the said allotment in favour of the petitioners, and which has been noticed by this Court while granting an interim order on 22.1.2008. This act of the Tehsildar, even though subsequent in point of time cannot be faulted with. The factum of the report and recommendation of the Tehsildar has been noticed in the impugned orders. This fact has been stated in Para 7 of the petition and has been accepted as a matter of record in Para 5 of the counter affidavit of the private respondent. The same has also not been questioned or disputed in the counter affidavit.

8. The Tehsildar therefore having recommended favourably, will be presumed to have applied his mind to the same. To approve means to be in favour of or to judge favourably. It is to favourably sanction and confirm an act. This expression is an act of approval, ratifying an authorized act. It is an assent which is an approbation through a formal attestation. The Tehsildar's recommendation was favourable to the petitioners and therefore it was a conduct by a competent official approving the allotment. The respondents have not been able to bring on record any material to the contrary nor has the State filed any affidavit of the Tehsildar controverting the said fact.

9. In the circumstances, it cannot be said that the approval was bereft of any orders of the Tehsildar who was the authority competent to grant the approval. Putting of signatures by the Sub Divisional Magistrate might therefore be superfluous, but the exercise of the discretion by the Tehsildar in supporting the recommendations cannot be said to be an act either without authority or without jurisdiction. In the opinion of the Court, the recommendation made by the Tehsildar will amount to his approval and in the aforesaid circumstances the findings recorded by the authorities below on that count cannot be sustained. The impugned orders dated 29.8.2007 and 31.12.2007 are hereby quashed for the aforesaid reasons.

10. So far as the issue of eligibility of the petitioners and the issue of cancellation on other grounds of irregularity is concerned, it is open to the Collector to take appropriate action in case he finds that the allotments were otherwise made in favour of ineligible persons provided that the limitation as prescribed under the provisions of Section 198 permit him to proceed to do so.

11. The writ petition is allowed subject to the aforesaid observations.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 01.06.2012

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

Bail No. - 3791 of 2012

Saddam ...Petitioner
Versus
The State of U.P ...Respondents

Counsel for the Petitioner:
Piyush Kumar Singh

Counsel for the Respondents:
Govt. Advocate

Code of Criminal Procedure-439-Bail-offence under Section 3 of U.P. Provision of Cow Slaughter Act 1955-allegations that applicant found driving vehicle carrying 82 Bullocks and 30 Cows out of which 6 Bullocks and 4 Cows found dead-recovery memo nothing mentioned by which provision of Section 3 and 5 found violated-Learned Magistrate as well as Session Judge-instead of imparting justice without fear and favor-appears to have acted on their personal feelings-which has no scope in Rule of Law-entitled for bail-general direction issued for future action.

Held: Para 10

Judges right from the subordinate courts till to the highest strata cannot legislate when the legislature has provided punishment of fine under Section 11 of Prevention of Animal Cruelty Act, how a Magistrate or Additional Sessions Judge is rejecting bail application is a matter of grave concern which casts aspersion against the control of this Court on the subordinate courts.

Case law discussed:
AIR 2006 SC 1975; 1993 (1) SCC (Cri) 149; 178 CAR 107 (SC)

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

1. Heard learned counsel for the accused applicant and learned counsel for the State and perused the F.I.R. and other relevant papers filed in support of the bail application.

2. Counter affidavit filed today is taken on record. As per FIR, accused applicant was found driving vehicle in which 82 bullocks and 30 cows were loaded, out of which 6 bullocks and 4 cows were dead. There are no allegations of violation of any of the provisions contained in U.P. Prevention of Cow Slaughter Act, 1955. Section 3 prohibits slaughtering of cow, bull or bullock and Section 5 prohibits sale of beef. Both these prohibitions do not find to have been voilated, as nothing is mentioned in the recovery memo. The learned Magistrate and Learned Additional Sessions Judge did not bother to go through the recovery memo which recites that none of the accused were found at the place of recovery nor any weapon of slaughtering has been recovered.

3. Now, allegations remains for the offence punishable under Section 11 of Animal Cruelty Act, which reads as follows:

"If any person.....(d) conveys or carries, whether in or upon any vehicle or not, animal in such a manner or position as to subject it to unnecessary pain or suffering; or (e) keeps or confines any animal in any cage or other receptacle which does not measure sufficiently in in height, length and breadth to permit the animal a reasonable opportunity for movement; or

he shall be punishable (in the case of a first offence, with fine which shall not be less than ten rupees but which may extend to fifty rupees and in the case of a second or subsequent offence committed within three years of the previous offence, with fine which shall not be less than twenty five rupees but which may extend, to one hundred rupees or with imprisonment for a term which may extend, to three months, or with both.

4. Learned Sessions Judge has rejected the bail application without observing that the allegations do not relate to violation of any of the provisions of U.P. Prevention of Cow Slaughter Act, 1955, nor he has bothered to behave in a humane manner and has played recklessly with the rights guaranteed to a human being; what to think about Article 21 of the Constitution of India, by ignoring the repeated dictums laid down by the Hon'ble Apex Court. What pains this Court is that the offence, if any, is bailable one. India has not yet been declared to be a police State. Rule of law is the way of life and the courts are bound to implement "Rule of Law".

5. Considering the facts and circumstances and without expressing any view on the merits of the case, let the accused applicant be released on bail in Case Crime No.135/2012 under Section 3/5/8 Cow Slaughter Act & Section 11 of Animal Cruelty Act, PS Hasanganj, District Unnao, on his furnishing a personal bond and two local and reliable sureties each in the like amount to the satisfaction of the court/Magistrate concerned.

6. It appears that learned Additional Sessions Judge has been swayed by sentimental arguments placed before him and he has forgotten his basic duty to administer law as it is. Either the learned Additional Sessions Judge has involved his own sentiments or has attempted to avoid his criticism for, in case the bail application is allowed, he would face criticism from any section of bar members. Criticism is part of our system and if the Judge succumbs to criticism, he should reconsider his virtues, his moral excellence, his efficacy, his inherent power and the practice of duty. The pious seat of justice has no religion. A Judge has to abide by his constitutional obligations and laws framed thereunder. A Judge should maintain his integrity and virginity under all circumstances.

"Recently in Gurdev Kaur & others V. Kaki & others, AIR 2006 SC 1975 , the Hon'ble Apex Court has given a note of caution to such orders which are stigmatic on the justice delivery system in the mind of the public at large and has held; "Judges must administer law according to the provisions of law. It is the bounden duty of judges to discern legislative intention in the process of adjudication. Justice administered according to individual's whim, desire, inclination and notion of justice would lead to confusion, disorder and chaos ."

7. In Punjab National Bank v. Surendra Prasad Sinha, 1993 Supp. (1) SCC (Cri) 149 the Hon'ble Apex Court has held as under:

"The judicial process should not be an instrument of oppression or needless harassment. There lies responsibility and duty on the Magistracy to find whether

the concerned accused should be legally responsible for the offence charged for."

It was further held:

"Vindication of majesty of justice and maintenance of law and order in the society are the prime objects of criminal justice but it would not be the means to wreak personal vengeance."

8. People, by and large are rapidly loosing confidence in the criminal justice system, particularly the subordinate courts have opted tendency to play safe by overlooking the will of the people; underneath there is a feeling that the judicial officers manning the subordinate courts are fearful and not bold enough to deliver justice fearlessly which is soul of judicial system in India. This particular aspect is eroding the majesty of the courts which is suicidal for the national fabric. Passing orders in a mechanical manner like administrative officers is not expected from a Judge. A Judge has to keep his fingers on the pulse of the society.

9. In Sanjay Gandhi v. Union of India & ors. reported in 178 CAR 107 (SC), Hon'ble Apex Court has held as under:

"Since a fair trial is not a limping hearing, we view with grave concern any judicial insouciance which lengthens litigation to limit of exasperation."

10. Judges right from the subordinate courts till to the highest strata cannot legislate when the legislature has provided punishment of fine under Section 11 of Prevention of Animal Cruelty Act, how a Magistrate or Additional Sessions Judge is rejecting bail application is a matter of grave concern which casts aspersion against the control of this Court on the subordinate courts.

11. The Registrar General is directed to circulate copy of this order to all the Sessions Judge/C.J.Ms so that justice should be dispensed with strictly in accordance with law, in such a fashion that a message may be transmitted to the society at large that there is no deterioration in the judicial system.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.07.2012

BEFORE
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition No. 3850 of 2003

Ram Sudhar Prasad ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Jitendra Narain Rai

Counsel for the Respondents
C.S.C.

U.P. Temporary Govt. Servant (termination of Service) Rules 1975- termination order-of petitioner a daily wager on post of Mali-after substantive vacancy-service regularized-termination order questioned-on ground after regularization Temporary Rule 1975 has no application-held-misconceived-unless service confirmed status would be as temporary employee-no force on technical plea-petition dismissed.

Held: Para 9

By order dated 04.09.1987 the appointment of the petitioner has only

been regularized. The petitioner's service has not yet been confirmed. On the query being made whether any order of the confirmation of the service has been passed, learned counsel for the petitioner submitted that no order of confirmation has been passed. Since no order of confirmation has been passed, the service of the petitioner under U.P. Government Servant Confirmation Rules, 1991, was only temporary engagement and, therefore, the petitioner's service was covered under Rule, 1975 and exercise of power dismissing the petitioner from service under Rule 1975 can not be said to be illegal.

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

1. Heard Sri Jitendra Narain Rai, learned counsel for the petitioner and Sri Pankaj Rai, learned Additional Chief Standing Counsel.

2. By means of the present writ petition, the petitioner is challenging the order dated 19.08.2000 passed by District Magistrate, by which the petitioner has been dismissed from service and appeal against the said order has been dismissed. The petitioner's service has been dismissed on the ground that his service is no longer required, on payment of one month's salary under U.P. Temporary Government Servant (Termination of Service) Rules, 1975 (hereinafter referred to as "Rule 1975").

3. It appears that the petitioner has been engaged as daily wager on 06.07.1983 on the post of Mali. It appears that the post of Mali has become substantive and, therefore, by letter/order dated 04.09.1987 passed by Parganadhikari, Varanasi his appointment has been regularised on the post of Mali.

4. Learned counsel for the petitioner submitted that since the service of the petitioner has been regularised, Rule 1975 does not apply and the petitioner's service can not be terminated under Rule, 1975.

5. I do not find any substance in the argument of learned counsel for the petitioner.

6. The Uttar Pradesh Temporary Government Servants (Termination of Service) Rules, 1975 reads as follows:

"1. Short title, Commencement and application -- (1) There rules may be called the Uttar Pradesh Temporary Government Servants (Termination of Service) Rules, 1975.

(2) This Rule and Rules 2, 3 and 4 shall be deemed to have come into force on 30th January, 1953 and Rule 5 shall come into force atonce.

(3) They shall apply to all persons holding a civil post in connection with the affairs of Uttar Pradesh and who are under the rule making control of Governor, but who do not hold a lien on permanent post under the Government of Uttar Pradesh.

2. Definition -- In these rules temporary service means officiating or substantive service on a temporary post, or officiating service on a permanent post under the Uttar Pradesh Government.

"3. Termination of Service - (1) Notwithstanding anything to the contrary in any existing rules or orders on the subject, the services of a Government servant in temporary

service shall be liable to termination at any time by notice in writing given either by the Government servant to the appointing authority or by the appointing authority to the Government servant.

(2) The period of notice shall be one month.

Provided that the services of any such Government servant may be terminated forthwith, and on such termination the Government servant shall be entitled to claim a sum equivalent to the amount of his pay plus allowances, in any, for period of the notice or as the case may be period by for the which such notice falls short of one month as the same rates at which he was drawing them immediately before the termination of his services.

Provided further that it shall be open to the appointing authority to relieve a Government servant without any notice or accept notice for a shorter period without requiring the Government servant to pay any penalty in lieu of notice.

Provided also that such notice given by the Government servant against whom a disciplinary proceeding is pending or contemplated shall be effective only if it is accepted by the appointing authority, provided in the case of a contemplated disciplinary proceeding the Government servant is informed of the non-acceptance of his notice before the expiry of that notice."

Short Notes - Services of the temporary Government servant can be terminated at any time without assigning any reasons -- 1989 (1) SLR P&H 432: 1986 (6) SLR P&H 378: 1986 (1) SLR Gujarat 501: 1979 (1) SLR 351 (SC): 1986 (1) SLR J&K 396: 1986 (*) SLR SC 424.

4. Savings - Notwithstanding anything in these rules, the tenure or continuance of engagement or employment of the following categories of persons shall be governed by the terms of their engagement of employment, and nothing in these rules shall be construed to require the giving to them or by them of one month's notice or pay or penalty in lieu thereof before the termination of their engagement of employment --

(a) persons engaged on contract;

(b) persons not in whole-time employment of Government;

(c) persons paid out of contingencies;

(d) persons employed in a work charged establishment;

(e) persons re-employed after superannuation;

(f) persons employed for a specified period whose service stand determined on the expiry of that period;

(g) persons employed for a specified period on condition that the period may be curtailed at any time ?

(h) persons appointed in short-term arrangements or vacancies whose

services stand determined on the expiry of the arrangement or vacancy.

5. Rescission and saving - (1) The rule promulgated with Appointment (B) Department Notification No.230--II-B-1953, dated January 30, 1953, shall stand rescinded with effect from the same dated.

(2) Notwithstanding such rescission, anything done or any action taken or purporting to be done or taken under the said rule shall be deemed to have been done or taken under these rules.

Short Notes --- Where the services are terminated on the ground of unsatisfactory work, unsuitability and unfitness and not by way of punishment. There would be no requirement of conducting the departmental disciplinary proceedings and provisions of Article 311 (2) of the Constitution of India would not be attracted.

7. Section 4 of Uttar Pradesh Government Servant Confirmation Rules, 1991 reads as follows:

"4. Confirmation where necessary - (1) Confirmation of a Government servant shall be made only on the post on which he is substantively appointed (i) through Direct Recruitment, or (ii) by promotion, if Direct Recruitment is one of the sources of recruitment, or (iii) by promotion if the post belongs to a different service.

(2) Such confirmation shall be made---

(i) against a post, whether permanent or temporary, on which any other person does not hold a lien;

(ii) subject to the fulfilment of the conditions of confirmation laid down in the relevant service rules or executive instructions issued by Government, as the case may be;

(iii) formal order shall be necessary to be issued by the Appointing Authority with regard to confirmation;

Explanation - Notwithstanding the fact that a Government servant is confirmed anywhere else, if he is directly recruited on any post or is promoted to a post where Direct Recruitment is one of the sources of recruitment, he will have to be confirmed thereon."

8. Section 4 (2)(ii) of Confirmation Rules, 1991 provides that for the confirmation on the substantive post a formal order is necessary to be passed by appointing authority.

9. By order dated 04.09.1987 the appointment of the petitioner has only been regularized. The petitioner's service has not yet been confirmed. On the query being made whether any order of the confirmation of the service has been passed, learned counsel for the petitioner submitted that no order of confirmation has been passed. Since no order of confirmation has been passed, the service of the petitioner under U.P. Government Servant Confirmation Rules, 1991, was only temporary engagement and, therefore, the petitioner's service was covered under Rule, 1975 and exercise of

power dismissing the petitioner from service under Rule 1975 can not be said to be illegal.

10. In view of the above, there is no merit in the writ petition. The writ petition fails and is accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.05.2012

BEFORE
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE A.N. MITTAL, J.

Civil Misc. Writ Petition No.10154 of 2012

M/s Alka Ice and Cold Storages Pvt. Ltd. and others ...Petitioners
Versus
State of U.P. & Ors. ...Respondents

Counsel for the Petitioner:
Sri Rajesh Kumar Tiwari

Counsel for the Respondents:
Ms. Sudha Pandey
C.S.C.

U.P. Agricultural Credit Act1973-Section-11-A-Recovery of loan of Rs. 3,56,99,410/-from M/S Alka Ice and Cold Storage-as arrears of land revenue - objection the amount excess than 10 Lac can not be recovered as arrears of land revenue-except under provisions of 'Debt Recovery Act' or by suit for recovery-held-misconceived-Act of 73 being Special Act-providing specific mode of recovery after notice and appeal by following Principle of Natural Justice - attribute to Act of 1993 for protection of the interest of borrower as well the interest of bank for speedy recovery of dues sponsored by Central or State Govt. amount even exceed to Rs. 10 Lac can be recovered under Act of 73-petition dismissed.

Held: Para 24

In the present case we are concerned with the recovery under the U.P. Act of 1973, which is a special Act, which not only provides for a specific modes of recovery from movable, immovable and the personal security, it also provides for an order to be passed for recovery after notice and an appeal to the appellate authority, serving the principle of natural justice. The U.P. Act of 1973 thus has all the attributes of the Act of 1993 to protect the interest of the borrower as well as the speedy recovery of the dues of the bank sponsored by the Central Government and State Government under its various schemes for the benefit of agriculturists or for agricultural purposes. The recovery of agricultural debt, even if the outstanding amount is more than Rs.10 lacs, can thus be pursued under the U.P. Act of 1973.

Case law discussed:
1993 (76) Company Case 523 (SC)

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

1. We have heard Shri Rajesh Kumar Tiwari, learned counsel for the petitioner. Ms. Sudha Pandey appears for the Punjab National Bank-respondent no.6. Learned Standing Counsel appears for the State respondents.

2. The pleadings have been exchanged and thus with the consent of the parties, the writ petition was heard.

3. This writ petition is directed against the recovery proceedings initiated by the Punjab National Bank against the petitioner by forwarding a recovery certificate to the Collector, Aligarh under Section 11A of the U.P. Agricultural Credit Act, 1973 (for short U.P. Act of 1973) read with Rule 27 of the U.P. Agricultural Credit Rules, 1975, for recovering an amount of Rs.3,56,99,410/-

as on 31.10.2011 with further interest at the rate of 15.5% thereon towards the term loans namely term loan no.1 dated 6.11.2007 of Rs.200 lacs; term loan no.2 dated 30.3.2009 for Rs.50 lacs, term loan no.3 dated 30.3.2009 for Rs.14.28 lacs and the working capital loan dated 30.11.2007 for Rs.110 lacs.

4. The entire outstanding amount of loan is sought to be recovered from M/s Alka Ice and Cold Storage Pvt. Ltd., the petitioner, which has its registered office at 82, Avas Evam Vikas Colony, G.T. Road, Aligarh through its Director Shri Mohan Singh, Smt. Usha Singh, Smt. Alka Singh and Shri Kamal Singh for which they have mortgaged their agricultural (bhumidhari) land detailed in the recovery certificate. The petitioners have also prayed for quashing citation dated 26.12.2011 issued by the Tehsildar, Ghaziabad for the outstanding amount, as disclosed in the recovery certificate and interest and recovery charges.

5. This is the second writ petition against the recovery of the loans sanctioned, disbursed and utilised by the petitioner to establish a cold storage on mortgaged land and machinery. Earlier the bank had initiated proceedings for recovery by giving notice under Section 13 (2) of the SARFAESI Act, 2002 after classifying the account as non-performing asset (NPA) on 1.10.2008 on the defaults committed by the petitioner. The notice was challenged in Writ Petition No.64263 of 2009 in which the High Court directed the respondents by order dated 4.12.2009 to decide the objections and until the objections are decided no coercive steps were to be taken. The bank has dropped the proceedings under the SARFAESI Act, 2002 as it could not have proceeded to attach and sale the agricultural properties in view of the bar under Section 31 (i) of the SARFAESI Act, 2002. The bank has thereafter initiated the proceedings for recovery under the U.P. Act of 1973.

6. Learned counsel appearing for the petitioner submits that after receiving notice under Section 13 (4) of the SARFAESI Act, 2002, the Directors of the company approached the respondent bank to represent and plead the hardships in the repayment of the loan amount and requested to grant some time. It is stated that the respondent bank agreed and consequently the company deposited Rs.28,22,000/- in cash credit account from 25.3.2010 to 5.11.2011. Since an amount of Rs.8,89,740/- was deposited in excess in the cash credit account, the bank transferred the balance amount to the term loan account, thus reducing the outstanding balance in the term loan account.

7. It is submitted that on 30.11.2011 the Director of the company in accordance with the reply to the notice dated 23.11.2011 pointed out illegalities in the notice given by the bank demanding the outstanding amount and the rate of interest, which was excessive. On 30.11.2011 a letter was sent by the bank to the petitioner to approach it for One Time Settlement. A Director of the company attended the camp on 12.12.2011. He was required to submit a detailed proposal for repayment of the outstanding amount upto 25.12.2011. On 23.12.2011 the proposal was revised to be accepted by the bank. Thereafter the petitioner approached the bank many times but no one attended and heard his difficulties. The bank, thereafter, sent the recovery certificate under the U.P. Act of 1973 giving rise to this writ petition. One of the Directors of the bank namely Shri

Kamal Singh challenged the recovery in Writ Petition No.1233 of 2012, which was withdrawn as he had alleged there was likelihood of compromise with the bank.

8. It is submitted that in view of the Full Bench decision of this Court in Suresh Chandra Gupta v. Collector, Kanpur Nagar, AIR 2005 Alld. 320 the respondent bank cannot recover the outstanding amount form the petitioners as arrears of land revenue. The bank, if it wanted to recover the amount should have filed a suit as the amount is more than Rs.10 lacs, in the Debts Recovery Tribunal established under the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (for short the Act of 1993) and which will override the provisions of the U.P. Act of 1973.

9. Learned counsel for the petitioner has relied upon Section 2 (g) of the Act of 1993, which defines debt as liability of any person towards a bank/ financial institution. The guarantees are given during the course of business activity. The amount due by a person namely the guarantor and that debts within the meaning of Section 2 (g) is recoverable under the Act of 1993. Section 34 of the Act of 1993 provides that the Act will have an overriding effect. Sub-section (2) of Section 34 saves the mode on recovery under the Act of 1993, mentioned in sub-section. The U.P. Act of 1973 is not saved under Section 34 (2) of the Act of 1993. In Unique Butyle Tube Industries (P) Ltd. v. U.P. Financial Corporation, (2003) 2 SCC 455, the Supreme Court held with reference to U.P. Public Monies (Recovery of Dues) Act, 1972, as follows:-

"Section 34 of the Act consists of two parts. Sub-section (1) deals with the overriding effect of the Act notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than the Act. Sub-section (1) itself makes an exception as regards matters covered by sub-section (2). The UP Act is not mentioned therein. The mode of recovery of debt under the UP Act is not saved under the said provision i.e sub-section (2). ... [T]he High Court went wrong ... by holding that the proceedings under the UP Act were permissible."

10. It is submitted that the Full Bench in Suresh Chandra Gupta v. Collector, Kanpur Nagar, AIR 2005 (All) 320 concluded its opinion in para 23 as follows:-

"23. Our conclusions are as follows:

(a)In case of repugnancy or inconsistency between the Central Act under list-I and the State Act under list-II--the Central Act shall prevail.

(b)The UP Public Moneys (Recovery of Dues) Act, 1972 is neither contrary to section 32-G of the State Financial Corporation Act, 1951 nor is there any repugnancy between the two. It is not void.

(c)The guarantors are covered under the Recovery of Debt Due to Bank and Financial Institution Act, 1993 and recovery proceedings against them can be taken under this Act.

(d)Recovery proceedings can neither be initiated against the principal borrower nor against the guarantor under the UP Public Moneys (Recovery of Dues) Act, 1972 if the debt is more than 10 lakhs:

recovery proceedings can only be initiated under the 1993 Act."

11. Smt. Sudha Pandey appearing for the respondent bank submits that in view of the later judgment of this Court in M/s Mak Plastic (P) Ltd. & Ors. v. U.P. Financial Corporation & Ors., 2009 (1) AWC 579; and Sanjay Gupta v. State of U.P. & Ors., 2011 (8) ADJ 647 (DB), which have followed Full Bench judgment of this Court in Sharda Devi (Smt.) v. State of U.P. & Ors., (2001) 3 UPLBEC 1941, the recovery can proceed under the U.P. Act of 1973, which provides for special mode of recovery of agricultural credit.

12. It is submitted by Smt. Sudha Pandey that in M/s Mak Plastic (P) Ltd. (Supra) this Court has noticed that opinion in Unique Butyle's case (Supra), which has been referred by the Supreme Court to Larger Bench. The State Government can recover any amount due and payable to the Financial Corporation (U.P. Financial Corporation) as land revenue. The recovery under Section (3) of the U.P. Public Monies (Recovery of Dues) Act, 1972 of certain dues as arrears of land revenue is made by the State Government on the basis of agreement for the amount advanced under any State sponsored scheme. The State sponsored scheme does not necessarily mean that the loan advanced or grant is given by the State alone. The State is only approver of the scheme for financial assistance so that it can be easier for a loanee to receive such loans. If a loan is granted on the basis of such scheme by the State Financial Corporation, it is imperative on the State to take steps to recover it irrespective of other methods available under Central law. Therefore, it is difficult to construe that the State will not have any say to initiate proceedings for recovery of loan or it cannot recover the loan as arrears of land revenue. In Unique Butyle's case the Supreme Court held that the banks or financial institutions have option or choice to proceed either under the State Act or under the modes of recovery permissible under the Corporation Act, 1951. In case of M/s Paliwal Glass Works & Ors. v. State of U.P. & Ors. (Civil Appeal No.5933 of 2005) decided on 21.9.2005, a Division Bench of the Supreme Court held that the Act of 1993 not only provides expressly for exclusive adjudication by the Tribunal but also the modes of recovery and that Financial Corporation could only recover the monies due to it under the provisions of the Act of 1993, and not under any other provision. The parallel proceedings for recovery were allowed only to the limited extent under Section 34 (2) of the Act of 1993. Section 32G of the Corporation Act, 1951 cannot destroy the exclusivity of the jurisdiction created under the Act of 1993 as regards the mode of recovery. The Corporation Act, 1951 is a self-contained code and Section 32 (G) should not be read as incorporating, by reference the provisions of U.P. Act, 1972. In Unique Butyle (Supra) the Supreme Court held that scope of Section 32 (G) of the Corporation Act, 1951, and its impact on Section 34 (2) of the Act of 1993 was not considered and thus the matter was referred for consideration to Larger Bench.

13. In Sanjay Gupta v. State of U.P. & Ors. (Supra) a Division Bench of this Court considered the question of recovery of loan of more than Rs.10 lacs under the U.P. Act of 1972. It was held that recovery certificate for recovery of loan of more than Rs.10 lacs is not permissible to be issued under Section 3 of the U.P. Act of 1972 but since the loan in that case was

given under a state sponsored scheme, it did not come within the ambit of definition of debt in Section 2 (g) of the Act of 1993 and therefore its recovery was not barred by Section 18 of the Act of 1993. The Division Bench relied upon the reasoning given in M/s Mak Plastic (P) Ltd. & Ors. v. U.P. Financial Corporation & Ors. (Supra) and Full Bench judgment in Suresh Chandra Gupta v. Collector, Kanpur Nagar and concluded in para 19 as follows:-

"The judgment of the apex Court in Unique Butyle (supra) that for recovery of amount of more than 10 lacs, 1993 Act has to be resorted and 1972 Act is not applicable, is a pronouncement of the apex Court which is binding on all courts. However, in the said judgment, the question was not for consideration as to whether loan granted under the State sponsored scheme are covered by the definition of "debt" within the meaning of section 2(g) whereas in the Full Bench judgment in Sharda Devi's case (supra), the said question was specifically considered and answered. In the Full Bench of Suresh Chandra Gupta and another Vs. Collector, Kanpur Nagar which was also a case where loan was disbursed by the financial corporation and the question whether the loan was under any State sponsored scheme, had not arisen nor considered. Thus, the said judgment also does not help the petitioner in the present case. When the Full Bench judgment of our Court in Sharda Devi (supra) had categorically held that the loan granted under the State sponsored scheme are not covered within the definition of "debt" under section 2(g) of 1993 Act, the recovery under 1972 Act is thus permissible for the Bank and no objection can be taken by the petitioners on the said ground. Thus, we do not find any infirmity in the certificate for recovery of the amount as arrears of land revenue under 1972 Act and the contention of the petitioner on the said ground cannot be accepted."

14. In the present case it is stated in the counter affidavit of Shri Girish Chandra Agrawal, Authorised Officer, Punjab National Bank, Branch Civil Lines, Distt. Aligarh dated 20.3.2012, filed on 29.3.2012 that the petitioner failed to deposit the regular installments of the loan and thus answering respondent bank classified all the loan accounts as non-performing assets on 1.10.2008 and proceeded under the SARFAESI Act, 2002. The petitioner deposited Rs.3 lacs on 13.9.2011, Rs.5 lacs on 29.9.2011, Rs.5 lacs on 17.10.2001, Rs.1.5 lacs on 20.10.2011, Rs.30,000/- on 4.11.2011 and another Rs.30,000/- on 5.11.2011. A notice was, thereafter, issued on 23.11.2011 to the company and the Directors calling upon them to pay Rs.3,56,99,470/- as outstanding dues. In the objections filed through their counsel the Directors admitted that the loan facilities are by way of agricultural loan, and alleged that the bank cannot charge interest at the rate of 15.5%. The notice under Section 13 (4) of the SARFAESI Act, 2002 was published in the newspapers. Since Shri Mohan Singh is the Ex-Block Pramukh and has considerable political influence in the area, no one came forward to offer bids, in response to the auction notice and that sale could not be completed even on the reserved price. In the circumstances, the bank proceeded under Section 11A of the U.P. Act of 1973 by issuing recovery certificates against the company as well as Shri Mohan Singh, Smt. Usha Singh, Smt. Alka Singh and Shri Kamal Singh.

15. In paragraph 16 (VI) to (X) of the counter affidavit it is stated as follows:-

"VI) That the Financial Assistance/ Loan was advanced by the respondent bank to the petitioners for construction and running of cold storage in Rural Area for the purpose of storage of agricultural/ horticulture produce (Potatoes) of farmers of the area of District Aligarh. The cold storage is constructed on the Khata No.439 Gata No.3/6 (a) Q 3/6 situated at Vill. Sujanpur, Aligarh, hence there is no agricultural land remains on the spot.

VII) The respondent bank has forwarded the petitioner's project report in respect of running of cold storage in rural area (Village Sujanpur, Tehsil Khair, District Aligarh) for sanction of subsidy of Rs.50 lacs to the National Bank for Agricultural and Rural Development (NBARD) under scheme of CISS and in turn the NBARD has sanctioned Rs.50 lacs and transferred the 50% of the subsidy i.e. Rs.25 lacs in favour of M/s Alka Ice and Cold Storage on 19.03.2009, which is evident from the confirmation of deposit letter of respondent bank. Photo copy of the letter dated 19.03.2009 issued by NBARD and Confirmation of Deposit Letter of respondent bank is being filed herewith and marked as Annexure No.CA1 to this affidavit.

VIII) The answering bank is also annexing the photocopy of the Capital Investment Subsidy Scheme for Construction/ Expansion/ Modernization of Cold Storage and Storages for Horticulture Produce issued by National Bank for Agricultural and Rural Development as Annexure No.CA2 to this affidavit and will produce the latest circular dated 16th July, 2011 in respect of Priority Sector Advances-Classification Report wherein in Section 1 Under column Agriculture Sub-Column Indirect Finance the construction and running of cold storage to store Agriculture Produce/ Products irrespective of their location comes.

IX) That the respondent bank is also annexing the copy of the letter dated 25.03.2012 written by the petitioner's company wherein three postdated cheques of Rs.20 lacs and one postdated cheque for Rs.28 lacs were given to the respondent bank by the petitioners but the same were dishonored due to the insufficient fund in the account of petitioner's in the concern bank. Photo copy of the letter dated 25.03.2010 and 10.09.2010 is being filed herewith and marked as Annexure No.CA3 to this counter affidavit.

X) That it is undisputed between the parties that the financial assistance provided to the petitioner for construction and running of Cold Storage for Agricultural purpose within the meaning of Section 2 (a) of the U.P. Agricultural Credit Act, 1973 therefore, the respondent bank issued recovery certificate under aforesaid Credit Act and Rules.

In view of the above facts and circumstances, the respondent bank has proceeded under the provisions of U.P. Agricultural Credit Act, 1973 and issued the recovery certificate for recovery of outstanding Dues from the petitioners."

16. The paragraph 20 is also relevant for the purposes of deciding the case and is quoted as follows:-

"20. That the contents of para no.25 and 26 of the writ petition are not admitted

in the form as stated. The contents under para in reply are argumentative in nature and suitable arguments may be advanced at the time of hearing of case. However, it is most respectfully submitted that:-

a) Admittedly the financial assistance has been provided to the petitioner for the purpose of construction and running of the Cold Storage in the Rural Area for storage of agricultural produce/ product and horticulture produce (Potatoes) of the farmers. The Agricultural land is converted for use of running the cold storage hence bar is not attracted as provided in Sec.31 (i) of Act, 2002.

b) The U.P. Agricultural Credit Act, 1973 and U.P. Agricultural Credit Rules, 1975 is the valid piece of legislation.

c) A Division Bench of this Hon'ble Court in the case "Sanjay Gupta Vs. State of U.P. & others" reported in 2011 Vol.8 ADJ page 647 occasion to consider whether recovery of outstanding dues more than 10 lacs of rupees can be made as arrears of the land revenue under the provisions of U.P. Public Money (Recovery of Dues) Act, 1972 and Division Bench of this Hon'ble Court after considering the Full Bench decision of this Hon'ble Court rendered in the case of "Sharda Devi v. State of U.P. and others" reported in 2001 (3) UPLBEC 1941 and considering the another Full Bench decision rendering in case of "Suresh Chandra Gupta Vs. State of U.P. and others" reported in 2005 (3) UPLBEC 2210 and also considering the case of Unique Butyle Tube Industries Ltd. Vs. U.P. Financial Co. and others 2003 (2) S.C.C. 455 and case of Eureka Forbs Ltd. Vs. Allahabad Bank and others and other cases came to the conclusion and held that recovery can be made for rupees more than 10 lacs under U.P. Public Money (Recovery of Dues) Act, 1972 as arrears of the land revenue if the financial assistance is provided under the State Sponsored Scheme by placing reliance on the case of Sharda Devi.

In the present case also recovery certificate and citation has been rightly and validly issued under the provisions of U.P. Agricultural Credit Act, 1973 for recovery of outstanding dues for Rs.3,56,99,410/- + interest + others charges because the Credit Act, 1973 is a valid piece of legislation and on the same analogy as mentioned in the para 23 of the Sharda Devi case to avoid repugnancy between the Central Act and State Act, both are a valid piece of legislation therefore, in the peculiar circumstances of the case when the proceeding fails under the SARFAESI Act, 2002 the respondent bank initiated proceeding under Credit Act, 1973 as there is no bar to proceed under Agricultural Act, 1973 in view of the Section 37 of the SARFAESI Act, 2002."

17. The respondent bank has annexed the letter of the General Manager, National Bank for Agricultural and Rural Development (NBARD) dated 19th March, 2009 to the Asstt. General Manager, Punjab National Bank, Regional Office, Vibhav Nagar, Agra advising that with reference to proposals under CISS-Cold Storage- NBARD has credited an amount of Rs.25 lacs to the account of M/s Alka Ice and Cold Storage, Civil Lines, Aligarh with request to arrange minimum credit to the borrower/ unit strictly in accordance with the scheme guidelines. The petitioner had on 5.9.2008 written to the Branch Manager, Punjab National Bank, Civil Lines, Aligarh for arranging

inspection by Joint Monitoring Committee so that second and final installment and subsidy can be claimed.

18. The subsidy was given by NBARD to the petitioner for setting up cold storage for plantation and horticulture produce providing for in Annexure-1; capital investment subsidy for construction/ expansion/ modernisation of cold storage and storages for horticulture produce. The subsidy as claimed by the bank was given under the Capital Investment Subsidy Scheme (CISS) on the recommendation of NBARD, which had appraised the proposals and thus the loan is specifically covered under Section 3 of the U.P. Agricultural Credit Act, 1973.

19. The U.P. Act of 1973 was enacted to make provisions to facilitate adequate flow of credit for agricultural production and development through banks and other institutional credit agencies and for matters connected therewith and incidental thereto. In **Shyam Singh v. Collector, Distt. Hamirpur, U.P. & ors., 1993 (76) Company Case 523 (SC),** the Supreme Court examined the provisions of the Act and found that Sections 10B, 11 and 11A prescribed three procedures for recovery of the loan advanced to an agriculturist. The definition of 'agricultural purpose' in Section 2 (a) (ii) includes the acquisition of implements and machinery in connection with any such activities. Section 10B is applicable, when steps are taken for sale of any movable property or agricultural produce. Section 11 prescribes the procedure for sale of land or any interest therein, or any other immovable property, which has been charged or mortgaged for payment of the amount advanced. Section 11A contains special provisions namely without prejudice to the provisions of Section 10B and 11 under which the bank may forward to the Collector a certificate in the manner prescribed specifying the amount due from agriculturists. The amount due is to be recovered by the Collector as land revenue under Section 279 of the U.P. Zamindari Abolition and Land Reforms Act. It was held that where the recovery proceedings are statutory in nature and the creditor is itself the State, or an authority within the meaning of Art.12 of the Constitution, the right of the bank to follow one or the other modes, separately or simultaneously, for the realisation of the dues has to be recognised.

20. In the present case the loan given by the Punjab National Bank as an element of State funding the application for grant of loan under CISS-Cold Storage-NBARD, with a subsidy of Rs.25 lacs, to be given out of State funds. The financial assistance, thus amount to purely a bank loan given by way of commercial transaction. The definition of bank under Section 2 (c) of the U.P. Act of 1973 includes NBARD. The loan was given for agricultural purpose, which includes under Section 2 (a) (i) marketing of agricultural products, their storage and transport and that financial assistance under Section 2 (e) includes loan, advance, guarantee or otherwise for agriculture purpose. The Act provides for recovery of dues under Chapter IV, which includes Section 10B, Section 11 and Section 11A. The recovery under Section 11 (1) is through by an officer specified by the State Government by notification in the gazette. The State Government has vide notification dated 7.1.1974 specified all Sub Divisional Officers and Addl. Sub Divisional Officers to be the Prescribed Authority within their respective jurisdiction in the district. The

bank is required to make an application on which the Prescribed Authority will pass an order directing that any amount due to the bank on account of financial assistance be paid by the sale of the land or any interest therein or other immovable property charged or mortgaged for payment of such amount, provided that no order shall be made unless the agriculturists has been served with a notice by the Prescribed Authority. The provisions of the Limitation Act are applicable and that the order passed by the Prescribed Authority is subject to the result of the appeal under Section 12 final and binding on the parties. Section 12 provides for an appeal against the order of Prescribed Authority under Section 11 to the appellate authority as may be specified by the State Government by notification in the gazette. By notification dated 7.1.1974 all the Collectors of the districts have been given the powers of appellate authorities within their respective jurisdiction.

21. Section 11 and 12 provide for a complete procedure for recovery, which provides for notice to the agriculturists, and order to be passed by the prescribed authority and appeal. Section 11 and 12 of the Act are quoted as below:-

"11. Recovery of dues of a bank through a prescribed authority.--

(1) Notwithstanding anything contained in any law for the time being in force an officer specified by the State Government by notification in the Gazette (hereinafter referred to as the prescribed authority) may, on the application of a bank by order, direct that any amount due to the bank on account of financial assistance given to an agriculturist be paid by the sale of the land or any interest therein or other immovable property which is charged or mortgaged for the payment of such amount :

Provided that no order of sale shall be made under this sub-section unless the agriculturist has been served with a notice by the prescribed authority calling upon him to pay the amount due.

(1-A) The provisions of the Limitation Act, 1963, shall apply in relation to an application under sub-section (1), as if such application were a suit in Civil Court for sale of the land or interest therein or other immovable property for enforcing recovery oft he sum referred to in that sub-section.

(2) An order passed by the Prescribed Authority shall, subject to the result of appeal under Section 12, be final and be binding on the parties.

(3) Every order passed by the Prescribed Authority in terms of sub-section (1) or by the Appellate Authority under Section 12 shall be deemed to be a decree of a Civil Court and shall be executed in the same manner as a decree of such Court by the Civil Court having jurisdiction.

(4) [***]

12. Appeal- (1) Any party aggrieved by an order of the Prescribed Authority under Section 11 may within a period of thirty days from the date of the order prefer an appeal to such Appellate Authority as may be specified by the State Government by notification in the Gazette.

(2) The Appellate Authority may, after giving an opportunity of hearing to the parties, pass such order as it thinks fit."

22. In the instant case the loan given by the Punjab National Bank sponsored by NBARD with subsidy is not a ordinary commercial transaction for which the provisions of the Act of 1993 may be invoked. The U.P. Act of 1973 provides for special mode of recovery, in which the principles of natural justice inbuilt, with the stages of notice, objection, reasons to be given, limitation, finality to the orders of Prescribed Authority and a statutory appeal, before a recovery may be made.

23. It cannot be doubted that the petitioner is in debt of a banking company under Section 2 (g) of the Act of 1993. The transaction, however, is not by way the ordinary course of any business activity undertaken by the bank or financial institution falling within the meaning of debt. A debt may be in the course of any business activity undertaken by the bank or financial institutions, it may also be a debt advanced by the bank under a State sponsored scheme or by the funds provided by the Central Government or the State Government for which a specific method of recovery is provided in the State Act. We are thus of the view that the Act of 1993, will not override the provisions of the U.P. Act of 1973, even if it is not specifically mentioned under sub-section (2) of Section 34. In Unique Butyle Tube Industries (P) Ltd. (Supra) the U.P. Financial Corporation had initiated recovery, which was otherwise permissible as the State Financial Corporation Act, 1951 has not been overridden by the Act of 1993 under the U.P. Public Monies (Recovery of Dues) Act, 1972. In that context it was held that the State Financial Corporation Act could not have initiated recovery under the U.P. Act of 1972, which provides for separate modes of recovery and such proceedings were not relatable to proceedings under the State Financial Act.

24. In the present case we are concerned with the recovery under the U.P. Act of 1973, which is a special Act, which not only provides for a specific modes of recovery from movable, immovable and the personal security, it also provides for an order to be passed for recovery after notice and an appeal to the appellate authority, serving the principle of natural justice. The U.P. Act of 1973 thus has all the attributes of the Act of 1993 to protect the interest of the borrower as well as the speedy recovery of the dues of the bank sponsored by the Central Government and State Government under its various schemes for the benefit of agriculturists or for agricultural purposes. The recovery of agricultural debt, even if the outstanding amount is more than Rs.10 lacs, can thus be pursued under the U.P. Act of 1973.

25. For the aforesaid reasons, we do not find any good ground to interfere with the recovery proceedings drawn by the Punjab National Bank under the U.P. Agricultural Credit Act, 1973.

26. The writ petition is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.07.2012

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

Civil Misc. Writ Petition No. 12531 0f 1995

Shiv Charan Singh ...Petitioner
Versus
Additional Commissioner (Judicial) Meerut Division, Meerut and others ...Respondents

Counsel for the Petitioner:
Sri G.N. Verma
Sri M.C. Singh

Counsel for the Respondents:
C.S.C.

Imposition of Ceiling and Land Holding Act, 1960-Section 10 (c)-Notice declaring surplus land-by clubbing share of brothers-by misinterpreting the bar of Section 49 of the Consolidation Act-admittedly both claimants born prior to abolition of Zamindari-are not entitled to be jointly recorded over Khudkasht land-held-having independent rights to continue as tenure holders-their title can not extinguished-authorities committed great illegality by applying bar of Section 49 of U.P. Consolidation Act.

Held: Para 26

The parties may not have been at variance during consolidation operations and not having got their shares separated or mutated in records does not take away their right to assert the same so long as their title has not extinguished. As explained above their title survived and did not evaporate merely because the entries were not corrected which aspect is also covered by the bench decision in the case of Ram Chander (supra) referred to hereinabove. The sons in their own independent right continued as tenure holders and the assertion of such rights by them is not barred by applying Section 49 of the U.P. Consolidation of Holdings Act, 1953 as explained in the bench decision of Shri Ram (supra). As a matter of fact the reasoning of the authorities is misconceived while applying Section 49 of the 1953 Act inasmuch as the proceedings under the Ceiling Act are not to determine such title that is governed by a separate procedure under the U.P. Z.A. & L.R. Act, 1950 or the U.P. C.H. Act, 1953.

Case law discussed:
2011 (112) RD page 734 (Paragraph 7, Paragraphs 48 to 49); 1969 AWR Pg. 686

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

1. Heard Sri M.C. Singh, learned counsel for the petitioner and the learned Standing Counsel for the State.

2. This petition questions the legality and validity of the orders passed by the Prescribed Authority and affirmance thereof in appeal by the respondent no. 1 in proceedings under the U.P. Imposition of Ceiling on Land Holdings Act, 1960. An area of 7 bighas, 10 biswas and 11 biswansis has been declared surplus in the hands of the petitioner-tenure holder treating it to be in excess of the maximum limit permissible under the 1960 Act.

3. The petitioner Shiv Charan Singh died during the pendency of the writ petition and is now substituted by his heirs.

4. The background of the case is that the holding in question is ancestral and was also recorded as Sir Khudkasht. Sir Khudkasht is land brought under the personal cultivation of the ex-zamindar

and continued as such on the date when Zamindari was abolished on the promulgation of the U.P. Zamindari Abolition & Land Reforms Act, 1950. The fact that it was Sir Khudkasht land is undisputed.

5. Baljeet Singh was the zamindar and also the tenure holder of the said land that was cultivated as Sir Khudkasht and he was succeeded to the said holding by his two sons, namely, Shiv Charan Singh (deceased petitioner), and his brother Khushal Singh. The two brothers stood recorded as tenure holders in their independent rights. Khushal Singh was issue-less and he died leaving behind his widow Smt. Ishwari Devi who succeeded to his half share of the holdings and her name was accordingly recorded in the revenue records.

6. There is no dispute that Shiv Charan Singh and Khushal Singh in their independent capacity or even Ishwari Devi had no land surplus as defined under the Ceiling Act.

7. The dispute appears to have commenced after the death of Ishwari Devi who is said to have executed an unregistered will on 5th August, 1986 and by virtue of the terms of the will the land covered thereunder was succeeded to by the beneficiaries therein, which also included the sons of the deceased petitioner Shiv Charan Singh.

8. Upon the death of Smt. Ishwari Devi, the beneficiaries under the will applied for mutation and having not succeeded before the Mutating Authority, filed an appeal before the Appellate Authority under the U.P. Land Revenue Act, 1901. In appeal the Sub Divisional Magistrate vide order dated 30.11.1987 allowed the claim of the beneficiaries under the will and their names were directed to be mutated in place of Smt. Ishwari Devi.

9. The Ceiling Authorities, however, after the death of Smt. Ishwari Devi presumed that her holding reverted back to Shiv Charan Singh who under the normal rule of succession and inheritance under Section 171 readwith Section 172 of the 1950 Act became the tenure holder, and accordingly clubbed the land of Smt. Ishwari Devi with that of Shiv Charan Singh to calculate the ceiling area and issued notices to Shiv Charan Singh under Section 10(2) of the 1960 Act.

10. Shiv Charan Singh filed objections that the land which was sought to be clubbed with his holding and that was recorded in the name of Smt. Ishwari Devi, is an erroneous approach as he has not succeeded to the same, and the holding has devolved on the beneficiaries under the will in whose favour the order of mutation has already been passed.

11. Separate objections were filed by the beneficiaries under the will and also by the sons of Shiv Charan Singh on a separate ground, namely, that the sons of Shiv Charan Singh were born prior to the abolition of zamindari under the 1950 Act, and therefore, they had an independent share in their own right in the holding that had passed on from Baljeet Singh as per the then existing personal law of succession. They contended that prior to the abolition of zamindari, succession was governed according to the coparcenary rights of the members of the Joint Hindu Family and that the sons of Shiv Charan Singh who were born on

12th July, 1931 and 26th August, 1942 respectively were entitled to separate shares and were already holding the same by virtue of such succession. It was also contended in the objection that such a right stood transformed into independent bhumidhari rights of the sons of Shiv Charan Singh as per the provisions of Section 18 of the U.P. Z.A. & L.R. Act, 1950. It was therefore contended that on this count as well the Prescribed Authority and the Appellate Authority have failed to exclude the said shares from the holding of Shiv Charan Singh and Ishwari Devi.

12. There were other issues also raised but primarily the Prescribed Authority and the Appellate Authority after rejecting the said submissions raised on behalf of the petitioner and the other objectors declared the land to be surplus in the hands of Shiv Charan Singh.

13. Aggrieved, an appeal was preferred, which has also been dismissed reiterating the findings of the Prescribed Authority vide judgment dated 12.1.1995, hence, this petition.

14. The Court granted an interim order on 15.5.1995 whereafter the State filed a counter affidavit to which a rejoinder has also been filed. The State was also called upon to file a reply to the supplementary affidavit filed on behalf of the petitioners to which a supplementary counter affidavit is said to have been filed by the State. I have heard learned counsel for the parties and have perused the records.

15. Sri M.C. Singh learned counsel for the petitioner submits that the will executed by Smt. Ishwari Devi was proved to the hilt and the conclusion drawn by the Prescribed Authority that no evidence was adduced in terms of the Evidence Act proving the same is perverse as it ignores the statement of the attesting witness including that of one Mool Chand. He further submits that the will was never challenged by any person and merely because the will is unregistered, the same cannot be discarded. He submits that Section 169 of the U.P. Z.A. & L.R. Act, 1950 empowers a tenure holder to bequeath his or her holding through a will and the registration thereof was not compulsory prior to 2004. In the circumstances, in the absence of any material to the contrary the conclusion drawn by the Prescribed Authority that the will had been set up to avoid ceiling proceedings is erroneous.

16. He further submits that the finding that no attempt was made to get the mutation carried out before the Tehsildar who is the authority under Section 34 of the U.P. Land Revenue Act, 1901 is also an erroneous finding ignoring the order already passed by the Sub Divisional Magistrate on 30.11.1987. He submits that merely because the order of mutation was not incorporated in the revenue record, the same cannot be a circumstance to disbelieve the will. He further contends that the order of the Sub Divisional Magistrate dated 30.11.1987 copy whereof has been filed as an annexure to the petition fortifies the stand of the petitioner even though in a summary proceeding, that the will had been proved.

17. On the issue of the sons of Shiv Charan Singh having succeeded to the holding by virtue of Section 18 of the U.P. Z.A. & L.R. Act, 1950, Sri Singh

submits that the fact of Shiv Charan Singh' sons having been born prior to the abolition of zamindari has not been disputed at any stage of the proceeding by the State. Once this fact is admitted then they did succeed to the holding which was Sir Khudkasht as on the date of the vesting of zamindari.

18. The finding of the Prescribed Authority that they did not get their names mutated independently would not be detrimental and cannot be an adverse circumstance to deny them their independent title over the land to the extent of their share. He further contends that even if subsequent settlement proceedings have been carried out under the U.P. Consolidation of Holdings Act, 1953, and the co-tenants have failed to get their names recorded, then such an omission cannot take away their rights which they are asserting before the State. The submission therefore in short is that their independent right in the holding also did exist and there was no bar operating against them as concluded by the Prescribed Authority in terms of Section 49 of the U.P. Consolidation Holdings Act, 1953 in the ceiling proceedings. The Appellate Authority according to him also misdirected itself by recording that the bar of Section 49 of the U.P. Consolidation of Holdings Act will be attracted as the sons had failed to get their names recorded for a long time.

19. He has further invited the attention of the Court to the documents, namely, the statement of the beneficiary under the will and the attesting witness which was recorded before the Prescribed Authority in Case No. 208 of 1988, State Vs. Shiv Charan Singh under the Ceiling Act. He submits that the said statement clearly proves the execution of the will and its attestation, as such the will had been proved through cogent evidence in terms of Section 68 of the Indian Evidence Act. He submits that the fact that the said statements were recorded before the Prescribed Authority has not been controverted before this Court and in view of this the findings recorded by the authorities below that there was no evidence to prove the will led by the petitioner is perverse. Accordingly, he contends that the impugned orders deserve to be quashed. The rejoinder to the counter affidavit has already been filed and is on record.

20. Coming to the question of the execution of the will by Ishwari Devi, it is undisputed that the will was unregistered. According to the provisions of Section 169 of the U.P. Z.A. & L.R. Act, 1950 no registration was required for a will bequeathing tenancy rights till the year 2004 when an amendment was brought about making such a will to be compulsorily registrable. The will is admittedly of the year 1986 and therefore merely because it was unregistered will not take away the effect of the instrument unless it is established that the same was not proved. The contention of the State therefore that the will was unregistered and the finding of the authority discarding it on this ground cannot be sustained.

21. So far as proving the will is concerned, according to the records available before this Court and which remains virtually uncontroverted indicates that the beneficiary under the will Rajendra Singh gave his statement indicating the circumstance of the execution of the will and one of the attesting witnesses Mool Chand son of

Chandrasen had deposed before the Prescribed Authority that the will had been executed and that the thumb impressions had been affixed by the testator in the presence of 4 to 5 persons. The statement also indicates the contents of the will having been read to the testator whereafter she put her thumb impression. The Prescribed Authority and the Appellate Authority have totally overlooked the said statement of the attesting witness and one of the beneficiaries and as such they have arrived at a totally perverse finding that the will was not proved. In the opinion of the Court the will had been proved in terms of Section 68 of the Act before the Prescribed Authority by leading evidence in support of the said will.

22. Not only this even assuming that the mutation order was a summary nature of order yet the same dated 30.11.1987 also records the will having been proved on the basis whereof the mutation order was directed. In the circumstances the conclusion drawn by the authorities about the will is perverse and is unsustainable. The will in the opinion of the Court was genuinely proved not only before the Sub Divisional Magistrate who is the mutating authority but also before the Prescribed Authority by leading evidence and producing the attesting witness. The statement of the Lekhpal on behalf of the State was no proof of the non-execution of the will, once the attesting witness had been produced and he had made a statement about the execution of the document. The Prescribed Authority, therefore, committed a manifest error by disbelieving the will against the weight of evidence on record and contrary to the law referred to hereinabove. In the circumstances, the land of Smt. Ishwari Devi devolved under the will on the beneficiaries and the same could not have been included in the holding of Shiv Charan Singh. The notice, therefore, issued to Shiv Charan Singh proceeded on an erroneous premise and therefore the orders impugned deserve to be set aside.

23. The issue relating to succession by the sons of Shiv Charan Singh and their share in the land also has to be accepted. The bar of Section 49 is not attracted at all, inasmuch as, these are proceedings under the Ceiling Act and not under the Consolidation of Holdings Act, 1953. Nonetheless, even otherwise the claimants are not precluded from setting up such a claim on the inference of the bar as contained in Section 49 of the U.P. Consolidation of Holdings Act, 1953 in view of the Division Bench judgment in the case of **Shri Ram & others Vs. Deputy Director of Consolidation, Allahabad Camp, Fatehpur & others, 2011 (112) RD Pg. 734 (Paragraph 7, Paragraphs 48 to 59).**

24. The findings of the authorities below are erroneous as they have been unable to appreciate the nature of the tenancy, the status of the claimant tenure holder even though unrecorded, and the right of inheritance having accrued prior to the abolition of Zamindari and its consequences under the U.P. Z.A. & L.R. Act, 1950. This therefore requires a reiteration of the settled law.

25. It is undisputed in the present case that the sons/grandsons (being sons of a predeceased son who were born prior to abolition of Zamindari) of the petitioner have claimed rights as independent tenure holders in the holding on the ground that their share, which is acquired by them

under law, cannot be included in the holding their father. The claim is supported in law by the pronouncement of a division bench of this Court in the case of **Ram Chander & another Vs. Commissioner & Director of Consolidation, Meerut and others, 1969 AWR Pg. 686.** The reason is that the fact of the sons being born prior to abolition of Zamindari and their date of birth remains undisputed. The division bench further rules that an omission to record the names of the sons alongwith their father does not deprive them of their title over the land which exists by operation of Section 18 of the U.P. Z.A. & L.R. Act, 1950. It is also undisputed that the land is ancestral Sir Khudkasht acquired by a common ancestor from whom inheritance is claimed.

26. The parties may not have been at variance during consolidation operations and not having got their shares separated or mutated in records does not take away their right to assert the same so long as their title has not extinguished. As explained above their title survived and did not evaporate merely because the entries were not corrected which aspect is also covered by the bench decision in the case of Ram Chander (supra) referred to hereinabove. The sons in their own independent right continued as tenure holders and the assertion of such rights by them is not barred by applying Section 49 of the U.P. Consolidation of Holdings Act, 1953 as explained in the bench decision of Shri Ram (supra). As a matter of fact the reasoning of the authorities is misconceived while applying Section 49 of the 1953 Act inasmuch as the proceedings under the Ceiling Act are not to determine such title that is governed by a separate procedure under the U.P. Z.A. & L.R. Act, 1950 or the U.P. C.H. Act, 1953.

27. For the foregoing reasons and in view of the discussion made hereinabove, the orders impugned dated 31.8.1994 and 12.1.1995 are quashed.

28. The writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDER
DATED: ALLAHABAD 05.07.2012

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

Civil Misc. Writ Petition no. 14850 of 2007

Raj Bahadur Upadhyay ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri S.D. Shukla
Sri Amit Singh
Sri B.M. Chaturvedi

Counsel for the Respondents:
C.S.C.
Sri Siddharth Singh
Sri Santosh Kumar Srivastava

U.P. Secondary Education Services Board, Act 1982-Section 18-short term vacancy of L.T. Grade teacher-after requisition and advertisement in two national newspapers-disapproved by DIOS-on ground vacancy advertised without reference of Board-held-in view of D.B. Case of Daya Shanker Shukla short term vacancy needs urgent consideration-if not filled up in time teaching intensity suffers-as such admitted legal position-order passed by DIOS can not survive-quashed.

Held: Para 12

In view of the aforesaid legal position and the facts admitted in the impugned order itself, the impugned order dated

30.10.2006 therefore, is absolutely illegal and cannot survive.
Case law discussed
2010 (10) ADJ 829 (DB)

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

1. By this writ petition the petitioner is challenging the order dated 30.10.2006 whereby his appointment against the short term vacancy of Assistant Teacher has been disapproved by the respondent no.3, the District Inspector of Schools, Azamgarh.

2. The facts of the case, in brief, are that there is an institution by the name of Janta Inter College Ahiraula, Azamgarh (Institution). The institution is governed by the U.P. Intermediate Education Act, 1921 and the U.P. Secondary Education (Services Selection Boards) Act, 1982 and as also the U.P. High Schools & Intermediate Colleges (Payment and Salaries of Teachers and other Employee) Act, 1971. One Vidyadhar Upadhyay, Assistant Teacher in L.T.Grade in the institution is stated to have proceeded on leave on 24.12.1997 on account of ill health. Leave was sanctioned by the Committee of Management by order dated 27.12.1997 for three months. However, even after the expiry of the said period, Vidyadhar Upadhyay could not join his duty. Subsequently he retired as such on 30.6.1998 on attaining the age of superannuation. In the meantime to fill up vacancy arising out on account of the non joining of Sri Vidyadhar Upadhyay, the Committee of Management advertised the vacancy in two newspapers 'Aaj' and 'Dainik Jagran' both dated 29.12.1997. Applications were invited and the petitioner was also one of the applicants for the said post. According to the petitioner, he is M.A.(Sanskrit) and M.A. (Politics) as well as he has done his B.A. in Education and he is, therefore, fully eligible for the appointment as Assistant Teacher in L.T. Grade against the post so advertised. The Committee of Management considered the candidature of the various candidates. Thereafter, by its resolution dated 19.1.1998 finding the petitioner to be the best candidate, granted ad hoc appointment to the petitioner. The petitioner also joined the post as Assistant Teacher in L. T. grade on 20.1.1998. Thereafter, papers relating to the selection were forwarded by the Committee of Management by its letter dated 20.1.1998 to the District Inspector of Schools, Azamgarh.

3. When no decision was communicated by the District Inspector of Schools the petitioner filed a writ petition no.14097 of 1998 in which notices were issued and subsequently the writ petition was disposed of by this Court on 18.5.1999 with a direction to the District Inspector of Schools to decide the question of grant of financial approval.

4. Again when no decision was taken by the District Inspector of Schools the petitioner was compelled to file Contempt Petition No.3169 of 1999 in which notices were issued on 12.9.2006. It is after the issue of the notices in the contempt petition that the District Inspector of Schools has passed the order dated 30.10.2006, which is impugned in the present writ petition.

5. I have heard Sri Amit Singh, learned counsel appearing for the petitioner and learned Additional Chief Standing Counsel appearing for the respondent nos.1 to 4. No one appears for the Committee of Management, respondent no.5 although the name Sri Siddharth Singh has been shown in the cause list in the array of the respondents. List has been revised.

6. The submission of learned counsel for the petitioner is that he was appointed against the short term vacancy which occurred on account of regular teacher, Sri Vidyadhar Upadhyay, proceeding on medical leave. It is also submitted that the appointment was made after the vacancy had been advertised in two newspapers 'Aaj' and 'Dainik Jagran' both published on 29.12.1997 and out of several applications which were received, the candidature of the petitioner was found to be most suitable and thereafter the petitioner was issued appointment letter on 19.1.1998 by resolution of the Committee of Management of the same date. The petitioner also joined as Assistant Teacher on 20.1.1998. His submission is, therefore, that the selection of the petitioner has been made through proper procedure by advertising the vacancy in two newspapers and therefore, the same cannot be faulted. His further submission is that the regular incumbent, Sri Vidyadhar Upadhyay, retired on 30.6.1998 on attaining the age of superannuation, therefore, the vacancy became a substantive vacancy and ever since the petitioner has taken charge of the post, no other selection has been held and no other candidate selected by the Service Selection Board has come to join the post.

7. The further submission of learned counsel for the petitioner is that the impugned order dated 30.10.2006 is bad in law inasmuch as Section 18 of the Act, 1982 does not place any embargo upon the powers of the Committee of Management to make appointment against short term vacancy without making any reference to the Service Selection Board.

8. From a perusal of the impugned order dated 30.10.2006 it appears that the petitioner was appointed through proper selection in which vacancy arising out of the regular incumbent, Sri Vidyadhar Upadhyay, proceeding on leave, had been published in two newspapers 'Aaj' and 'Dainik Jagran' both dated 29.12.1997. Along with the various other applicants, the petitioner had also submitted an application and after considering the candidature of the candidates, the petitioner was found to be best candidate and by the resolution of the Committee of Management dated 19.1.1998 the petitioner was recommended for appointment and a letter was also issued to him. In pursuance of the resolution of the Committee of Management the petitioner also joined as Assistant Teacher, L. T. grade on 20.1.1998. It is also the admitted position that Sri Vidyadhar Upadhyay thereafter never reported for joining and remained on leave till 30.6.1998 on which date he retired on attaining the age of superannuation.

9. In the impugned order it is also stated that requisition was sent to the Uttar Pradesh Secondary Education Service Selection Board, Allahabad but no candidate has been selected so far. The petitioner has been working as Assistant Teacher, L.T.Grade since 20.1.1998

10. From the impugned order it is seen that the ground on which the appointment of the petitioner has been held to be bad was that it was made by the Committee of Management by advertising the vacancy in two newspapers without reference to the Uttar Pradesh Service Selection Board, Allahabad and, therefore, such appointment was bad in law being in violation of the provisions of Section 18 of the Act, 1982 which provided that after coming the enforcement of the Act 1982 all appointments shall be made only through the Uttar Pradesh Service Selection Board.

11. This aspect of the mater has already been considered by the Division Bench of this Court in the case reported in ***2010 (10) ADJ 829 (DB) Daya Shankar Misra vs. District Inspector of Schools and others*** and the Division Bench while interpreting the provision of Section 18 of the (Service Selection Board) Act, 1982 has held as follows:-

"29.The next question to be considered which is interrelated is as to whether there is any power with the management surviving to make ad hoc appointments on short term vacancies after insertion of Section 33-E in the 1982 Act which rescinded the various Removal of Difficulties Orders issued. With regard to this question two aspects have to be considered. Firstly the effect of Section 32 of the 1982 Act, which provides that the provisions of 1921 Act, the Rules and Regulations made thereunder shall continue to be in force for the purposes of selection, appointment, promotion, dismissal, removal, termination or reduction in rank of a teacher, so far as they are not inconsistent with the provisions of the 1982 Act or Rules or Regulations made thereunder. Secondly whether there is any power under the 1921 Act or the Regulations framed thereunder to fill up short term vacancies.

30. We may note here with emphasis that Section 32 of the 1982 Act uses the words selection, appointment and promotion of a teacher. The words selection, appointment and promotion will include substantive as well as short term vacancies. Further we have to see whether there is any inconsistency or not in the provisions of the two Acts and the Rules and Regulations framed thereunder. We have already held above that the power of the Board to make selections is only with regard to appointments against substantive vacancies. There is no provision under the 1982 Act for making selection for appointments against short term vacancies.

31. Under the 1921 Act, the procedure for selection of teachers and head of the institutions is laid down in section 16-E thereof. Power of the management to fill up short term vacancy having occurred on account of leave extending for more than six months or on suspension is specifically provided in sub section 11 of Section 16-E of the 1921 Act. Further Chapter-II of the Regulations framed under the 1921 Act deals with the appointments of heads of the institutions and teachers. It refers to Sections 16-E, 16-F and 16-FF of the 1921 Act. Regulation 9 of the said Chapter confers the power on the management to fill up the short term vacancies arising out of leave exceeding period of six months and suspension of a teacher having been approved. The management thus was vested with the power under the 1921 Act and the Regulations framed thereunder to fill up short term vacancy. Further as there is no provision under the 1982 Act or the Rules and Regulations framed thereunder with regard to filling up of short term vacancies, it can be safely concluded that there is no question of any inconsistency in the two Acts or the Rules and Regulations framed thereunder for filling up short term vacancies. Thus taking aid of Section 32 of the 1982 Act the definition of vacancy given in 1998 Rules and the provisions contained in Section 16-E(11) of the 1921 Act and Chapter-II of the Regulations framed under the 1921 Act, the management of an institution is vested with the power to fill up short term vacancies.

32.A Full Bench of this Court in the year 1994 in the case of Radha Raizada

(supra) while dealing with the various provisions contained in the 1982 Act and the 1921 Act, had laid down that no ad hoc appointment could be made by the management against the substantive vacancy in view of the provisions contained in Sections 16 and 18 of the 1982 Act. It, however, further held that only short term vacancies could be filled up by the management after following the due procedure prescribed in the Second Removal of Difficulties Order, which had not been rescinded till then. After its rescission in 1999 the power to fill up short term vacancy of a teacher can be derived by the management from section 16-E(11) of the 1921 Act and regulation 9 of the Chapter II of the Regulations framed under the 1921 Act.

33.We have also dealt with the practical aspect of the matter that in order to maintain not only the discipline but also the standard of education and commitment enforced under the Constitution, regular teaching is essential. For enforcing the same, in the given circumstances and under emerging situations, the short term vacancies need to be given urgent attention. If short term vacancies are not filled up in time, the teaching would intensely suffer. Apparently for this reason the Legislature knowing fully well that selections will be made by the Board, not for individual cases, but at State level would result into long durations, left the selection for short term vacancies outside the purview of the Board."

12. In view of the aforesaid legal position and the facts admitted in the impugned order itself, the impugned order dated 30.10.2006 therefore, is absolutely illegal and cannot survive.

13. The writ petition is allowed and the impugned order dated 30.10.2006 is quashed.

14. It is directed that the petitioner will be entitled to full salary and other emoluments on the post of Assistant Teacher, L.T. grade month to month and in case he has not been paid salary, he shall also be entitled to arrears of salary as per Rules.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.07.2012

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

Civil Misc. Writ Petition No. 15560 of 2000

Ramesh Singh ...Petitioner
Versus
Gram Panchayat and others ...Respondents

Counsel for the Petitioner:
Sri Anil Sharma

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

U.P. Zamindari Abolition and Land reform Act 1950-Section 122-B-Ejectement order-ignoring Decree passed in Civil Suit in favor of petitioner-patta granted after realizing premium of lease-categorical finding regarding validity of patta and grant of lease-ex-parte Decree not recalled-subsequent order of ejectment-held-illegal-possession of petitioner can not be unauthorizes one-impugned order quashed.

Held: Para 8

Even assuming that the decree was ex-parte, the respondents could have

applied to the court for setting aside the ex-parte decree. In view of the categorical finding recorded by the appellate court that the suit had been contested by the respondents and the written statement had also been filed, it cannot be said that the suit was decreed ex-parte.

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

1. By this writ petition, the petitioner is seeking a writ in the nature of certiorari quashing the notice dated 5.2.2000 whereby the Tehsildar Chandpur District Bijnor held the possession of the petitioner to be unauthorised and called upon the petitioner to show cause as to why he may not be evicted for unlawful occupation of the land in question which belongs to Gaon Sabha and also for causing damages to the property.

2. The facts of the case, in brief, are that the petitioner was allotted the land in question by the Land Management Committee for a sum of Rs.900/- payable to the Gaon Sabha through receipt dated 20.4.1980. The petitioner constructed boundary wall, two rooms, tin shed besides a thatch over this land. He tethered his cattle and used to store cow dung cakes. He also kept his tractor-trolley, tiller and buggi etc. One room was used for storing chaff. The case of the petitioner further is that the Gram Pradhan and his employees are trying to forcibly evict the petitioner from the property to construct an office for Krishi Prasad in the north of the disputed land. The petitioner filed a suit no. 783 of 1992 which the respondents did not contest and, therefore, the decree became final between the parties. Thereafter the respondents again tried to forcibly evict the petitioner from the land in question and, therefore, the petitioner again filed another suit no. 28 of 1994, which was decreed on 12.12.1994. This suit was contested by the respondent-Gaon Sabha by filing its written statement, paper no. 47-A. In the written statement it was alleged that the Pradhan was the father of the petitioner and therefore, he could not have allotted the land in question to his son and even otherwise there was no resolution of the Land Management Committee of the Gaon Sabha. It was alleged that the petitioner took advantage of the fact that his father was the Pradhan of the Gaon Sabha and took possession over the land in question. The trial court held that the plaintiff-petitioner was in possession over the land in question and that he had a receipt from the Land Management Committee in his favour but it also recorded a finding that the receipt was issued by his own father and beside the plaintiff-petitioner had not filed copy of the resolution of the Gaon Sabha and suit was ultimately dismissed.

3. Aggrieved the plaintiff-petitioner filed civil appeal no. 18 of 1997 (Ramesh Singh Vs. Babu Ram and others). The appellate court has recorded a clear cut finding that the appellant-petitioner was in possession over the land in question and this finding had not been challenged by the respondent-Gaon Sabha. It has also recorded a finding that receipt was issued by the Gaon Sabha in favour of the appellant-petitioner showing him to be a valid allottee of the land in question. However, the court held that as long as the appellant-petitioner had a valid allotment order in his favour he could not have been dispossessed from the land in question and he cannot be said to be a person who had encroached over the land of Gaon Sabha so far as the legal

allotment certificate in his favour survives. On the question of damages the appellate court had held that the petitioner had failed to establish the extent of damage he had sustained and therefore, the relief to the extent of damage was rejected and the appeal of the appellant-petitioner was partly allowed. It was held that the appellant-petitioner cannot be evicted from the suit property otherwise than in accordance with law.

4. I have heard Shri Anil Sharma, learned counsel for the petitioner and the learned standing counsel for the respondents as well as perused the material on record.

5. The submission of Shri Sharma is that the appellate court in civil appeal no. 18 of 1997 has recorded a clear cut finding that there was an allotment order in favour of the petitioner dated 20.4.1980 and there was also a receipt of payment of Rs. 900/- in pursuance of the order of allotment and therefore, the possession of the petitioner over the land in question cannot be said to be illegal or unauthorised. His submission further is that the order of the court below dated 13.4.1998 passed in civil appeal no. 18 of 1997 had become final between the parties inasmuch as the respondent did not challenge the same in any superior court and, therefore, the possession of the petitioner having been held to be valid over the land in question, he could not be said to be an unlawful occupant of the disputed land or have caused any damage to the same.

6. Rebutting the submissions of the learned counsel for the petitioner, the learned standing counsel has submitted that at the time when the land was allotted in favour of the petitioner, the petitioner's father was the Pradhan of the Gaon Sabha and, therefore, the land in any case could not have been allotted in favour of the petitioner and that it was a collusive action and therefore, the possession over the land in question and any receipt of the Gaon Sabha was a fraudulent action and, therefore, there was absolutely no infirmity in the notice issued by the Tehsildar, Chandpur, District Bijnor dated 5.2.2000 and the Tehsildar was well within his right to proceed to take action in pursuance of the provisions of section 122(B) of the U.P. Zamindari Abolition and Land Reforms Act 1950. It has also been submitted that the respondents were never made a party to the suit and whatever decree was obtained by the petitioner was an ex-parte decree.

7. From a perusal of the records and considering the submissions of the learned counsel for the respective parties, it is seen that there was a clear cut finding of the appellate court in civil appeal no. 18 of 1997 (Annexure-3 to the writ petition) that the possession of the petitioner over the land in question was valid and there was an allotment order in his favour and also a receipt has been issued to him of Rs.900/- which was paid by the Gaon Sabha and, therefore, his possession cannot be said to be illegal and unauthorised. The appellate court has also recorded a clear cut finding that the Gaon Sabha was a party to the dispute and had contested the suit by filing the written statement which was filed as paper no. 47-A and, therefore, it cannot be said that the Gaon Sabha was not a party in the suit or that the decree was an ex-parte decree and the finding recorded by the court below was not binding upon the respondents.

8. Even assuming that the decree was ex-parte, the respondents could have applied to the court for setting aside the ex-parte decree. In view of the categorical finding recorded by the appellate court that the suit had been contested by the respondents and the written statement had also been filed, it cannot be said that the suit was decreed ex-parte.

9. So far as the finding recorded by the civil court that the possession of the petitioner is valid and there was a receipt in his favour, the learned standing counsel has not been able to point out that any challenge was given to the order of the civil court dated 13.4.1998 and therefore, in the circumstances the finding has become final between the parties.

10. In this fact situation the possession of the petitioner cannot be held to be illegal, or unauthorized and the order dated 5.2.2000 passed by the Tehsildar, Chandpur District Bijnor holding the petitioner to be in illegal and unauthorised possession over the land in question deserves to be quashed.

11. For the aforesaid reasons the writ petition is allowed and the order dated 5.2.2000 passed by the Tehsildar, Chandpur District Bijnor is accordingly quashed.

12. There shall be no order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.07.2012

BEFORE
THE HON'BLE SUNIL HALI, J.

Civil Misc. Writ Petition No. 20313 of 2008

Anita Gandhi ...Petitioner
Versus
Nideshak Rajya Shai Anu. Aur Pra. Lko. And Others ...Respondents

Counsel for the Petitioner:
Sri P.K. Mishra

Counsel for the Respondent:
C.S.C.

Uttar Pradesh Public Service (Reservation for Physically Handicapped, Dependence of Freedom Fighters & Ex-Serviceman) Act 1993-as amended on 19.08.2009-Section-2(b)-inclusion of word "unmarried and married grand daughter"-petitioner being married grand daughter-selected for special B.T.C. Training course-cancellation on ground-being married grand daughter included for first time 2009-hence was not eligible to claim benefit of dependant of freedom fighters-held-misconceived-such clarifactory amendment being and eurative as such it relates back from the time when original provision was introduced.

Held: Para 21

It is not a case where the old rule has ceased to exist and a new rule is brought into force. Evidently, the idea was only to supply an omission and therefore the amendment is only a clarificatory and curative one and therefore the provision will relate back to the time when the prior provision was introduced.

Case law discussed:
AIR 1988 SC 740; (2001) 4 SCC 236; (2004) 8 SCC 1; {(2005) 7 SCC 396}; {(2009) 7 SCC 673}

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

1. After completion of Special B.T.C. Course petitioner had applied for the post of Assistant Teacher under the Uttar Pradesh Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-servicemen) Act, 1993 (in short referred to as U.P. Act No. 4 of 1993). She claims to be grand daughter of freedom fighter of Nathu Ram Gandhi. There is no dispute that grand father of the petitioner was freedom fighter and on the basis of this strength petitioner was appointed. However, it was specifically stated that she was not entitled to be appointed on the strength of being a Freedom Fighters as she did not come within the definition of dependents of freedom fighters enshrined under Section 2(b) of the UP Act No. 4 of 1993.

2. The word 'dependent' is defined under section 2(b) of the Act. According to it a son or a daughter (married or unmarried), or a son of son or an unmarried daughter of a son, of a freedom fighter is a dependent. Petitioner is a married grand daughter of the freedom fighter. She does not come under the category of dependents as indicated as a result of which her appointment was cancelled vide order dated 25.2.2008. It was stated in the impugned order that petitioner was married grand daughter of freedom fighter as such not included in the definition of dependent of freedom fighter defined under Section 2(b) of the UP Act No. 4 of 1993. Recovery to the tune of RS. 23931/- is also sought from her. It is this order which is subject matter of challenge before this Court.

3. Ground of challenge is that while including the grand son and unmarried grand daughter in the category of dependents the petitioner who was married grand daughter of the deceased freedom fighter was excluded even though she constituted same homogeneous class with dependents as defined under the Act and while excluding married grand daughter from the definition of dependents an artificial classification has been made with no intelligible differentia and has no nexus with the object which is sought to be achieved by the Act. The intent and purpose of the Act of 1003 is to provide reservation for dependents of freedom fighter.

4. During pendency of the writ petition, State Government issued an amendment in the Act of 1993 on 19.8.2009. The said amendment act came into force on June 16, 2009. The following amendment have been effected which is as under:-

"In Section 2 of the UP Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-servicemen) Act 1993, hereinafter referred to as the principal Act, in clause (b), in sub clause (ii) for the words "unmarried grand daughter(daughter of a son)" the words "grand daughter (daughter of a son) (married or unmarried)" shall be substituted."

5. The aforesaid amendment is in the nature of substitution by including the grand daughter both married or unmarried instead of unmarried grand daughter.

6. It is contended that the effect of substitution is that the earlier provision is repealed by substitution and thus the newly amended provisions shall always be deemed to have been in force from the date the Act came into force. What is being contended by the learned counsel for the petitioner that in view of the changed circumstances

petitioner had become eligible to be considered in the reserved category of freedom fighters as a result of this substitution. The effect of substitution shall always be retrospective as it tends to repeal the earlier provision.

7. On the other hand stand of the learned counsel for the respondents is that this infact is not substitution but addition of category in the definition of dependents. By virtue of amendment and addition of unmarried grant daughter married daughter also has been included and it shall always have prospective operation not retrospective operation. Every act is prospective in nature unless legislature intends to make it prospective. It is clearly visible from the Act itself that the present act does not make any provision for retrospective operation.

8. Heard learned counsel for the parties and perused the material on record.

9. Petitioner was selected on the strength of reservation made in favour of the Freedom fighter as being married grand daughter of the freedom fighter. On the date of her selection she was not eligible to be considered against the said category as being a married grand daughter who was excluded from the definition of dependents of freedom fighter. Her selection was rightly cancelled by the respondents in the year 2008.

10. Challenge has been thrown by the petitioner to the Section 2(b) of the Act of 1993 on the ground that by excluding a married grand daughter a class within the class has been created. Both unmarried and married grand daughter constitute one class as such artificial classification made has no intelligible differentia with the object sought to be achieved. The Act of 1993 has been amended during the pendency of the writ petition as a result of which earlier definition of unmarried grand daughter has been replaced by unmarried and married grand daughter of freedom fighter. This substitution has the effect of repealing the earlier provision. The effect of substitution is that the earlier provision does not subsist and the same is replaced by the new provision. Consequence of this is that the replaced rule shall always deemed to be in force from the date the act has been made applicable. Intention of the said substitution is not to keep the old rule alive by replacing the new rule.

11. The legislature seems to have realized the need for substitution on becoming aware of the anomalies and absurdities to which the provision without such substitution may lead to, even resulting, at times, in repugnancy with the main provision and virtually defeating the intention of the legislature. The modification of the provision, as carried out by the substitution ordered, when found to be needed and necessitated to implement effectively the legislative intention and to prevent a social mischief against which the provision is directed, a purposive construction is a must and the only inevitable solution.

12. Hon'ble Apex Court in **Bhagat Ram Sharma Vs Union of India's case reported in AIR 1988 SC 740,** has pointed out the distinction between 'repeal' and 'amendment'. While interpreting the meaning of the words 'repeal' and 'amendment', it was laid down in paragraphs 17 and 18 as follows:

"It is a matter of legislative practice to provide while enacting an amending law, that an existing provision shall be deleted

and a new provision substituted. Such deletion has the effect of repeal of the existing provision. Such a law may also provide for the introduction of a new provision. There is no real distinction between repeal and amendment. Amendment is, in fact, a wider term and it includes abrogation or deletion of a provision in an existing statute. If the amendment of an existing law is small, the Act professes to amend; if it is extensive, it repeals a law and re-enacts it. An amendment of substantive law is not retrospective unless expressly laid down or by necessary implication inferred. Therefore, when the amendment is extensive, it repeals a law and re-enacts it. "

13. It was also held that when one provision is deleted and a new provision is substituted, it will have the effect of repealing of the existing provision. If the amendment herein is thus construed, there is no deletion of the relevant provision. The omission alone is supplied. In that view of the matter, it cannot be said that there is a repeal of the existing provision as known to law.

14. The scope of the expression 'substituted' was considered by the Hon'ble Apex Court in **Ramkanali Colliery of BCCL's case reported in (2001) 4 SCC 236.** Therein also, it was held that when there is a repeal and introduction of another provision in its place, by a single exercise, the expression substituted is used. In para 8 of the judgment the relevant principles have been stated thus and reliance is placed upon the decision of the Apex Court in Bhagat Ram Sharma's case (AIR 1988 SC 740), which is as under:

"What we are concerned with in the present case is the effect of the expression substituted; used in the context of deletion of sub- sections of Section 14, as was originally enacted.In Bhagat Ram Sharma Vs Union of India (supra) this Court stated that it is a matter of legislative practice to provide while enacting an amending law, that an existing provision shall be deleted and a new provision substituted. If there is both repeal and introduction of another provision in place thereof by a single exercise, the expression substituted; is used. Such deletion has the effect of the repeal of the existing provision and also provides for introduction of a new provision. In our view there is thus no real distinction between repeal and amendment or substitution in such cases. If that aspect is borne in mind, we have to apply the usual principles of finding out the rights of the parties flowing from an amendment of a provision. If there is a vested right and that right is to be taken away, necessarily the law will have to be retrospective in effect and if such a law retrospectively takes away such a right, it can no longer be contended that the right should be enforced. However, that legal position, in the present case, does not affect the rights of the parties as such."

15. Therefore, when there is a deletion, it has the effect of repealing of the existing provision. The Apex Court held that when, in such cases, there is an introduction of a new provision, there is no real distinction between repeal or amendment or substitution.

16. In a later decision in **Zile Singh Vs State of Haryana and others reported in (2004) 8 SCC 1,** the principles relating to retrospective operation of the Statutes and the question whether any curative or declaratory provision will be retrospective or not, was considered. Paragraphs 13 and

14 of the judgment laid down the proposition thus:

"13. It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights, it is deemed to be prospective only "nova constitutio futuris formam imponere debet non praeteritis" -- a new law ought to regulate what is to follow, nor the past. (See Principles of Statutory Interpretation by Justice G.P. Singh, 9th Edn. 2004 at p.438). It is not necessary that an express provision be made to make a statute retrospective and the presumption against retrospectivity may be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole (ibid. p. 440).

17. The test for considering the retrospective nature of the provision was laid down in para 15 as follows:

"Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Craies (Statute Law, 7th Edn.), it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the statute retrospectivity. Four factors are suggested as relevant: (i) general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the legislature contemplated. (p.388) The rule against retrospectivity does not extend to protect from the effect of a repeal, a privilege which did not amount to accrued right. (p.392).

18. Therefore, in the absence of express words, the true intention of the legislature will have to be considered. Finally, with respect to a Statute which is passed for the purpose of supplying an obvious omission in a former statute or to explain a former statute, it was held thus in para 16 which is as under:-

"Where a statute is passed for the purpose of supplying an obvious omission in a former statute or to "explain" a former statute, the subsequent statute has relation back to the time when the prior Act was passed. The rule against retrospectivity is inapplicable to such legislations as are explanatory and declaratory in nature.

19. Finally, the legislative device of substitution was also adverted to in paragraphs 24 and 25 in the following words:

"24. The substitution of one text for the other pre-existing text is one of the known and well-recognised practices employed in legislative drafting. Substitution has to be

distinguished from supersession or a mere repeal of an existing provision."

"25. Substitution of a provision results in repeal of the earlier provision and its replacement by the new provision (see Principles of Statutory Interpretation, ibid. p. 565). If any authority is needed in support of the proposition, it is to be found in West U.P. Sugar Mills Assn. v. State of U.P. (2002) 2 SCC 645), State of Rajasthan v. Mangilal Pindwal - (1996) 5 SCC 60, Koteswar Vittal Kamath v. K. Rangappa Baliga and Co. - (1969) 1 SCC 255, and A.L.V.R.S.T. Veerappa Chettiar v. S. Michael - AIR 1963 SC 933. In West U.P. Sugar Mills Assn. case, a three-Judge Bench of this Curt held that the State Government by substituting the new rule in place of the old one never intended to keep alive the old rule. Having regard to the totality of the circumstances centring around the issue the Court held that the substitution had the effect of just deleting the old rule and making the new rule operative. In Mangilal Pindwal case, this Court upheld the legislative practice of an amendment by substitution being incorporated in the text of a statute which had ceased to exist and held that the substitution would have the effect of amending the operation of law during the period in which it was in force. In Koteswar case, a three-Judge Bench of this Court emphasised the distinction between supersession of a rule and substitution of a rule and held that the process of substitution consists of two steps: first, the old rule is made to case to exist and, next, the new rule is brought into existence in its place.

20. It is thus clear that the word 'substitution' really results in repeal of an earlier provision and enactment of a new provision. Therefore, even though the learned counsel for the respondents submitted that this infact is not substitution but addition of category in the definition of dependents. By virtue of amendment and addition of unmarried grand daughter married daughter also has been included and it shall always have prospective operation not retrospective operation.

21. It is not a case where the old rule has ceased to exist and a new rule is brought into force. Evidently, the idea was only to supply an omission and therefore the amendment is only a clarificatory and curative one and therefore the provision will relate back to the time when the prior provision was introduced.

22. Hon'ble Apex Court in **Indian Tobacco Association's case {(2005) 7 SCC 396}** also has emphasised, the meaning of the term substituted in para 15 which is as under:-

"The word "substitute" ordinarily would mean "to put (one) in place of another" or "to replace." In Black's Law Dictionary, 5th Edn. at p. 1281, the word substitute has been defined to mean to put in the place of another person or thing, or to exchange. In Collins English Dictionary, the word substitute has been defined to mean to serve or cause to serve in place of another person or thing and to replace (an atom or group in a molecule) with (another atom or group); or a person or thing that serves in place of another, such as a player in a game who takes the place of an injured colleague.

23. On the facts of the said case, it was held in para 16 that only an obvious mistake was sought to be removed by the amendment and there was no substitution. Finally, the effect of supplying an omission

was laid down thus in para 27 which is as under:-

"There is another aspect of the matter which may not be lost sight of. Where a statute is passed for the purpose of supplying an obvious omission in a former statute, the subsequent statute relates back to the time when the prior Act was passed. (See Attorney General v. Pougett - (1816) 2 Price 381."

24. The decision in Zile Singh's case (supra) was relied upon by the Apex Court in **Shakti Tubes Ltd.'s case {(2009) 7 SCC 673},** wherein the principles regarding retrospective operation of statutes as reiterated in paragraphs 15 and 16 of Zile Singh's case {supra) was affirmed.

25. In an earlier decision of the Apex Court in Channan Singh v. Jai Kaur (AIR 1970 SC 349), while considering the retroactive nature of a provision which explains a former one, it was held in para 5 as under:-

"It is well settled that if a statute is curative or merely declares the previous law retroactive operation would be more rightly ascribed to it than the legislation which may prejudicially affect past rights and transactions. Therefore, the legal position with regard to the retroactive nature of a curative provision cannot be doubted."

26. The amendment which was introduced in the year 2009, going by the explanatory note therein, was to provide some more benefits and to remove the discrimination between daughter and grand daugher it was decided to amend the said Act to include the married grand daughter of a freedom fighter in the definition of the word dependent. Therefore, the object of the amendment was to benefit the employees by liberalising the scheme. It is a welfare measure also. Therefore, an interpretation which promotes the object will have to be attempted.

27. Learned counsel for the respondents submitted that retrospective effect will not normally be granted to a provision which affects the vested rights. The provision can therefore only be prospective, contended the learned Standing Counsel.

28. The legal position in that regard admits of no doubt. Normally prospective operative alone can be given to a statute which affects a vested right, as held by the Apex Court in the various decisions. Every statute is prima facie prospective unless expressly or by necessary implication, made to have a retrospective operation. To find out whether the provision will have effect or relation back to the date on which it was introduced, it will have to be assessed whether it is an attempt to supply an omission and it is curative. Herein, it is not a case where there is a real substitution of the provision, as noted already. A mischief was sought to be remedied by the present amendment introduced in the year 2009. Therefore, clearly it is a case where an obvious omission of the former statute is sought to be supplied which is not a case of substitution of a provision. As such, it is not the introduction of a new provision after repeal of an existing provision.

29. In that view of the matter, it can only be the interpretation that the present amendment will be retrospective in nature.

30. In view of above, the writ petition is allowed. The order cancelling the petitioner's candidature in the reserved

category of dependents of freedom fighter is set aside. The respondents are directed to reinstate the petitioner from the date she has been terminated and this shall be construed to be continuity of her service from the date her services have been terminated. However, she will not be entitled to backwages. This may be done, if possible, within a period of three months from the date certified copy is served on them.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 20.07.2012

BEFORE
THE HON'BLE RAMESH SINHA, J.

Criminal Misc. 482 Cr.P.C. Application No. 20760 of 2012.

Pawan Kumar kushwaha & others ...Applicants

Versus

State of U.P. & another ...Respondents

Counsel for the Applicants:
Sri Anuj Bajpai

Counsel for the Respondents:
Sri Ram Krishna Dubey
Sri A.P. Tewari
A.G.A.

Code of Criminal Procedure-Section 482-quashing of proceedings-on ground once investigation conducted-final report submitted-without permission of court-re-investigation not permissible-earlier investigate confined in respect of allegations under 498-A and ¾ D.P. Act, subsequent F.I.R. Allegation of offence-under Section 307, 326, 504 I.P.C. Conducted-Magistrate confined its consideration with scope of Section 173 (8) Cr.P.C.-amounts to further investigation on basis of supplementary chargesheet-due application of mind taking into consideration of facts collected during further investigation, Magistrate being original court not precluded to do so-proceedings can not be quashed

Held: Para 8

However, if the Magistrate was passing an order on the basis of the supplementary charge-sheet after due application of his mind to the facts collected during further investigation and was asking the accused to appear in respect of other offences also, it could be treated as another order of summoning and that the magistrate in my considered view, being the court of original jurisdiction in that behalf, is not precluded to do.

Case law discussed:
2009 (65) ACC 962; 2008 (62) ACC 351; (2004) 5 SCC 347; 2002 (1) SCC 714

(Delivered by Hon'ble Ramesh Sinha, J.)

1. Heard Sri Anuj Bajpai, learned counsel for the applicants, Sri Ram Krishna Dubey, learned counsel for opposite party no.2 and learned A.G.A. for the State.

2. By means of application under Section 482 Cr.P.C., the applicants have prayed for quashing of the entire proceedings of Case No. 1172 of 2011, State Versus Gullu Prasad and others arising out of Case Crime No. 124 of 2011 under Section 498A, I.P.C. and 3/4 , D.P. Act, police station Kareli, District Allahabad pending in the court of Additional Chief Judicial Magistrate, Court No.5, Allahabad.

3. Brief facts of the present case are that the opposite party no.2, Smt. Vandana Kushwaha w/o Pawan Kumar Kushwaha, applicant no.1 and daughter of Lalta Prasad Kushwaha had filed an application before the D.I.G for registration of F.I.R. against

the applicants on which the matter was enquired by the S.I. of police station Dhoomanganj, who submitted his report to the D.I.G. In the said report, it was stated that the applicants have not committed any offence against opposite party no.2. Thereafter, opposite party no.2 moved an application under Section 156 (3) Cr.P.C. before the Additional Chief Judicial Magistrate, Allahabad which was dismissed by the Court on the request of counsel for opposite party no.2 as not pressed vide order dated 7.7.2011. Subsequently, an F.I.R. was lodged against the applicants by opposite party no.2 on 10.5.2011 which was registered as Case Crime No. 124 of 2011 under Section 498A, 307, 326, 504, I.P.C. and 3/4, D.P. Act at police station Kareli, District Allahabad in connection with offences having taken place from 11.12.2008 to 24.4.2010. After investigation, the first Investigating Officer, namely, Ram Nath Singh submitted a charge-sheet against the applicants being Charge-sheet No.58 of 2011 dated 29.6.2011 for offences under Section 498A, I.P.C. and 3/4 D.P. Act and stated in the said charge-sheet that no offence under Section 307, 326, 504, I.P.C. was made out against the applicants. On the basis of the said charge-sheet, the learned Magistrate on 6.7.2011 took cognizance of the offence and directed that the case be registered as Case No. 1172 of 2011. A copy of the said charge sheet has been annexed as annexure-4 to the affidavit filed in support of the present application. The applicants appeared before the court and were granted bail on 29.8.2011 except applicant no.1, Pawan Kumar Kushwaha, who was granted bail by this Court on 2.11.2011. It appears that when the complainant came to know about the submission of Charge-sheet under Sections 498A, I.P.C. and 3/4 D.P. Act submitted against the applicants by the Investigating Officer, Ram Nath Singh then she moved an application alongwith an affidavit before the D.I.G., Allahabad alleging that the first Investigating Officer had not conducted the investigation in a fair manner on which the D.I.G. Vide order dated 29.8.2011 entrusted the investigation to another Investigating Officer with immediate effect and further ordered the Station Officer, Kareli to carry on the investigation in view of the provisions of Section 173 (8) Cr.P.C. after completing all the legal formalities. The second Investigating Officer submitted charge-sheet against the applicants on 13.12.2011.From the order sheet of the Court of Additional Chief Judicial Magistrate V in Case No. 1172 of 2011, it appears that 27.1.2012 was fixed for framing of charges and on 7.1.2012 a supplementary charge sheet No. 58 A was filed in the Court of Magistrate for offences under Sections 307, 326, 504, I.P.C. on the basis of which the learned magistrate again took cognizance of the offence and directed that the case be registered against the applicants on the basis of the supplementary charge sheet. The court fixed 14.12.2011 for framing of charges against the applicants vide ordered dated 5.11.2011. The applicants again appeared before the court on 27.1.2012, date fixed for framing of charges.

4. It has been contended by the learned counsel for the applicants that the manner in which the supplementary charge sheet has been brought on record before the trial court and the second cognizance taken for the offences under Sections 307, 326, 504, I.P.C. by the trial court on 7.1.2012 is not sustainable in the eyes of law. It is further submitted that the learned magistrate after taking cognizance on 6.7.2011 on the basis of the earlier charge sheet could not

have taken cognizance again on 7.1.2012 for the offences under Sections 307, 326, 504, I.P.C. on the basis of the investigation ordered under Section 173 (8), Cr.P.C. He submitted that after the cognizance, the reinvestigation which was alleged to have been ordered by the D.I.G. under Section 173 (8) Cr.P.C. is barred. It was further submitted by the learned counsel for the applicants that the discharge application moved by the applicants for discharging them for offences under Section 498A, I.P.C. and 3/4 D.P. Act was also illegally rejected by the magistrate vide order dated 26.5.2012 and the applicants were directed to appear before the court for getting themselves bailed out for offences under Sections 307, 326 and 504, I.P.C. In support of his contention, learned counsel for the applicants has placed reliance on two judgments of the Apex Court reported in ***2009 (65) ACC 962, Rama Chaudhary Vs. State of Bihar*** in which the Hon'ble Apex Court has held that further investigation is permitted under Section 173 (8), Cr.P.C. whereas reinvestigation is prohibited. In another judgment relied upon by the learned counsel for the applicants reported in 2***008 (62) ACC 351, Ramachandran vs. R Udhayakumar*** it was held that the police has no right of fresh investigation or reinvestigation.

5. On the other hand, learned A.G.A. replying to the submissions made by learned counsel for the applicants has submitted that after the submission of charge sheet under Section 498A, I.P.C. and 3/4 D.P. Act by the first Investigating Officer, the D.I.G. Allahabad on the complaint received by opposite party no.2 was of the view that the Investigating Officer, who had submitted charge sheet only under Section 498A, I.P.C. and 3/4, D.P. Act had not conducted the investigation in a fair manner hence he entrusted the investigation to another Investigating Officer and directed him to conduct the investigation under Section 173 (8), Cr.P.C. He further submitted that the D.I.G. did not order for reinvestigation of the case which is evident from the order dated 29.8.2011 passed by D.I.G., Allahabad in pursuance of which, the second Investigating Officer carried out further investigation in the case. After collecting the medical examination report of the injured/opposite party no.2, Smt. Vandana incorporated the same in the supplementary case diary, submitted a supplementary charge sheet on 13.12.2011 against the applicants for offences under Section 307, 326 and 504, I.P.C. and filed the same before the court of Magistrate. Learned A.G.A. has further relied on the judgment of the Apex Court in the case of ***Rama Choudhry (Supra)*** which was also relied upon by the learned counsel for the applicants and has argued that in the said case, the Apex Court has held that the law does not mandate taking appropriate permission from the Magistrate for further investigation under Section 173 (8), Cr.P.C. and it is well settled that carrying out further investigation even after filing of the charge-sheet is a distinct statutory right of the police. He relied upon paragraphs 9 and 13 of the said judgment in support of his arguments. He further submitted that further investigation was not altogether ruled out merely because cognizance has been taken by the Court. The court has to arrive at the truth, to do real and substantial as well as effective justice. In support of his contention, learned A.G.A. has also relied upon the judgment of the Apex Court reported in ***(2004) 5 SCC 347 Hasanbhai Valibhai Qureshi Vs. State of Gujrat and others*** and also ***2002 (1) SCC 714 Kari Choudhary Vs. Sita Devi*** in which the

Apex Court clearly laid down the law on Section 173 (8) Cr.P.C.

6. Having considered the submissions advanced by the learned counsel for the parties, it appears from the record that the first Investigating Officer who had submitted the charge-sheet for the offence under Section 498-A, I.P.C. and Section 3/4, D.P. Act did not conduct the fair investigation though the case was also registered under Sections 307, 326, 504, I.P.C. along with the aforesaid offences and had stated that no offence under Sections 307, 326, 504, I.PC. was disclosed against the applicants. From the perusal of the F.I.R. as well as the statement of the victim recorded under Section 161 Cr.P.C. and her parents and other witnesses, it is apparent that there is an allegation that the victim Smt. Vandana Kushwaha was burnt by pouring kerosene oil by the applicants including her husband and she received sufficient burn injuries on her body for which she was admitted into Narayan Swaroop hospital by her father and she remained in the hospital from 26.4.2010 to 11.5.2010 and the doctor made a diagnosis of Thermal burn injuries 33% on her body for which she was given medical treatment in the said hospital as is evident from the prescription and the medical documents filed as C.A.-1 along with short counter affidavit by opposite party no.2 before this Court. The fact about the medical treatment in the said hospital was also found endorsed in the supplementary charge-sheet, being charge-sheet No. 58A of 2011 on 13.12.2011 under Sections 307, 326, 504, I.P.C. It is apparent from the record that the other Investigating Officer carried out further investigation in view of the provisions contained under Section 173 (8) Cr.P.C. and submitted a supplementary charge-sheet against the applicants in accordance with law. The submission made by learned counsel for the applicants that the police had no power to re-investigate the matter in view of the provisions contained under Section 173 (8), Cr.P.C. when cognizance has earlier been taken by the learned Magistrate on the first charge-sheet under Section 173 (8) Cr.P.C. on 6.7.2011 which submitted for the offence under Section 498A, I.P.C. and Sections 3/4, D.P. Act only is wholly unfounded and the case laws which have been relied upon by learned counsel for the applicants, i.e., ***Rama Chaudhary (Supra)*** and ***Rama Chandran (Supra)*** lay down that even after completion of investigation under Section 173 (8), Cr.P.C., the police has a statutory right to further investigate the matter under Section 173 (8), Cr.P.C. The investigation which was carried out by the second Investigating Officer, who submitted a supplementary charge-sheet under Sections 307, 326, 504 I.P.C. against the applicants, was in accordance with the provisions contained under Section 173 (8) Cr.P.C. which was in pursuance of the order of D.I.G. who did not order to re-investigate rather only to further investigate the matter under Section 173 (8), Cr.P.C. The very order of the DIG to investigate under Section 173 (8) Cr.P.C. is itself a point to the fact that further investigation had only been ordered as that particular provision concerns the police-powers to that effect. As such, the submission that the IInd I.O. re-investigated the case appears quite hollow and merit less. Hence the case laws cited by the learned counsel for the applicants do not support his contention, rather it supports the argument of the learned A.G.A. Thus the argument of learned counsel for the applicants to this respect is not sustainable in the eyes of law.

7. Learned A.G.A. has produced the copy of the order dated 29th August, 2011 passed by the D.I.G., Allahabad by which he has ordered for investigation in pursuance of the provisions contained under Section 173 (8), Cr.P.C. before this Court along with the case diary and after perusal of the same it transpires that the contention of the learned counsel for the applicants that reinvestigation was ordered by the D.I.G. in view of the provisions contained under Section 173 (8), Cr.P.C. has no force.

8. From a perusal of the order-sheet of the case, it appears that the learned magistrate has taken cognizance of the offence again on the basis of supplementary charge-sheet vide order dated 7.1.2012 which is not sustainable in the eye of law, hence the order of the magistrate only in that respect by which he has taken again cognizance is struck down. However, if the Magistrate was passing an order on the basis of the supplementary charge-sheet after due application of his mind to the facts collected during further investigation and was asking the accused to appear in respect of other offences also, it could be treated as another order of summoning and that the magistrate in my considered view, being the court of original jurisdiction in that behalf, is not precluded to do.

9. Learned Magistrate is directed to proceed with the case taking into account all the materials available on record including those which were collected during further investigation under Section 173 (8), Cr.P.C. and examine the offences disclosed against the applicants at the time of framing charges.

10. No ground for quashing the entire proceedings is made out, the same is hereby refused.

11. Applicants are directed to appear before the court below within two weeks from today as ordered by the court below vide order dated 26.5.2012.

12. With the above observations, the application stands disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.05.2012

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

Civil Misc. Writ Petition No. 21952 of 2012

Abdul Hai and Others ...Petitioners
Versus
Union of India & another ...Respondents

Counsel for the Petitioner:
Sri Gopal Krishna Pandey

Counsel for the Respondents:
Abu Sufiyan Azmi
A.S.G.I.

Constitution of India, Article 226- Passport-Delay in issuance-representation-remained unheard-direction to decide within 15 days if no legal impediment-aggrieved party may approach before Permanent Lok Adalat-seeking compensation for delay in issuance of Passport.

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

Amitava Lala, J.-- When the representation dated 28.11.2011 has been filed for non issuance of pass port annexing a judicial order, we fail to understand as to why so much delay is being caused. Therefore, in disposing the writ petition, at the stage of admission, we direct he

authority concerned to consider the same if any legal impediment is not available and pass appropriate order as expeditiously as possible preferably within a period of 15 days from the date of communication of this order upon giving fullest opportunity of hearing to the petitioners in accordance with law.

2. No order is passed as to costs.

3. Now-a-days, we find that so many cases with regard to delay of issuance of pass port are coming forward before the Court which are unnecessarily consuming the valuable Court's time, as a result whereof we observe herein that in case of such default, any party can approach to the permanent Lok Adalat, Lucknow for the purpose of expeditious efficacious remedy. In case any of the parties is compelled to proceed before the permanent Lok Adalat in such type of situation, he/she will also be entitled to claim for compensation for unnecessary delay.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.07.2012

BEFORE
THE HON'BLE SUNIL HALI, J.

Civil Misc. Writ Petition No. 23213 of 1999

Nafisul Hasan ...Petitioner
Versus
III-Addl. District Judge Deoria And Others ...Respondents

Counsel for the Petitioner:
Sri S.A. Lari

Counsel for the Respondents:
C.S.C.
Sri Vivekanand Yaday

Constitution of India, Article 226- readwith order 1 Rule 10 C.P.C.-Trail Court allowed impleadment Application-revision also dismissed-Writ Court can not act as Court of Appeal-unless order impugned found illogical of suffering from procedural irregularities-no interference called far-Petition Dismissed.

Held: Para 7

Considering the facts and circumstances of the case, I find no illegality or irregularity in the order impugned in this writ petition. Moreover, impleadment would necessarily not mean that their claims are being accepted. Petitioner has right to contest the matter before the Trial Court. I find no force in this writ petition. It is trite in law that in considering the challenge to decisions, Courts will not interfere as if they are sitting in appeal over the decisions. In essence, the test is to see whether there is any infirmity in the decision making process and not in the decision itself. Thus, the Court cannot interfere with the decisions like this unless it was illogical or suffers from procedural impropriety or was shocking to the conscience of the Court.

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

1. The only ground taken in this writ petition is that learned Trial Court has wrongly allowed an application under Order 1 Rule 10 CPC for impleadment of respondents vide order dated 4.9.1993. Revision against this order has also been dismissed vide order dated 8.2.1999.

2. Heard learned counsel for the parties and perused the material on record.

3. The general rule in regard to impleadment of parties is that the plaintiff

in a suit, being dominus litis, may choose the persons against whom he wishes to litigate and cannot be compelled to sue a person against whom he does not seek any relief. But this general rule is subject to the provisions of Order I Rule 10(2) of Code of Civil Procedure which provides for impleadment of proper or necessary parties.

4. The said sub-rule is extracted below:

"Court may strike out or add parties. (2) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

5. The said provision makes it clear that a court may, at any stage of the proceedings either upon or even without any application, and on such terms as may appear to it to be just, direct that any of the following persons may be added as a party:

(a) any person who ought to have been joined as plaintiff or defendant, but not added; or(b) any person whose presence before the court may be necessary in order to enable the court to effectively and completely adjudicate upon and settle the question involved in the suit.

6. The court is given the discretion to add as a party, any person who is found to be a necessary party or proper party. However, the 'discretion' must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, 'but legal and regular'. In other words, the court has the discretion to either to allow or reject an application of a person claiming to be a proper party, depending upon the facts and circumstances. The only object of Order I Rule 10 CPC is to discourage contests on technical pleas, and to save honest and bonafide claimants from being non suited. The power to strike out or add parties can be exercised by the Court at any stage of the proceedings. Thus, the power of the Court to add a party to a proceeding cannot depend solely on the question whether he has interest in the suit property. The question is whether the right of a person may be affected if he is not added as a party. Such right, however, will include necessarily an enforceable legal right.

7. Considering the facts and circumstances of the case, I find no illegality or irregularity in the order impugned in this writ petition. Moreover, impleadment would necessarily not mean that their claims are being accepted. Petitioner has right to contest the matter before the Trial Court. I find no force in this writ petition. It is trite in law that in considering the challenge to decisions, Courts will not interfere as if they are sitting in appeal over the decisions. In essence, the test is to see whether there is any infirmity in the decision making process and not in the decision itself. Thus, the Court cannot interfere with the decisions like this unless it was illogical or suffers from procedural impropriety or

was shocking to the conscience of the Court.

8. Accordingly the writ petition fails and is hereby dismissed. The interim order, if any, stands vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.05.212

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

Civil Misc. Writ Petition No. 23347 of 1995

Shiv Shanker ...Petitioner
Versus
The Commissioner, Bareilly Division, Bareilly & Others ...Respondents

Counsel for the Petitioner:
Sri Ravi Kant
Sri Mohd Arif
Sri Abhijeet Mukherjee

Counsel for the Respondents:
C.S.C.
Sri Prem Chandra
Sri P.N. Saxena

Constitution of India, Article 226- Dismissal from service-petitioner working as a clerk in M.G. Palika Inter College-placed under suspension for three allegations-three enquiry officers conducted enquiry without indicating date time and place-first allegation of filing counter affidavit without narrative-stand baseless in view of authority letters of executive officer-other two allegations of embezzlement without supported documents, without giving opportunity of cross examination-not sustainable more than 19 years have gone-considering unnecessary harassment and of charges without supporting document-no useful purpose to remand for fresh disciplinary proceeding-dismissal order quashed with all consequential benefits.

Held: Para 24 and 25

However, since I have already recorded a finding that on both the charges there was no evidence to substantiate the charges and it was a case of no evidence, therefore, I am not remitting back the matter to the enquiry officer for holding a fresh enquiry. Even otherwise the charge sheets were issued in the year 1994 and more than 18 years have already lapsed and the petitioner has suffered enough and it would not be in the interest of justice to remit the matter back to the disciplinary authority to enable him to sift and search for fresh evidence to prove the guilt of the petitioner.

Therefore, keeping strictly within the parameters laid down for exercise of power of judicial review in departmental enquiries, from the above facts and circumstances the irresistible conclusion is that both the charges against the petitioner are based on no evidence and the finding recorded by the enquiry officer are such which no man of ordinary prudence or reason would arrive at.

Case law discussed
(1947) 2 All E.R. 680; (1983) I.A.C. 768; (1996) 7 SCC 509; (1999) 8 SCC 90; (1999) 2 SCC 10; (2001) 2 SCC 386; (2003) 3 SCC 583; (2006) 13 SCC 1; (1983) I.A.C. 768

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

1. This writ petition has been filed by the petitioner challenging the show cause notice dated 25.11.1994, order dated 29.11.1994 dismissing him from service and the appellate order dated 31.3.1995 rejecting his appeal.

2. The facts of the case, in brief, are that while the petitioner was working on the

post of clerk in the Mahatama Gandhi Palika Inter college, Ujhani District Budaun, he was placed under suspension by order dated 7.5.1992. A charge sheet was issued to him on 30.5.1994 wherein the allegation was that in a pending writ petition no.37002 of 1993 (Smt. Pratibha Singh Vs. Mandaliya Balika Nirikshak, Bareilly, he filed an affidavit without obtaining any narrative or legal opinion or sanction from the Manager of the Committee of Management in writing and swore paragraphs 10,11 and 12 of the said affidavit on personal knowledge and thus a wrong and false affidavit was filed in the High Court.

3. Another charge sheet was issued to the petitioner on 27.7.1994 alleging that the petitioner in collusion with one Shri Hodil Prasad Sharma, the then Incharge Principal and some others embezzled an amount of Rs. 31,587.15/- being cash in hand and 17 funds of the Institution amounting to Rs. 5 lacs.

4. With regard to charge no. 1, the petitioner submitted his reply, which is filed as Annexure-4 to the writ petition, requesting therein that the copy of the alleged counter affidavit in which he is said to have sworn paragraphs 10.11 and 12 on personal knowledge be provided to him. He submitted another reply, which is Annexure-5 to the writ petition, wherein he has stated that on 5.11.1993 he was given directions in writing by the President/Manager, Nagar Palika Asharfi Devi Kanya Inter College, Ujhani District Budaun to proceed to Allahabad with immediate effect and meet Shri Ravi Kant, Advocate and get the counter affidavit prepared and file the same at the earliest. The petitioner has also filed copy of the said letter dated 5.11.1993 which is at page 54 of the paper book.

5. With regard to charge no. 2, the petitioner submitted his reply on 18.8.1994 wherein he requested that the copy of the alleged report of the Principal dated 9.7.1994 which is marked as relied upon document in the charge sheet, be provided to him and unless the same is provided to him it would not be possible for him to submit any concrete reply in respect of the allegation of embezzlement of 17 funds and cash in hand of Rs. 31,587.15/-.

6. In respect of charge no. 2 the petitioner submitted another reply on 30.8.1994 in which he alleged that one Ramesh Chandra Sharma, Clerk was responsible for receipt of all the fees in the College and same was also deposited in the Bank by him and therefore, if there was any cash in hand as mentioned in the charge sheet it was only Ramesh Chandra Sharma who could give any information about the same. As regard the allegation of embezzlement in respect of 17 funds amounting to Rs. 5 lacs in collusion with Shri Hodil Prasad, the petitioner submitted in his reply that the allegation itself was vague and in any case the copy of the alleged complaint dated 9.7.1994 and 13.7.1994 submitted by Uma Nath Bajpai do not contain any particulars which would show as to what amount was alleged to be embezzled. He further submitted that the power to withdraw money from Boys Fund vested exclusively in the Principal and therefore, only the Principal could give proper explanation as to why the funds were withdrawn by him at all and the petitioner has only issued cheques on the direction of the Principal and it is not for the petitioner to question the Principal as to why the amounts are being withdrawn.

7. An enquiry was held and enquiry officer was appointed and he submitted his report on 7.9.1994. Both the charges were held to be proved against the petitioner. The copy of the enquiry report was supplied to the petitioner under covering letter dated 9.9.1994 requiring the petitioner to submit his reply thereto within one week. The petitioner submitted his reply on 24.9.1994, filed as Annexure-15 to the writ petition.

8. The petitioner in his reply contended that during the course of enquiry, two enquiry officers were changed of which no information was given to him and, therefore, he had no opportunity to appear before the enquiry officers. He further contended that the persons who allegedly en-cashed the cheques from the Bank, their list was also not provided to him and, therefore, he had no occasion to cross examine them as witness. It was further contended that no evidence whatsoever was recorded of the persons who were alleged to be involved in the act of embezzlement. The statement of Ramesh Chand, Clerk, Shri Uma Nath Bajpai, Principal and Shri Hodil Prasad Sharma, Incharge Principal were neither recorded nor they were called in the enquiry and therefore, the petitioner had no opportunity to cross examine them. He was not allowed to examine the payment receipts, guide file or the Accounts records (Bahi) or the pass books. At any stage of the enquiry no date was fixed or at-least no date was intimated to him on which the enquiry may be said to be held nor was he called in the enquiry on any date and, therefore, he had no opportunity to defend himself and there was gross violation of principles of natural justice.

9. The disciplinary authority considered the enquiry report and the reply of the petitioner dated 24.9.1994 and thereafter passed the impugned order dated 29.11.1994 removing the petitioner from service.

10. Aggrieved by the order of removal dated 29.11.1994 the petitioner filed writ petition no. 39290 of 1994, which was disposed of by this court by order dated 7.12.1994 with a direction that the petitioner has an alternative remedy by way of an appeal before the appellate authority and if such an appeal is preferred the appellate authority shall decide the appeal within three months. In pursuance of the order of this court, the petitioner preferred departmental appeal before the appellate authority which was rejected by the Commissioner, Bareilly Division, Bareilly-respondent no. 1 by his order dated 15/31.3.1995.

11. I have heard Shri Abhijeet Mukherjee, learned counsel appearing for the petitioner and Shri P.N. Saxena, learned senior counsel assisted by Shri Prem Chand, appearing for the respondent nos. 2 and 3 as well as learned standing counsel appearing for the State respondents.

12. From the records it will be seen that two charge sheets were issued to the petitioner, one on 30.5.1994 alleging that the petitioner had filed an affidavit in the High Court in writ petition no. 37002 of 1993 without obtaining any narrative or legal opinion or even a written permission from the Manager of the Committee of Management and in the said affidavit paragraphs 10, 11 and 12 were sworn from personal knowledge as a result of which a false and wrong affidavit came to be filed in the High Court. The second allegation against the petitioner was that he alongwith Incharge Principal Shri Hodil Prasad Sharma and some other persons embezzled

from the Boys Fund and Rs. 31,587.15/- cash in hand amounting to Rs. 5 lacs.

13. Taking the first charge sheet, learned counsel for the petitioner submitted that the petitioner was directed by the President/Manager, Nagar Palika Asharfi Devi Kanya Inter College, Ujhani District Budaun to proceed to Allahabad with immediate effect and meet Shri Ravi Kant, Advocate and get the counter affidavit prepared and file the same at the earliest. The petitioner has also filed a copy of the said letter dated 5.11.1993 which is at page 54 of the paper book. This document was also filed by the petitioner before the enquiry officer but the enquiry officer has rejected the same as being a false and fraudulent document. However, from the discussion of the enquiry officer it will be seen that no witness was called in evidence to prove the document/authority letter dated 5.11.1993 much less the author of the document.

14. In paragraph 10 of the counter affidavit, filed on behalf of the respondent nos. 2 and 3, only this much is stated that no instructions were issued by the Chairman/Manager of the Committee of Manager. However, the letter dated 5.11.1993 has not been specifically denied. It is not disputed that the Chairman is the ex-officio Manager of the Government Colleges and the letter dated 5.11.1993 was issued by one Shri Yadav Krishna Goel as Adhyaksha/Manager, Adhyapika, Nagarpalika Asharfi Devi, Kanya Inter College, Ujhani District Budaun. The said authority was not called as a witness in the enquiry and he was the only person who could have admitted or denied the document dated 5.11.1993.

15. Moreover, a perusal of the letter dated 5.11.1993 would show that a direction was issued to the petitioner to proceed to Allahabad and to meet Shri Ravi Kant, Advocate, High Court and prepare a counter affidavit and file the same at the earliest. The letter does not mention whether the counter affidavit was to be prepared by the learned counsel on the basis of a narrative or otherwise. The direction to the petitioner further was to file the counter affidavit at the earliest. It does not mention any where that the petitioner was to prepare a draft counter affidavit and get it approved by the Chairman/Manager, Nagarpalika Ujhani, Budaun. In the circumstances in view of the clear cut direction given in the letter dated 5.11.1993 to the petitioner to proceed to Allahabad and meet the Advocate concerned and file the counter affidavit at the earliest and in the absence of any denial by the respondents that the letter dated 5.11.1993 was ever issued by the Chairman/Manager, Nagarpalika Asharfi Devi Kanya Inter College, Ujhani Budaun, it cannot be said that the petitioner in swearing and filing the counter affidavit exceeded his brief and the directions given to him. Thus the charge no. 1 itself fails on the ground of being a case of no evidence.

16. As regard the charge no. 2, the allegation against the petitioner is that he acting in collusion with Shri Hodil Prasad Sharma, Incharge Principal, embezzled funds from the 'Boys Fund' and cash in hand of Rs.31,587.15/-, amounting to Rs. 5 lacs. In the enquiry report the enquiry officer has only brought a finding of guilt against the petitioner by accepting the report of the Principal dated 5.7.1994. What was contained in that report has not been disclosed. It has also not been disclosed as to whether in the said report dated 9.7.1994 there was any evidence pointing the needle

of suspicion towards the petitioner. The enquiry officer has also not disclosed as to what was the material contained in the report of the Principal on the basis of which the Principal arrived at his finding that there was an embezzlement of funds. The Principal's report dated 5.7.1994 by itself is not 'the' evidence. It is the material on which the report has been based which is 'the' evidence. In the absence of any discussion of the evidence in the enquiry report dated 9.7.1994 by the enquiry officer it cannot be said that there was any evidence to bring home the finding of guilt against the petitioner regarding embezzlement of funds from the 'boys funds' or from cash in hand.

17. There is another factor which needs to be noted. The petitioner through out, in his reply to the charge sheet kept asking for the relied upon documents namely, Account records (Bahi), reference of pass books of persons who may be alleged to have en-cashed the cheques and other relied upon documents. The only document that was supplied to him was the report of the Principal dated 9.7.1994. There is no finding of the enquiry officer anywhere that other than the report of the Principal any other documentary evidence was supplied to the petitioner. Even Shri Hodil Prasad Sharma and Shri Ram Chandra were never called in the enquiry as witness or their statement recorded or any opportunity given to the petitioner to cross examine them in-spite of the petitioner requesting that they may be called.

18. It may be mentioned that the report of the Principal dated 9.7.1994 has been shown as a relied upon document but the report itself does not constitute the evidence. It is contents of the report which may disclose the evidence available against the petitioner to bring home the charge of embezzlement. As already noted above, the enquiry officer has only relied upon the report of the Principal but has not disclosed the contents thereof and has not stated as to which finding in the report points or leads toward the guilt of the petitioner. In the circumstances this is not only a case where there was no evidence in either of the charge sheet to establish the guilt of the petitioner but this was also a case of gross violation of principles of natural justice.

19. Another factor to be noted is that no date was fixed in the enquiry, no presenting officer was appointed nor was the petitioner given any opportunity to nominate a Defence Assistant. Three enquiry officers were appointed. The petitioner's specific case is that when first two enquiry officers were changed, it was never disclosed to him since he was never called to appear before any of the enquiry officer and it is only the third and the last enquiry officer who submitted the report, therefore, he also raises the question as to whether the departmental enquiry report is of the third enquiry officer or the third enquiry has based his report on the findings recorded by the first two enquiry officers, in which case it cannot be said to be the report of third enquiry officer and it cannot be said to a discussion of the facts or the evidence by the third enquiry officer.

20. The law in this regard is well settled in a number of cases, which are as under:

1.(1947) 2 All E.R. 680 (Associated Provincial Picture Houses Vs. Wednesbury Corporation);

2.(1983) I.A.C. 768 (Council for Civil Services Union Vs. Minister of Civil Services;

3.(1996) 7 SCC 509 (State of T. N. Vs. S. Subramaniam);

4.(1999) 8 SCC 90 (R.S. Saini Vs. State of Punjab and others);

5.(1999) 2 SCC 10 (Kuldeep Singh Vs. Commissioner of Police);

6.(2001) 2 SCC 386 (Om Prakash Vs. Union of India);

7.(2003) 3 SCC 583 (Lalit Popli Vs. Canara Bank);

8.(2006) 13 SCC 1 (Government of India Vs. George Philip).

21. It is a well settled principle of law known as the Wednesbury principle that the High Court while examining the report of the enquiry officer in a departmental proceedings and the order of the disciplinary authority and appellate authority will not sit as a court of appeal and re-apprise the evidence as an appellate court. However, it also does not mean that the High Court has no powers to interfere with the finding of an enquiry officer within certain limited parameters. The parameters within which the High Court may interfere with the findings recorded in a disciplinary enquiry in exercise of power of judicial review are as follows:

1.Whether the conclusion is based on evidence on record and supports the finding or whether the conclusion is based on no evidence;

2.The order was contrary to law;

3.The Rules of procedure were not followed ;

4.Irrelevant factors were taken into consideration;

5.The decision was one which no reasonable person could have taken;

6.Where the penalty imposed is shockingly disproportionate to the misconduct alleged; and

7.Where the departmental proceedings were motivated by malafides and the order impugned would be tainted by malice.

22. The genesis of judicial interference by exercising powers of judicial review was first enunciated in the celebrated case reported in ***(1947) 2 All E.R. 680 (Associated Provincial Picture Houses Vs. Wednesbury Corporation)***, wherein Lord Greene, M.R. Held as under:

".....the court is entitled to investigate the action of the local authority with a view to seeing whether it has taken into account matters which it ought not to take into account, or, conversely, has refused to take into account or neglected to take into account matters which it ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that the local authority nevertheless, have come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not that of an appellate authority to override a decision of the local authority, but is that of a judicial authority which is concerned, and concerned only, to see whether the local

authority have contravened the law by acting in excess of the powers which Parliament has confided in it. ....."

23. This celebrated principle known as the Wednesbury principle of law was thereafter relied upon in ***(1983) I.A.C. 768 (Council for Civil Services Union Vs. Minister of Civil Services)*** and which has thereafter been consistently followed by the Supreme Court of India and various High Courts.

24. However,since I have already recorded a finding that on both the charges there was no evidence to substantiate the charges and it was a case of no evidence, therefore, I am not remitting back the matter to the enquiry officer for holding a fresh enquiry. Even otherwise the charge sheets were issued in the year 1994 and more than 18 years have already lapsed and the petitioner has suffered enough and it would not be in the interest of justice to remit the matter back to the disciplinary authority to enable him to sift and search for fresh evidence to prove the guilt of the petitioner.

25. Therefore, keeping strictly within the parameters laid down for exercise of power of judicial review in departmental enquiries, from the above facts and circumstances the irresistible conclusion is that both the charges against the petitioner are based on no evidence and the finding recorded by the enquiry officer are such which no man of ordinary prudence or reason would arrive at.

26. In the circumstances the show cause notice dated 25.11.1994, the impugned orders dated 29.11.1994 and 15/31.3.1995 are quashed.

27. The writ petition is allowed. The petitioner will be reinstated in service with all consequential benefits.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.07.2012

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 25441 of 2012

Lalta Prasad Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Lallan Chaubey

Counsel for the Respondents:
C.S.C.
Sri Vipin Sinha

Code of Civil Procedure-Order 39 Rule 2 (2) (g) as amended U.P. Amendment Act 1976-Injunction-against state from realizing certain amount towards loan-admittedly Agricultural loan for purchase of Tractor advanced on default in payment recovery certificate issued under Public money recovery Act-injunction suit itself not maintainable-Writ Court can not adjudge its validity setting as Appellate Court-petition dismissed.

Held: Para 8

Secondly, the jurisdiction under Article 226 or 227 of the Constitution of India can not be exercised like an appellate authority by indulging in re-appreciation of evidence to correct errors of fact or law. It is exercisable only to correct jurisdictional errors if the courts below have acted without jurisdiction or in flagrant violation of the principles of natural justice or where there is manifest or patent error apparent on the face of record.

(Delivered by Hon'ble Pankaj Mithal, J.)

1. Heard Sri Lallan Chaubey, learned counsel for the petitioner. Sri Tripathi has appeared for respondent No.3, State Bank of India.

2. Petitioner has filed this writ petition assailing judgment and order dated 27.7.2011 passed by Civil Judge (S.D.), Varanasi in Original Suit No.1099 of 2010 and the appellate order thereto dated 20.3.2012 passed by the Additional District Judge, Court No.14, Varanasi. The courts below by the aforesaid orders have refused to grant injunction in favour of the petitioner in the aforesaid suit.

3. Petitioner had taken a loan of Rs.3,70,000/- from the State Bank of India for purchasing a tractor. On account of non-payment of instalments a recovery has been issued against him. Therefore, he instituted suit for permanent injunction. In the suit, he filed an application for interim injunction restraining the bank and State authorities from recovering the loan amount.

4. The injunction application has been rejected by the court of first instance, besides other things, on one of the grounds that as the recovery certificate has already been issued by the Collector, no injunction can be granted in view of Order XXXIX Rule 2(2)(g) of C.P.C. as amended by U.P.State Amendment Act, 1976. On merits the court of first instance held that there is no prima facie case and balance of convenience in favour of the petitioner. This order has been affirmed by the appellate court.

5. The Code of Civil Procedure in its applicability to the State of U.P. has been amended vide U.P. Act No.57 of 1976 and it provides for adding a proviso after Sub-Rule 2 to Rule 2 of Order XXXIX C.P.C. The said proviso contemplates that no injunction shall be granted in cases specified therein below which in clause (g) refers to proceedings for recovery of dues recoverable as arrears of land revenue unless adequate security is furnished.

6. Thus, in view of addition of the above proviso to Rule 2(2)(g) of Order XXXIX, no injunction can be granted in respect of proceedings for recovery of dues which are recoverable as arrears of land revenue unless adequate security is furnished.

7. The recovery of loan in the present case is by way of land revenue and the petitioner had not furnished or offered to furnish any security. Therefore, he is not entitle to any injunction.

8. Secondly, the jurisdiction under Article 226 or 227 of the Constitution of India can not be exercised like an appellate authority by indulging in re-appreciation of evidence to correct errors of fact or law. It is exercisable only to correct jurisdictional errors if the courts below have acted without jurisdiction or in flagrant violation of the principles of natural justice or where there is manifest or patent error apparent on the face of record.

9. In view of the above the writ petition lacks merit and is dismissed.

10. It will, however, be open to the petitioner to approach the bank for mutual settlement or to furnish adequate

security and apply afresh for interim injunction.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.07.2012

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.

Civil Misc. Writ Petition No. 27717 of 1995

Amir Ahmad ...Petitioner
Versus
Additional Commissioner and others ...Respondents

Counsel for the Petitioner:
Sri K.G.Srivastava
Sri Amaresh Sinha
Sri Dinesh Pathak
Sri Mohd. Farooq
Sri S.T. Ali
Usha Kiran
Sri Preetam Lal

Counsel for the Respondents:
C.S.C.

U.P. Imposition of Ceiling on Land Holdings Act, Section 3(8)-surplus land-.grove land-consisting 22 trees existed prior 1974-can not be ceased to grove if same part utilized for cattle fodder-other ground for denying the will-delay about 11 years in mutation-also unfounded-if the exertion and attestation not questioned-delay in mutation can not be basis to ignore the will-order quashed.

Held: Para 14 and 17

It is only on the ground of an alleged delayed mutation proceeding that the Will has been discarded by the Prescribed Authority. In the opinion of the Court merely because proceedings for recording the name took 11 years will not defeat the devolution of interest under the Will so long as the Will is not stated to be either fake or forged. In the absence of any such finding neither the Prescribed Authority nor the Appellate Authority could have discarded the said Will more so when the appellate order dated 17.5.1988 and 19.2.1991 specifically issued a direction to exclude the land under the Will.

As to what should be the criteria to judge the status of a holding as grove, reference can be had to the definition of a grove as contained in Section 3(6) of the U.P. Tenancy Act, 1939. The definition is similar, in so far as this feature is concerned, to Section 3(8) of the 1960 Ceiling Act. The same was considered by a learned Single Judge of this Court in the case of Shiv Sahai & others Vs. Har Nandan & others reported in 1963 RD Pg. 119 where it was held that the existence of fourteen trees in an acre of land was sufficient to construe a grove. In the present case there are 22 trees which were found to be existing prior to the appointed date aged about 25 to 30 years and some newly planted trees aged about four to five years spread over an area of approximately one hectare. Thus even if some of the trees are sparsely located, the same would not change the nature of the holdings.

Case law discussed:
1978 AWC 205; 1978 AWC Page 574; 1963 RD 199

(Delivered by Hon'ble Amreshwar Pratap Sahi, J.)

1. Heard Shri Preetam Lal holding brief of Shri Dinesh Pathak, learned counsel for the petitioner and the learned Standing Counsel for the contesting respondents.

2. This writ petition arises out of proceedings under the U.P. Imposition of Ceiling on Land Holdings Act, 1960. The petitioner was put to notice and the ceiling proceedings were concluded by the

Prescribed Authority in the year 1977. An appeal was filed which appears to have been allowed on 17th of May, 1988 and the matter was remanded back to the Prescribed Authority. The Prescribed Authority passed a fresh order on 20th of June, 1990 against which the petitioner again filed an appeal before the learned Commissioner.

3. The appeal was allowed and the matter was again remanded holding that the Prescribed Authority has incorrectly proceeded to ignore the Will of Smt. Fatima and that the land which had devolved on Mr. Nasir Ahmed and the other sons of the petitioner under the said Will ought to have been excluded, keeping in view the earlier appellate order dated 17.5.1988 which fact is evident from the appellate order dated 5.2.1991 (Annexure No. 1 to the writ petition).

4. The Prescribed Authority, thereafter, has again proceeded to hold that the Will as set up could not be proved and has also doubted the said Will on the ground that the proceedings of mutation on the basis of the said Will were initiated after a lapse of the 11 years in the year 1987. On this ground the Prescribed Authority came to the conclusion that the Will was set up only with a view to avoid the ceiling proceedings.

5. On other grounds also the Prescribed Authority rejected the objections particularly with regard to the existence of a grove over the entire Plot No. 1362 on the ground that the existing trees were scattered and some new saplings were planted.

6. The petitioner filed an appeal and the appeal has been dismissed cursorily without appreciating the issue so raised by the petitioner by the impugned order dated 31.8.1995 hence this petition.

7. This writ petition was entertained and an interim order was passed on 18th October, 1995. A counter affidavit has been filed on behalf of the state and the reasons given in the impugned order are sought to be supported without anything further. It has been asserted in paragraph 9 that the Prescribed Authority has proceeded to decide the objections in the light of the remand order dated 5.2.1991 and that the conclusion drawn that the land under the Will was in possession of the petitioner is correct. On other issues also the Appellate Authority and the Prescribed Authority have not committed any error in declaring the land of the petitioner as surplus.

8. Learned counsel for the petitioner submits that on both grounds the impugned orders are unsustainable, inasmuch as the Will has been discarded only on the ground that the mutation on the strength of the Will was sought after 11 years of its execution.

9. It is urged that the Will could not have been ignored once it has been set up and proved. Unless there is a finding that the Will has not been proved in accordance with the Evidence Act there was no occasion for the Prescribed Authority to have drawn a conclusion to the contrary. It is also urged that the name of Fatima Begum has been scored out by Supervisor Kanoongo in 1976 itself and therefore, to conclude that the sons of the petitioner had delayed in setting up their case of succession is incorrect.

10. It is further submitted that the definition of grove land as contained in Section 3(8) of the U.P. Imposition of Ceiling on Land Holdings Act, 1960 clearly

indicates that trees as existing prior to 24th January, 1971 would be sufficient to construe that it was a grove. Learned counsel submits that the finding recorded by the Prescribed Authority itself indicates that plot no. 1362 which was being claimed as grove was in the nature of the grove. It is for the said reason that the impugned order is vitiated as a major part of the land was grove. The proceedings in 1977 had also concluded that the said plot was grove and the order of the Prescribed Authority holding Plot No. 1362 as grove was not challenged by the State any further.

11. He, therefore, contends that the Will having been rightly set up which was in existence and there being no evidence to the contrary, the impugned order proceeds on surmises and conjunctures, and the finding on the issue of grove is also erroneous.

12. Replying to the aforesaid submissions, learned Standing Counsel contends that in effect the Prescribed Authority has found that it was the petitioner himself who was in occupation of the land and, therefore, the holding will be presumed to be of the petitioner, as such, the Will could not extend any benefit to the beneficiaries named thereunder. He further contends that on facts and on inspection, it was found that part of the land was not grove and hence the said finding of fact cannot be disputed. The Appellate Authority also, therefore, has not committed any error in affirming the same.

13. Learned Standing Counsel further contends that the direction contained in the remand order has been complied with by examining the same in detail and hence it cannot be said that the Prescribed Authority has committed any error. The appellate order also, therefore, for the same reason does not require any interference.

14. Having heard learned counsel for the parties the subject matter of land under the Will had been directed to be excluded under the appellate order dated 17th of May, 1988 and the same has been reiterated in the appellate order dated 5.2.1991. In view of the provisions of Section 13 of the U.P. Imposition of Ceiling on Land Holdings Act, 1960 it is clear that the decision in an appeal shall be final and conclusive and shall not be questioned in any Court of law. The appellate order dated 17.5.1988 as reiterated in the order dated 5.2.1991 was, therefore, final. There was no evidence to the contrary to dispute the execution of the Will. It is only on the ground of an alleged delayed mutation proceeding that the Will has been discarded by the Prescribed Authority. In the opinion of the Court merely because proceedings for recording the name took 11 years will not defeat the devolution of interest under the Will so long as the Will is not stated to be either fake or forged. In the absence of any such finding neither the Prescribed Authority nor the Appellate Authority could have discarded the said Will more so when the appellate order dated 17.5.1988 and 19.2.1991 specifically issued a direction to exclude the land under the Will. It is for this reason that this Court granted an interim order recording the same on 18.10.1995. The stand taken in the counter affidavit that the earlier remand order has been complied with is absolutely illusory and the authorities have mechanically proceeded to pass the impugned order ignoring the impact of the said appellate orders.

15. Coming to the question of the existence of grove as claimed by the petitioner once the same plot no. 1362 has

been accepted as a grove by the Prescribed Authority in the earlier proceedings culminating in the order dated 9.8.1977 and the State did not contest the said position by filing an appeal, then the State on a later stage of remand could not have taken a u-turn. The fact aforesaid has been stated in Para-11 of the writ petition to which the reply of the State in para-7 of the counter affidavit is that it is not disputed. Apart from this the finding is that 22 old trees were in existence but they were scattered and some new saplings that are 4 to 5 years old have been planted.

16. The Prescribed Authority on the said basis of inspection and the fact that some cattle fodder was also sown and irrigated, came to the conclusion that it did not fall within the definition of grove. In my opinion, even accepting the said factual situation as narrated in the inspection report, the Prescribed Authority completely lost sight of the contingency of old trees being replaced by new saplings. If the trees planted earlier, which were twenty two in number and were found in existence, then the planting of new trees which were 4 to 5 years old in place of earlier ones for filling in the gaps will not amount to creating a new grove and will simply be trying to restore the status of the grove that did exist as per the evidence of the State itself. The existence of 22 very old trees therefore, even in a scattered state did clearly exhibit the existence of the grove. The temporary utilization of the gaps between the newly planted trees by growing cattle fodder and irrigating it would not transform the original nature of the land which had full grown 22 trees that were quite old according to the State itself.

17. As to what should be the criteria to judge the status of a holding as grove, reference can be had to the definition of a grove as contained in Section 3(6) of the U.P. Tenancy Act, 1939. The definition is similar, in so far as this feature is concerned, to Section 3(8) of the 1960 Ceiling Act. The same was considered by a learned Single Judge of this Court in the case of Shiv Sahai & others Vs. Har Nandan & others reported in 1963 RD Pg. 119 where it was held that the existence of fourteen trees in an acre of land was sufficient to construe a grove. In the present case there are 22 trees which were found to be existing prior to the appointed date aged about 25 to 30 years and some newly planted trees aged about four to five years spread over an area of approximately one hectare. Thus even if some of the trees are sparsely located, the same would not change the nature of the holdings.

18. A grove also requires periodical cultivation of the land to keep the trees spruced and healthy and therefore even if something is sown, like in the present case cattle fodder, the same will not dilute the status of the grove. The cultivator of the holding, namely the tenure holder, has every right to restore his grove by increasing the number of trees. This therefore is not a case where the Plot No. 1362 was never a grove nor it can be said that the tenure holder intended to subsequently convert the holding into a grove to avoid the provisions of the Ceiling Act.

19. This Court in the case of Mahendra Singh vs. State of U.P. and others reported in 1978 AWC 205, Hamid Hussain vs. State of U.P., 1978 AWC Page 574, and relying on Shiv Sahai vs.

Har Nandan 1963 RD 199 has held that if some area of a grove is cultivable then the character of land does not cease to be that of a grove. The test is to decipher as to whether the grove was planted prior to 24th January, 1971 or not. The said decisions have again been followed in the case of Indrapal Singh vs. Prescribed Authority reported in 2007 volume 6 AWC Page 5810 and in the case of Narendra Pal Singh Gahlot vs. The Upper Commissioner Judicial reported in 2009 volume 1 AWC Page 46. This aspect was also considered by another learned Single Judge in the case of Smt. Indu Rani vs. State of U.P. and others in Writ Petition No. 4982 of 1988 decided on 17th September, 2001 where it was held that the authorities have miscalculated the number of trees existing in the plot and then holding that the land is not grove. The action of the authorities was held to be unjustified.

20. The presumption therefore, drawn adverse to the petitioner on the facts of this case is perverse. It also cannot be said that if the new saplings were planted 4 to 5 years before the inspection, the same had been done with some ulterior motive. To the contrary the motive is to restore and revive the grove over the area that required a re-plantation.

21. The Ceiling Act does not prohibit or create any disqualification if new saplings are planted to restore the status of a grove as this is a natural process. Old trees once stop bearing fruits or die out or even new trees or middle aged trees falling down are contingencies which are genuine and a tenure holder is not prohibited from planting new trees in an old grove. If the interpretation and presumption adverse to this is accepted then the status of grove land will gradually become coterminous with even a minor decrease in the number of trees, which is not the intention of the legislature.

22. In this circumstances none of the grounds taken either by the Prescribed Authority or the Appellate Authority for non-suiting the petitioner can be sustained. The impugned order dated 25.2.1992 as affirmed in appeal vide order dated 31.8.1995 are both quashed.

23. The writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.07.22012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Civil Misc. Writ Petition No. 31489 of 2012

Smt. Prema Devi ...Petitioner
Versus
State of U.P. Through Principal Secretary Department & Ors ...Respondents

Counsel for the Petitioner:
Sri Kapil Muni Dubey
Sri S.N. Tripathi

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

U.P. Kshetra Panchayat & Zila Panchayat Act 1961-Section-15(3) (i)-no confidence motion-against Pramukh-meeting convened before expiry of 30 days-liable to set-a-side-keeping it open to hold no confidence meeting in accordance with law

Held: Para 7

There is no dispute in regard to the dates. Counsel for parties also could not dispute that requirement of Section 15(3) is mandatory. (See Khursheed Hussain Vs. District Magistrate and Collector, Bareilly, 1992(1) AWC 208; Mahendra Pal Singh Vs. State of U.P. and others, 1992(1) AWC 424; and, Chhatrapal Singh Vs. State of U.P. and others, 2003(6) AWC 5635). In view thereof, the impugned notice cannot be sustained.

Case law discussed:

1992 (1) AWC 208; 1992 (1) AWC 424; 2003 (6) AWC 5635

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

1. Heard Sri K.M. Dubey and Sri S.N. Tripathi, learned counsel for the petitioner; learned Standing Counsel for respondents; and Sri M.C. Chaturvedi and Sri Vikas Tiwari, Advocates for Caveator, namely, Kesar son of Ram Karan.

2. Learned counsels appearing for respondents and caveator-applicant stated at the Bar that they do not propose to file any counter affidavit since the issue raised is purely a question of law and they would advance oral submissions which may be considered by the Court. It is in these circumstances and as requested and agreed by learned counsel for the parties, the Court proceed to decide the matter finally at this stage under the Rules of this Court on the basis of record of writ petition.

3. The petitioner is aggrieved by notice dated 18.06.2012 issued by Collector Jalaun at Orai convening a meeting for considering a no confidence motion against petitioner received on 23.05.2012 fixing the date of meeting on 10.07.2012 by him.

4. The submission is that the date of meeting having been fixed beyond 30 days from the date of notice for no confidence received by Collector, such meeting is in the teeth of Section 15(3)(i) of U.P. Kshettra Panchayat and Zila Panchayat Act, 1961 *(hereinafter referred to as the "Act, 1961")* and is wholly illegal and without jurisdiction.

5. It is not disputed that petitioner is an elected Pramukh of Kshettra Panchayat Kadaura, District Jalaun. Some Members of Kshettra Panchayat proposed a no confidence motion against petitioner and delivered the notice upon Collector, Jalaun on 23.05.2012. The Collector issued notice dated 03.06.2012 convening meeting for considering no confidence motion on 19.06.2012. Though the notice issued by Collector was dated 03.06.2012, but in fact it was issued for onward communication to post office under registered post on 06.06.2012. The notice was challenged before this Court in Writ Petition No. 30211 of 2012 on the ground that having been placed in the postal service on 06.06.2012 the notice convening meeting does not give 15 days of notice as contemplated in sub-section 3(ii) of Section 15 of Act, 1961. The submission prevailed with this Court in view of admitted fact with regard to above dates and the writ petition was allowed on 14.06.2012 with liberty to Collector to proceed from that stage. The Collector thereafter has issued the impugned letter/notice dated 18.06.2012 convening meeting on 10.07.2012.

6. Now the submission is that under Section 15(3)(i) the meeting must be convened within a period not later than 30 days from the date on which the notice under Section 15(2) was delivered to Collector. It is submitted that Collector was served with notice under Section 15(2) on 23.05.2012 and, therefore, 30 days would expire on 22.06.2012. Convening meeting for considering no confidence motion delivered upon Collector on 23.05.2012 fixing 10.07.2012 is clearly in the teeth of Section 15(3)(i) and, therefore, the impugned notice/letter is illegal and liable to be set aside.

7. There is no dispute in regard to the dates. Counsel for parties also could not dispute that requirement of Section 15(3) is mandatory. (See **Khursheed Hussain Vs. District Magistrate and Collector, Bareilly, 1992(1) AWC 208; Mahendra Pal Singh Vs. State of U.P. and others, 1992(1) AWC 424; and, Chhatrapal Singh Vs. State of U.P. and others, 2003(6) AWC 5635).** In view thereof, the impugned notice cannot be sustained.

8. However, learned counsel appearing for respondents then submitted that the notice impugned in this writ petition if set aside, it would be against public interest inasmuch as the petitioner would then be contending that no fresh motion for no confidence can be initiated for a period of one year and that would cause serious prejudice to public at large. In our view this submission has no force. When a meeting itself has not been convened validly despite delivery of notice of no confidence under sub-section (2) of Section 15 by the Collector under Section 15(3), sub-section (12) of Section 15 would not be attracted in such a case. It would apply only when meeting actually is convened but the motion is not carrying out or the meeting though convened but for want of quorum etc. the actual business in the meeting does not take place. A similar question came up for consideration before the Division Bench in **Khursheed Hussain (supra)** and while considering this very provision, the Court said, when no meeting is held on account of some fault on the part of Collector in convening a meeting, committing fault in observance of provisions of sub-section (3), it would not debar a fresh motion. This Court, therefore, has no hesitation in holding that setting aside notice impugned in this writ petition would not debar the Members of Kshettra Panchayat in bringing a fresh motion. In the present case, in the facts and circumstances, as discussed above, sub-section (12) of Section 15 shall not be attracted at all.

9. In view of above discussion and with the above clarification, the writ petition, in our view, deserves to be allowed.

10. The impugned notice dated 18.06.2012 is hereby quashed.

11. The writ petition is allowed, as directed above.

12. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.05.2012

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Court No. 32814 of 2002

Smt. Shanti Devi ...Petitioner
Versus
D.D.C. and others ...Respondents

Counsel for the Petitioner:
Sri M.A.Qadeer
Sri Anees Ahmad
Sri R.P.S. Chauhan
Sri R.R. Khan
Sri Shamim Ahmad
Sri V.M. Zaidi
Sri S.M.G. Asgar
Sri S.C. Sinha
Sri A.K. Tripathi

Counsel for the Respondents:
C.S.C.
Sri Anupam Kulshrestha
Sri Brijesh Yadav
Sri K. Srivastava

Code of Civil Procedure-Order XXII Rule-5-scope for determination of legal heir-confined only with purpose of determination of proceeding-it shall not effect the rights of parties-substitution proceeding for asserting the legal representation for continuance of proceeding-both applicants allowed to be substituted.

Held: Para 6

The words used "shall proceed with the suit" in Order XXII Rule 3 is if read with Rule 5 then it will mean to carry on the proceeding uptill it reaches to its logical end. To my mind the scope of substitution application is limited one i.e. to prosecute the suits/proceedings and the order passed on the substitution application is not binding on the court which will examine the genuineness of the documents claiming right over the property in dispute.

Case law discussed:
AIR 1975 Mad 174; AIR 1988 Mad 117; AIR 1994 Raj 31; Substitution Application No. 42063 of 2008 in Second Appeal No. (282) of 2002 Smt. Pramila Devi Vs. Rajendra Prasad and others decided on 10.9.2008

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

Re: - Civil Misc. Substitution Applications No. 287860 of 2008 and 322897 of 2009 are taken up for orders.

1. Both the applicants claim themselves to be legal heir and representative of sole petitioner late Shanti Devi. The applicant of Substitution Application No. 287860 of 2008 claim himself to be sole surviving heir of late Shanti Devi whereas the applicant in Substitution Application No. 322897 of 2009 claim herself to be daughter of late Shanti Devi. Both sides dispute status of each other and their relation to late Shanti Devi.

2. Sri M.A.Qadeer, learned Senior Counsel assisted by Sri Shamim Ahmad appears in Substitution Application No. 287860 of 2008 whereas Sri V.M.Zaidi, learned Senior Counsel assisted by Sri S.M.G. Asgar, appears in Substitution Application No. 322897 of 2009.

3. It is not in dispute that late Shanti Devi had filed writ petition and she has passed away. In both the applications, the applications praying for condonation of delay in filing the substitution application have been allowed. Both the applications have been filed under Order 22 Rule 3 of the Code of Civil Procedure.

4. Heard learned counsel for the parties.

5. For deciding the rival claim for substitution, the language used under Rule 3 and Rule 5 of Order 22 of Code of Civil Procedure are required to be examined, which are reproduced herein under :-

Procedure in case of death of one of several plaintiffs or of sole plaintiff.- (1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to the sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

5. Determination of question as to legal representative- Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court.

[Provided that where such question arises before an Appellate Court, that Court may, before determining the question, direct any subordinate Court to try the question and to return the records together with evidence, if any recorded at such trial, its findings and reasons therefor, and the Appellate Court may take the same into consideration in determining the question.]

6. The words used "shall proceed with the suit" in Order XXII Rule 3 is if read with Rule 5 then it will mean to carry on the proceeding uptill it reaches to its logical end. To my mind the scope of substitution application is limited one i.e. to prosecute the suits/proceedings and the order passed on the substitution application is not binding on the court which will examine the genuineness of the documents claiming right over the property in dispute.

7. The view taken by me is supported by numerous decisions of this court as well as of other High Courts. In the case of Jagdish Vs District Judge, Gorakhpur and others reported in (1999 (17) LCD-1451) this Court has has observed that:-

"The scope and ambit of Order 22 is related to the carriage of the proceedings to the extent who is to carry on the proceedings. It does not determine the rights of the parties or even persons claiming as legal representatives. The definition of legal representative as defined in Section 2(ii) of the Code of Civil Procedure includes a person who inter-meddles with the estate of the deceased. Thus it is only a proceeding for ascertaining as to who is the legal representative eligible to continue the lis. The scope of enquiry under Order 22 cannot surpass the purpose and object for which Order 22 is prescribed. It cannot be stretched to the extent of determining the lis between the parties on merits by deciding title. Thus the provision of Rule 5 of Order 22 relating to determination of the question as to legal representative is confined only to the extent of determining the legal representative for the purpose of carriage of the proceeding and representing the lis or the estate even though he may be a inter-meddler. It does not determine the rights of the parties. Even if it is so determined, the same would be wholly outside the scope of final determination in the suit where the

question is involved. The question remains open to be decided in appropriate proceeding either in the suit itself or in a separate suit or proceeding as the case may be. The substitution does not preclude the parties to establish their respective right during the course of hearing of the suit, there it could be so permitted within its scope and ambit, on materials to be produced by adducing evidence oral or documentary. Even if a legal representative is excluded still then he has a right to apply for being added as a party to a proceeding if he is so advised depending on the facts and circumstances of the case."

8. The Madras High Court has also taken a same view in the case of Krishna Kumar v. N.G. Naidu and another (AIR 1975 Mad 174) while dealing the scope of Order 22 Rule 5 which reads as under :-

" An adjudication in the course of proceeding to substitute legal representatives does not make the legal representative heirs as such. The finding should be construed to have given only for the prosecution of the proceeding. It is not a decision on merits. It cannot operate as res judicata."

9. The same view has been reiterated in the case of Muniappa Nadar and others v. K.V.Dora pandi Madar and another(AIR 1988 Mad 117).

10. The Full Bench decision of the Punjab High Court in the case of Mohinder Kaur and another v. Piara Singh and others (AIR 1981 Punj 130) have also taken the same view that the decision in a proceeding under Order 22 Rule 5 of the Code does not operate as res judicata. A similar view has been taken by the Himanchal Pradesh High Court in the case of Nisapati v. Gayatri and others (AIR 1982 HP 8).

11. The Rajasthan High Court has also taken the same view in the case of Kalu Ram v. Charan Singh (AIR 1994 Raj 31) where it has been observed:

" that the enquiry into right to heirship is not the determining factor in deciding whether a person is or is not legal representative for the purpose of proceeding before the Court. What is required to be considered is whether the person claiming to represent the estate of the deceased for the purpose of lis has sufficient interest in carrying on litigation and is not an imposter. In case of rival claimants, it may also be necessary to decide that out of the rival claimants, who really is the person entitled to represent the estate for the purpose of a particular proceedings. Even that determination does not result in determination of inter se right to succeed to the property of the deceased and that right has to be established in independent proceedings in accordance with law. In the said case, in a suit for specific performance of contract of sale transferor died leaving his widow who too dies during the proceeding. One stranger on the strength of an unprobated will sought to be impleaded in the suit. He was allowed to be substituted in place of the widow."

12. This Court in the Substitution Application No. 42063 of 2008 in Second Appeal No. (282) of 2002 Smt. Pramila Devi Vs. Rajendra Prasad and others decided on 10.9.2008 has also taken the same view.

13. In this case since the sole petitioner has died and both the applicants namely Sri Om Prakash and Smt. Abha Sharma have filed substitution application to prosecute the petition, therefore, both substitution applications are allowed. Let Sri Om Prakash and Smt. Abha Sharma be substituted in place of sole petitioner in the array of parties by the office within three weeks.

14. List this case in second week of July, 2012.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.07.2012

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.

Civil Misc. Writ Petition no. 32391 of 2012

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

Counsel for the Petitioner:
Sri Raj Narayan

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 226-Writ Petition-by brother of petitioner (a minor girl)-without disclosing fact as to how became guardian-petition-held-not maintainable.

Held: Para 3

In the opinion of the Court the petitioner cannot represent his sister so long as he is not the guardian of his sister under the relevant law for the time being in force and even otherwise a minor can be appropriately represented in a writ petition on the principles as enshrined under Order 32 of the Code of Civil Procedure. In my opinion the petition suffers from the defect aforesaid and is accordingly dismissed without prejudice to rights of the minor to represent her cause in accordance with law through her lawful guardian.

(Delivered by Hon'ble Amreshwar Pratap Sahi, J.)

1. This petition has been filed by the brother of one Kumari Richa Singh who is admittedly a minor. The relief claimed in this petition is that the result of Km. Richa has not been properly prepared as the marks awarded to her in the examination in question is not on proper evaluation.

2. Unfortunately this petition has been filed by the brother of the candidate without disclosing as to how he is the guardian of the concerned student. The Vakalatnama has been filed by Pramod Kumar Singh who is the brother of the candidate.

3. In the opinion of the Court the petitioner cannot represent his sister so long as he is not the guardian of his sister under the relevant law for the time being in force and even otherwise a minor can be appropriately represented in a writ petition on the principles as enshrined under Order 32 of the Code of Civil Procedure. In my opinion the petition suffers from the defect aforesaid and is accordingly dismissed without prejudice to rights of the minor to represent her cause in accordance with law through her lawful guardian.

4. The writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.07.2012

BEFORE
THE HON'BLE RAN VIJAI SINGH,J.

Civil Misc. Writ Petition No. 35569 of 2012

Shambhu Sharan Chaubey and others ...Petitioners
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioners:
Sri R.C. Singh

Counsel for the Respondents:
C.S.C.

U.P. Imposition on Land Holding Act, 1960-Section-38-procedure for deciding appeal-applicability of the provisions of order 41 Rule 3-A (1) (2) and (3)-and Section 42 of ceiling appeal-delay of more than 15 years-without application for condonation of delay-without explanation-held-provisions of order 41 Rule 3-A (1) (2) and (3) being mandatory and not directory-consequence of the provision of Section 3 of limitation would be dismissal of appeal-order passed on merit without considering the provisions contained above-appeal liable to be dismissed.

Held: Para 13 and 14

From the bare reading of the aforesaid judgments it transpires that if a revision or appeal is filed beyond the period of limitation as prescribed under the law then that has to be accompanied with an application under Section 5 of Limitation Act supported with an affidavit disclosing the reason for not approaching the court well within the time, and in absence of such application or in absence of any notice to the other side, the court can only dismiss the appeal/revision as barred by time and in no case it can condone the delay or admit/allow the Appeal/Revision.

In view of the submissions made by the learned counsel for the petitioners, admittedly, the appeals were highly barred by time and the appellate court, without condoning the delay has admitted the appeals. Therefore, in view of the provisions contained under section 3 of the Limitation Act and sub-rules (1) and (2) of Rule 3A of Order 41 of CPC, the appeals ought to have been rejected as barred by time and, in fact, there was no appeal unless the delay was condoned, as has been held by the apex Court.

Case law discussed:
2006(1) SCC 164; JT 2005 (9) SC 503; 2009 (5) SCC 121(paras 11 and 12); 2008 14 SCC 445 (in paragraph 32 and 33of the aforesaid judgment); 2005 4 SCC 613 (in paragraph 20 of the judgment); (2009) 6 SCC 194; 2001 (9) SCC 717

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

1. Heard Sri R.C. Singh, learned counsel for the petitioners and Sri Sanjay Goswami, learned Additional Chief Standing Counsel for the respondents.

2. Through this writ petition, the petitioners have prayed for issuing writ of certiorari quashing the impugned orders dated 3.4.2012, passed by respondent no. 2 in appeals nos. 406K of 2012, 407K of 2012 and 408K of 2012 (annexure nos. 9, 11 and 13 to the writ petition), by which highly time barred appeals have been admitted, without condoning the delay.

3. Sri Singh contends that in view of the provisions contained under section 38 of the U.P. Imposition of Ceiling on Land Holdings Act, 1960 (hereinafter referred to as, 'the Act'), for deciding the appeal, the procedure contained in the Code of Civil

Procedure, 1908 (in short, 'CPC') shall be applicable and once the provisions of CPC are applicable, the appeal could not be admitted without condoning the delay in filing the appeal. In his submissions, through the appeals, the orders of the year 1996, passed by the prescribed authority /Chief Revenue Officer were challenged. The appeals were filed in the year 2012.

4. Sri Goswami submitted that only legal questions are involved in this case, therefore, the writ petition may be decided on its own merit in view of the grounds taken in the appeals without inviting the counter affidavit. Therefore, with the consent of learned counsel for the parties, the writ petition is taken up for final disposal.

5. For appreciating the controversy, it would be necessary for me to look into the provisions (sections 38 and 42 of the Act and the relevant provisions of Order 41, Rule 3A sub-rules (1), (2) and (3)), contained in the CPC, for adjudication of the appeals. Sections 38 and 42 of the Act and Rule 3A sub-rules (1), (2) and (3) of Order 41 of CPC are reproduced hereinunder:

"38. Powers of the appellate Court and the procedure to be followed by it: *(1) In hearing and deciding an appeal under this Act, the appellate Court shall have all the powers and the privileges of a Civil Court and follow the procedure for the hearing and disposal of appeals laid down in the Code of Civil Procedure, 1908.*

(2) Where, under the provisions of this Act, an appeal has to be heard by the Commissioner, he may either hear the appeal himself or transfer it for hearing to any Additional Commission subordinate to him.

42. Application of the Limitation Act, 1963: *The provisions of Sections 4, 5 and 12 of the Limitation Act, 1963 shall be applicable to all proceedings including proceedings in appeals, applications and objections under this Act.*

Order 41, Rule 3A of the CPC

3A. Application for condonation of delay: *(1) When an appeal is presented after the expiry of the period of limitation specified therefor, it shall be accompanied by an application supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period.*

(2) If the Court sees no reason to reject the application without the issue of a notice to the respondent, notice thereof shall be issued to the respondent and the matter shall be finally decided by the Court before it proceeds to deal with the appeal under rule 11 or rule 13, as the case may be.

(3) Where an application has been made under sub-rule (1), the Court shall not make an order for thte stay of execution of the decree against which the appeal is proposed to be filed so long as the Court does not, after hearing under rule 11, decide to hear the appeal."

6. From the bare reading of section 38 of the Act, it is clear that for deciding the appeal, the procedure contained in the CPC for deciding the appeal would be applicable and in view of section 42 of the Act, the provisions contained under section

5 of the Limitation Act would also be attracted in case the appeal has been filed after expiry of the period of limitation.

7. According to section 13 of the Act, which provides provisions of appeal, the limitation for filing the appeal is 30 days from the date of order. Here in this case, as has been noticed, the orders impugned in the appeals were passed in the year 1996 and the appeals were filed in the year 2012. Since the limitation for filing the appeal is 30 days from the date of order, therefore, certainly the appeals were highly barred by time by more than 15 years. Therefore, in view of Order 41, Rule 3A(1) of the CPC, it was to be filed alongwith an application under section 5 of the Limitation Act with supporting affidavit, stating therein the facts on which the appellants rely to satisfy the court, that they had sufficient cause for not preferring the appeals within time. Sub rule (2) of Order 41, Rule 3A of CPC provides that in case there is no reason to reject the application without issuing notice, the notice is to be issued to the other side before condoning the delay. From the bare reading of the language used in Order 41 Rule 3A sub-rules (1), (2) and (3), it would transpire that the same is mandatory in nature and not directory, as consequences not to follow has been clothed in the words used therein. It is well settled that when the Statute provides to do a thing in a particular manner and the consequences to not follow the procedure (manner) is given in the Statute, in that eventuality, the provisions contained in the Statute are held to be mandatory. Here in the particular case, the consequences have been given not to follow the procedure contained in Order 41, Rule 3A of the CPC, therefore, the provisions contained in Order 41, Rule 3A of the CPC are mandatory in nature and consequences not to follow would be fatal in admitting the appeal as without condoning the the delay, the appeal could not be admitted in view of sub rule (3) of Order 41, Rule 3A of CPC. Reference may be given in AIR (1935) PC 85 ***Maqbul Ahmad and Others Vs. Omkar Pratap Narain Singh and others***, 2006(1) SCC 164 ***HUDA*** *Vs.* ***B.K. Sood***, JT 2005 (9) SC 503 ***Haryana Urban Development Authority*** *Vs.* ***B.K. Sood*** and 2009 (5) SCC 121 (paras 11 and 12) ***State Bank of India Vs. B.S. Agriculture Industries (I).***

8. The controversy in hand may be examined from the provisions contained in sub-section (1) of section 3 of the Limitation Act, perusal of which, talks about bar of limitation, which provides that subject to the provisions contained in sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not been set up as a defence. For this purpose, if any appeal / revision is preferred beyond the period of limitation, section 5 of the Limitation Act empowers the court to extend the period of limitation on its satisfaction, provided the application contain sufficient ground for not approaching the court within time.

9. Taking note of this, the apex Court in the case of ***Noharlal Verma Vs. District Cooperative Central Bank Ltd. Jagdalpur,*** 2008 14 SCC 445 (in paragraphs 32 and 33 of the aforesaid judgment) has observed as under:

" 32. Now, limitation goes to the root of the matter. If a suit, appeal or application is barred by limitation a court or an adjudicating authority has no jurisdiction, power or authority to

entertain such suit, appeal or application and to decide it on merits.

33. Sub Section (1) of Section 3 of the Limitation Act, 1963 reads as under:

" 3. Bar of Limitation.- (1) Subject to the provisions contained in Sections 4 to 24 (inclusive) every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not be set up as a defence."

Bare reading of the aforesaid provision leaves no room for doubt that if a suit is instituted, appeal is preferred or application is made after the prescribed period, it has to be dismissed even though no such plea has been raised or defence has been set up. In other words, even in the absence of such plea by the defendant, respondent or opponent, the court or authority must dismiss such suit, appeal or application, if it is satisfied that the suit, appeal or application is barred by limitation."

10. In the case of ***V.M. Salgaocar and bros. Vs. Board of Trustees of Port of Mormugao and another,*** 2005, 4 SCC 613 (in paragraph 20 of the judgment) the apex Court has observed as under:

" The mandate of Section 3 of the Limitation Act is that it is the duty of the court to dismiss any suit instituted after the prescribed period of limitation irrespective of the fact that limitation has not been set up as a defence. If a suit is ex facie barred by the law of limitation, a court has no choice but to dismiss the same even if the defendant intentionally has not raised the plea of limitation."

11. In the case of ***Sneh Gupta Vs. Devi Sarup and others,*** (2009)6 SCC 194 the apex Court (paragraph 70 of the said judgment) has observed that in absence of any application for condonation of delay, the court has no jurisdiction in terms of S. 3, Limitation Act, 1963 to entertain the application filed for setting aside of decree after expiry of period of limitation.

12. Further, in the case of ***Ragho Singh Vs. Mohan Singh,*** 2001 (9) SCC 717, the apex Court (in paragraph 6) has held as under:

" We have heard learned counsel for the parties. Since it is not disputed that the appeal filed before the Additional Collector was beyond time by 10 days and an application under Section 5 of the Limitation Act was not filed for condonation of delay, there was no jurisdiction in the Additional Collector to allow that appeal. The appeal was liable to be dismissed on the ground of limitation. The Board of Revenue before which the question of limitation was agitated was of the view that though an application for condonation of delay was not filed, the delay shall be deemed to have been condoned. This is patently erroneous. In this situation, the High Court was right in setting aside the judgment of the Additional Collector as also of the Board of Revenue. We find no infirmity in the impugned judgment. The appeal is dismissed. No costs."

13. From the bare reading of the aforesaid judgments it transpires that if a revision or appeal is filed beyond the period of limitation as prescribed under the law then that has to be accompanied with an application under Section 5 of Limitation Act supported with an affidavit

disclosing the reason for not approaching the court well within the time, and in absence of such application or in absence of any notice to the other side, the court can only dismiss the appeal/revision as barred by time and in no case it can condone the delay or admit/allow the Appeal/Revision.

14. In view of the submissions made by the learned counsel for the petitioners, admittedly, the appeals were highly barred by time and the appellate court, without condoning the delay has admitted the appeals. Therefore, in view of the provisions contained under section 3 of the Limitation Act and sub-rules (1) and (2) of Rule 3A of Order 41 of CPC, the appeals ought to have been rejected as barred by time and, in fact, there was no appeal unless the delay was condoned, as has been held by the apex Court.

15. In view of the legal position, as discussed above, the impugned order dated 3.4.2012, passed by Commissioner, Gorakhpur Division, District Gorakhpur (respondent no. 2) cannot be sustained.

16. The writ petition succeeds and is allowed. The impugned orders dated 3.4.2012, passed by respondent no. 2 in Appeal Nos. 406K of 2012, 407K of 2012 and 408K of 2012, are hereby quashed.

17. The Commissioner, Gorakhpur Division, Gorakhpur (respondent no. 2) is directed to, first of all, decide the application for condonation of delay filed in Appeal Nos. 406K of 2012, 407K of 2012 and 408K of 2012 (Annexure nos. 9, 11 and 13 to the writ petition) and if delay is condoned, thereafter, may proceed to hear the appeals in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.07.2012

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN, J.

Civil Misc. Writ Petition no. 36719 of 2012

Constable 4725 Manoj Kumar
...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri N.L. Pandey
Sri Suyash Pandey

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 226- Principle of Natural Justice-dismissal order challenged allegations of violation of Principle of Natural Justice-during preliminary enquiry even being 'Ahir' by cast had produced cast certificate as Scheduled Cast-held-where guilt admitted-technical plea of procedural omission or violating Natural Justice-not available-dismissal-proper.

Held: Para 6 and 7

As petitioner categorically admitted in the preliminary inquiry that he obtained appointment by showing himself to be a member of scheduled caste hence it was not necessary to search the initial application form of the petitioner. Moreover there is no allegation that in the service book/record petitioner has not been shown to have been appointed under scheduled caste reserved quota.

Supreme Court in Aligarh Muslim University and Ors. v. Mansoor Ali Khan AIR 2000 SC 2783 and Ashok Kumar Sonkar v. Union of India and Ors. (2007) 4 SCC 54 has held that a person challenging an order on the ground that

opportunity of hearing was not provided to him will have to show in the petition challenging the order that in case opportunity had been provided, what plausible cause he would have shown. Opportunity of hearing is not an empty formality.

Case law discussed:

AIR 2000 SC 2783; (2007) 4 SCC 54; AIR 2010 SC 75; AIR 2006 SC 1800

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

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

2. Petitioner was appointed as constable in P.A.C. in the year 1998 against vacancy reserved for scheduled caste. For the said purpose petitioner had filed a certificate showing that he was Chamar by caste which is a scheduled caste. Thereafter some complaint was received that petitioner was only backward (Ahir/Yadav) and he had obtained appointment against scheduled caste vacancy by filing false caste certificate. Chargesheet/notice was issued on 5.8.2006 to the petitioner to show cause as to why his appointment shall not be cancelled. Petitioner filed reply. After considering the reply (which was virtually an admission) petitioner's appointment was cancelled through order dated 26.8.2006 passed by the Commandant 42nd Battalion, P.A.C., Naini, Allahabad, copy of which is Annexure-3 to the writ petition. Against the said order petitioner filed appeal which was dismissed on 11.6.2012 by Deputy Inspector General of P.A.C., Eastern Zone, U.P., Lucknow hence this writ petition.

3. Petitioner filed reply to the charge sheet/show cause notice on 14.8.2006 and 17.8.2006. Copy of notice dated 5.8.2006 has been annexed alongwith writ petition but copies of replies have not been annexed by the petitioner.

4. In the order dated 26.8.2006 in para-4 it is mentioned that petitioner in his replies dated 14.8.2006 and 17.8.2006 mentioned that at the time of appointment he had not filed any certificate showing that he belonged to scheduled caste and that he was a member of *Ahir* caste which was O.B.C. It is further mentioned in the said para that the allegation of the petitioner was utterly false as in his statement given before Inquiry Officer in preliminary inquiry he categorically stated that at the time of his appointment in October, 1998 he went to Tehsil Jamaniya District Ghazipur for obtaining caste certificate and there he met a person whose name he did not know and that person gave him a certificate of scheduled caste and on the basis of the said certificate petitioner was taken in service. It was further stated by him before Inquiry Officer that afterwards for preparation of service/character book he was asked to produce caste certificate and as he belonged to Yadav caste hence he obtained a certificate to that efect and presented the same. Accordingly, in the impugned order dated 26.8.2006 (as well as in the appellate order) it was mentioned that petitioner admitted that he was not scheduled caste still he obtained employment under scheduled caste reserved quota.

5. The main argument of learned counsel for the petitioner is that he was forced to confess before the Inquiry Officer. This is an untenable argument. Before the authorities below this plea does not appear to have been taken. It has not been shown that what compulsion was exercised upon the petitioner to give the statement. Petitioner took up a fantastic case that a person whose name was not known to the

petitioner gave a scheduled caste certificate and on the basis of that certificate petitioner obtained employment.

6. The next argument of learned counsel for the petitioner is that no formal inquiry was held and petitioner's application for appointment was not produced before the Inquiry Officer or the authority which passed the termination order to show that petitioner had obtained employment by asserting that he belonged to scheduled caste. As petitioner categorically admitted in the preliminary inquiry that he obtained appointment by showing himself to be a member of scheduled caste hence it was not necessary to search the initial application form of the petitioner. Moreover there is no allegation that in the service book/record petitioner has not been shown to have been appointed under scheduled caste reserved quota.

7. Supreme Court in **Aligarh Muslim University and Ors. v. Mansoor Ali Khan AIR 2000 SC 2783 and Ashok Kumar Sonkar v. Union of India and Ors. (2007) 4 SCC 54** has held that a person challenging an order on the ground that opportunity of hearing was not provided to him will have to show in the petition challenging the order that in case opportunity had been provided, what plausible cause he would have shown. Opportunity of hearing is not an empty formality.

8. Supreme Court in **Chairman cum Managing Director, Coal India Limited and Anr. vs. Mukul Kumar Choudhuri and Ors. AIR 2010 SC 75** has held that if delinquent admits the charge, no procedural irregularity can be taken into consideration.

9. In **Commissioner of Police, New Delhi v. Narender Singh AIR 2006 SC 1800** it has been held that even after acquittal in criminal case, in departmental proceedings the employee can be dismissed from service merely on the basis of confession made by him before police (which was not admissible in criminal case hence in the criminal case the employee concerned was acquitted).

10. Accordingly, there is absolutely no merit in the writ petition hence it is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.07.2012

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.

Civil Misc. Writ Petition no. 36242 of 2008

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

Counsel for the Petitioners:
Amar Singh

Counsel for the Respondents:
C.S.C.

U.P. Intermediate Education Act-1921-Chapter III-Part II-B-correction of date of birth and name-petitioner failed in High School Examination 2004-agagin appeared in 2005-date of birth incorrectly recorded in mark sheet as 07.07.1991 instead of 07.07.1992-inspite of direction of Court-Secretary rejected representation saying the Principal has already corrected-held-change on basis of report of Principal without opportunity of hearing-not only in violation of principle of Natural Justice but contrary to regulation-order quashed-Secretary to re-examine the

matter after calling report from Principal after giving opportunity to both.

Held: Para 9

Having heard learned counsel for the parties and having perused the regulations as also the impugned order, the change in any part of the certificate or mark sheet can be brought about provided the same is not inconformity with records or on the asking of the candidate. In the instant case the Secretary has proceeded to alter the name of the petitioner and his date of birth without putting the petitioner to notice on the asking of the Principal of the Institution. The order does not indicate any discrepancy in the records for bringing about this change in the name of the petitioner and his date of birth. The order, therefore, is in violation of the principles of nature justice and not only this it is not in conformity with the regulations as quoted hereinabove.

(Delivered by Hon'ble Amreshwar Pratap Sahi, J.)

1. Heard Sri Amar Singh, learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. The petitioner appeared in the High School Examination-2004 after having been registered in Class-IX in terms of the regulations framed under the U.P. Intermediate Education Act, 1921. The date of birth of the petitioner was recorded as 7th July, 1992. The name of the petitioner was mentioned as Ritu Raj Singh son of Raksh Pal Singh.

3. The petitioner failed in the High School Examination-2004 and he again appeared in the High School Examination-2005. His result was declared but when the final mark-sheet was issued to the petitioner by the college, his date of birth was incorrectly shown as 7.7.1991 and his name was wrongly spelled as Ritu Pal Singh. The petitioner accordingly moved an application for correction before the respondent-Board.

4. The power to carry out such corrections is contained in Part-II-B-Chapter 3 of the Regulations narrating the powers of the Secretary of the Madhyamik Shiksha Parishad. Para 7 of the said regulation is extracted hereinunder:

"7– सचिव, परिषद की ओर से सफल उम्मीदवारों को परिषद की परीक्षा में उत्तीर्ण होने का प्रमाण–पत्र विहित प्रपत्र में देगा और ***बाद में उसकी प्रविष्टियों में कोई शुद्धि करेगा,*** *बशर्ते कि प्रमाण–पत्र में किसी ऐसी गलत प्रविष्टि, किसी अविचारित लिपिकीय भूल या लोप के कारण या किसी ऐसी लिपिकीय भूल के कारण की गई हो जो असावधानी से परिषद के स्तर के या* ***उस संस्था के, जहां से अन्तिम बार शिक्षा प्राप्त की हो, स्तर पर अभिलेख में हो गई हो। यह शुद्धि सचिव द्वारा उसी स्थिति में की जा सकेगी जबकि अभ्यर्थी ने*** *सम्बन्धित परीक्षा के प्रमाण–पत्र को परिषद द्वारा निर्गमन करने की तिथि से दो वर्ष के अन्दर ही लिपिकीय त्रुटि की ओर ध्यान आकृष्ट करते हुए सम्बन्धित प्रधानाचार्य/केन्द्र व्यवस्थापक को त्रुटि के संशोधन हेतु प्रार्थना–पत्र प्रस्तुत कर दिया हो और उसकी प्रति पंजीकृत डाक से सचिव, परिषद को भी प्रेषित की हो।"*

5. The matter was being delayed, as a result whereof the petitioner filed Writ Petition No. 1105 of 2007 which was disposed of with a direction to the Secretary of the Parishad to decide his application within a month. The judgment of this Court dated 9th January, 2007 also records the recommendation made by the District Inspector of Schools dated 14th July, 2006 on the basis of the record that was placed before him.

6. The petitioner, therefore, after completing all the formalities approached the respondent-Board whereafter the Secretary of the Board rejected the said application on the ground that the Principal

of the institution vide his letter dated 23.7.2005 had earlier made a request for such alteration in the name and date of birth of the petitioner which was accordingly granted vide order dated 27.7.2005. The Secretary further indicated that since this change was brought about by the principal himself, therefore, no further alteration can be made on the request of the petitioner.

7. It is this order dated 16th of May 2007 which has been assailed before this Court on the ground that the Principal of the Institution had no authority to request for any change unless there was any thing contrary in the records, and even if it was to be done, the petitioner ought to have been put to notice. Learned Counsel contends that the said change, according to the regulation quoted hereinabove, can be brought out only on the asking of the candidate concerned and not on the request of the Principal of the Institution.

8. Learned Standing Counsel on the other hand contends that it appears that the principal had made the request on the basis of the record available with him and in such circumstances the impugned order cannot be faulted with.

9. Having heard learned counsel for the parties and having perused the regulations as also the impugned order, the change in any part of the certificate or mark sheet can be brought about provided the same is not inconformity with records or on the asking of the candidate. In the instant case the Secretary has proceeded to alter the name of the petitioner and his date of birth without putting the petitioner to notice on the asking of the Principal of the Institution. The order does not indicate any discrepancy in the records for bringing about this change in the name of the petitioner and his date of birth. The order, therefore, is in violation of the principles of nature justice and not only this it is not in conformity with the regulations as quoted hereinabove.

10. Accordingly, the impugned order dated 16.5.2007 rejecting the application of the petitioner is hereby quashed. The Secretary of the Board shall in the light of the observations made herein above proceed to examine the records after calling for a report from the Principal of the institution and thereafter pass an appropriate order on the application of the petitioner within three months after giving him an opportunity to file objections, if any.

11. The writ petition is accordingly allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.07.2012

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.

Civil Misc. Writ Petition No. 37630 of 1995

Ravindra Nath Srivastava ...Petitioner
Versus
State Of U.P. & Others ...Respondents

Counsel for the Petitioner:
Sri Shyamal Narain
Sri Habib Ahmed

Counsel for the Respondents:
C.S.C.
Sri Ajit Kumar
Sri J P Pandey
Sri Tarun Verma
SriVirendra Singh
Sri R.B.Pandey
Sri Shyam Singh
Sri Ajit Kuamr Singh

U.P. Imposition of Ceiling on Land Holdings Act-1960-Section 38-procedure about deciding ceiling appeal-as per provision of order 41 rule 17 (1)-request for adjournment on ground to attained funeral of senior counsel rejected-commissioner decided appeal on merit on ex-parte basis-held-appellate authority committed manifest mistake by ignoring the death of Senior Counsel-at the most appeal could have been dismissed in default rather to decide on merit-order quashed-with necessary direction.

Held: Para 7

Having considered the aforesaid submissions and having perused the records as well as the order sheet of the appellate court, this Court finds that the appellate authority has committed a manifest error by showing disrespect to the resolution of the Bar Association for a genuine cause, namely, to attend the funeral of one the senior lawyers who had expired on that date. In the circumstances the request made by the counsel on behalf of the petitioner for adjournment was absolutely justified and could have been granted. The finding recorded that the petitioner was seeking unnecessary adjournments with a view to prolong the appeal, therefore, does not appear to be correct on the basis of the facts which have been brought on record.

(Delivered by Hon'ble Amreshwar Pratap Sahi, J.)

1. Heard Sri Shyamal Narain, learned counsel for the petitioner and learned Standing Counsel for the State.

2. This petition deserves to be disposed of on a very short ground and on a point which has been advanced by the learned counsel for the petitioner contending that the appellate authority has manifestly erred by not respecting the resolution of the Bar on account of the condolence due to the death of a senior lawyer practicing in the Bar Association in the court of the Commissioner, Gorakhpur.

3. Sri Shyamal Narain submits that the appeal was filed by the petitioner's father and when he died the petitioner was substituted by the appellate authority on 21st October, 1995. Thereafter the next date fixed was 28th October, 1995 on which date an adjournment was sought which was granted and the date fixed was 31st October, 1995. Sri Shyamal Narain submits that the petitioner after his substitution had not sought any unnecessary adjournment and as a matter of fact on 31st October, 1995 the petitioner's counsel could not assist the appellate authority on account of the resolution of the Bar Association copy whereof has been filed as annexure-8 to the writ petition. He has invited the attention of the Court to the said document where it is recorded that the lawyers in order to attend the funeral of late Sri Vishwanath Tripathi were abstaining from work and as such the appeal be accordingly adjourned.

4. The appellate authority in stead of adjourning the matter recorded that the matter has been heard with the assistance of D.G.C. Revenue and that the counsel for the petitioner was avoiding hearing only with a view to linger on the matter. He described the adjournment sought as a devise to prolong and protract the hearing of the appeal. Accordingly, he proceeded ex-parte and in a cryptic manner dismissed the appeal.

5. Aggrieved, the petitioner approached this Court through this petition and the operation of the impugned order was stayed vide interim order dated 31.12.1995.

6. The contesting respondents including the State have filed counter affidavits and they contend that the appellate authority has not committed any error and has disposed of the appeal keeping in view its long pendency. In the circumstances they pray that the writ petition be dismissed as the petitioner himself was responsible for the delay caused in the hearing of the appeal.

7. Having considered the aforesaid submissions and having perused the records as well as the order sheet of the appellate court, this Court finds that the appellate authority has committed a manifest error by showing disrespect to the resolution of the Bar Association for a genuine cause, namely, to attend the funeral of one the senior lawyers who had expired on that date. In the circumstances the request made by the counsel on behalf of the petitioner for adjournment was absolutely justified and could have been granted. The finding recorded that the petitioner was seeking unnecessary adjournments with a view to prolong the appeal, therefore, does not appear to be correct on the basis of the facts which have been brought on record.

8. The learned Standing Counsel and the learned counsel for the contesting respondents have not been able to justify the action of the appellate authority in dismissing the appeal cursorily without the assistance of the petitioner's counsel and in his absence.

9. Apart from this Section 38 of the U.P. Imposition of Ceiling on Land Holdings Act requires that the procedure for hearing and deciding an appeal to be followed by the appellate authority shall be the same as that of a civil court and the procedure laid down in the Code of Civil Procedure Code, 1908. Since the matter arose out of an appeal, therefore, the provisions of Order XXXXI Rule 17 (1) stood attracted. The court, therefore, could have dismissed the case in default but not on merits in the absence of the counsel for the petitioner. On both counts, therefore, the order of the appellate authority is unsustainable. Accordingly, the order of the learned Additional Commissioner dated 31st October, 1995 is quashed. The appellate authority may now proceed to dispose of the appeal on merits in accordance with law.

10. The writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.07.2012

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.

Civil Misc. Writ Petition No. 41252 of 1996

Mardan ...Petitioner
Versus
Collector Kanpur Dehat & Others ...Respondents

Counsel for the Petitioner:
Sri A..K. Sachan

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

U.P.Zamindari abolition and Land Reform Act, 1950-Section9, 122-B-Eviction of

land recorded as pond-contention of petitioner-nature of land being abadi-structure standing from the period of his ancestors-settled by the then Zamindar since much prior to the Zamindari Abolition-stood settled under Section 9 of the Act-admitted position by the Revenue authorities-land belongs to Zamindar-can not be restricted to settle any body-only consideration requires whether land was recorded as Abadi on pond at the time abolition of Zamindari-orders impugned not sustainable-liberty given to the Revisional Court to consider its public utility.

Held: Para 8

In the aforesaid circumstances, in the opinion of the Court, neither the revisional authority nor any other authority has been able to successfully conclude that the land over which the petitioner has raised his construction is recorded as a pond or was recorded as a pond prior to abolition of Zamindari when the said constructions are said to have been raised. It also needs to be clarified that a hereditary tenancy could not be created under the provisions of Section 20 of the U.P. Tenancy Act over public utility land before abolition of Zemandari. Nonetheless there was no bar or prohibition on a Zamindar to have leased out any form of land for any other purpose. The reason was simple that the zamindar was the owner or every inch of land and he could have leased out even a pond. A heriditary right could not have been in a tenant, but that did not take away the power of the Zemandari to settle the land. In the circumstances where the evidence is that the petitioner's construction and his possession is prior to the abolition of Zamindari then it was the duty of the revisional autholrity to have looked into the aforesaid provisions of the U.P. Tenancy Act as well before arriving at any conclusion.

(Deliverd by Hon'ble Amreshwar Pratap Sahi, J.)

1. Heard learned counsel for the petitioner, Sri A.K. Sachan and learned standing counsel for the State.

2. This is a writ petition arising out of proceedings under Section 122-B of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (hereinafter referred to as 'the U.P.Z.L. & L.R. Act') on the ground that the petitioner has encroached upon Gaon Sabha land. The stand of the State is that the land of plot No. 93 was recorded as a pond over which the petitioner has encroached upon and has constructed his house.

3. The petitioner's contention is that he is in possession over plot No. 161 which was recorded as Abadi and not a pond and that he was in a permissive possession over the said land from the then Zamindar even from prior to abolition of Zamindari. The evidence which was led on behalf of the petitioner also was believed by the revising authority. This fact is being stated as it is on record.

4. The tehsildar dropped the proceedings against the petitioner. On a revision filed by the Gaon Sabha the order has been reversed on the ground that the petitioner is in adverse possession even if it is correct that the land was that of the Zamindar.

5. The issue is if the land was in the shape of an Abadi then the Zamindar, prior to abolition of Zamindari, who was the owner of every inch of land, had authority to allow any

of his tenants or villagers to raise constructions on such land. The petitioner's consistent case is that he and his ancestors had obtained the said land and the house was constructed thereon and is existing there prior to the abolition of the zamindari.

6. The revisional authority, in the opinion of the Court, has completely overlooked the provisions of Section 9 of the U.P.Z.L. & L.R. Act which provides that in case an Abadi had been settled prior to abolition of Zamindari in favour of either the intermediary or the tenant then the constructions stand thereon together with the Abadi will be deemed to be settled with the intermediary or the tenant as the case may be. In the instant case the revisional authority itself has accepted and admitted that the land belonged to the then Zemindar.

7. The only question that remains to be seen is whether the land was Abadi or a pond as alleged by the respondent-state. The evidence which was brought on record including the statement of Lekhpal does not indicate any clarity with regard to the location of the disputed land and it cannot, therefore, be concluded that the constructions are situated over a land which is recorded as a pond. It is for this reason that while granting an interim order on 19.12.1996 this Court had categorically taken notice of this fact.

8. In the aforesaid circumstances, in the opinion of the Court, neither the revisional authority nor any other authority has been able to successfully conclude that the land over which the petitioner has raised his construction is recorded as a pond or was recorded as a pond prior to abolition of Zamindari when the said constructions are said to have been raised. It also needs to be clarified that a hereditary tenancy could not be created under the provisions of Section 20 of the U.P. Tenancy Act over public utility land before abolition of Zemandari. Nonetheless there was no bar or prohibition on a Zamindar to have leased out any form of land for any other purpose. The reason was simple that the zamindar was the owner or every inch of land and he could have leased out even a pond. A heriditary right could not have been in a tenant, but that did not take away the power of the Zemandari to settle the land. In the circumstances where the evidence is that the petitioner's construction and his possession is prior to the abolition of Zamindari then it was the duty of the revisional autholrity to have looked into the aforesaid provisions of the U.P. Tenancy Act as well before arriving at any conclusion.

9. Accordingly, the revisional order dated 13.9.1996 is quashed. It shall be open to the revisional authority to pass a fresh order in the light of the observations made hereinabove.

10. With the aforesaid directions the writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.05.2012

BEFORE
THE HON'BLE AMITAVA LALA, J.
THE HON'BLE SANJAY MISRA, J.

Civil Misc. Recall Application No.247150 of 2011
And
Criminal Misc. Application No. Nil of 2011
In
Civil Misc. Writ Petition No. 43896 of 2011

Ashish Sharma and another ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Amit Jaiswal
Sri Manoj Kumar Gautam

Counsel for the Respondents:
Sri Seema Mishra
C.S.C.

Constitution of India, Article 226-Writ Court-where within definition of 'Court' for purposes of initiating of proceeding under Section 195 (3) with Section 340 Cr.P.C.-Writ Court decided Writ Petition being satisfied with documentary evidence regarding age of girl and boy-granted protection-recall application on allegation of fraud-affidavit filed by applicant is counter to affidavit by petitioner-can not be determining aspect of fraud unless established by Court-having power of evidence and recording specific finding-admittedly no FIR as yet filed against the petitioner-application for initiation of criminal proceeding-rejected-writ court is not court of evidence-can not be termed as court under provisions of Section 195 readwith 340 Cr.P.C.

Held: Para 10

Proceedings under Section 195 is to be proceeded under Section 340 Cr.P.C. therefore, at the time of making application both the sections will be conjointly read. Sub-Section 3 of Section 195 Cr.P.C. speaks about the meaning of the 'Court', which means a Civil, Revenue or Criminal Court, and includes a Tribunal constituted by or under a Central, Provincial or State Act if declared by that Act to be a 'Court' for the purposes of this Section. The applicant has made out a case under Sections 193, 196, 199, 200, 463, 471 and 475 IPC, but no FIR has been lodged nor any complaint case was filed nor the applicant proceeded before the Criminal Court to obtain an order. Law is well settled by now that the term 'Court' indicates that there must be power to record evidence and to come to a judicial determination on the evidence so recorded. The words used in the provision are important. The Writ Court is not the Court of evidence. Thus, the Writ Court under no circumstances can be said to be the 'Court' under the provisions of Section 195 read with Section 340 Cr.P.C.

Case law discussed:
1976 (3) SCC 234; 2006 (5) SCC 475; AIR 2010 SC 3196; 2011 (6) SCC 396; Civil Misc. Writ Petition No. 16299 of 2012 (Niresh Kumar Srivastava and another Vs. State of U.P. and others)

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

Amitava Lala, J.-- These are the applications of the respondent no.4 to recall the order passed by this Bench on 04.08.2011 in connection with marriage between petitioner nos. 1 and 2 and interference with their private life and to proceed under Section 340 of the Code of Criminal Procedure, 1973 (hereinafter in short called as ' Cr.P.C.'). Like few others, in this State also, even in 21st century so many factors are involved in connection with the life and security of the married couples. Casteism, religionism, 'honour' killings,

forcible departure of the boy and girl from each other even by the parents or family members, threat, pressure and many other nature of transgress, infringes their life and personal liberty as guaranteed under Article 21 of the Constitution of India. As a result whereof, we have started believing that such actions are not in the garb of but in the wake of violation of Article 21.

2. This Court framed out a common order expressing its feelings, but only with a positive rider that where no First Information Report (hereinafter referred to as the 'FIR') has been lodged or inquiry or necessary police actions are taken by either of the parties, it is expected that no coercive action will be taken against the newly wedded couples, who are otherwise entitled to choose the better half to marry and settle. Even the Supreme Court has proceeded to the extent of justifying the cause of living together in the judgment reported in **1976 (3) SCC 234 (Gian Devi Vs. Supdt., Nari Niketan, Delhi),** and held as under :

"7. It is the case of the petitioner that she was born on June 5, 1994. As against that, the plea of Sheesh Pal Singh, father of the petitioner, is that she was born on April 20, 1956. Whatever may be the date of birth of the petitioner, the fact remains that she is at present more than 18 years of age. As the petitioner is sui juris no fetters can be placed upon her choice of the person with whom she is to stay, nor can any restriction be imposed regarding the place where she should stay. The court or the relatives of the petitioner can also not substitute their opinion or preference for that of the petitioner in such a matter. The fact that the petitioner has been cited as a witness in a case is no valid ground for her detention in Nari Niketan against her wishes. Since the petitioner has stated unequivocally that she does not want to stay in Nari Niketan, her detention therein cannot be held to be in accordance with law. We accordingly direct that the petitioner be set at liberty."

3. In **2006 (5) SCC 475(Lata Singh Vs. State of U.P and another)** the Supreme Court has also held as follows :

"17. The caste system is a curse on the nation and the sooner it is destroyed the better. In fact, it is dividing the nation at a time when we have to be united to face the challenges before the nation unitedly. Hence, inter-caste marriages are in fact in the national interest as they will result in destroying the caste system. However, disturbing news are coming from several parts of the country that young men and women who undergo inter-caste marriage, are threatened with violence, or violence is actually committed on them. In our opinion, such acts of violence or threats or harassment are wholly illegal and those who commit them must be severely punished. This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such inter-caste or inter-religious marriage the maximum they can do is that they can cut off social relations with the son or the daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person

who undergoes such inter-caste or inter- religious marriage. We, therefore, direct that the administration/police authorities throughout the country will see to it that if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple are not harassed by any one nor subjected to threats or acts of violence, and any one who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law."

4. The Supreme Court has further held in **AIR 2010 SC 3196 (S Khushboo Vs. Kanniammal & Another),** as follows:-

"21. While it is true that the mainstream view in our society is that sexual contact should take place only between marital partners, there is no statutory offence that takes place when adults willingly engage in sexual relations outside the marital setting, with the exception of 'adultery' as defined under Section 497 IPC. At this juncture, we may refer to the decision given by this Court in Lata Singh v. State of U.P. and Anr. (AIR 2006 SC 2522) wherein it was observed that a live-in relationship between two consenting adults of heterogenic sex does not amount to any offence (with the obvious exception of 'adultery'), even though it may be perceived as immoral. A major girl is free to marry anyone she likes or "live with anyone she likes". In that case, the petitioner was a woman who had married a man belonging to another caste and had begun cohabitation with him. The petitioner's brother had filed a criminal complaint accusing her husband of offences under Sections 366 and 368 IPC, thereby leading to the commencement of trial proceedings. This Court had entertained a writ petition and granted relief by quashing the criminal trial. Furthermore, the Court had noted that 'no offence was committed by any of the accused and the whole criminal case in question is an abuse of the process of the Court'.

5. In the judgment reported in **2011 (6) SCC 396 [Bhagwan Dass Vs. State (NCT of Delhi)],** it has further been held by the the Supreme Court as under:-

"28.Before parting with this case we would like to state that `honour' killings have become commonplace in many parts of the country, particularly in Haryana, western U.P., and Rajasthan. Often young couples who fall in love have to seek shelter in the police lines or protection homes, to avoid the wrath of kangaroo courts. We have held in Lata Singh's case (supra) that there is nothing `honourable' in `honour' killings, and they are nothing but barbaric and brutal murders by bigoted, persons with feudal minds. In our opinion honour killings, for whatever reason, come within the category of rarest of rare cases deserving death punishment. It is time to stamp out these barbaric, feudal practices which are a slur on our nation. This is necessary as a deterrent for such outrageous, uncivilized behaviour. All persons who are planning to perpetrate `honour'

killings should know that the gallows await them."

6. However, such western culture has not been accepted by our society, but that does not necessarily mean that right of major boy and girl to choose their better half will be interfered with **in all possible manner.**

7. Following the ratio of the aforesaid judgements of the Supreme Court, a Division Bench of this Court presided over by one of us (Amitava Lala, J.) has delivered a judgement **dated 03.04.2012 in Civil Misc. Writ Petition No. 16299 of 2012 (Niresh Kumar Srivastava and another Vs. State of U.P. and others)** and held as follows:

"From the aforesaid three judgments, precisely we get three relevant points. Firstly, if one is sui juris, no fetter can be placed upon choice of the person with whom she is to stay nor any one can restrict her. Secondly, any person cannot give threats or commit or instigate the acts of violence and cannot harass the adult person who undergoes inter-caste or inter-religion marriage. Administration/ policy authorities can be directed to see to it so that the couple, upon being major, should not be harassed by any one. Thirdly, live-in relationship between two consenting adults of heterogenic sex does not amount to any offence. It will not be unnecessary to say that there are many States in our country where castism or religionism is so deep-rooted even in the 21st Century that one can go to the extent of honour killing upon being forgetful that their interference might cause unhappiness in the life of their children. Such type of activities are totally in violation of the preamble of the Constitution of India in connection with human dignity of an individual. The country is one and it is pluralistic in nature. No secular idea can be ignored. No person shall be deprived of his life and personal liberty except according to the procedure established by law as per Article 21 of the Constitution of India. Liberty and reasonable restriction are inbuilt in such Article.

Against this background, according to us, there should not be any deprivation of the interests of any adult particularly an adult girl in connection with her living. Administration/police authorities are directed to protect their interest to that extent.

It is made clear that the boy and the girl are not debarred from proceeding before the appropriate Court of law in case of any exigency. Generally, the police and the administration will be much more alert and sensitive in dealing with such type of issues. Repeated awareness programme is needed to be made to uproot the social evil and minimise the incidents."

8. Normally, in such type of writ petitions, we call upon the learned counsel appearing for the petitioners to identify the petitioners i.e. boy and girl having been present before the Court and verify the documents available before the Court or adopts the other methodology i.e. ossification test etc. apart from our own examination in the Court. After that identification and

verification, the following orders are passed:

"Marriage is definitely wishes of a boy and girl to continue with their conjugal relationship provided they have attained the age of marriage, as required by law. We have been fortified with several writ petitions in which more or less identical reliefs are claimed for protection of their marital relationship, which is allegedly being interfered with and harassed by their parents or relatives, who are private respondents. The writ jurisdiction is not made to resolve such type of dispute between the two private parties. We otherwise strongly believe family law is no law. It is a social problem, which can only be uprooted socially and not by the intervention of the writ Court in the garb of violation of Article 21 of the Constitution of India unless it is established beyond doubt.

If there is any real grievance of married couple against their parents or relatives who are allegedly interfering with their conjugal rights which goes to such extent that there is threat of life, they are at liberty to lodge any criminal complaint or file F.I.R. whichever is required under the law to the police and in case of refusal, may make appropriate application before the appropriate court of criminal law by way of applications under Sections 155 or 156 of the Criminal Procedure Code. Similarly, in case the parents or relatives, find that illegally their son or daughter was eloped for the purpose of marriage although he or she is underage or not inclined or they are behaving violently, they are equally at liberty to take steps in a similar manner.

But, when neither of the actions are taken amongst each other, a fictitious application with certain vague allegations, particularly by the newly married couple, under writ jurisdiction of the High Court, appears to be circuitous way to get the seal and signature of the High Court upon their respective marriages without any identification of their age and other necessary aspects required to be done by the appropriate authority/authorities. It is well settled by now that every marriage is required to be registered by the appropriate registering authority upon due verification of the ages etc. of respective parties. We cannot also allow to develop the disputed questions of fact under the writ jurisdiction nor we can draw any inference by the colourful presence of the newly wedded couple in the Court as per the respective advices. If we do so, it will be wrong presumption by using excessive power of the Court in this jurisdiction.

However, where no F.I.R. has been lodged or necessary police actions are taken by either of the parties, it is expected that no coercive action could be taken against each other.

In case the party/parties approaches/ approach the appropriate court of law or the authority concerned, raising his/her/their grievances, the same will be considered strictly in accordance with law.

If this order is obtained by fraud or suppression of material facts, then the law will take its own course independently.

Accordingly, the writ petition is treated to be disposed of, however, without any order as to costs. "

9. However, by inadvertent mistake in some of the orders observation regarding fraud or forgery has not been incorporated, but that will not vitiate the due process of law. Fraud or forgery frustrates the entire proceeding. But the fraud or forgery has to be established at first. Therefore, to establish the same, one has to proceed before the appropriate Court of law and only thereafter the person concerned can get relief. Mere description of fraud or forgery to recall the order cannot be held to be a fraudulent act on the part of the petitioners. The applicant may say that at the time of passing the order, he did not get any opportunity of hearing, therefore, his case has to be heard. But on the basis of affidavit filed in support of the recall application, we have granted such opportunity and have carefully gone through the application of the applicant. According to us, filing of such application supported by affidavit can, at best, be treated as oath versus oath, but not an absolute determination of fraud or forgery. The writ petition is supported by two valid documents necessary for the purpose of its disposal. The age of the girl is supported by a certificate of Board of High School and Intermediate Examination, U.P. of the year 2007, giving her date of birth as 20th August 1991, therefore, the girl seems to be a major. The age of the boy is supported by Voter Identity Card issued by Election Commission of India, giving his year of birth as 1986. Having so, the High Court cannot make a robbing inquiry about validity of such documents, place of marriage, residence, defects in father's name etc.. Scope of the writ petition is limited about the adult marital relationship only for their protection.

10. Proceedings under Section 195 is to be proceeded under Section 340 Cr.P.C. therefore, at the time of making application both the sections will be conjointly read. Sub-Section 3 of Section 195 Cr.P.C. speaks about the meaning of the 'Court', which means a Civil, Revenue or Criminal Court, and includes a Tribunal constituted by or under a Central, Provincial or State Act if declared by that Act to be a 'Court' for the purposes of this Section. The applicant has made out a case under Sections 193, 196, 199, 200, 463, 471 and 475 IPC, but no FIR has been lodged nor any complaint case was filed nor the applicant proceeded before the Criminal Court to obtain an order. Law is well settled by now that the term 'Court' indicates that there must be power to record evidence and to come to a judicial determination on the evidence so recorded. The words used in the provision are important. The Writ Court is not the Court of evidence. Thus, the Writ Court under no circumstances can be said to be the 'Court' under the provisions of Section 195 read with Section 340 Cr.P.C.

11. In totality, the applications are dismissed, however, without imposing any cost.

12. In any event, passing of this order will not prevent the applicant from proceeding before the appropriate

Court/forum/authority independently in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.07.2012

BEFORE
THE HON'BLE SUNIL HALI, J.

Civil Misc. Writ Petition No. 45956 of 2008

Anees Kumar Hajela ...Petitioner
Versus
State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri R.C.Singh
Sri Arun Kumar Mishra

Counsel for the Respondents:
C. S. C.
Sri M.Tripathi,
Sri Neeraj Tiwari
Sri P. K. Tripathi

Constitution of India, Article 226- appointment of Principle and other teachers-recognized by U.P. Education Board-unaided institution-managed by U.P. State Electricity Board-certain vacancy advertised by Electricity Board initiating selection process-questioned held-once institution recognized by U.P. Education Board only U.P. Secondary Education Service Selection Board 1982- empowered for such exercise-U.p. Rajya Vidyut Parishad Shiksha Sewa Viniyamawali has no application.

Held: Para 12

It is trite law that that in order to establish an educational institution in the State of UP which are non aided in their character is regulated by the Intermediate Education Act 1921. When the Electricity Board seeks recognition of its institution under the provisions of U. P. Intermediate Education Act, 1921 it binds itself with the conditions of the recognition and the provisions of the Act under which it seeks recognition. Once the institution becomes a recognised institution, the provisions of U. P. Intermediate Education Act, 1921 will be applicable. It is admitted case of the parties that the Board has sought recognition of the Institution under the Act as such it is deemed to be recognised Institution. Since the recognition has been granted under the Act of 1921 the Board cannot escape the consequence of the Act and rules framed therein.

Case law discussed:
1998 (1) AWC 681

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

1. All the aforesaid writ petitions raise common questions of facts and law and hence for convenience they are being disposed of by a common order.

2. U.P. State Electricity Board Inter College, Parichha (hereinafter referred as an Institution) is an Intermediate College run and managed by U.P. Rajya Vidyut Parishad. The Institution is recognised under the provisions of U.P. Intermediate Education Act 1921 and the regulations framed thereunder and the provisions of U.P. Secondary Education (Services Selection Board) Act 1982 and the rules framed therein are applicable. The Institution does not receive grant from the State of UP and liability to pay the salary rest with the U.P. Electricity Board. It is also not in dispute that the U.P. Electricity Board is a State within the meaning of Article 12 of the Constitution of India.

3. The dispute in these writ petitions is as to whether the regulation framed by the U.P. Electricity Board under Section 79(c) of the Electricity

(supply) Act 1948 will govern the service conditions of the teachers who stands appointed in the Institution established by the UP Electricity Board or under Act of 1921.

4. The dispute arose when on account of vacancy which arose on the post of Principal which was required to be filled up from amongst the eligible senior most lecturer working in the Institution.

5. An advertisement dated 17.1.2007 was issued by the Company Secretary of the Board for making selection to the various posts including the post of Principal in the Institution. It seems that no selection process was undertaken after advertisement notice and the present petitioner was allowed to continue on the post of the Principal on adhoc basis.

6. It is contended by learned counsel for the petitioner that the power to make selection vests with the respondent no. 4 i.e. UP Secondary Education Service Selection Board. It is the only power of appointment which vests with the respondent no. 5 & 6. Selection process is to be undertaken by the respondent no. 4 and on its recommendation appointment orders are required to be issued. Respondents no. 5 & 6 have no competence either to issue advertisement or to initiate the selection process for making such appointment.

7. In this behalf reliance has been placed by the petitioner on U.P. Secondary Education (Services Selection Board) Act 1982. The intent and purpose of promulgating this Act was to constitute the secondary education Commission at the State level to select lecturers and teachers in the institutions recognised under the Intermediate Education Act, 1921. Section 10 of the Act of 1982 provides procedure of selection by direct recruitment. Under Section 11 the Board as soon as may be after the vacancy is notified under sub section (1) of Section 10 hold examination, where necessary and interview of the candidates and prepare a panel of those found most suitable for appointment. Selection shall be conducted by the Selection Committee constituted under the Act. Section 16 of the Act clearly envisages that every appointment of a teacher shall on or after the date of commencement of the UP Secondary Education Services Selection Board (Amendment) Act 2001 be made by the Management only on the recommendation of the Board. Thus any selection process undertaken for making appointment in the Institution has to be done in consonance with the Act of 1982. Advertisement notice issued by the respondents is de-horse the rules as they do not have competence to make the appointment of teachers/staffs in the Institution even though they are being run and managed by the U.P. Rajya Vidyut Parishad.

8. On the other hand stand of the respondents is that under Section 79 (c) of the Electricity Supply Act 1948 the Board is empowered to make regulations for the duties of officers and other employees of the Board, and their salaries, allowances and other conditions of service. In the light of this Regulation 95 has been issued in the year 1995 and thus the service conditions of the teachers of the concerned 'College' is governed by the

U.P. Rajya Vidhut Parishad Shikshak Sewa Viniyamawali, 1995 (hereinafter referred to as the 1995 Viniyamawali).

9. Empowered under the regulations, advertisement notice was issued for the purposes of filling up the vacancies which had fallen vacant in the Institution run by the Board. It is stated that the teachers working in the Institution established by the Board are employees of the Board as such their service conditions will be regulated by 1995 Regulation.

10. Heard learned counsel for the parties and perused the material on record.

11. There is no dispute that the Institution has been established by the Board and the employees borne on the strength are paid from the funds of the Board. They are not receiving any grant in aid from the State Government. It is also not in dispute that the Board is an Instrumentality of the State and by way of peripheral activity it has established various schools and colleges basically for imparting education to the children of the employees of the Electricity Board and are run and managed by the Board. The Principal and teachers including employees of these schools were throughout employees of the U. P. State Electricity Board and their services are governed by the Regulations framed by the Board in exercise of powers conferred by Section 79(c) of the Electricity (Supply) Act, 1948. The Board framed rules known as U. P. Rajya Vidyut Parishad Shikshak Sewa Viniyamawali, 1995 which is a complete Code dealing with all aspects in regard to the teachers including recruitment, service conditions, etc.

12. It is trite law that that in order to establish an educational institution in the State of UP which are non aided in their character is regulated by the Intermediate Education Act 1921. When the Electricity Board seeks recognition of its institution under the provisions of U. P. Intermediate Education Act, 1921 it binds itself with the conditions of the recognition and the provisions of the Act under which it seeks recognition. Once the institution becomes a recognised institution, the provisions of U. P. Intermediate Education Act, 1921 will be applicable. It is admitted case of the parties that the Board has sought recognition of the Institution under the Act as such it is deemed to be recognised Institution. Since the recognition has been granted under the Act of 1921 the Board cannot escape the consequence of the Act and rules framed therein.

13. Thus, every recognised Institution has to act in accordance with the provisions of U.P. Intermediate Education Act 1921 except which is covered by Section 16 H of the 1921 Act. Section 16H grants exemption of certain classes of institutions from the operation of certain sections. It provides that the provisions of Sections 16A, 16B, 16C : sub-sections (2) to sub-section (13) of Section 16D and Sections 16E or 16F and 16G shall not apply to recognised institutions maintained by the State Government or the Central Government. Sub-section (2) provides that in the case of recognised institutions maintained by a local body, the State Government may declare that

all or any of the provisions referred to in subsection (1) shall not apply or shall apply subject to such alteration, modifications or additions as it may make and the provisions, if any, so made applicable, shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

14. Electricity Board is neither the State Government nor the Central Government and it is not covered by sub-section (1) of Section 16H of the Act. It has also not been declared as Local Body under sub-section (2) of Section 16H of the Act. Reliance has been placed on the decision of this Court reported in **1998 (1) AWC 681, Smt Satyawati Verma Vs U.P. State Electricity Board and another,** wherein it has been held as under:

"Thus every recognised institution has to act in accordance with the provisions of U.P. Intermediate Education Act except where it is covered by the exception given under Section 16H of the Act. It leaves no room for any further controversy. The terms and conditions of service of employees of all the recognised institutions will be the same as provided under the Act and Regulations framed under the Act.

A Division Bench of this Court in Brahm Dayal v. Senior Personnel Executive, Indian Drugs and Pharmaceuticals (1990) 3 UPLBEC 1570, held that the institution maintained by Indian Drugs and Pharmaceuticals Ltd. Is neither State nor Central Government. The institution run by it having recognised under the provisions of U.P. Intermediate Education Act, the age of retirement of its emoloyees employees will be governed by Regulation 21 of Chapter III of the Regulations framed under the Act and not on the basis of contract entered into by I.D.P.L. with its employees of the institution. In Km. Shamim Fatima v. Manager, B.V.M. School, 1994 HVD (All) IV 143, where the institution was recognised under the provisions of U.P. Basic Education Act, it was held that the age of retirement will be 60 years as provided under the U.P. Basic Education (Teachers' Service) Rules. 1981 end not on the basis of contract entered into with the Electricity Board.

Regulation 21 of Chapter III of the Regulations framed under the U.P. Intermediate Education Act provides that the age of superannuation of the Principal or Head Master, Matron, Teacher, Clerk or Librarian and other servants shall be 60 years and if the date of superannuation falls within the mid-session, it shall extend to the end of the session. This provision will be applicable in respect of recognised institution of U.P. Electricity Board and Regulation 37 of U.P. Rajya Vidyut Parishad Shikshak Viniyamavali, 1995 will not be applicable. Such provisions will be applicable when the Board has not taken recognition of the institution under the provisions of U.P, Intermediate Education Act, 1921."

15. Thus, in view of aforesaid discussion, it clearly emerges that the regulation framed in terms of Act of 1921 will govern the recruitment and selection process of the employees working in the Institution run by the

Board. Statutory regulation framed under the Act of 1948 would only operate in case no recognition is sought by the Institution run by the Board from the State Government.

16. In view of the aforesaid facts and circumstances of the case, the writ petitions are allowed. Impugned orders are hereby quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.07.2012

BEFORE
THE HON'BLE VINEET SARAN, J.
THE HON'BLE VIRENDRA VIKRAM SINGH, J.

Civil Misc. Writ Petition No. 59785 of 2010

Dr. Harihar Upadhyay ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri S.P. Pandey
Sri J.P. Pandey

Counsel for the Respondents:
C.S.C.

Constitution of India,Article 226-interest for delay-in payment of arrears of salary-unreasonable delay of 10 years in payment of Rs. 1,55,000 and Rs. 8,34000/-delay of 4 years-unexplained delay-held-petitioner entitled for 10 % interest payable within four month-in case of default 18 % per annum shall be paid.

Held: Para 6

In the absence of there being adequate explanation for the delay in payment of amount due to the petitioner, we are of the view that this writ petition deserves to be allowed and the petitioner would be entitled to payment of interest for the delayed period in view of the fact that the petitioner has been un-necessarily dragged into litigation and he was compelled to file several petitions also before this Court as well as before the Tribunal and it was only then that payments were made and that too without interest and without there being any reason for delay in payment.

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

1. This is an unfortunate case where a retired employee has to run from pillar to post for payment of the amount for which he is entitled to be paid. After several round of litigation, the petitioner has been paid the amount but with much delay and, thus, this writ petition has been filed with a prayer for a direction to the respondents to pay interest at the rate of 18% per annum for the delayed payment.

2. Briefly the facts of the case are that the petitioner, who is a medical officer in the Ayurvedic Department of the State, was placed under suspension on 9.4.1996 in contemplation of departmental enquiry. The said order of suspension was challenged by the petitioner in Writ Petition No.16103 of 1996 in which interim order was passed on 6.5.1996, staying the suspension of the petitioner. Despite that the petitioner was neither reinstated in service nor paid his salary. It was only on 4.6.1998, the State Government took a decision to reinstate the petitioner in service but a censure entry was given to the petitioner. It was further stipulated in the order of reinstatement that the decision with regard to payment of difference of salary and the suspension allowance would be taken separately. When no decision was taken by the respondents for payment of

difference of salary for the period of suspension, the petitioner was compelled to file another Writ Petition No.31404 of 1998 and it was only after directions were passed in the aforesaid writ petition that the State Government took a decision on 29.6.2002 directing forfeiting the remaining salary for the period of his suspension. The said order was challenged by the petitioner before the U.P. State Public Services Tribunal in Claim Petition No.579 of 2003, which was allowed and the orders dated 4.6.1998 and 29.6.2002 were quashed and a specific direction was given to the respondents to pay salary to the petitioner for the period of his suspension. In the meantime, the petitioner had retired on 31.1.2005.

3. Despite the order of this Court passed in the writ petitions as well as the order passed by the Tribunal, when payments were not made to the petitioner, he was compelled to initiate contempt proceeding. Not only this, the petitioner was also not given the benefit of merger of 50% Dearness Allowance in the basic pay and even though the basic pay of other government servants was re-fixed on such basis but such benefit was denied to the petitioner.

4. Petitioner was then compelled to file another Writ Petition No.25167 of 2008, which was disposed of on 21.5.2008 with a direction to decide the representation of the petitioner in respect of his claim. When no decision was taken, the petitioner had to file another Contempt Petition No.3723 of 2008 in which on 24.10.2008, the respondents were granted two months further time to comply with the direction of this Court. When no orders were passed, the petitioner was compelled to file another Contempt Petition No.1576 of 2009 in which notices were issued by this Court on 5.5.2009. It was only after the aforesaid rigorous exercise has been made by the petitioner and repeated directions have been issued to the respondents by this Court as well as the Tribunal in writ jurisdiction as well as contempt jurisdiction, the petitioner was ultimately paid the difference of Dearness Allowance amounting to Rs.8,34,000/- in December, 2009 which was due to be paid to him in the year 2005. The amount of difference i.e. Rs.1, 55,000/- of suspension allowance and the salary which was due to be paid in the year 1998, was paid to him in the year 2008. Such position is not denied in the counter affidavit in as much as, in paragraph 4 of the counter affidavit, it is admitted that "the major part of the amount has been released in favour of the petitioner in the year 2009."

5. In the counter affidavit, the main thrust of the respondents is that payment has already been made to the petitioner. The question in this petition is not with regard to payment, which the petitioner has himself accepted in the writ petition itself but it is with regard to delay in payment to the petitioner. No explanation whatsoever has been given by the respondents in the counter affidavit as for what reason such delay was caused.

6. In the absence of there being adequate explanation for the delay in payment of amount due to the petitioner, we are of the view that this writ petition deserves to be allowed and the petitioner would be entitled to payment of interest for the delayed period in view of the fact

that the petitioner has been unnecessarily dragged into litigation and he was compelled to file several petitions also before this Court as well as before the Tribunal and it was only then that payments were made and that too without interest and without there being any reason for delay in payment.

7. In view of aforesaid fact, we allow the writ petition and direct the respondents to pay interest at the rate of 10% on the amount of Rs.1,55,000/- for a period of 10 years (delay being from 1998 to 2008) and the same interest at the rate of 10% on the amount of Rs.8,34,000/- for a period of four years (delay being from 2005 to 2009). Such payment shall be made to the petitioner within a period of four months from today, failing which respondents shall be liable to pay interest at the rate of 18% per annum instead of 15% per annum.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.07.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Court No. 41055 of 2011

Pramod Chandra Pandey ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri A.B. Singh
Sri Manish Singh

Counsel for the Respondents:
C.S.C.
Sri M.C. Chaturvedi

Constitution of India, Article 226-writ petition-against 'U.P. Ganna Kishan Sansthan'-whether maintainable-held-'Yes'-'Sansthan' being within definition of instrumentality of state-under Article 12 of Constitution-Writ maintainable.

Held: Para 5

A preliminary objection was raised that a writ petition would not lie in the matter of dispute relating to Sansthan which is a society registered under the Societies Registration Act. This Court finds answer to this query in a Full Bench judgment in Radhey Shyam Rai Vs. State of U.P. and others, 2005(3) UPLBEC 2549 wherein U.P. Ganna Kisan Sansthan has been held an instrumentality of State and, therefore, a "State" within Article 12 of the Constitution and hence a writ petition under Article 226 of the Constitution would be maintainable. In para 40 of the judgment the Full Bench has concluded as under:

Case law discussed:
2005 (3) UPLBEC 2549; Writ Petition No. 9690 of 2010, Bhopal Singh Vs. State of U.P. and others, decided on 23.02.2010; 2011 All. C.J. 1752

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

1. Heard Sri Manish Singh, learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. With the consent of learned counsel for the parties, since pleadings are complete, the Court has proceeded to decide this matter finally under the Rules of this Court at this stage.

3. The facts, in brief, giving rise to the present dispute are that petitioner was working as Senior Assistant-cum-Accountant in Ganna Kisan Sansthan Training Centre, Gorakhpur and completed 58 years of age in August, 2011. The Assistant Director, Ganna Kisan Sansthan, Gorakhpur, resondent

no. 3, vide order dated 26.03.2011 communicated the petitioner that in view of Para 7.7 of Ganna Vikas Sansthan Sewa Niyamawali he would retire on 31.08.2011, i.e., on completion of age of superannuation, i.e., 58 years.

4. The claim of petitioner is that he was entitled to continue till he attains the age of 60 years in view of the fact that Governing Council has already resolved to extend the age of retirement upto 60 years and power to amend the rule is vested with Governing Council of U.P. Ganna Kisan Sansthan *(hereinafter referred to as the "Sansthan").* Hence the petitioner could not have been retired on attaining the age of 58 years only on the ground that this resolution of Governing Council was not approved by State Government vide order dated 31.12.2008. It is in these circumstances the Government Order dated 31.12.2008 declining to grant approval extending age of superannuation from 58 to 60 years to employees of Sansthan has also been assailed.

5. A preliminary objection was raised that a writ petition would not lie in the matter of dispute relating to Sansthan which is a society registered under the Societies Registration Act. This Court finds answer to this query in a Full Bench judgment in **Radhey Shyam Rai Vs. State of U.P. and others, 2005(3) UPLBEC 2549** wherein U.P. Ganna Kisan Sansthan has been held an instrumentality of State and, therefore, a "State" within Article 12 of the Constitution and hence a writ petition under Article 226 of the Constitution would be maintainable. In para 40 of the judgment the Full Bench has concluded as under:

"40. In the premise we hold, as stated above, that Ganna Kisan Sansthan is State within the meaning of Article 12 of the Constitution and a Writ in the nature of certiorari is maintainable against the Sansthan under Article 226 of the Constitution."

6. In view thereof, it cannot be said that writ petition in question is not maintainable. I hold accordingly.

7. Now I come to the core question whether the petitioner would have retired on attaining the age of 58 years or 60 years. There is no dispute between the parties that terms and conditions of service of petitioner are governed by U.P. Ganna Kisan Sansthan Service Rules, 1979 *(hereinafter referred to as the "Rules, 1979")*, a copy whereof has been filed as Annexure-4 to the writ petition. These Rules have been framed in 1979 and were implemented w.e.f. 01.04.1979. Para 7.7 provides the age of superannuation of employees of Sansthan. For Class-IV employees it is 60 years and for others it is 58 years. It also confers power of premature retirement upon the competent authority provided the employee concerned has completed 50 years of age. This Court is not concerned with the question of premature retirement.

8. Para 16 of Rules, 1979 as amended in 1992 confers power upon the Governing Council of Sansthan to make amendment in the Rules or to grant relaxation, if any.

9. The petitioner contended that since Rules, 1979 could have been amended by Governing Council itself and it had taken a decision to increase age of retirement to 60 years from 58 years vide resolution dated 06.05.2006, hence there was no occasion to seek approval from Government. In view of the decision taken by Governing Council on 06.05.2006, Para 7.7 of Rules, 1979 ought to be treated as duly amended and petitioner, therefore, could not have been retired on attaining the age of 58 years. He submitted when a particular procedure has been prescribed in the Rules, the same has to be observed strictly and by superimposing the requirement/condition of so called approval of higher authority, i.e., the State Government, the procedure prescribed in Rules cannot be given a go bye. It is further submitted that in other departments including the Cooperative Sugar Societies the age of retirement was increased from 58 to 60 years, therefore, non-extension of same benefit to petitioner is even otherwise illegal and arbitrary.

10. A counter affidavit has been filed on behalf of respondents sworn by Dr. Naval Kishore Kamal, Deputy Director, Lal Bahadur Sastri Ganna Kisan Sansthan, Lucknow. It is not disputed that service conditions of petitioner and other employees of Sansthan are governed by Rules, 1979 as amended in 1992. A complete set of Rules has been filed as Annexure-1 to the counter affidavit. It is stated that there was no resolution making any amendment in Rules but a decision was taken in principle to extend age of retirement from 58 to 60 years but subject to approval of State Government. Therefore, the resolution as such does not have the effect of amending Para 7.7 of Rules, 1979. It is also submitted that under Memorandum of Association of Sansthan the State Government has the power to issue executive orders directing Sansthan to act in a particular manner and Sansthan is under an obligation to give effect to such directives of the State Government. A copy of Memorandum of Association of Sansthan has been filed as Annexure-4 to the counter affidavit and Clause 41(a) has been quoted in para 13 of the counter affidavit. It is also submitted that the issue has already been settled by this Court in **Writ Petition No. 9690 of 2010, Bhopal Singh Vs. State of U.P. and others,** decided on 23.02.2010 in favour of Sansthan and the writ petition seeking similar relief has already been dismissed.

11. I have heard learned counsel for the parties and perused the record.

12. Para 7.7 of Rules, 1979, which provides age of retirement, reads as under:

''संस्थान के चतुर्थ श्रेणी कर्मचारी की सेवा निवृत्ति की आयु 60 वर्ष तथा अन्य सेवकों की सेवा निवृत्ति की आयु 58 वर्ष होगी। किन्तु नियुक्ति प्राधिकारी को यह अधिकार होगा कि वह ऐसे सेवक को जिसने 50 वर्ष की आयु पूरी कर ली हो तथा जिसका कार्य एवं आचरण औसत से निम्न स्तर का हो और जिसमें कोई सुधार की सम्भावना न हो, तीन माह की नोटिस अथवा उसके बदले तीन माह का वेतन देकर कार्यहित में सेवा निवृत्त कर सकता है।''

"Age of superannuation of Class-IV employees of the Institute will be 60 years and that of other employees would be 58 years. But the Appointing Authority shall have the power to

superannuate, in the interest of administration, such employee who has completed 50 years of age and whose work and conduct is below the average, with no hope of improvement, after giving him three months notice or giving salary of three months." (English translation by the Court)

13. The power of amendement of Rules has been conferred under Rule 16 and it reads as under:

''16. नियमों में आवश्यक परिवर्तन तथा शिथिलीकरण का अधिकार संस्था की गवर्निंग काउंसिल को होगी।''

"Power to make necessary changes and relaxation in rules will be vested in the Governing Council of the Institution."

(English translation by the Court)

14. Learned Standing Counsel has also not disputed the power of Governing Council of Sansthan to make amendment in the Rules. He, however, has firstly submitted that there was no decision taken by Governing Council to make amendment in the Rules and, therefore, the assumption of amendment in Rules founded on resolution dated 06.05.2006 is baseless and non est. The basic premise of entire writ petition is fallacious and unfounded. He further submitted that it is always open to Governing Council to seek approval of State Government for a decision taken by it before making amendment in the Rules. Such power of Governing Council is not contrary to any provision of the Rules. The Governing Council at no point of time decided to amend Para 7.7 in a particular manner and, therefore, its resolution dated 06.05.2006 by itself would not confer any right upon petitioner to claim extended age of retirement, i.e., 60 years by treating as if Para 7.7 of Rules, 1979 stood automatically amended. I find substance in these arguments.

15. This Court finds it appropriate first to consider the resolution passed by Governing Council. Can it be construed as an ipso facto amendment of Para 7.7. The agenda Item No. 8 and resolution passed by Governing Council is contained in minutes, placed on record as Annexure-6 to the writ petition, and the relevant part on page 51 reads as under:

"प्रस्ताव संख्या–8 *गन्ना संस्थान कर्मियों को सेवानिवृत्त आयु बढ़ाये जाने के सम्बन्ध में।* *"Item No. 8* *Regarding extension of retirement age of employees of Ganna Sansthan." (English translation by the Court)*	*"सर्व सम्मत से संस्थान कर्मियों की सेवानिवृत्त आयु 58 वर्ष से बढ़ाकर 60 वर्ष किये जाने की शैद्धान्तिक स्वीकृत प्रदान करते हुए शासन के अनुमति हेतु संस्तुति की गयी।''* *Unanimously resolved on principle to extend age of retirement of employees of Institution from 58 to 60 years and was recommended for approval of the Government. (English translation by the Court)*

16. From a bare perusal of minutes it is evident that Governing Council as such did not consider the amendment of Rules. A general subject of extension of

age came to be considered by it and it passed a resolution to accept on principle the extension of age of retirement from 58 to 60 years but for that it also resolved for seeking approval from State Government. This is a decision taken by a body competent to make amendement in the Rules. The learned counsel for the petitioner could not place anything to show that such a decision could not have been taken by Governing Council before making an amendment of Para 7.7 in a particular manner. The aforesaid decision of Governing Council was also not inconsistent with the provisions of Memorandum of Association and this Court find nothing obnoxious or invalid therein.

17. This question can be considered from another angle. Para 7.7 which this Court has already quoted above shows that in the first part it provides age of retirement of Class-IV employees but in the continuing sentence it provides age of retirement of other employees as 58 years. In order to make amendment in Para 7.7 it has to be redrafted in a proper manner and that redrafted rule has to be approved by Governing Council. The resolution dated 06.05.2006 does not show that any redrafted rule which would have substituted Para 7.7 was approved or accepted by Governing Council. Unless it is done, it cannot be said that a resolution passed by Governing Council accepting a subject matter on a particular aspect in principle would have the result of amendment in Rules. Whenever a change is made in a Rule, the manner in which amended Rule shall be read has to be drafted and approved by competent authority. Nothing of that sort has been done in the case in hand. The Governing Council's power to seek approval of State Government has not been shown to be in contravention of any provision particularly when it was not seeking approval on the amendement of Rule but it was seeking approval on the policy decision taken by it on a particular subject without having the effect of a suo motu or ipso facto change in the format of Rule. Such procedure followed by Governing Council cannot be said to be illegal or without jurisdiction or in violation of any statutory provision. None in fact has been shown to this Court. In the circumstances, it cannot be said that Para 7.7 stood amended as soon as resolution dated 06.05.2006 was passed by Governing Council and had the effect of extending age of superannuation of employees other than Class-IV employees from 58 to 60 years.

18. Moreover, I find that this question has also been considered by this Court in **Bhopal Singh (supra)** and there also the ultimate conclusion has been drawn by Court that age of retirement provided in Para 7.7 of Rules, 1979 has not been amended by resolution dated 06.05.2006. To the reasons assigned in the judgement, I respectfully concur and agree.

19. The various authorities cited at the bar, on the proposition that procedure once prescribed cannot be diverted or that when something is required to be done in a particular manner, must be done in that way, have no application to the facts of this case. In my view the Apex Court's decision in

The Joint Action Committee of Airlines Pilots Associations of India and others Vs. The Director General of Civil Aviation and others, 2011 All. C.J. 1752 also has no application to the facts of this case.

20. In the result, the writ petition is devoid of merit.

21. Dismissed.

22. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.06.2012

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition no. 14905 of 2005

Mohammad Shamim Akhtar ...Petitioner
Versus
State Of U.P. & Others ...Respondents

Counsel for the Petitioner:
Sri M.Sarwar Khan
Sri K.N. Rai

Counsel for the Respondents:
C.S.C.

Indian Stamp Act 1899-Section-2(14-A)-oral gift under Mohammadan Law ,made on 17.12.2001-reduced in writing on 08.05.2002-amened provision made effective w.e.f. 20.05.2002-held-such deed is record of past transactions-does not require registration-demand of stamp duty with penalty-quashed.

Held: Para 14

In the above situation neither the gift made by a Mohammedan orally nor its reduction in writing subsequently would amount to execution of an instrument which could be subjected to payment of stamp duty. Thus, I am of the opinion that the authorities below grossly erred in law in subjecting the above memorandum of gift dated 8.5.2002 to stamp duty.

Case law discussed:
2011 (2) ARC 218; AIR 1962 AP 199; AIR 1927 Cal. 197; AIR 1934 Allahabad 1052 Sukhdeo Prasad; AIR 1958 Raj 291

(Delivered by Hon'ble Pankaj Mithal,J.)

1. Heard Sri K.N.Rai, learned counsel for the petitioner and Sri Nimai Das, learned Standing Counsel for the respondents and with the consent of the parties the writ petition is being finally decided.

2. The father of the petitioner, Mohd. Kaleem made an oral gift on 17.12.2001 of the land in question in favour of the petitioner. The petitioner accepted the gift and was given possession of the same. Subsequently, as a memoriam, the said gift was reduced to writing on 8.5.2002.

3. The authorities under the Indian Stamp Act, 1899 (in short 'Act') initiated proceedings on the basis of the aforesaid memorandum by treating it to be a gift deed and vide order dated 11.5.2004 determined the deficiency in stamp duty of Rs.92,400/- and imposed a penalty of Rs.7,600/-. The aforesaid order was affirmed in appeal vide order dated 4.1.2005.

4. The petitioner has thus invoked the writ jurisdiction of this Court challenging both the above orders.

5. Sri Rai has argued that under the Mohammedan Law gift can be made orally and there is no requirement of executing any document in respect thereof. The memorandum of gift is not a

gift deed amenable to stamp duty. Even if any document witnessing the oral gift is executed it would not be an instrument chargeable to stamp duty. He has further submitted that Section 2(14-A) of the Act was inserted w.e.f. 20.5.2002 which included instrument of gift made orally but since in the present case the gift was made earlier it would not be applicable.

6. Learned Standing Counsel accepts that Section 2(14-A) of the Act, which has been introduced with effect from 20.5.2002, would not be applicable to the present memorandum which is dated 8.5.2002 or even to a gift alleged to have been orally made on 17.12.2001 but nonetheless since the gift has been reduced in writing and it purports to extinguish rights of one party and records that of another it would be covered under Section 2(14) of the Act and stamp duty on it would be payable.

7. The said memorandum is Annexure - 2 to the writ petition. A plain reading of the aforesaid memorandum makes it clear that the gift was orally made on 17.12.2001. It was accepted by the petitioner and he was put in possession of it also. It is not a gift deed in itself.

8. In view of the respective contentions of the parties, only one question arises for consideration as to whether the memorandum dated 8.5.2002 is an instrument within the meaning of Section 2(14) of the Act and chargeable to stamp duty.

9. The definition of the instrument under Section 2(14) of the Act is very wide and it includes every document or record which purports to create, transfer, limit, extend, extinguish or record the right or liability of a party in respect of any property.

10. Recently, the Apex Court in ***Hafeeza Bibi and others Vs. Shaikh Farid (Dead) by Lrs. and others 2011 (2) ARC 218*** has dealt with gift under the Mohammedan Law and has ruled as under:

"In our opinion, merely because the gift is reduced to writing by a Mohammadan instead of it having been made orally, such writing does not become a formal document or instrument of gift. When a gift could be made by Mohammadan orally, its nature and character is not changed because of it having been made by a written document."

11. The Apex Court in the aforesaid decision distinguishing the decision of the Full Bench of Andhra Pradesh High Court in the case of ***Inspector General of Registration and Stamps, Govt. of Hyderabad Vs. Smt. Tayyaba Begum, AIR 1962 AP 199*** approved the view of the Calcutta High Court in the case of ***Nasib Ali Vs. Wajed Ali, AIR 1927 Cal. 197*** holding that a deed of gift by Mohammedan is not an instrument effecting, creating or making the gift but a mere piece of evidence. Such writing is not a document of title but a piece of evidence only.

12. In view of the above decision of the Supreme Court, though the Court therein has not considered the impact of definition of the instrument as contained in the Act, clearly ruled that the nature and character of the gift made by the Mohammedan does not change merely for

the reason that it has been written down and that a gift by the Mohammedan is not an instrument effecting, creating or making the gift in writing but only a piece of evidence.

13. In addition to the above, the definition of 'instrument' under Section 2(14) of the Act contemplates a document or a record creating or extinguishing rights and liabilities which means existence of a document in some form or the other. Therefore, where an oral gift is permissible and made there happens to be no document or record of rights and liabilities which could be subjected to stamp duty. Liability of payment of stamp duty arises only on the execution of an instrument. ***(Reference: AIR 1934 Allahabad 1052 Sukhdeo Prasad).*** The subsequent writing it out on a paper would not make it a gift deed as the gift stood completed in the past by making an oral declaration, its acceptance and delivery of possession. His Lordship of the Rajasthan High Court in ***Hanuman Prasad Vs. The State of Rajasthan AIR 1958 Raj 291*** ruled that a document which is not an instrument of gift but only a record of the past transaction does not require to be stamped under the Act.

14. In the above situation neither the gift made by a Mohammedan orally nor its reduction in writing subsequently would amount to execution of an instrument which could be subjected to payment of stamp duty. Thus, I am of the opinion that the authorities below grossly erred in law in subjecting the above memorandum of gift dated 8.5.2002 to stamp duty.

15. Accordingly, a writ of certiorari is issued quashing the impugned orders dated 11.5.2004 and 4.1.2005. Any amount deposited by the petitioner pursuant to the impugned order or under the interim order of this Court shall be refunded to the petitioner within a period of one month from the date of production of certified copy of this order.

16. The writ petition is allowed.
